

Interim Measures: Why Litigate if You Cannot Stop the Clock ?

By Piers Gardner
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In public law, just as in commercial law, time is often of the essence. As a result, the availability of effective interim measures is central to the purpose of litigating.

Four recent decisions of three "final instance" courts and one international tribunal underline the practical importance of interim measures. The European Court of Human Rights, the Privy Council and the United Nations Human Rights Committee (UN HRC) have each handed down landmark decisions which show a renewed appreciation of the central role of interim measures

First, the European Court of Human Rights reversed its earlier caution in this respect¹, holding in *Mamatkulov v Turkey*² that its interim measures are binding. Then the UN HRC held in the *Weiss* case³ that its interim measures indication to Austria, forbidding a fugitive's extradition to the USA, were similarly mandatory. Thirdly, in August, the Privy Council held that it, too, has jurisdiction to grant interim measures in a civil appeal from a Commonwealth jurisdiction, even without express statutory authority⁴.

This confidence in the availability of interim relief has raised a new question: can the refusal of interim measures by domestic courts, and those in Luxembourg, be appealed to Strasbourg, or even Geneva, on human rights grounds?

At the heart of this new debate is the *Liner Conference* case⁵, which concerned a competition investigation by the EU Commission into the arrangements for most of the transatlantic container trade through northern European ports. The Commission levied fines totalling 273M Euros, including 13.75M Euros on DSR-Senator Lines GmbH. Senator challenged that decision and sought interim relief against the fine on the grounds that payment, or the provision of a bank guarantee in lieu, would trigger its insolvency.

¹ *Cruz Varas v Sweden* Eur Ct HR judgement of 20 March 1991 EHRR 14:1

² Eur Ct HR judgment of 6 February 2003, No 46827/99

³ CCPR/C/77/D/1086/2002 8 May 2003

⁴ *Belize Alliance of Conservation Non-Governmental Organisations v (1) The Department of the Environment and (2) Belize Electricity Company Limited* [2003] PC App No 47

⁵ Joined cases T-191/98 and T-212/98 to 214/98, *Atlantic Container Line AB and others v Commission* CFI (Third Chamber) 30/09/2003

Both the CFI⁶ and the ECJ⁷ refused interim measures and the Commission commenced enforcement proceedings Germany. Senator applied to the European Court of Human Rights, in a case directed against all 15 member States of the EU⁸, alleging that the absence of interim relief prejudged its challenge to the fines and denied it effective access to court.

Although the EU is not party to the European Convention on Human Rights⁹ the Strasbourg Court listed Senator's case for a hearing on 22 October 2003. At issue was not only the interim measures issue, but the extent to which Strasbourg may review decisions of "the other" European courts. The clash of jurisdictions was averted (with three weeks to spare) by the judgment of the CFI, quashing all the fines on due process grounds. Those grounds in turn owe much to the extension of human rights into the commercial sphere, another area where the ECJ and the CFI have followed Strasbourg's case law.

The moral? The availability of powerful interim measures makes public law litigation an even more useful tool.

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⁶ Order of 21 July 1999, [1999] ECR II-2531

⁷ Order of 14 December 1999, Case C-364/99 P(R) [1999] ECR I-8733

⁸ No 56672/00

⁹ But see the pronouncements of the President of the Eur Ct HR of 28 January 2003 and 3 September 2003 advocating this step