Interim measures are temporary measures to protect the parties’ interests pending the resolution of their dispute. Interim relief is an important tool in international arbitration to preserve the status quo and prevent the dissipation of assets or evidence. This article will explore the legal framework in African jurisdictions and how the national laws make express provision for the role of national courts in arbitral process in some African jurisdictions. It will also outline the condition precedent for grant of interim reliefs by arbitral tribunals and courts where the tribunal is yet to constituted.

Interim Reliefs

Interim relief is an interlocutory order to maintain the status-quo pending the final award. It may be a form of freezing injunction for the preservation of evidence or for security of cost. Interim relief binds the parties like the final award whether granted by a court or tribunal. The application can be made by ex-parte applications at the seat of application or where the assets are located.

In practice, interim reliefs are granted by arbitral tribunal. The powers and procedure is subject to the institutional rules of the arbitral institution such as the Cairo Regional Centre for International Commercial Arbitration Rules (2011). In most cases, the primary purpose for expedited appointment of an emergency arbitrator is to grant interim reliefs. The London Court of Arbitration Rules (2020), Article 9C provides for expedited appointment of arbitrator and interim reliefs can be granted under Article 25 by such appointed arbitrator. The choice of governing law, Institution and the seat are therefore important for granting and enforcement of interim measures.

The legal framework in Africa on interim relief could be deduced from arbitration laws in Nairobi, Sierra Leone and Nigeria. The laws in these jurisdictions make express provision on interim reliefs in the arbitration laws. In Nairobi, the Nairobi Arbitration Rules 2015 Revised (2019), Rules 27 and 28 provides for interim reliefs and emergency arbitrator respectively. More recently, Sierra Leone Arbitration Act 2022, Part VII Article 27 of the Act (2022), and the Arbitration and Mediation Act 2023 (AMA) section 20 respectively prescribe the modes of application for interim reliefs. These laws mandate inter-alia the grant of an order for “preservation, storage, sale or other disposal of any property or thing under the control of any other party and relating to the subject matter of the arbitration”.

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6 Art. 27(1)(a) of the Nairobi Arbitration Rules, 2015 revised (2019)
Grounds, Mechanisms for Interim Reliefs

Jurisdiction is the primary consideration in an application for interim reliefs. Where the tribunal lacks jurisdiction as per the agreement of the parties, it is deprived of jurisdiction to grant reliefs. Jurisdiction is set out in national laws and institutional rules such as sections 32 of the Sierra Leone Arbitration Act (2022) and Section 21 Nigeria Arbitration and Mediation Act (2023).

The tribunal may also consider the following: (i) chance of success in the final award is key defense to an application by such party, (ii) effect of irreparable harm, (iii) urgency, (iv) merit and the balance of inconvenience, (v) prima facie case on the merit of the dispute are valid defenses to application for interim measures.

Approach to Interim Reliefs by National Courts

There is need for clarity on the role of national courts. In applications before courts, the compliance with arbitration laws by national courts is essential especially in jurisdictions with recent arbitral laws. In Nigeria, the case of Owners of the MV Lupex v. Nigerian Overseas Chartering & Shipping Ltd[2003] SC 21/2000, the Supreme Court of Nigeria held that a party to an arbitral proceeding would be permitted to institute an action for injunctive reliefs in Court during the pendency of the arbitral proceedings if there is a “strong, compelling and justifiable reason” for such an action.8

In Sierra Leone, the Cape Lambert Resources v. Craig Dean & others (FTCC 089/17) 2017, before the Fast Track Commercial Court Division of the High Court, the court granted an “interlocutory injunction restraining the 1, 2 and 3rd Defendants from liquidating the 4th Defendant pending the hearing and determination of the matter”.

