

Freezing Orders, other interim measures and ex parte applications at the AIFC Court

Justice Charles Banner Q.C.
AIFC Small Claims Court



Overview

- Generally speaking, an interim remedy is a remedy applied for and granted to cover the intervening period between the commencement of the proceedings and final judgment or order, and having effect for the duration of that period and no longer
- AIFC Court Rules (“**ACR**”) Part 15 – Interim Remedies
- Part 15 is structured as follows:
 - Rules 15.1-15.3 – the interim remedies available
 - Section I (rules 15.4-15.14) – “Interim Remedies – General” (including provisions concerning the procedure for seeking an interim remedy)
 - Section II (rules 15.15-15.25) – “Interim Payments”
 - Section III (rules 15.26-15.33) – “Security for Costs”

Rule 15.1 – the interim remedies available (1/3)

“The Court may grant such interim remedies as are necessary in the interests of justice, including:

(1) **an interim injunction;**

(2) an interim declaration;

(3) an order:

(a) for the detention, custody, inspection or preservation of relevant property;

(b) for the taking of a sample of relevant property;

(c) for the carrying out of an experiment on or with relevant property;

(d) for the sale of relevant property which it is desirable to sell quickly; and

(e) for the payment of income from relevant property until a claim is decided;

(4) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under sub-paragraph (3);

(5) an order providing for the delivery up of any goods to the claimant or to a person appointed by the Court for the purpose on such terms and conditions as may be specified in the order;

(6) an order (referred to as a ‘freezing order’) restraining a party from removing assets from Kazakhstan or from dealing with assets wherever they may be located;

(7) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order;

Rule 15.1 – the interim remedies available (2/3)

(8) an order (referred to as a ‘search order’) requiring a party to admit another party to premises for the purpose of preserving evidence;

(9) an order for production of documents or inspection of property before a claim has been made;

(10) an order for production of documents or inspection of property against a non-party;

(11) an order (referred to as an order for interim payment) under Section II of this Part for payment by a defendant on account of any damages, debt or other sum (except costs) which the Court may hold the defendant liable to pay;

(12) an order for a specified fund to be paid into Court or otherwise secured, where there is a dispute over a party’s right to the fund;

(13) an order permitting a party seeking to recover personal property to pay money into Court pending the outcome of the proceedings and directing that, if he does so, the property shall be given up to him;

(14) an order directing a party to prepare and file accounts relating to the dispute;

(15) an order directing any account to be taken or inquiry to be made by the Court;

(16) an order appointing a receiver or receiver and manager, having such powers as the Court may see fit, of the property or any of the property of any body corporate;

Rule 15.1 – the interim remedies available (3/3)

(17) where the person against whom the order is to be made is a natural person:

(a) an order appointing a receiver or trustee, having such powers as the Court may see fit, of the property or any of the property of that person;

(b) an order requiring that person to deliver up to the Court his passport and such other documents as the Court sees fit; or

(c) an order prohibiting that person from leaving the Republic of Kazakhstan without the consent of the Court; and

(18) any other remedy provided by any other legislation.”

Overarching principles

- ACR. 1.6: the overriding objective “***of enabling the Court to deal with cases justly***”. This includes:
 - Ensuring that the system of justice is accessible and fair
 - Ensuring that the parties are on an equal footing
 - Ensuring that the case is dealt with expeditiously and effectively
 - Dealing with the case in ways which are proportionate
- ACR 1.7: the Court “shall seek to give effect to the overriding objective” when exercising any power and/or when interpreting any rule or Practice Direction.
- Thoughts on the overriding objective in the context of interim measures...
- ***National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Practice Note)*** [2009] UKPC 16 per Lord Hoffmann at para. 16:

“The purpose of an interim remedy is to improve the chances of the court being able to do justice after a determination of the merits at trial.”

Relevance of common law case-law

AIFC Constitutional Statute Article 13(6):

“In adjudicating disputes, the AIFC Court is bound by the Acting Law of the AIFC and may also take into account final judgments of the AIFC Court in related matters and final judgments of the courts of other common law jurisdictions.”

AIFC Court Regulations, Regulation 29(2)

“The Court, as provided by Article 13(6) of the AIFC Constitutional Statute, in determining a matter or proceeding, shall be guided by decisions of the Court and decisions made in other common law jurisdictions.”

