Introduction

1 Sections 68 and 69 do somewhat concentrate the minds of arbitrators on their duties, duties to act fairly and to get it right. Frequently, though, party A will ask arbitrators to do something, to issue a particular order, possibly because of something which party B might do during an arbitration which, if done, might prejudice the interests of party A – sell or fumigate goods held in silo at a discharge port, for example, or release of a vessel from arrest. Party A may fear for the integrity of the evidence – or indeed for the integrity of the asset against which he might effectively enforce a favourable award. If party A asks for certain orders regarding that cargo, what are the arbitrators’ powers to make them?

2 Equally, when scanning the remedies requested by claimants in their submissions, it is common or garden to be asked to award damages, interest and costs. However, what if other remedies are asked for – declarations, orders for specific performance, remedies, perhaps more commonly associated with Court rather than arbitral practice? What remedies can arbitrators grant?

3 The 1996 Act deals with these matters relatively briefly in three sections, namely section 38, rather unhelpfully entitled “General powers of the tribunal”; section 39, somewhat inaccurately entitled “Power to make provisional awards”; and section 48, entitled simply “Remedies”.

4 If these sections are brief – and at times perhaps ambivalent – the UNCITRAL Model Law on International Commercial Arbitration is briefer. The tribunal’s powers to order interim measures are set out at Article 17:
“Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security with such measure.”

5 There are two major differences between this Article and sections 38 and 39 of the 1996 Act. First, the Model Law is more open-textured than the Act: there is, in Article 17, no list of powers, such as is contained in our two sections – which immediately raises the question, is our list exhaustive? Secondly, the powers in Article 17 can only be exercised “at the request of a party”; no such trigger is mentioned in our sections – which immediately raises the question, can a tribunal acting under the 1996 Act exercise the powers in sections 38 and 39 of its own motion?

6 As for the remedies which it is open to a tribunal to grant, while we have a list in section 48 (and again, is the list exhaustive?) the Model Law has no counterpart section, presumably leaving it to the substantive law applicable to dictate which remedies can be granted.

7 The relevant three sections in the 1996 Act deal with three matters: the costs of the arbitration, orders regarding property, and remedies. While none of the three sections specifically deals with anti-suit injunctions, for obvious reasons these currently raise considerable interest and they will therefore be referred to at the end of this paper.

A Costs

8 Arbitrators’ powers here come in two shapes:
   [a] the first is an order to provide security for the costs of the arbitration, a power set out in section 38(3);
   [b] and the second is an order to make an interim payment on account of the costs of the arbitration, a power set out at section 39(2)(b).
9 It will be recalled first of all that the phrase “costs of the arbitration” is something of a term of art in our Act. The phrase is defined in section 59 to refer to the arbitrators’ fees and expenses, any institutional fees and expenses, and legal or other costs incurred by the parties.

10 There are two differences between the two interim powers relating to costs. First, the section 38(3) power is to order a claimant to provide security for costs; the section 39(2)(b) power is to order an actual interim payment on account of the costs of the arbitration. Secondly, the power to order provision of security for costs is an opt-out power: the parties may exclude it by agreement, but absent agreement, the tribunal has that power: see section 38(2). The power to order an interim payment on account of costs is, however, an opt-in power: the tribunal only has that power if the parties have agreed that it does: see section 39(4).

An order to provide security for costs

11 In common with its sister section, section 39, section 38 has hardly ever been litigated. One likely reason for this is that most institutional rules agreed to by arbitrating parties will contain specific rules about the deposit of security for costs. Thus, for example, section (e) of the First Schedule to the LMAA Rules; Rule 18 of the Gafta Arbitration Rules 125; and Articles 30 and 31 of the ICC Rules of Arbitration make specific provision for security for costs.

12 In the absence of such specific Rules, section 38(3) gives arbitrators the power to order a claimant (which must include a counter-claimant) to provide security for costs. Given the decision at first instance of HH Judge Seymour QC in Wicketts and Sterndale v Brine Builders [2001] CILL 1805, it is clear that this power ought to be exercised with very considerable caution:
[a] the power is best exercised on an application by the respondent rather than by the tribunal of its own motion;
[b] the tribunal ought to require and assess evidence showing that there are serious grounds for doubting whether the claimants’ assets within accessible jurisdictions are sufficient to cover an eventual costs order;
[c] the amount required in security ought to be proportionate and
[d] should not be sought exclusively to guarantee payment of the tribunal’s fees;
[e] above all, an order cannot be based on the ground that the claimant is outside the jurisdiction [section 38(3)(b)].

