SESSION THREE

HOT, COLD, FREEZING

Angela Bilbow reports on the third panel of the day, which traversed the challenges of jurisdiction and enforcement in arbitrations with an offshore element, particularly in securing freezing orders on assets

Launching the debate, panel chair **Iain McKenny**, general counsel, disputes at third-party funder **Vannin Capital** said the topic of offshore enforcement was important for his company and law firm clients, stating that while practitioners are aware that there are "wonderful processes and procedures", lawyers could often find themselves caught in the thrust and cut of battle.

"At the end of it, you need to prevent a simple judgment or an award from being something nice that you can hang in your living room, to convert it into the compensation of loss that ultimately your client came to talk to you about four or five years ago," he said.

Nathan Searle, counsel at **Hogan Lovells**, said there were three typical scenarios when there is an offshore element to the arbitration.

First, where the offshore entity is party to the arbitration, so there is a contract between one or more offshore entities, within the jurisdiction of the arbitral tribunal.

The second is where there are two shareholders in a dispute and the joint venture entity is held offshore. The offshore entity is not party to the arbitration, but you may be seeking some remedies in relation to it.

Third, where one of the parties to arbitration, 'company A', holds shares in 'company B' which is an offshore company. There you might be looking to secure that shareholding as an asset in the proceedings.

Freezing orders were common, Searle said, referencing familiar offshore courts such as those in Cyprus, Cayman and the British Virgin Islands (BVI), which he said have a large volume of *ex parte* applications for freezing relief, so it is important when you are thinking about securing assets offshore that you do so at an early stage.

"One of the key things is to decide where you are going to seek relief. If the offshore entity is party to the arbitration, and the tribunal has not been formed, one option under the **ICC** or **London Court of International Arbitration** (LCIA) rules is to apply the emergency arbitrator procedure. If the tribunal has formed, you could seek interim measures from the tribunal," he advised.

A second option, particularly if the arbitration is seated in London, is to seek a worldwide freezing order from the English courts under section 44 of the Arbitration Act, which would need to be done before the tribunal is formed. You could then seek permission to export that order from the English court to enforce it in an offshore jurisdiction.

Or, Searle said, more commonly, lawyers would go directly to the offshore jurisdiction and seek freezing relief there in aid of the arbitration.

"The reason why offshore plays an important role, and we see a lot of these freezing applications in offshore jurisdictions, is that

Nathan Searle, Hogan Lovells

Ignas Jazerskis

it is a shorter process than taking a worldwide freezing order in the English courts and then having to enforce it in the local offshore courts. It shortens the process."

In relation to a tribunal order, one obstacle to enforcement is that an order for interim measures is not a final award; and does not fall under the New York Convention, and therefore is not directly enforceable.

"One of the big sticks with a freezing order given by the court is that if the defendant breaches it, they are in contempt of court. That does not typically apply with a tribunal award, or interim measure," Searle noted.

One reason why it is important to freeze assets before the arbitration has commenced is that, under LCIA rule 25.3, there is an obligation on parties to 'promptly' notify the LCIA and the tribunal of any application or any orders granted.

Under rule 25.3, it becomes difficult when the tribunal has formed, because the tribunal's permission is then required to go to the courts to seek interim measures.

"If you discover evidence of dissipation of assets, there is an interesting question as to whether a party can form the view that when seeking permission from the tribunal it is not bound by the usual rule that all communications need to be copied to the other party," Searle said.

Given the importance of going *ex parte*, he said: "One may tentatively form the view that in those circumstances, the appropriate course is to send the correspondence to the tribunal and indicate that it should not be shared with the other party until after the *ex parte* application has been heard and determined." However, there was a lack of clarity on this issue, he acknowledged.

"If you have to tell the other party that you are seeking to go *ex parte*, then it rather defeats the purpose when you are looking for freezing relief."

For this, McKenny asserted that tribunals needed an appreciation of the commercial reality that parties cannot always abide by the tribunal's orders, "that is why you really need the teeth of a court judgment where contempt of court and the ability to directly enforce against the assets is important", he said.

When asked by McKenny if offshore jurisdictions see themselves as arbitration centres, Searle said they do not necessarily see themselves that way, one difference being Singapore which sees itself as an arbitration-friendly jurisdiction, having changed its law to achieve that. "Other offshore jurisdictions' courts are often making quite a business out of freezing orders. Singapore has a different incentive than other offshore jurisdictions that may actually be quite happy with the status quo."

Iain McKenny, Vannin Capital

Ignas Jazerskis

"A point of what comes up with a lot of Vannin's clients is what can be done in advance, instead of reacting when the arbitration has started and you suddenly have the fear that the defendant might start to dissipate the assets," McKenny noted.

"Often clients are very tied up on the merits of the dispute, so you need to make clients think about enforcement early on and then move swiftly to get the information necessary," said Searle, because often such information is not easily obtained.

Freezing orders, Searle said, are also available post-award. In circumstances where an award needs enforcement, if the award was seated in London, you can apply to the English courts for a freezing order and seek to transfer it offshore, or appoint receivers to safeguard assets post-award.

Describing the approach his company takes to assessing a case, McKenny said: "When we are trying to create a sensible facility for claimants to pursue a claim which is enforceable at the end, we ask how much is this going to cost and how long is it going to take? Of course often the answer to that is 'how long is a piece of string'?"

In terms of offshore jurisdictions, local lawyers have a lower cost base, Searle responded. "However, when you are looking at large arbitrations and important sums, often you have international counsel working alongside the local law firms. In the end you may not save that much money."

In most offshore jurisdictions *ex parte* freezing orders are awarded quite quickly, although *inter partes* hearings can often take much longer, Searle remarked. ■