Caught between Arbitrators and the Courts:

Interim Measures in U.S. International Arbitration

By Hon. J. Edgar Sexton (Ret.)

Though the Channel Tunnel connecting Britain and France was one of the great construction and engineering accomplishments of the late twentieth century, in the fall of 1991 its construction was mired in a legal dispute. Work on the tunnel had by that time been underway for more than three-and-a-half years. A dispute arose between Eurotunnel, the owners and future operators of the tunnel, and Trans-Manche Link (TML), the consortium of French and British companies building the tunnel. TML claimed that Eurotunnel was shortchanging it on payments related to the construction of the tunnel's cooling system. In October 1991,TML threatened to suspend all work on the cooling system if its demands were not met. Despite the fact that the contract between Eurotunnel and TML contained a clause requiring the parties to resolve any disputes by arbitration in Brussels, Eurotunnel sought an injunction from an English court requiring TML to continue its work until the dispute was resolved by arbitration. TML responded that the English court had no jurisdiction because the parties had agreed to use arbitration. The case, known as *Channel Tunnel Group v. Balfour Beatty Construction*, eventually reached the House of Lords, which refused to grant the injunction.

Considering that the issue reached the House of Lords in England, it is perhaps surprising that it has not reached the Supreme Court of the United States. This leaves American litigants in an uncertain position. When faced with a situation like the *Channel Tunnel Group* case, should they seek relief from an arbitrator or the courts? Would the case be resolved the same way in the United States today?

The *Channel Tunnel Group* case

The judge at first instance would have granted the injunction sought by Eurotunnel, although he declined to do so when TML undertook not to suspend work without notice. The Court of Appeal reversed that decision. While an English court had jurisdiction to grant an injunction in support of a domestic arbitration between English companies, according to the Court of Appeal, it had no jurisdiction to issue an injunction relating to a dispute that was the subject of a foreign arbitration.

The House of Lords affirmed the decision of the Court of Appeal, but for different reasons. Lord Mustill held that the court did have the jurisdiction to grant an injunction in support of a foreign arbitration. However, he wrote that an injunction would be inappropriate in this case. Because Eurotunnel also sought a permanent injunction from the arbitrators, by granting an injunction the court would effectively preempt the arbitrators' decision and usurp the role that the parties had agreed to give the arbitrators alone. He concluded that granting an injunction "would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration."

Lord Mustill characterized the interaction between arbitrators and the courts in broad terms:

> The purpose of interim measures of protection…is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.

When assessing whether an American court is likely to follow the House of Lords' decision, it is important not to overlook one factual quirk in the *Channel Tunnel Group* case. Despite threatening to suspend work on the tunnel's cooling system, TML never actually did so. In some sense, then, the House of Lords was faced with an abstract legal issue. One wonders whether the result would have been the same had construction actually been suspended and an injunction really been necessary to keep such an important construction project going.

The applicable rules

Arbitrations are governed by two sets of rules: the terms of the contract between the parties and the relevant legislation. Where the arbitration clause between the parties specifically addresses the role of courts in providing interlocutory relief, the court need only hold the parties to their agreement. Often the arbitration clause in the contract will not address this issue, but instead incorporate a set of arbitration

rules, which may offer some assistance dividing jurisdiction between arbitrators and courts. This may not settle the issue, however. The JAMS *International Arbitration Rules*, for instance, empower the arbitral tribunal to grant "whatever interim measures it deems necessary, including injunctive relief," but also note that requesting such measures from a court "will not be deemed incompatible with the agreement to arbitrate." This type of provision does not establish when it is appropriate for a court to grant such relief.

Where the terms of the arbitration agreement are not clear, courts look at the relevant legislation. The United States has not implemented the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Commercial Arbitration, which explicitly gives courts and arbitrators concurrent jurisdiction over interim measures. However, it has ratified and implemented the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, better known as the New York Convention.

Though international arbitrations can also fall under other treaties and legislation, such as the *Inter-American Convention on International Commercial Arbitration* (also known as the Panama Convention), the North American Free Trade Agreement or bilateral investment treaties, most international arbitrations fall within the auspices of the New York Convention.

§203 of the *Federal Arbitration Act* gives federal courts original jurisdiction over "an action or proceeding falling under the New York Convention." The Convention does not explicitly discuss the question of interim relief because it is primarily concerned with the recognition of enforcement of arbitral awards on the merits. In this absence, courts have focused on Article II(3):

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Courts are divided as to whether this language implicitly addresses their power to issue interim measures in support of international arbitrations. Similar language in §3 of the *Federal Arbitration Act* has given rise to a parallel debate.

The law of preliminary injunctions

The Supreme Court has established a four-part test for granting a preliminary injunction. The party seeking the injunction must satisfy the court that: (a) it is likely to succeed on the merits; (b) in the absence of relief, it is likely to suffer irreparable harm; (c) the balance of equities favors granting the injunction; and (d) the injunction is in the public interest.

One issue in the *Channel Tunnel Group* case was whether an English court could issue an interlocutory injunction in support of an arbitration to be held abroad. The House of Lords reversed the Court of Appeal on this issue and held the English court could do so. American courts have reached similar conclusions. Where courts have accepted that they have jurisdiction to grant injunctive relief, they have not been troubled by the fact that the arbitration is to take place abroad.

