

ENGLISH HIGH COURT CONSIDERS INTERACTION BETWEEN ARBITRATION INTERIM POWERS AND ARBITRATION ACT 1996

Gerald Metals S.A v Timis & Ors [2016] EWHC 2327 (Comm)

Introduction

In a decision handed down on 21 September 2016, the English Commercial Court, having refused two applications for a freezing order and relief pursuant to section 44 of the Arbitration Act 1996, considered the interaction between expedited procedures/emergency arbitrator provisions in arbitral rules and applications to court for interim relief.

Background

On 14 November 2014, Gerald Metals entered into a contract referred to as an Offtake Contract with a company called Timis Mining Corp (SL) Limited, which owns an iron ore mine in Sierra Leone. Related to that agreement, Safeguard Management Corp (the professional trustee of the trust through which Mr Timis pursued his business interests) executed a guarantee given in the form of a deed, under which Safeguard guaranteed payment of all sums due to Gerald Metals under the Offtake Contract up to a maximum amount of \$75 million. The guarantee is governed by English law and provides for disputes to be referred to arbitration in London under LCIA rules.

On 8 August 2016, following disputes between the parties, Gerald Metals commenced arbitration proceedings against Safeguard under the guarantee. Each party appointed an arbitrator, and at the time of the hearing (21 September 2016), the two arbitrators had until 1 October to appoint the third arbitrator at which time the tribunal would be constituted.

Gerald Metals applied to the LCIA for the appointment of an emergency arbitrator, for the purposes of seeking emergency relief (including an order preventing Safeguard from disposing of the trust's assets). The LCIA rejected Gerald Metal's application following undertakings by Safeguard relating to disposal of trust assets.

On 8 August 2016, Gerald Metals applied for a worldwide freezing order against Mr Timis. On 22 August, Gerald Metals also issued proceedings in the Commercial Court seeking urgent relief under section 44 of the Arbitration Act 1996, and in particular, a freezing injunction against the trust and provision of information by the trust.

Decision

The Commercial Court (Mr Justice Leggatt) refused both the application for the freezing order and the application for relief under s44.

As to the s44 application, Mr Justice Leggatt observed at the outset that s44 gives the court powers to make orders in support of arbitral proceedings about matters which include the preservation of evidence and the granting of an interim injunction. The court could make such orders as it thinks necessary for the purpose of preserving evidence or assets in cases of

urgency, such urgency to be assessed by reference to whether the arbitral tribunal has the power and the practical ability to grant effective relief within the relevant timescale.

It was agreed that there were cases in which the need for relief was so urgent that the power to appoint an emergency arbitrator is insufficient and the court may properly act under s44. However, Mr Justice Leggatt rejected Gerard Metals' submission that there was a further gap in the LCIA rules which exists in cases which are not emergencies or of such exceptional urgency as to justify the expedited formation of the tribunal but which are nevertheless cases of urgency within the meaning of section 44 – to accept such an approach would be “uncommercial and unreasonable”.

Mr Justice Leggatt found that the purpose of Articles 9A (expedited formation of tribunal) and 9B (emergency arbitrator) of the LCIA Rules was to reduce the need to invoke the assistance of the court in cases of urgency by enabling an arbitral tribunal to act quickly in an appropriate case. It was only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, were inadequate, or where the practical ability was lacking to exercise those powers, that the court may act under s44. This conclusion was not affected by Paragraph 9.12 of the LCIA Rules which states "Article 9B shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the arbitration tribunal and it shall not be treated as an alternative to or substitute for the exercise of such right."

Concluding observations

This represents an important decision on the interaction between the interim measures/emergency and expedited powers available in arbitration and the power of the court to intervene in support of arbitration.

11th October 2016