The approach of the British court in the case of Gerald Metals SA v Timis [2016] EWHC 2327 (Ch) digested the power to grant urgent relief. The case was determined under the Arbitration Act 1996 (“Act”) and LCIA Arbitration Rules 2014.10 The Court ruled that under s 44(3) of the Arbitration Act 1996 (“Act”) it could not grant interim relief in the circumstances where timely and effective relief could have instead been granted by an expedited tribunal or emergency arbitrator under the LCIA Arbitration Rules 2014 (“LCIA Rules”).11 Gerald Metals SA (“Gerald Metals”), a commodities trader, filed a claim in respect of a financing arrangement entered with Timis Mining Corp (SL) Limited (“Timis Mining”) and Gerald Metals would advance $50 million to Timis Mining to finance the development of an iron ore mine in Sierra Leone. In order to secure Timis Mining’s performance, the trustee of the Timis Trust, Safeguard Management Corp (“Safeguard”), provided a guarantee of all sums due under the offtake agreement. The guarantee was subject to arbitration in London under the LCIA Rules. Following defaults under the offtake agreement, Gerald Metals commenced

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10 EWHC 2327 (Ch), the English High Court accessed on 7th August 2023.
arbitral proceedings under the LCIA Rules against Safeguard under the guarantee. Before the constitution of the tribunal, Gerald Metals applied to the LCIA for the appointment of an emergency arbitrator, with a view to seeking emergency relief, including an order to prevent Safeguard from disposing of the Trust's assets. On an application for undertaking on the disposal of assets, the LCIA rejected Gerald Metals' application for the appointment of an emergency arbitrator.  

On an application before the English Court for urgent relief against Safeguard, the court considered Section 44(3) of the English Act. The section provides inter alia that the court may “make such orders as it thinks necessary for the purpose of preserving evidence or assets subject to s 44(5) of the Act. The power of the court is however to be exercised only in circumstances where the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.” The Court held it did not have power to grant the freezing injunction requested by the applicant. In a nutshell, there is sufficient time for an applicant to obtain relief from an expedited tribunal or emergency arbitrator under the LCIA Rules, which had already been considered and dismissed by the LCIA.

The decision of the English court is significant in comparison to the decisions before the courts in Nigeria and Sierra Leone. The decision of the English court suggests the approach of the national courts where there is availability of timely and effective mechanism for interim relief under arbitral institutional Rules.

Conclusion

In conclusion, interim reliefs provide adequate measures in maintaining the justice in arbitral proceeding. The power of court is relevant firstly, to aid the enforcement of urgent relief granted in support of the arbitral proceedings. This is not to erode the inherent power of to court as it may seem but rather to compliment the arbitral process.

Secondly, in instances where the arbitral tribunal has not been constituted, the role of the court is grant interim relief until an emergency arbitrator is appointed or the tribunal is constituted.

12 Article 9A of the LCIA Rules LCIA, Paragraph 9.1 of Rules relating to urgent relief provides that in cases of "exceptional urgency", any party may apply to the LCIA Court for the expedited formation of the arbitral tribunal. It is worth noting that express provisions of Paragraph 9.4 and 9.12 of Article 9B. The former provides that "in the case of an emergency", at any time prior to the formation or expedited formation of the arbitral tribunal, any party may apply to the LCIA Court for the appointment of an emergency arbitrator. The latter provides that Article 9B shall not prejudice a party's right to apply to a state court or other legal authority for any interim or conservatory measure before the formation of the arbitral tribunal.

13 Leggatt J held that if an expedited tribunal could be constituted or an emergency arbitrator appointed within the relevant timeframe, and the expedited tribunal or emergency arbitrator could practically exercise the necessary powers, the test of "urgency" under s 44(5) of the Act will not be satisfied and the court will not have power to grant urgent relief.

14 The LCIA had considered Gerald Metals' application for an emergency arbitrator and dismissed the application in light of Safeguard's undertakings on the grounds that the case was not sufficiently urgent to satisfy the requirements of Article 9A or 9B under the LCIA Rules, it could not be urgent enough to fall within s 44(3) of the Act.
The interaction between national courts and arbitral tribunals should be complimentary, geared towards effective judicial systems.

References:

The Cairo Regional Centre for International Commercial Arbitration Rules (2011)

The Nairobi Centre for International Arbitration Act, (No. 26 of 2013)


The London Court of International Arbitration Rules (2020)

The Sierra Leone Arbitration Act, 2022 (Act No. 18 of 2022)

The Nigeria Arbitration and Mediation Act, 2023

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