13 The sanctions against a claimant’s failure to provide security for costs are
[a] that the tribunal may make a peremptory order setting a time limit for compliance [see section 41(5)]; and
[b] that the tribunal may then, if the claimant still fails to provide security, make an award dismissing the claim.

An order to make an interim payment on account of costs

14 This power is contained in section 39(2)(b) of the 1996 Act, which talks of “an order to make an interim payment on account of the costs of the arbitration.” It would appear, at any rate from the bland wording of the section, that this section provides arbitrators with the power, if agreed to by the parties [see section 39(4)] to order a party to make an actual payment on account of costs. Four observations occur, subject to the caveat that this new power has not been the subject of litigation – and to the observation that the DAC Report is somewhat laconic on this power.

15 First, section 39(2)(b) must be taken to envisage a payment of an interim sum to the other party, given that orders for security, which would
normally be lodged in an escrow account or with an agreed third party, are specifically provided for in section 38(3).

16 Secondly, it would also appear that the order to make interim payment may be made not only against the claimant, but also against the respondent: there is no limitation in this section, as there is in section 38(3), to orders being made against “the claimant”.

17 Thirdly, it should be recalled that the phrase “the costs of the arbitration” in section 39(2(b) must be taken to include legal costs: see section 52. Given the fact that these costs may come to considerable amounts, it is not unlikely that, if parties have agreed to grant arbitrators the powers listed in section 39, that either party may well make an application for the exercise of this power for an interim payment.

18 Finally, section 39(2)(b) talks of “an order”, albeit under a section heading saying “Power to make provisional awards”. The ambivalent terminology raises a problem: is a decision to direct an interim payment on account of costs an “award”, in which case it needs to be issued in the form set out at section 52 and in which case it is subject to an application for correction under section 57, to challenge under section 68 and to appeal under section 69? Or is it simply “an order”, not subject to formal requirements under section 52 and only subject to complaint through an eventual section 68 challenge to an award when published? The wording of section 39(3) and of the last sentence of section 39(4) would seem to point in the latter direction, i.e. that this is “an order”, not an award: if it was an award, why would the “final award, on the merits or as to costs”, “need to “take account of any such order”? Moreover, the last line of section 39 seems to leave “awards on different issues” to quite another section, namely to section 47.

B Orders regarding property

19 Here again, the tribunal’s power comes in two shapes:
A number of issues arise.

**Orders for the disposition of property**

20 Section 38(4) is drawn in fairly wide terms: it talks of “directions in relation to any property” and of the “detention of property by ... a party”. The first question that arises is whether this section is drawn in wide enough terms as to allow a tribunal to make a direction ordering party A to dispose of property to party B.

21 If we simply look at the wording of section 38(2), the answer might appear to be Yes: that, even in the absence of a specific agreement by the parties, a tribunal can order party A to make over property to party B, an order attractive to B where A’s assets raise doubts as to enforcement.

22 A sensible reading of section 38 and 39 together would, however, appear to lead in the opposite direction, ie that the dispositions of property are a matter exclusively provided for by section 39 not section 38. A brief look at section 38(4) makes it clear that the purpose of section 38(4) is to preserve evidence: it talks of, among other things, inspection, preservation and sample. The purpose of section 39(2), on the other hand, is clearly geared to the preservation of assets rather than evidence: the provisional remedy here is of an altogether different tenor and purpose and is one which ought to require the express agreement of the parties, as is required by section 39 but not by section 38.

**Award or an order?**

23 The same issues discussed at para 18 above in respect of section 39(2)(b) orders/awards in respect of interim payments on account of
costs arise here: is a decision as to the disposition of property an award or an order? For the same reasons given in that paragraph, it is suggested that a decision under section 39(2)(a) amounts to an order, free of the formal requirements of section 52 and of applications under sections 57, 68 and 69.

