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Emergency Relief: Court or Tribunal? Your Options May Be More Limited Than You Thought

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Modern institutional arbitration rules commonly provide for emergency relief at the outset of the arbitration either through the expedited formation of a tribunal or the appointment of an emergency arbitrator, or both. This could either be viewed as a broadening of options for a party seeking immediate remedy or a constraint of the court's powers to order such relief. It was commonly thought to be the former but the recent Commercial Court decision in *Gerald Metals SA v Timis & Ors* [2016] EWHC 2327 (Ch), considering Articles 9A and B of the LCIA Rules, has cast doubt on this position. We understand that an application for permission to appeal has been filed.

Emergency procedures under the LCIA Rules

Article 9A of the LCIA Rules provides that in cases of 'exceptional urgency' a party may apply to the LCIA Court for the expedited formation of an arbitral tribunal. Article 9B provides for an application to the LCIA Court for the appointment of an emergency arbitrator in the case of an 'emergency'. These two phrases are not defined in the LCIA Rules, but it is accepted that each application is examined on its specific facts and circumstances.('A Commentary on the LCIA Arbitration Rules 2014', 9-014 and 9-015) It is also arguable that the standard of 'emergency' is stricter than the standard of 'exceptional urgency'.('A Commentary on the LCIA Arbitration Rules 2014', 9-018)

Article 9.12 (part of Article 9B) 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 Arbitral Tribunal, and it shall not be treated as an alternative to or substitute for the exercise of such right."

This enables parties to seek urgent interim relief in England & Wales under section 44 of the Arbitration Act 1996 (the 1996 Act).

Section 44(3) provides:

> "If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."

The test for 'urgency' under this section being assessed on whether the arbitral tribunal has the power and the practical ability to grant effective relief within the relevant timescale. (*Starlight Shipping v Tai Ping Insurance* [2008] 1 Lloyd's Rep 230, paras 22, 24, 27)

However, the power granted under s 44(3) is subject to s 44(5):

> "In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral 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."

Gerald Metals

The parties, Gerald Metals, a commodities trader, and Timis Mining Corp Limited, a mining company entered into a financing contract, containing an LCIA arbitration clause, for the development of an iron ore mine in Sierra Leone.

A dispute arose and Gerald Metals commenced arbitration under the LCIA Rules, claiming that Timis had defaulted under the contract. Prior to the constitution of the tribunal, Gerald Metals applied to the LCIA Court for urgent interim asset freezing relief. The LCIA declined to both appoint an emergency arbitrator under Article 9B, and enact the expedited formation of the tribunal under Article 9A (the judgment does not state that an application was made under Article 9A but it is apparent from the submissions made to the Commercial Court). The LCIA Court refused the application in light of Timis' undertakings and because it did not consider the application was so urgent that it could not wait until the arbitral tribunal was constituted in the ordinary way.

Gerald Metals sought interim relief from the Commercial Court under section 44 of the 1996 Act arguing that the requirement of urgency under subsection 44(3) is a lower standard than the exceptional urgency required under Article 9A of the LCIA Rules.

Gerald Metals' application was dismissed by Leggatt J in the Commercial Court. He held that *"a similar functional interpretation of Articles 9A and 9B needs to be adopted as has been given to section 44(3)"*.

Leggatt J held that the Court may only act under section 44 where the powers of an arbitral tribunal or an emergency arbitrator are inadequate, or where the practical ability is lacking to exercise those powers.

Impact of this decision

Provisions such as Articles 9A and 9B of the LCIA Rules were thought to have intended to give parties greater access to emergency relief from their chosen dispute resolution forum in addition to the ability to rely on the courts. This is not just the case at the LCIA, similar provisions have been included in almost all recent major rule revisions (see the ICC, SIAC, or the HKIAC) though the LCIA is the only leading institution to have both emergency and expedited tribunal procedures.

