

BRITISH VIRGIN ISLANDS COURT OF APPEAL

PT Ventures SGPS SA and Vidatel Ltd
Claim No. BVIHC (Com) 2015/0017

APPLICATION TO CONTINUE WORLDWIDE FREEZING ORDER OBTAINED EX PARTE IN SUPPORT OF FOREIGN ARBITRATION - COURT'S JURISDICTION UNDER SECTION 43 OF ARBITRATION ACT 2013 - WHETHER GOOD ARGUABLE CASE MADE OUT IN ICC ARBITRATION FOR US\$2.449 BILLION - WHETHER GOOD ARGUABLE CASE MADE OUT FOR EACH HEAD OF LOSS IN THE ARBITRATION PROCEEDINGS- WHETHER REFLECTIVE LOSS PRINCIPLE APPLIES IN ARBITRATION CLAIM - WHETHER REAL RISK OF DISSIPATION OF ASSETS - EFFECT OF OFFER OF UNDERTAKING IN LIEU OF INJUNCTION - DELAY - WHETHER MATERIAL NON-DISCLOSURE - WHETHER APPLICATION FOR AN IMPROPER MOTIVE OR COLLATERAL PURPOSE - WHETHER JUST OR CONVENIENT TO CONTINUE FREEZING ORDER.

This was an *inter partes* hearing of an application to continue a freezing order (the "FO") which had been obtained, *ex parte*, against the Respondent in aid of ICC Arbitration proceedings under Section 43 of the *Arbitration Act, 2013* (the "Act"). In resisting the continuation of the FO the Respondent argued that the jurisdiction to grant interim measures under Section 43 of the Act was limited and that the relevancy of the requirement that the arbitral award being enforceable in the jurisdiction (Section 43(5)(a) of the Act) related to whether the Respondent has assets in the jurisdiction and went to the justice of continuing the FO, the absence of assets being a relevant consideration for the grant of such. The Respondent also maintained that by Section 43 (5)(b) the natural court for the grant of interim measures was Paris as the supervisory court for the ICC Arbitration proceedings.

The Learned Judge rejected both submissions and found that Section 43 of the Act was not so limited and would be granted where it was just to do so. In arriving at a just result the Court was required to consider the matters set out at Subsections (4), (5) and (6) of Section 43 and other requirements relevant to the application for an interim injunction. The Court contrasted the Section 43 of the Act with the English equivalent of Section 44 and found that, unlike the English provisions which was narrowly drawn, the Act was broader and more flexible.

In so far as it concerns, the general discretion to grant freezing relief the Respondents also maintained the Applicant has not demonstrated a good arguable case, there was no solid evidence of risk of dissipation and (related to the risk of dissipation point) that the Respondent had offered an

undertaking and that there were material non-disclosures which meant that FO should not be continued.

The Court rejected all the Respondents grounds. The Court stated the principles on which it would grant an application for a freezing order adopting the summary in *Metropolitan Housing Trust Limited -v- Devenkuma Keshavlal Taylor and others* [2015] EWHC 2897 (Ch). The high point of the Respondents case was that the Applicant had not shown that it had a good arguable case to justify the grant of the FO. Confirming that the test for “good arguable case” was that expressed by the *Niedersachsen* [1983] 2 Lloyd’s Law Reports 600 which was adopted and applied in the Court of Appeal case of *Adari -v- Adari*, Civil Appeal No. 2 of 2005, the Court found that the Applicant had made out a good arguable case for relief in the ICC Arbitration. The court also found, on the evidence, that there was a solid risk of dissipation and that the undertaking had not been sufficient to justify the discharge of the injunction and the non-disclosures to the extent that there was not enough material to justify a discharge.

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