**Freezing Orders**

24 Do arbitrators have the power to issue a freezing order? This matter is controversial, as was pointed out by Rix LJ in Kastner v Jason in [2005] 1 Lloyd’s Rep 397 at paras 14-19. The Court of Appeal explicitly declined to make any final determination of this question and the central planks of the debate would seem to be the following:

[a] section 39(2)(a) envisages an order for the disposition of property “as between the parties”, and this might appear to exclude the making of a freezing order under section 39, despite an agreement opting into section 39;

[b] on the other hand, the powers listed at section 39(2) are only given by way of example: “This includes….”. And the only limitations to section 39 are
[   [i] that the parties have conferred the powers on the tribunal – see section 39(4); and
[   [ii] that the provisional order given under this section might be given in a final award – see section 39(1).

[c] it would therefore appear to follow that, assuming the parties agreeing to confer the powers in section 39, the only question is whether a freezing order can be given in a final award under section 48(5) – and on this, there is disagreement among the commentators.

[d] If the view is taken that a freezing order falls outside section 48(5) and therefore outside section 39, then does this really matter? The terms of section 38(1) are wide enough in any event to allow
the parties to grant the tribunal the power to issue a freezing order.

If this is right, then the bottom line is that a tribunal only has the right to issue a freezing order if the parties so agree, whether under section 39 or under section 38. In either case, the tribunal only has the power to issue a freezing injunction if that power is conferred by agreement of the parties.

C Remedies

Section 48(5) only intended for substantive awards?

25 These are dealt with in section 48 and the first question which arises here is whether the remedies listed in section 48 are remedies which can be granted only in substantive awards – or whether they are remedies which can be given in provisional awards under section 39 or, indeed, under directions made under section 38. The question arises because of the very wide terms in which section 48(5)(a) is drawn: “to order a party to do or to refrain from doing anything”. Surely, there is nothing explicitly in section 48 to limit that wide power to a substantive award?

26 The generally held view among commentators is, however, that, given that provision for interim measures is specifically made in sections 38 and 39, it must follow that section 48 is there for, as it were, what is left, i.e. substantive awards. Again Rix LJ conveniently gathered the references at para 16 of his decision in Kastner v Jason [2005] 1 Lloyd’s Rep 397 at 401.

An opt-out section

27 The parties are free to agree to limit – or indeed extend – the remedies which the tribunal may give: see section 48(1) and (2).
What are the default powers

28 Absent contrary agreement by the parties, the tribunal may:

[a] make a declaration; or
[b] order the payment of a sum of money, in any currency; or
[c] order a party to do or refrain from doing anything; or
[d] order specific performance of a contract other than one for land; or
[e] order the rectification, setting aside or cancellation of a deed or other document.

D Anti-suit injunctions

29 The discussions following the decision of the ECJ in the West Tankers case (C-185/07) just over a year ago will be well-known. From the perspective of the powers of an arbitral tribunal, the issue which arises is the following. Where a party to an arbitration agreement referring disputes to arbitration in London starts judicial proceedings in a country within the EU or EFTA, can the arbitral tribunal, as opposed to an English court, issue an anti-suit injunction?

30 Section 48(5)? The wide terms of section 48(5)(a) look promising; “to refrain from doing anything”, including presumably, from starting or proceeding with a claim in the foreign court.

31 For the reasons given above at para 26, however, the powers in section 48 are, on the preferred view, limited to remedies sought and given in substantive awards – and in the nature of things, the issue dealt with here is likely to arise at an early stage of the arbitral proceedings. In which case, does either section 38 or section 39 give a tribunal the power to issue an anti-suit injunction?

32 Section 39? It will be recalled that this section is an opt-in section, the application of which needs the agreement of the parties. Even if there
were, however, a section 39 agreement, a power to issue an anti-suit injunction would fall outside section 39(2): it is neither an order for the payment of money or the disposition of money; nor an order to make an interim payment on account of costs. Moreover, a power to issue an anti-suit injunction would also fall outside section 39(1): given the ECJ’s decision in *West Tankers*, a power to issue such an injunction would not be one which the tribunal would have power to give in a final award (section 39(1)) because it would not be a power which a court could exercise for the purposes of section 48(5). And if a court could not issue such an injunction, then neither could a tribunal under section 39.

