

Court enforces arbitral tribunal's peremptory order for interim payment

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Introduction

Interim relief from the courts before the conclusion of arbitration proceedings is available to parties under the Arbitration Act 1996 in a number of limited circumstances. Section 42 of the act provides that a court may make an order requiring a party to comply with a peremptory order made by the tribunal pursuant to Section 41. Rarely used in practice, Section 42 was the subject of the English High Court decision in *Pearl Petroleum Company Ltd v The Kurdistan Regional Government of Iraq*. (1) The case provides useful guidance as to the circumstances in which the courts may exercise their discretion to make an order under this section and enforce peremptory orders from an arbitral tribunal.

The court also discussed the distinction to Section 44 of the act, under which parties more frequently apply for relief by the courts in support of arbitration proceedings. Unless the parties have agreed otherwise, this will permit the court to make such orders as it thinks necessary for the purpose of preserving evidence or assets if the case is urgent. However, the court may order relief only if the tribunal or any arbitral institution vested with relevant powers is unable to act effectively.

Facts

The claimants were three special purpose vehicles (SPVs). The respondent was the Kurdistan Regional Government of Iraq. The parties entered into an agreement for the exploitation of gas fields in the Kurdistan Region of Iraq. Disputes arose in 2009 over the price payable to the SPVs for the gas products produced and sold to the government. The SPVs claimed that these payments were substantially short of what was owed to them under the contract. When the SPVs commenced arbitration proceedings in 2013, the government stopped making payments but continued to require the SPVs to deliver the gas products.

The arbitration was seated in London and subject to the LCIA Arbitration Rules. The SPVs applied to the arbitral tribunal for interim relief. Arguing that one of the SPVs would otherwise run out of cash and be forced into insolvency, the SPVs sought an order compelling the government to resume the payments and release the funds withheld since the commencement of the proceedings. The tribunal ordered the government to make payments at reduced prices from the date of the SPVs' application for the order. The government refused to comply. On the SPVs' application, the tribunal granted a peremptory order for the payment of \$100 million, pursuant to Section 41 of the act and the applicable provision of the LCIA Arbitration Rules. The government continued to refuse payment.

The SPVs then applied to the English High Court for an order under Section 42 of the act to require the government to comply with the tribunal's peremptory order. The court granted the order in the terms sought.

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Decision

The court observed at the outset that there were three issues for it to consider:

- Was the peremptory order properly made within the tribunal's jurisdiction vested in it by Section 41 of the act and the applicable provision of the LCIA Arbitration Rules? Did the court therefore have jurisdiction to make an order under Section 42 of the act?
- Should the court – in exercising its discretion – make the order sought by the SPVs?
- A further issue for the court's determination was whether the government was entitled to state immunity pursuant to the State Immunity Act 1978 and whether the SPVs should therefore be denied the relief sought. After detailed consideration, the court concluded that the government was not entitled to such immunity.

Tribunal's peremptory order and court's jurisdiction under Section 42

The government put forward two grounds of challenge to the court's jurisdiction to make an order under Section 42.

First, it argued that – pursuant to the wording of the act – the tribunal's peremptory order under Section 41 had to "do something necessary for the proper and expeditious conduct of the arbitration". The tribunal's order did not meet that requirement. The order was one for mandatory injunctive relief to enforce an obligation for payment against the government. To obtain such relief from the court, the SPVs could – and should – have made an application under Section 44 of the act or under Section 37 of the Senior Courts Act 1981 (which sets out the High Court's powers with respect to injunctions).

The court rejected this argument, holding as follows:

- While the tribunal had not spelled out in its orders that they were for the proper and expeditious conduct of the arbitration, it was plain that the orders and compliance were needed for that purpose.
- The tribunal had concluded that it was appropriate that the *status quo ante* – whereby the government paid for what was extracted – should be restored and that this was necessary for at least one of the SPVs to continue with the arbitration and be in a position to obtain relief. The tribunal was effectively preserving the subject matter of the arbitration – the rights under a 25-year contract which the parties were disputing. The tribunal's order did not prejudice the merits.
- The court further held that there was no purpose in any application under Section 44 of the act or Section 37 of the Senior Courts Act 1981 for an injunction where the tribunal had already issued an order for interim measures. A court order under Section 42 and an injunction under Section 44 would in any event have the same effect and would lead to similar remedies if not complied with.

