

31 OCTOBER, 2016

CONTACT

Tom Canning
Partner
+44-20-7615-3047
tcanning@milbank.com

Peter Edworthy
Senior Associate
+44-20-7615-3070
pedworthy@milbank.com

Litigation & Arbitration Group Client Alert: London Arbitration - An ‘Urgent’ Choice to Make?

A recent decision of the English Commercial Court refusing a party’s application for urgent injunctive relief under s.44 of the Arbitration Act 1996 (the “**Act**”), brings into focus an important issue to consider when drafting agreements to arbitrate (see *Gerald Metals v The Trustees of the Timis Trust & others*).

BACKGROUND

In very brief summary:

1. Gerald Metals had applied to the LCIA Court for (i) the appointment of an emergency arbitrator under Article 9A of the LCIA Rules, or (ii) the expedited formation of the arbitral tribunal under Article 9B of the LCIA Rules, in order to obtain an urgent freezing order.
2. The LCIA Court refused the application on the basis that it was not a case of “*exceptional urgency*” or “*emergency*”, as required under Articles 9A and 9B.
3. Gerald Metals subsequently applied to the Commercial Court (pursuant to the Court’s jurisdiction under s.44 of the Act) for the freezing order.
4. The Commercial Court rejected the application on the basis that its jurisdiction under s.44 only arises where “*the case is one of urgency*” (s.44(3)) and the tribunal or relevant institution (in this instance, the LCIA Court) “*has no power or is unable for the time being to act effectively*” (s.44(5)). In the Commercial Court’s view, “*urgency*” in the context of s.44 should therefore be understood to mean that the time it would take a party to obtain relief through the tribunal (or LCIA Court) would render that relief ineffective, which was not the case in the circumstances of *Gerald Metals*.

IMPLICATIONS ON INCORPORATING THE LCIA RULES

The decision in *Gerald Metals* suggests that the Commercial Court may only entertain s.44 applications made by parties to LCIA-administered arbitrations in circumstances where there is not enough time for the LCIA Court to appoint the emergency arbitrator (or tribunal) in order to grant the relevant relief.

Therefore, rather than Articles 9A and 9B acting as additional means to obtaining urgent relief, they are now, arguably, the default process save in truly exceptional circumstances. This is notwithstanding that Article 9.12, on its face, suggests that Article 9B is without prejudice to the parties' rights to seek relief from the Commercial Court.

DOES THIS INFLUENCE THE DECISION AS TO WHICH INSTITUTIONAL RULES TO CHOOSE?

In short, no. This is because it is unlikely that the *Gerald Metals* decision only bites on arbitrations conducted pursuant to the LCIA Rules. Most of the major institutional rules (including the ICC Rules, SIAC Rules and ICDR/AAA Rules) contain equivalent provisions in relation to appointing emergency arbitrators for the purpose of granting urgent relief. Accordingly, it seems likely that the English Court would adopt the same approach to arbitrations conducted under those sets of rules as well (and, in a 2013 case (*Seele Middle East FZE v Drake & Scull International SA Co*), the Commercial Court implied (albeit without stating expressly) that the relevant provisions of the ICC Rules have a similar effect).

Thus, in determining which rules to incorporate into an arbitration clause, parties should continue to assess the respective benefits more widely, rather than focussing on the implications of the decision in *Gerald Metals*. Relevant factors in this regard may include the calculation of fees, the compatibility of the rules with the applicable procedural law, the default procedure for appointing arbitrators, and the extent to which institutions scrutinise awards for publication.

That said, in light of the Commercial Court's decision in *Gerald Metals*, parties should now give due consideration when drafting agreements to arbitrate as to whether they should, in fact, opt out of the emergency relief provisions in the relevant set of rules altogether. If they do so, applying the reasoning in *Gerald Metals*, there is likely to be greater scope to obtain urgent relief from the Commercial Court pursuant to s.44 of the Act.

**LITIGATION & ARBITRATION
GROUP**

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any of the members of our Litigation & Arbitration Group.

If you would like copies of our other Client Alerts, please visit our website at www.milbank.com and choose "Client Alerts" under "News."

This Client Alert is a source of general information for clients and friends of Milbank, Tweed, Hadley & McCloy LLP. Its content should not be construed as legal advice, and readers should not act upon the information in this Client Alert without consulting counsel.

©2016 Milbank, Tweed, Hadley & McCloy LLP

All rights reserved.

LONDON

10 Gresham Street, London, EC2V 7JD

Tom Canning	tcanning@milbank.com	+44-20-7615-3047
Charles Evans	cevans@milbank.com	+44-20-7615-3090
Julian Stait	jstait@milbank.com	+44-20-7615-3005

LOS ANGELES

601 South Figueroa Street, 30th Floor Los Angeles, CA 90017

Robert J. Liubicic	rliubicic@milbank.com	+1-213-892-4525
Jerry L. Marks	jmarks@milbank.com	+1-213-892-4550
Mark C. Scarsi	mscarsi@milbank.com	+1-213-892-4580

NEW YORK

28 Liberty Street, New York, NY 10005

Wayne M. Aaron	waaron@milbank.com	+1-212-530-5284
Antonia M. Apps	aapps@milbank.com	+1-212-530-5357
Thomas A. Arena	tarena@milbank.com	+1-212-530-5828
James N. Benedict	jbenedict@milbank.com	+1-212-530-5696
George S. Canellos Global Head of Litigation	gcanellos@milbank.com	+1-212-530-5792
James G. Cavoli	jcavoli@milbank.com	+1-212-530-5172
Scott A. Edelman Firm Chairman	sedelman@milbank.com	+1-212-530-5149
Christopher J. Gaspar	cgaspar@milbank.com	+1-212-530-5019
David R. Gelfand	dgelfand@milbank.com	+1-212-530-5520
Joseph S. Genova	jgenova@milbank.com	+1-212-530-5532
Robert C. Hora	rhora@milbank.com	+1-212-530-5170
Lawrence T. Kass	lkass@milbank.com	+1-212-530-5178
Atara Miller	amiller@milbank.com	+1-212-530-5421
Sean M. Murphy	smurphy@milbank.com	+1-212-530-5688

Daniel Perry Practice Group Leader	dperry@milbank.com	+1-212-530-5083
Tawfiq S. Rangwala	trangwala@milbank.com	+1-212-530-5587
Stacey J. Rappaport	srappaport@milbank.com	+1-212-530-5347
Fiona A. Schaeffer	fschaeffer@milbank.com	+1-212-530-5651
Jed M. Schwartz	jschwartz@milbank.com	+1-212-530-5283
Alan J. Stone	astone@milbank.com	+1-212-530-5285
Errol B. Taylor	etaylor@milbank.com	+1-212-530-5545
Fredrick M. Zullo	fzullo@milbank.com	+1-212-530-5533

WASHINGTON, DC

International Square Building, 1850 K Street, NW, Suite 1100, Washington, D.C. 20006

David S. Cohen	dcohen2@milbank.com	+1-202-835-7517
Robert J. Koch	rkoch@milbank.com	+1-202-835-7520
Andrew M. Leblanc	aleblanc@milbank.com	+1-202-835-7574
Michael D. Nolan	molan@milbank.com	+1-202-835-7524
Aaron L. Renenger	arenenger@milbank.com	+1-202-835-7505