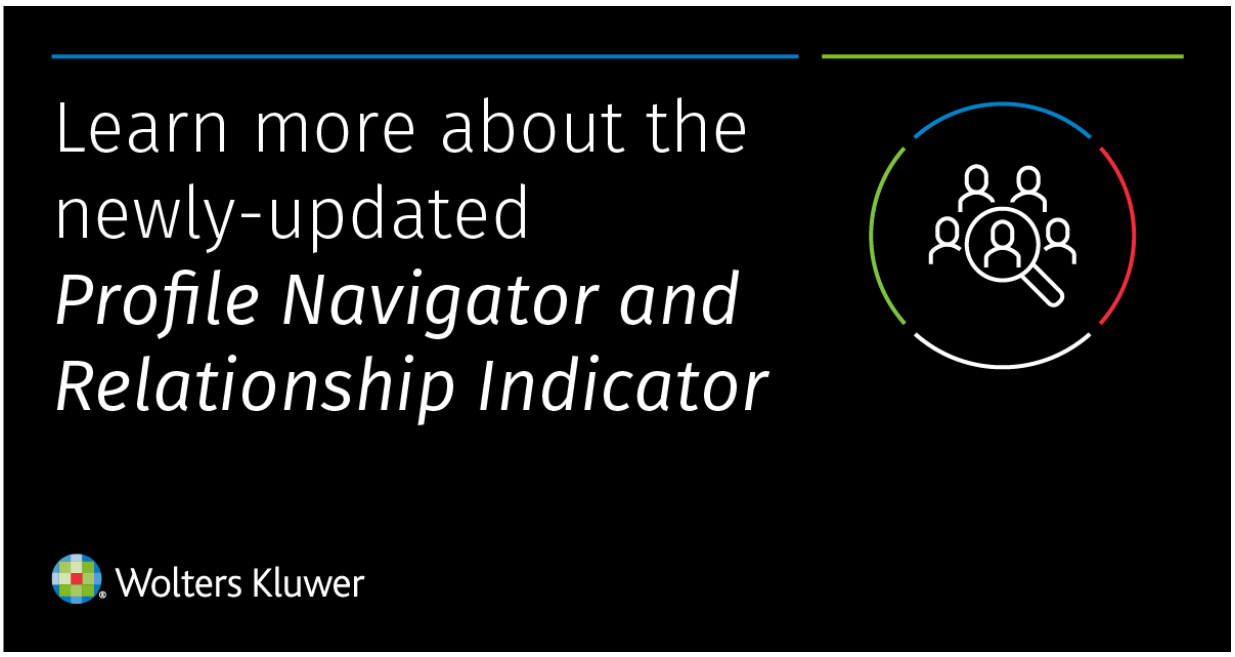
This judgment suggests that where a party can apply to an arbitral institutional or tribunal and they have the power to act then the court's powers are effectively precluded. This may go beyond what the LCIA intended.

One must also keep in mind the 'question mark' hanging over the enforceability of awards made by an emergency arbitrator due to the ability of a later tribunal to re-consider the decision made (therefore leading to a question as to whether the award is 'final and binding' for the purposes of the New York Convention and enforcing legislation). While in some jurisdictions (notably Singapore) this is being addressed in legislation, in England this remains unanswered.

One impact of this decision may be for parties arbitrating under the LCIA Rules (or indeed other institutional rules with similar provisions) to agree to 'opt-out' of the emergency arbitrator provisions, in order to preserve the power of the court's jurisdiction. This would raise questions as to the effectiveness of the LCIA's emergency provisions.

Parties must keep in mind that there are still cases where the court's assistance is required to support the arbitral process. Notably in the context of emergency relief, the courts still have a key role to play in 'filling a void' where an application needs to be made without notice or against a third party ('A Commentary on the LCIA Arbitration Rules 2014', 9-049. Consider for example a freezing order that needs to bind those other than the named respondent).

While this case is indicative of the court's approach to emergency proceedings and a strong indication to those who make an unsuccessful application for emergency relief not to try and have a second bite of the cherry from the court, it feels to have limited rather than expanded choice for arbitrating parties.



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