# Is there "urgency" under section 44(3) of the Arbitration Act? Not just because there is delay

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This article discusses the requirement that an application to the English court for interim relief in support of arbitration proceedings, which is made without the permission of the tribunal, must demonstrate that the case is one of "urgency". It is clear, in light of recent case law, that a case is not one of urgency, simply because there may otherwise be delay in obtaining relief. The article discusses what this means for parties how they should proceed where interim relief is needed.

*Section 1* of the English Arbitration Act 1996 (AA 1996) sets out the principles on which that act is founded, which include (at paragraph (c)) that the court should not intervene in arbitrations, save as provided in Part I of the AA 1996. This determines the approach of the English courts to all arbitration-related applications, including for interim relief in support of an arbitration. The recent decision of Foxton J in *JOL and JWL v JPM [2023] EWHC 2486 (Comm)* (JOL) (discussed in *Legal update, Interim injunction refused under section 44 of Arbitration Act 1996 as lacking urgency (English Commercial Court)*) confirms that a party to an arbitration agreement seeking interim relief from the English court will have to meet a high bar to satisfy the court that the case is one of urgency, as required by *section 44(3)* of the AA 1996.

## Court's powers in support of arbitration

*Section 44* of the AA 1996 sets out the powers exercisable by the court in support of arbitral proceedings. These powers include the ability to make orders on the taking of witness evidence, the preservation of assets, or the granting of an interim injunction (*section 44(2)*).

Unless the case is one of "urgency", the court can act on an application by a party to the arbitration only with the agreement of all other parties or with the tribunal's permission (*section 44(4)*). However, where the case is one of urgency, the court can act on an application by a (proposed) party to an arbitration without the other parties' agreement or the tribunal's permission, and can make such orders as it deems necessary for the purposes of preserving evidence or assets (*section 44(3)*). In either case, the court should only exercise its powers under section 44 if or to the extent the tribunal has no power or is unable to act effectively for the time being (*section 44(5)*).

A key question that arises from the structure of section 44 is what will constitute "urgency" in this context.

## The JOL case

### Application for relief under section 44

For the background to *JOL*, see *Legal update, Interim injunction refused under section 44 of Arbitration Act 1996 as lacking urgency (English Commercial Court)* but, in brief, the dispute arose from two bareboat charterparties (BBCPs) under which two vessels were chartered by JPM, whose obligations were guaranteed by a guarantor. JPM then sub-chartered the vessels to GHH. The BBCPs contained various termination events, in the event of which the owners (JOL and JWL) could terminate

 

the agreement, including where the guarantor's shareholding in GHH fell below a certain threshold, which had happened by 2 September 2023.

The owners then purported to serve a notice terminating the BBCPs with immediate effect, and requiring the charterers to redeliver the vessels to a designated port. When the vessels were not redelivered,

the owners commenced LMAA arbitration, in accordance with the terms of the BBCPs and applied for interim relief to the English court under section 44(3) of the AA, requiring redelivery of the vessels. To succeed, the owners were required to demonstrate that their case was one of urgency.

### Decision rejecting application

Foxton J dismissed the application, finding that the owners had failed to establish urgency, despite the fact that the tribunal did not possess the power to order interim relief and, therefore, could only determine the matter in a final award, which would, necessarily, result in some delay.

The judge rejected the owners' argument that any significant delay in redelivery of the vessels would finally deprive them of their contractual right to immediate redelivery, noting that such an argument can be made of any contractual obligation, which must be performed by a particular date, but which was also capable of being performed later. The mere fact that it would take longer to obtain relief from the tribunal was also held to be insufficient to establish urgency. In the circumstances of the case, the court was of the view that it would be possible for the tribunal to issue its award within six to eight weeks.

Foxton J considered that there was a need to proceed with particular caution where the relief sought was for an order that cannot effectively be revisited in the arbitration, as here. Once the vessels were redelivered, it was not realistic to suppose that the consequences flowing from that could be reversed.

While that risk would still subsist if the owners were to make a new application with the tribunal's permission under section 44(4), an intervention by the court that is sanctioned by the tribunal could more readily be reconciled with the general principles set out in section 1 of the AA 1996. Interestingly, Foxton J stated that, in giving its permission, it would be open to the tribunal to express its views on the merits of the application, which, while not binding, would be of assistance and interest to the court.

## Earlier cases on urgency

Given previous case law on section 44 of the AA 1996, the decision in *JOL* should not come as a surprise. As Males J made clear, first in *Zim Integrated Shipping Services Ltd v European Container KS [2013] EWHC 3581 (Comm)* and then in *Euroil Ltd v Cameroon Offshore [2014] EWHC 52 (Comm)*, the closer any injunction sought under section 44 comes to finally determining a matter, which the parties have agreed is for the tribunal to decide, the more wary the court should be of making any such order. See *Legal updates, Whether contractual rights can be treated as assets for purposes of injunctive relief under section 44 Arbitration Act (Commercial Court)* and *Meaning of asset for purposes of section 44(3) Arbitration Act 1996 (Commercial Court)*.

The case of *Gerald Metals SA v Timis [2016] EWHC 2327 (Ch)* went even further than *JOL* in relation to the issue of urgency, and demonstrated that, even when the tribunal has not yet been constituted, if the arbitration agreement provided for either an emergency arbitrator or the expedited formation of the tribunal (which it did in that case through incorporation of the LCIA Rules) in circumstances where they could be appointed within an appropriate timeframe and exercise the necessary powers, the test of urgency under section 44(3) will not be met (see *Legal update, LCIA emergency arbitrator provisions limit court's power to grant freezing injunction in support of arbitration (English Chancery Division)*).

 

## Delay does not equate to "urgency"

*JOL* and the cases before it illustrate that the concept of urgency in applications under section 44(3) of the AA 1996, while context dependent, require an applicant to show more than mere delay in the matter being determined by a tribunal, as opposed to by the court. This will be the case even when the tribunal has not yet been constituted but the arbitration agreement provides for either expedited formation of the tribunal or emergency arbitrator provisions.

In the case of *JOL*, a delay of six to eight weeks for the determination of the owners' claim for the redelivery of the vessels was not, in of itself, considered to constitute urgency. A key element of that decision, however, was clearly that granting the relief sought would have, in effect, equated to a final determination of the issue, which should have been one for the tribunal. It is at least open to question whether the outcome would have been different where the delay was the same but intervention by the court would not have been, effectively, final.

## Best route to achieve relief sought

Each case will turn on the facts, and the concept of urgency will differ from case to case. However, it is key in any application made under section 44(3) to clearly set out why the matter is urgent in the specific circumstances of the case. Where it is clear that any argument on urgency is likely to fail, parties should consider seeking the permission of the tribunal (or, less likely, the agreement of the other parties) to make an application under section 44(4), if it is still considered that a court order is preferable to a tribunal's order. In cases where the relief being sought from the court would, effectively, be determinative of the matter, the court is likely to be wary of granting such relief. It will be interesting, however, to see whether any tribunals to whom applications for permission are made avail themselves of the opportunity alluded by Foxton J of offering their views on any such application and, in turn, how such indications may be viewed by a judge of the Commercial Court, Foxton J's views on their utility notwithstanding.

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