Although neither the New York Convention nor the *Federal Arbitration Act* grants arbitrators the right to order injunctions or other interim relief, courts have held that they have the inherent authority to do so unless the parties agree to the contrary. The parties' agreement to arbitrate would lose meaning unless they also intended to grant the arbitral tribunal the power to preserve the status quo until it can decide the case on its merits.

The overlap between courts and arbitrators

Except where the jurisdiction of the court has explicitly been ousted by the parties, judges are loath to deprive litigants of access to the courts. However, the parties should be held to their bargain, especially in light of the compromise represented by the arbitration agreement.

Faced with the uneasy interaction between these two principles, courts have taken at least three different approaches to applications for injunctions in the face of an arbitration clause. Under the first approach, courts simply deny that they have any jurisdiction to grant interim relief. This approach appears to be based on two things: a broad reading of Article II(3) of the New York Convention as prohibiting courts faced with an arbitration clause from doing anything other than referring the parties to arbitration, and policy concerns that the party seeking judicial relief was seeking to bypass the agreed-upon method of settling disputes.

This line of cases has been roundly criticized by academics and courts. It relies on a strained interpretation of the text of the New York Convention that is inconsistent with the Convention's history and *travaux préparatoires*. Its sense of policy is also flawed. While it is true that parties should be held to their agreement, this position ignores the fact that there are many situations where parties cannot get important relief from the arbitrators, either because the arbitral panel has not been formed or because it lacks jurisdiction. If interim relief is unavailable, the dispute may be moot by the time it can be decided by the arbitrators, making the arbitration agreement hollow. Finally, it is telling that this interpretation has found no support from foreign courts interpreting the New York Convention.

The second approach goes to the other extreme, holding that the presence of an arbitration clause does not in any way limit the court's authority to order interim relief. We believe this approach is also flawed. Where parties have agreed to resolve their dispute by arbitration, it is illogical to assume this agreement includes final remedies but somehow excludes provisional remedies. The essence of an arbi-

tration clause is the parties' decision to stay out of court, often for reasons relating to confidentiality or cost. Where the dispute is between parties in different jurisdictions, the decision to arbitrate also often represents a considered choice to avoid giving either side a "home field advantage" in domestic courts. Going to one of those same courts to receive interlocutory relief may violate the spirit of the parties' agreement and give one side an unfair advantage. Because they are immersed in the facts and procedural history of the case, arbitrators are generally better placed than courts to determine whether an application for provisional measures is truly needed or whether the legal process is being used as a delaying tactic or as a means of gaining an advantage in settlement discussions. By undermining the effectiveness and predictability of the arbitration agreement, this approach actually diminishes the parties' autonomy.

This approach also relies on the premise that there is little connection between a court's decision on interlocutory relief and the final decision on the merits, which is reserved for the arbitrator. The reality is not so simple. A court faced with an application for an interlocutory injunction must consider the merits of the case at the first stage of the test, and its findings could influence the parties' arguments and the arbitrator's decision. The court's decision whether to grant the injunction will also shape the facts on the ground facing the arbitrator, which can and do affect the arbitrator's final decision and choice of remedy. These concerns must be balanced against the fact that an interlocutory injunction may be often necessary to ensure a dispute is not rendered moot by the parties' actions before it can be decided by the arbitrator.

If parties do wish to retain unrestricted access to the courts, they are of course always free to include this in the arbitration agreement.

A third approach, which views arbitrators as the primary source for interim relief without entirely blocking parties' access to the courts, avoids these problems.

Even where granting the interim relief would not directly preempt the arbitrator's decision on the merits, under this approach courts only assume jurisdiction in cases where the arbitrator cannot grant the relief sought.

This may be the case for a number of reasons. The parties may not yet have appointed an arbitrator, a process that can take months. Even if an arbitrator has been appointed, he or she may not be able to deal with a motion quickly enough. Courts, which are available 24 hours a day if necessary, may be able to offer more urgent relief. Though arbitrators generally do have the authority to grant interim relief, the remedy sought may be outside the limits of the arbitrator's jurisdiction, either generally or under a specific arbitration clause. An arbitrator, for instance, has no power to issue relief binding third parties.

Some courts have taken this further and suggested that a court should deny interim relief where it is theoretically available from the arbitrators, even if getting that relief is practically impossible. In one case, for instance, the party seeking a writ of attachment sought judicial relief because it knew that provisional relief would not be available under the arbitral rules due to a jurisdiction quirk. The court nonetheless denied relief, holding that as long as the arbitral rules allow for provisional relief, the practical question of whether that relief is actually available on the facts of a given case was "irrelevant." We think this goes too far. Courts should approach the question of whether relief is available from the arbitrator in a pragmatic way, never losing sight of whether their intervention would help or hinder the arbitration. Judicial intervention is often appropriate where for whatever reason the arbitrator cannot even consider a claim for interim relief on its merits.

Conclusions: some practical advice

Though we believe courts should exercise restraint when faced with an application for an interlocutory injunction in support of a dispute governed by an arbitration agreement, not all American courts have done so. Still other courts, however, have denied that they can consider such applications at all.

One hopes that in time the Supreme Court will resolve this uncertainty. In the meantime, however, the prudent course of action is to seek interlocutory relief from the arbitrator whenever possible. This avoids the possibility that a court will decline jurisdiction, wasting time and money.

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