The court also gave short shrift to the second ground on which the government sought to challenge the court's jurisdiction. Pursuant to Section 41 of the act, the tribunal could only make a peremptory order if a party did not comply with a previous order "without showing sufficient cause" for its failure to comply. The government submitted that before issuing its peremptory order, the tribunal had not given it an opportunity to show "sufficient cause" for its non-compliance with the tribunal's earlier order for payment. The court held that the parties before the tribunal knew what the issues were and that the government was given the fullest opportunity to show sufficient cause.

Court's discretion to make order under Section 42

Both parties accepted that the court had discretion as to whether to make the order sought by the SPVs and did not act as a rubber stamp on orders made by the tribunal. It was also common ground that the court should be supportive of the tribunal and not revisit the arguments that had already been presented, provided that the court was satisfied that the tribunal had addressed the correct questions. Reconsideration by the court should arise only where there has been an error of law or serious irregularity analogous to the grounds for challenging arbitral awards under Sections 67 and 68 of the act. The court held that it saw no such sign of error or irregularity.

In addition, there were a number of other matters that the court could consider, including whether

there had been any material change of circumstance since the tribunal made its peremptory order and questions of the utility of any order.

The government argued that there had in fact been a material change in circumstance and that its position had deteriorated. It submitted that there were now only limited funds available because of a budgetary deficit and because of competing demands on the funds. These included a greater responsibility to arm the military due to the volatile national security situation and cope with an increasing tide of refugees. The court was not persuaded by these submissions. It observed that the government had made substantial payments to other international oil producers. The court concluded that there was no basis for its taking a different view to that of the tribunal.

As for questions of the utility of the court's order, the government argued that if it failed to comply with the order, thereby leading the SPVs to issue proceedings for contempt of court, the court's order, if made, would be futile, as no remedy would be available against the government if it committed contempt. The government representative who might be amenable to the court's jurisdiction would be entitled to diplomatic immunity. The SPVs countered that now was not the time to speculate as to what remedy might be available in connection with contempt of court. No assumption should be made that the government would not comply with the court's order. An order under Section 42 was the only way to enforce the tribunal's orders which would otherwise remain uncomplished with.

Accepting these submissions, the court concluded that it had jurisdiction to make the order and in the exercise of its discretion did so.

Subsequent applications for permission to appeal the court's judgment were dismissed.

Comment

This case helpfully confirms that the court will not seek to revisit arguments put before the arbitral tribunal when exercising its discretion whether to enforce the tribunal's orders, save in limited circumstances, such as where there has been a change of circumstance (which the court did not find to have taken place in the present case).

The court's decision illustrates that there are a number of routes available to parties seeking interim relief and that there may be a degree of overlap between the court's powers and those of the tribunal. As a matter of English law, the parties must agree to the tribunal's powers to grant interim relief. In practice, the scope of those powers will depend on the wording of the arbitration clause and any arbitral rules that the parties may have adopted. For example, Article 25 of the LCIA Arbitration Rules provides that the tribunal has the power "to order on a provisional basis, subject to a final decision in an award, any relief which the [a]rbitral [t]ribunal would have power to grant in an award, including the payment of money or the disposition of property as between any parties".

When drafting arbitration agreements, the parties should ensure that any interim relief from the tribunal and the court is provided for. Once a dispute has arisen, a party seeking interim relief must select the best route available to it, taking into account the circumstances of its case. The key factors for consideration are likely to include the jurisdiction in which any relevant assets are located and how easy or difficult it might be to enforce a court order or arbitral award in that jurisdiction. Other factors might include whether a party can be pursued for contempt of court in the event of non-compliance with an order and whether the threat of contempt proceedings might encourage that party to comply with the order for interim relief.

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Endnotes

(1) [2015] EWHC 3361 (Comm).

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