

The Case against Arbitration Ex-Parte Relief

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We are here to round up this interesting session with a good debate. In this we have been well served by speakers Jim Castello and Yves Derains. We have not only had lucid argument from each of them but also a cogently argued paper from Jim favouring arbitral interim relief ex parte, and a splendidly challenging paper against, written in Yves' inimitable style.

Now, as it happens, I have come hot foot from London with direct and recent experience of ex parte interim relief. It concerned my wife, who is a doctor and serves as a National Health Service Consultant in a major London teaching hospital. Three or four weeks ago, she discovered, to her surprise and everybody else's, that *her entire hospital salary* for several years had not been paid to her but to an electrician in Paphos, Cyprus, who, it appears, has been living for the same several years in great luxury! When asked for an explanation of how this Cypriot electrician

came to be in receipt of my wife's salary, the hospital stated, somewhat blandly, that the "circumstances were unusual." The bank, one of the major clearing banks in the UK, stated with greater blandness, "It was a fluke!"

To try and remedy this unfortunate situation, my wife first needed to obtain 'disclosure orders' against all the banks that held accounts into which her salary had been wrongly deposited – after the initial deposits my wife's monies were then transferred to other bank accounts. Second, she needed to obtain 'gag orders' against each of the banks that had received disclosure orders – preventing them from disclosing to their clients, until after the investigation had been completed, that inquiries were being made. Third, my wife needed to obtain 'freeze orders' against the banks, and the wrongful receiver of her hospital salary, to prevent any movement of the funds out of the disclosed accounts.

Now place these needs, in the dispute between my wife and the Cypriot electrician, within the setting of an arbitration. All but one of the needed disclosure, gag and freeze orders were made *ex parte* against third parties (the banks). Therefore, the arbitral tribunal would not have been able to issue any of these important interim orders. The point is that when the respondent in the arbitration seeks to hide his assets (and hence deprive the claimant of receiving monies awarded by the tribunal) there are bound to be others (not involved in the arbitration) who are assisting him in removing these assets from the claimant's reach. Moreover it is from these third parties (in the case of my wife, the banks) that the most *effective* interim relief can be

obtained. In short, obtaining freeze orders against them provides a much more reliable means of keeping the respondent's assets available to satisfy the arbitral award.

Therefore, I believe that the right approach is for arbitral tribunals and courts of law to divide responsibilities when there is a need for *ex parte* interim measures. Thus, when interim measures are needed on an 'inter parte' basis, such as an order of 'security for costs', the tribunal has authority to issue them. But when interim measures are needed *ex parte*, and/or needed to be enforced, there is *no effective role* which an arbitral tribunal can play, even though it may be more familiar with the dispute and the facts. The body that issues these orders for interim relief must be responsible for them being properly issued—and that body almost invariably will be a court of law. I think that this division of responsibility between arbitrators and courts has been well achieved in Article 23 of the ICC Rules (1998), in Article 21 of the International Centre for Dispute Resolution Rules (2002), and in Article 25 of the LCIA Arbitration Rules (1998), written, as is the thoroughness of the English, at some greater length than the equivalent provisions in the ICC and ICDR Rules!

As expressly provided in all three of these institutional rules, applications for interim relief to the court do not jeopardize the arbitration process. Indeed it is an important adjunct to it. The more courts of law work in co-operation with arbitral tribunals, the more efficient and fair is the arbitration process.