33 *Section 38(1)*? This leaves section 38. Now again, here, a power to grant an anti-suit injunction comes outside the default powers in section 38(3) and (4). What, however, if the parties have expressly agreed to give the tribunal the power to issue an anti-suit injunction through section 38(1)? This might be done in the arbitration clause itself, in a separate arbitration agreement or, indeed, in institutional rules adopted in the arbitration clause. Would this give the tribunal a power to issue an order directing the parties to desist from starting proceedings in another EU/EFTA jurisdiction or, if such proceedings had started, directing the party who started them to desist from pursing them?

34 It is difficult to see why an arbitral tribunal, basing itself on an agreement of the parties granting such a power, could not exercise such a power? *CMA v Hyundai* [2009] 1 Lloyd’s 213 would support an affirmative answer.

35 The difficulty, however, then is: what if the party pursuing the foreign proceedings ignores the London tribunal’s direction under section 38(1)? Presumably at this stage, the respondent in the foreign court would apply to the arbitral tribunal for a peremptory order under section 41(5), setting a time for compliance with the anti-suit injunction.
36 That is, however, unlikely to put the matter to rest. For if the recalcitrant foreign claimant proceeds abroad, in defiance of the peremptory order, the jilted London counterparty’s only recourse would be to approach an English court to enforce the peremptory order under section 42(1), with the permission of the tribunal, which presumably would be forthcoming. So soon, however, as the English court intervenes so to enforce, such intervention is likely to come to grief against the West Tankers case.

37 The solution is, I suspect, likely to be a practical one and will depend on the speed with which an arbitral tribunal acts to issue its award – and on how slow the foreign court is to deliberate. It must be remembered that the tribunal is, in the meantime, at liberty to continue with the arbitral proceedings – in which case, the important thing is not so much who is first seized as much as who is first done!

Conclusion

38 These are interesting times for arbitrators’ powers. Sections 38 and 39 are largely untested – but with the sanctity of arbitration clauses increasingly at risk, users will look to arbitrators and to the proper exercise of their powers in order to secure effective remedies through the preferred method of dispute resolution chosen by the parties.
Appendix 1

Extracts from the Arbitration Act 1996

Section 38 – General Powers Exercisable by the Tribunal

38.—(1) The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.
(2) Unless otherwise agreed by the parties the tribunal has the following powers.
(3) The tribunal may order a claimant to provide security for the costs of the arbitration.
   This power shall not be exercised on the ground that the claimant is—
(a) an individual ordinarily resident outside the United Kingdom, or
(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.
(4) The tribunal may give directions in relation to any property which is the subject of the proceedings or as to which any question arises in the proceedings, and which is owned by or is in the possession of a party to the proceedings—
(a) for the inspection, photographing, preservation, custody or detention of the property by the tribunal, an expert or a party, or
(b) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property.
(5) The tribunal may direct that a party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation.
(6) The tribunal may give directions to a party for the preservation for the purposes of the proceedings of any evidence in his custody or control.

Section 39 – Power to make Provisional Awards

39.—(1) The parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.
(2) This includes, for instance, making—
(a) a provisional order for the payment of money or the disposition of property as between the parties, or
(b) an order to make an interim payment on account of the costs of the arbitration.
(3) Any such order shall be subject to the tribunal’s final adjudication; and the tribunal’s final award, on the merits or as to costs, shall take account of any such order.
(4) Unless the parties agree to confer such power on the tribunal, the tribunal has no such power.

This does not affect its powers under section 47 (awards on different issues, &c.).

Section 48 – Remedies

48.—(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.
(2) Unless otherwise agreed by the parties, the tribunal has the following powers.
(3) The tribunal may make a declaration as to any matter to be determined in the proceedings.
(4) The tribunal may order the payment of a sum of money, in any currency.
(5) The tribunal has the same powers as the court—
(a) to order a party to do or refrain from doing anything;
(b) to order specific performance of a contract (other than a contract relating to land);
(c) to order the rectification, setting aside or cancellation of a deed or other document.