

# Availability of emergency arbitrator procedures may limit courts' ability to support arbitral process

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## Introduction

Section 44 of the Arbitration Act 1996 provides the courts with various powers to support arbitral proceedings seated in England or elsewhere. These include the power to grant interim relief in the form of a freezing injunction under Section 44(2) (e) of the act. The court may exercise these powers "if the case is one of urgency" under Section 44(3) or in non-urgent cases under Section 44(4) (where the application must be made with notice and with permission of the tribunal or the consent of the parties is required). In this context, 'urgency' has been assessed by reference to whether the arbitral tribunal has the power and practical ability to grant the appropriate relief in the appropriate timeframe.<sup>(1)</sup> In any event, the courts may intervene only in cases where the "arbitral tribunal 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" (as per Section 44(5) of the act).

Article 9A of the London Court of International Arbitration (LCIA) Arbitration Rules allows a party to apply to the LCIA for the expedited formation of an arbitral tribunal in cases of "exceptional urgency". Article 9B, introduced in 2014, enables any party "in the case of emergency", to apply to the LCIA for the appointment of a sole arbitrator to provide interim relief pending the formation of the arbitral tribunal (whether on an expedited basis or not).

In *Gerald Metals SA v Timis*<sup>(2)</sup> Justice Leggatt provided useful guidance on the availability of the courts' powers to grant interim relief in support of arbitral proceedings in circumstances where similar relief may be available through the arbitral process.

## Facts

On November 14 2014 Gerald Metals SA entered into a contract with Timis Mining Corp (SL) Limited under which Gerald Metals advanced \$50 million to Timis Mining for the financing of an iron mine in Sierra Leone. Timis Mining was owned by the Timis Trust, which was controlled by Mr Timis. The trustee of the Timis Trust was Safeguard Management Corp.

Safeguard provided a guarantee of all sums due to Gerald Metals under the contract. The guarantee was governed by English law and provided for disputes to be referred to arbitration in London under the LCIA Arbitration Rules.

From March 2015 Timis Mining began to default under the contract by failing to make shipments of iron ore and failing to pay sums due to Gerald Metals. Gerald Metals ultimately commenced arbitral proceedings under the LCIA Arbitration Rules against Safeguard under the guarantee.

Gerald Metals applied to the LCIA for the appointment of an emergency arbitrator to provide interim relief to prevent Safeguard from disposing of trust assets. Safeguard responded with undertakings that it would not dispose of any assets other than for full market value and at arm's length, and would not dispose of assets worth more than £250,000 without giving seven days' notice to Gerald Metals. As a result of the undertakings, the LCIA rejected Gerald Metals' application.

On August 22 2016 Gerald Metals issued proceedings in the Commercial Court seeking a freezing injunction and ancillary orders requiring information as to the value and location of the trust assets.

## **Decision**

In dismissing Gerald Metals' application for interim relief, Leggatt noted that "[t]he obvious purpose of Articles 9A and 9B is to reduce the need to invoke the assistance of the court in cases of urgency by enabling the arbitral tribunal to act quickly in an appropriate case".**(3)**

The court held that only where these powers or the powers of a tribunal constituted in the normal way are inadequate can the courts act under Section 44 of the act.**(4)** For example, it is common ground that where a party requires a freezing injunction on a without-notice basis, recourse to the courts is likely to be the only effective option; the urgency of the situation is such that the court may properly act under Section 44 of the act.

To assess whether the LCIA has the power to act, the court provided an interpretation of the relevant provisions of the LCIA Arbitration Rules, applying the same functional test applied to the concept of urgency required under Section 44(3). Thus, as to whether there are circumstances of exceptional urgency justifying the expedited formation of the tribunal under Article 9A, the court held that the applicable test is whether effective relief could be granted in the relevant timescale if such relief were not granted. In these circumstances, the 'relevant timescale' is the time taken for an arbitral tribunal to be appointed in the normal course. In turn, for the appointment of an emergency arbitrator under Article 9B, the appropriate question was whether or not relief is required "more urgently than the time that it would take for the expedited formation of an arbitral tribunal".**(5)**

Turning to the facts, Leggatt considered why the LCIA had rejected Gerald Metals' emergency arbitrator application. He held that given the undertakings already provided by Safeguard, including the provision of seven days' notice before the disposal of assets worth over £250,000, the LCIA likely considered that there was not sufficient urgency to require the appointment of an emergency arbitrator before the appointment of the full arbitral tribunal.**(6)** This was not, the court held, a case where the LCIA had considered that it was unable to act. Accordingly, the court held that it lacked jurisdiction to grant the interim measures requested by Gerald Metals.

Leggatt also noted that even if the court did have jurisdiction under Section 44 of the act, there was no evidence to suggest any real risk that the assets would be dissipated, nor that provision of further information regarding the trust assets was required.**(7)**

## **Comment**

The facts of this case are unusual. Safeguard had already provided undertakings to the effect that it would not dispose of assets for less than their market value and that it would provide seven days' notice of any large disposals. This meant that the element of urgency required for both the appointment of an emergency arbitrator and relief from the court under Section 44 (3) of the act was lacking. Other grounds (including the risk of dissipation) were not made out.

This would not entirely bar the option of relief from the courts under Section 44 of the act. In theory, Gerald Metals could still have sought assistance on a non-urgent basis (in accordance with the act). Nonetheless, the decision is interesting for a number of reasons.

First, this is the first time that an English court has considered the way in which emergency arbitrator provisions (which remain relatively new in the industry) interact with the courts' powers under Section 44 of the act.**(8)** The judgment makes clear that while the existence of powers under Article 9A and also the new Article 9B under the LCIA Arbitration Rules provide parties with swift relief through the arbitral process, they also have the effect of limiting the English courts' ability to use their powers to support the arbitral proceedings. Moreover, the English courts will be reluctant to intervene in situations where the LCIA has effective powers. This is the case even if a tribunal chooses not, on the facts before it, to use those powers.

Second, the court applied a functional interpretation of Article 9A and 9B in order to make "commercial sense" of the provisions.**(9)** In the absence of detailed definitions of these terms in the LCIA Arbitration Rules themselves, this interpretation may have some influence in developing practice around the application of these provisions.

Third, in an attempt to clarify the court's jurisdiction under Section 44 of the act, this decision may factor into parties' decision to expressly opt out of emergency arbitrator provisions if they specifically anticipate requiring access to the English courts to support the arbitration.

It will be interesting to see whether the court's approach, if followed in subsequent cases, will apply equally to arbitrations under other institutional arbitral rules providing for emergency arbitrators or expedited formation.

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## Endnotes

(1) *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2008] 1 Lloyd's Rep 230 at [24].

(2) [2016] EWHC 2327 (Ch).

(3) *Ibid* at [54].

(4) *Ibid* at [55].

(5) *Ibid* at [54].

(6) *Ibid* at [53].

(7) *Ibid* at [66].

(8) In *Seele Middle East Fze v Drake & Scull Int Sa Co* [2013] EWHC 4350 (TCC), the court was asked to provide injunctive relief in relation to an International Chamber of Commerce (ICC) arbitration. The emergency arbitrator provisions under the ICC Rules 2014 were not applicable; therefore the court made reference to, but did not have to decide whether an emergency arbitrator would be able to act effectively for the purposes of Article 44(5) of the act.

(9) *Gerald Metals SA v Timis* [2016] EWHC 2327 (Ch) at [54].

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