Consider the applicability of case-law under (for example):

- [Part 25 of the English Civil Procedure Rules](#) (‘Interim Remedies and Security for Costs’)
- [Part 29 of the Hong Kong Rules of the High Court](#) (‘Interlocutory Injunctions, Interim Preservation of Property, Interim Payments, etc.’)
- [Part 25 of the Dubai IFC Court Rules](#) (‘Interim Remedies and Security for Costs’)

Interim injunctions (ACR r 15.1(1))

- The *American Cyanamid* principles (*American Cyanamid Co. v. Ethicon Co Ltd* [1975] AC 396):
 - Serious issue to be tried
 - Damages an inadequate remedy
 - Cross-undertaking in damages (see ACR r 15.8(1))
 - Balance of convenience (where there is doubt as to the adequacy of damages to either party or both)

“Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.” (Lord Diplock)

The evidence in support of or in opposition to an interim injunction must address these considerations.

Interim injunctions continued

- The interim injunction sought must be worded so that the person affected knows precisely what he is to be prevented from doing or required to do. If the applicant cannot define the order with a sufficient degree of precision (e.g. the extent of an area of land, or trade secrets or confidential information alleged to be protected) no injunction will be granted: see e.g. ***CEF Holdings Ltd v. Munday*** [2012] EWHC 1524 (QB)
- Sometimes a defendant may consider it preferable to offer undertakings instead of having an interim injunction imposed or maintained against them.
 - Where a defendant gives such undertakings, but wishes to preserve its rights to apply to be released from them, it is usually necessary (absent “good cause”) to express such reservation in the undertakings themselves: ***Emailgen Systems Corporation v. Exclaimer Ltd*** [2013] EWHC 167 (Comm).

Freezing orders (1/3)

- ACR r 15.1(6): “an order (referred to as a ‘freezing order’) restraining a party from removing assets from Kazakhstan or from dealing with assets wherever they may be located”
- ACR r 15.1(7) “an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order”
- A freezing order is a form of injunction and therefore the principles relating to injunctions apply, with some modifications.
- The purpose of a FO is to prevent the dissipation of assets which would otherwise be available to meet a judgment: **JSC BTA Bank v. Solodchenko** [2010] EWCA Civ 1436
- Freezing injunction test:
 - Good arguable case (no need to show more than 50% chance of success): see e.g. **Kazakhstan Kagazy plc v. Arip** [2014] EWCA Civ 381.
 - There are “grounds for belief” that there are assets on which the judgment will bite: **Ras Al Khaimah Investment Authority v. Bestfort Development LLP** [2017] EWCA Civ 1014.
 - Real risk (supported by evidence) of dissipation of assets: see e.g. **Holyoak v. Candy** [2017] EWCA Civ 92.

Freezing orders (2/3)

Typical factors:

- The ease or difficulty with which the respondent's assets could be disposed of or dissipated
- The nature and financial standing of the respondent's business (harder to get FO if the respondent is a long established business with a reasonable market reputation)
- Domicile of the respondent
- Any threat or intention expressed by the respondent about future dealings with his assets
- The respondent's behaviour in response to the applicant's claims (e.g. a pattern of evasiveness)
- Evidence of dishonesty which justifies the inference that the respondent will dissipate assets unless restricted

Freezing orders (3/3)

- A freezing order will usually require the defendant to provide information about their assets.
- A freezing order is an interim remedy and not a substitute for relief to be obtained at the trial. A claimant applying for and granted a FO should press on quickly with their action. Undue delay may be an abuse of process (and as such could potentially result in the claim being struck out and/or the FO being discharged) see e.g. ***Walsh v. Delouitte & Touhce Inc*** [2001] UKPC 58.
- However, post judgment freezing orders may be granted in circumstances where this is necessary to prevent the removal or dissipation of an asset before the process of execution and realise the value of that asset for the benefit of the judgment creditor: ***Camdex International Ltd v. Bank of Zambia (No 2)*** [1998] 1 WLR 632.
- An example of an “interim declaration” under ACR r 15.1(2) is to establish that a particular transaction which a party found to have been in breach of a freezing order proposed to make good that breach would not be a further breach of the freezing order that still bound them: see ***ABC v. SCDE*** [2010] EWCA Civ 533.

Interim payments (ACR rr 15.15-15.25)

- The Court may make an interim payment if (see r. 15.18)
 - The defendant has admitted liability to pay damages or some other some of money to the claimant.
 - The claimant has obtained judgment against the defendant for damages to be assessed or a sum of money (other than costs) to be assessed.
 - The Court is satisfied that the Claimant would obtain judgment for a substantial sum of money (other than costs) from the Defendant.
 - Special criteria where there are multiple Defendants (r. 15.18(4)).
- Interim payment shall not be more than a “reasonable proportion of the likely amount of the final judgment” (r 15.19)
 - In ***Pfizer Inc v. Mills*** 10/5/10, unreported (Vos J.), on the facts of the case this was 75% of the estimated profits made by the defendant by infringing the claimant’s trade marks.
- May subsequently be varied or required to be repaid (r 15.20-15.23).
- Interest payable if the interim payment exceeds what D ultimately has to pay C (15.24).
- The fact that an interim payment has been made shall not be disclosed to the trial judge (r 15.25).

