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U&M Mining Zambia Ltd v Konkola Copper Mines plc: Court of the seat does not have exclusive jurisdiction to grant interim measures in support of arbitration

In the recent case of *U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2013] EWHC 260 (Comm), the court examined the question of whether English courts have exclusive jurisdiction to grant interim measures in support of an arbitration seated in England pending the appointment of the tribunal. Although it did not have to decide the point, the court found that, whilst English courts would have primary jurisdiction to hear applications in support of arbitral proceedings, parties may nevertheless seek interim relief or conservatory measures from other national courts where, for practical reasons, the application can only sensibly be made there.

Pending the formation of the arbitral tribunal, parties to an English-seated arbitration may wish to consider whether they may be able to get more effective interim relief in courts other than those of the seat.

Background

Konkola Copper Mines Plc (**Konkola**), the Defendant, was the owner of a number of mines in Zambia. U&M Mining Zambia Ltd (**U&M**), the Claimant, was charged with the operation of one these mines. The terms and conditions for the provision of these services were set out in various contracts, including a Footwall and Hanging Wall agreement dated 15 December 2011 (the **FW/HW Contract**), under which these proceedings were brought. The FW/HW Contract provided for disputes to be referred to LCIA arbitration in London. The clause also provided that the 'place' of arbitration would be England. The FW/HW Contract also provided for the Zambian courts to have exclusive jurisdiction.

On 28 January 2013, Konkola terminated the FW/HW Contract and demanded that U&M vacate the site. On 31 January 2013, Konkola obtained an ex parte interim mandatory injunction from the High Court of Zambia compelling U&M to vacate the site immediately. The order was stated to be made until further order of the Zambian court or of the arbitral tribunal, as the case may be.

That same day, U&M filed a Request for Arbitration at the LCIA in London. On 1 February 2013, it obtained an anti-suit injunction from the English court restraining Konkola from taking steps in the proceedings commenced in Zambia. The court then determined whether the anti-suit injunction in question should be maintained or lifted.

Two main issues were decided:

- whether Konkola's submission that Zambia was the appropriate seat of the arbitration was correct; and
- whether, irrespective of whether the seat of the arbitration was London, the Defendant was still entitled, as a matter of English law, to use the Zambian courts to obtain interim remedies in support of the arbitration.

Decision

Was the correct seat of the arbitration England or Zambia?

The court found that reference to the 'place' of arbitration being in England made it plainly evident that the parties had agreed to the seat of the arbitration being England. Reference to the High Court of Zambia having exclusive jurisdiction in the separate governing law clause was not sufficient to displace this presumption, nor were the facts that both parties to the proceedings were Zambian, that the place of performance of the contract was in Zambia and that any award would be enforced in Zambia.

If the seat of the arbitration was England, was the Defendant entitled to use the local court to obtain interim remedies?

It is an established principle under English law that where the seat is agreed upon by the parties, the courts of that seat have exclusive jurisdiction to hear any claims for remedies going to the existence or the scope of the arbitrator's jurisdiction or to the validity of an existing interim or final award. What is not clear is whether English courts also have exclusive jurisdiction in respect of applications for interim relief pending the formation of the arbitral tribunal which do not seek to challenge the validity of arbitral proceedings where the arbitration is to be seated in England. Konkola maintained that its Zambian proceedings were to protect its contractual rights pending an arbitration, not to undermine any arbitral process.

Relying on the dictum in *Econet Wireless Ltd v Vee Networks Ltd* [2006] EWHC 1568 (Comm) and related commentary, the court noted that, whilst the natural court for the granting of interim injunctive relief would be the courts of the country of the seat of the arbitration, a party may exceptionally be entitled to seek interim relief in the courts other than those of the seat. He concluded that the correct position was summarised at Dicey, Morris & Collins' *The Conflict of Laws* (15th edn) paragraph 16-036, namely that "*the courts of the seat will have the sole supervisory and primary supportive functions in relation to the conduction of the arbitration*". This did not preclude parties seeking interim measures in courts other than those of the seat of the arbitration where "*for practical reasons the application can only sensibly be made there*".

Ultimately however, the court did not have to decide the point of principle as clause 25.3 of the LCIA Arbitration Rules adopted by the parties in their arbitration agreement implicitly recognises a party's right to apply to a state court before the formation of the tribunal. There was no apparent reason why reference to 'any state court' should be restrictively interpreted to 'the courts of the seat of the arbitration'. On this basis, and in light of the subject matter of the dispute being of national and local importance, the natural forum for such proceedings was indeed Zambia. The anti-suit injunction was discharged.

Comment

Although the court did not have to reach a decision on a point of law, the judgment in the case of *U&M Mining Zambia Ltd v Konkola Copper Mines plc* [2013] EWHC 260 (Comm) provides useful guidance as to whether, when an arbitration is seated in England, interim relief can be sought from courts other than English courts pending the formation of the tribunal. It appears that, whilst English courts retain primary jurisdiction to grant such interim relief, parties may nevertheless seek interim relief elsewhere where for practical reasons it is more sensible to do so.

This case also serves as a reminder to parties that the arbitral rules selected by the parties will have a bearing on whether interim remedies may be sought from courts other than those of the seat of the arbitration. In this case, it was made clear that the provisions of the 1998 LCIA Rules and those of the ICC rules (both 1998 and 2012) expressly reserve the right of the parties to apply to courts other than those of the seat for interim relief pending the formation of the tribunal.

The national legislation of the country from which interim relief is sought will also be relevant when deciding whether or not to apply there for interim relief. In countries having adopted the UNCITRAL Model Law, such as Zambia, the courts will not consider it incompatible with the arbitration agreement to grant interim measures of protection whether before or during the arbitral proceedings, even if the seat of that arbitration is elsewhere. This is not dissimilar to the position in England where the English courts, by virtue of articles 2(3) and 44 of the Arbitration Act 1996, have jurisdiction to exercise certain powers in support of the arbitral proceedings even where the seat is not in England. Subject therefore to contrary agreement of the parties, courts will be prepared to grant such interim measures where they deem them necessary. Whether or not the parties are then prohibited from seeking these measures in those courts will depend on whether the courts of the seat of the arbitration find that that they have exclusive jurisdiction to grant such interim measures and thereby grant an anti-suit injunction.

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