Security for costs

- Purpose: to protect a defendant against the risk of not being able to enforce a costs order against the claimant (or against someone sitting behind the claimant: see ACR rr. 15.31-15.32).
- Source of power: ACR r.15.29.
- Who can apply? Defendant to any claim (main claim or additional claim under ACR Part 13) – but cannot apply against the AFSA or Registrar of Companies in proceedings initiated by them (r. 15.27).
- When to apply?
 - As soon as possible and no later than the first CMC.
 - Danger of delay: security limited to future costs.
 - Where previous application was unsuccessful or resulted in an Order for Security for Costs in an amount now said to be insufficient, the applicant may reapply if they can prove some significant and relevant change of circumstances (even if the previous order was by consent){: see e.g. ***Republic of Kazakhstan v. Istil Group Inc*** [2005] EWCA Civ 1468.
- When granted? Reason to believe C won't pay D's costs.
- One or more conditions in ACR r. 15.30 must apply, such as:
 - C resident outside Kazakhstan.
 - C is a company with no or limited assets so will be unable to pay the costs if ordered.
 - C took steps in relation to his/its assets to make it difficult to enforce a costs order against him/it.

Applying for an interim remedy: procedure

- **Timing of an application for an interim remedy:**
 - ACR r. 14.4: “subject to any rule, practice direction or legislation which provides otherwise, an order for an interim remedy may be made at any time”.
 - But defendant cannot normally apply before he has filed his AoS and Defence (r.15.4).
 - A second application for the same interim remedy based upon material which was not, but could have been, deployed on an unsuccessful first application, is unlikely to impress the Court: see *Woodhouse v. Consignia plc* [2002] 1. W.L.R. 2558, at para. 55 per Brooke LJ.
- **Before a claim is brought :**
 - ACR rules 6.1(1) and 15.7 require the party seeking the interim remedy to issue an Abridged Procedure Claim Form (as to which see rr. 23.2-23.6).
 - Application notice and evidence (see below).
- **After a claim is brought (r. 6.1(2))**
 - ACR rule 6.1(2) requires the party seeking the interim remedy to file an application notice.
 - Copy of order sought (r. 6.11).
 - Evidence in support of an application (rr. 6.14-6.18):
 - Witness statement / statement of case/application notice verified by statement of truth.
 - Can rely on evidence already filed.
 - Applications for search orders and freezing orders must be supported by affidavit evidence.
 - Additional evidence for without notice applications.

Procedure: additional considerations applicable to applications for freezing orders & other interim injunctions

- See generally ACR rule 15.8.
- Often without notice (in which case the applicant must provide an undertaking to the Court to serve the application notice, evidence in support and any order made as soon as is practicable). But the Court may expect the applicant to explain why there is a real urgency necessitating a without notice application: ***Mayne Pharma (USA) Inc. v. Teva UK Ltd (Interim Applications: Costs)*** [2004] EWHC 2934.
- Return date for a hearing where the other party is present (r.15.8(3)).
- Duty of full and frank disclosure (note the evidential requirements of ACR r. 6.8).
- Undertaking in damages (promise to the court to pay whatever damage the respondent sustains): r. 15.8(1).
- If no claim has yet been made, the applicant must provide an undertaking to issue a claim form the next day or directions for issue of claim form.
- If the claim is stayed otherwise than by agreement between the parties, interim injunction ceases unless the Court orders otherwise (r. 15.9).
- An interim injunction ceases after 14 days if the claim is struck out due to the claimant's failure to pay court fees (unless the claimant successfully applies to have the claim reinstated).

Making an interim application: advocacy

- Make use of time effectively.
- Know your facts, procedural history, where the documents are.
- Research the Judge's powers and any applicable law.
- Structure your submissions:
 - Introduce yourself, opponent and who you appear for.
 - Outline the application and requested relief in first 30 seconds:
 - What you want;
 - Why you want it;
 - How the court can give it to you (power in the Rules).
- Make submission first, then go to the evidence.
- Where both parties have applications, establish the 'order of play' beforehand.
- Note that the AIFC Court and IAC will provide, free of charge to anyone who wants to register to attend, four days of comprehensive common law in-person and online advocacy training by a Russian speaking barrister from London. Details will be advertised via the AIFC Court and IAC websites and in the media soon.

Questions & Answers and Discussion