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Litigation & Arbitration Group Client Alert: A Brief Summary of Recent Developments

In the past few months there have been a number of noteworthy developments regarding English-seated arbitration proceedings.

1. CHALLENGES TO ARBITRAL AWARDS

It is clear that the English Court continues to demonstrate a general reluctance to interfere with decisions/awards rendered in arbitral proceedings:

- In March 2018, a Commercial Court Users' Group Meeting Report confirmed that there remains a high hurdle for litigants to overcome in order to challenge the decision of a tribunal. The Report highlighted that, between 2015 and 2017, in claims before the English Court:
    - Only 1 out of 112 challenges (0.9%) made pursuant to Section 68 (serious irregularity) was successful.
    - Only 5 out of 162 challenges (3.1%) made pursuant to Section 69 (errors of law) were successful.[1]
- In May 2018, the High Court dismissed an appeal brought pursuant to Section 68 in the case of *SCM Financial Overseas Ltd v Raga Establishment Ltd* [2018] EWHC 1008. In that case, a tribunal rendered an award notwithstanding that there was a decision pending before the Ukranian Court which was likely to have a material impact on the merits of the claims advanced in the arbitration. The High Court nevertheless held that it was within the tribunal's procedural discretion to render the award irrespective of these circumstances because the claimants had failed to place any evidence before the tribunal concerning the likely duration of those Ukranian proceedings. The High Court noted that "*it is a risk inherent in the choice of arbitration that a party choosing to arbitrate is at risk of inconsistent decisions.*"

[1] Commercial Court Users' Group Meeting Report dated 13 March 2018, available at https://www.judiciary.gov.uk/publications/commercial-court-users-group-meeting-report-march-2018/

- Also in May 2018, in the case of *Orascom TMT Investments S.À.R.L v. Veon Ltd* [2018] EWHC 985 (Comm), the Commercial Court rejected a challenge brought pursuant to section 68(2)(d) (namely, that the tribunal had failed to consider an issue) on the basis that the issue identified was not sufficiently significant to elevate the tribunal's failure to deal with it to a procedural irregularity.

Whilst the prevailing trend therefore continues to be a reluctance on the part of the English Court to interfere with arbitral awards, there are still occasions on which it will do so:

- The Commercial Court has recently overturned a tribunal's partial award on jurisdiction,[2] noting that, under the LCIA Rules, a single Request for Arbitration cannot be used to start multiple arbitration proceedings in relation to disputes under separate contracts. In the same case the Court also confirmed that the requirement to make any objection as to jurisdiction "*as soon as possible*" means doing so no later than the time of filing a Statement of Defence, rather than by the date of service of the response, as held by the tribunal.[3]

- In a rare case of national courts determining questions of jurisdiction in an investment treaty context, the English Court has this year rejected parts of an investment treaty arbitral award on jurisdiction (in which a tribunal had determined that it did not have jurisdiction over claims brought pursuant to an investment treaty between Belgium, Luxembourg, and Poland). In doing so, the Court also expressed the view that, as a matter of international law, 'creeping expropriation' (i.e. where a series of acts by a state deprives an investor of the benefit of its investment) is not necessarily precluded by virtue of the fact that there may also have been an event of direct or indirect expropriation.[4]

2. INTERIM MEASURES

The English Court has recently handed down two notable decisions in relation to interim measures:

- In *Michael Wilson & Partners v Emmott* [2018] EWCA Civ 367, the Court of Appeal refused to grant an anti-suit injunction restraining certain Australian court proceedings - a step which (on its face) appeared to run contrary to the broad approach to interpreting the scope of arbitration agreements set down in *Fiona Trust*.[5] The Court of Appeal held that an assignee (MWP) to claims

[2] Pursuant to a challenge under Section 67 of the Arbitration Act 1996.
[3] *A v B* [2017] EWHC 3417 (Comm). The Court noted that the LCIA Rules were unlikely to have been drafted so as to diverge from the intention of Sections 31 and 73 of the Arbitration Act 1996, which closely follow the Model Law (and which refers, at Article 16(2), to the Statement of Defence as the relevant cut-off date for objections to jurisdiction).
[4] *GPF GP Sarl v Poland* [2018] EWHC 409 (Comm)
[5] *Premium Nafta Products Limited (20th Defendant) and others v. Fili Shipping Company Limited (14th Claimant) and others* [2007] UKHL 40. In this 2007 case, the House of Lords confirmed that the approach

against Mr Emmott was not bound by an existing arbitration agreement between MWP and Mr Emmott, because the assigned claims were not contemplated by that arbitration agreement. The Court of Appeal therefore refused to grant an anti-suit injunction relating to those claims, save to the extent that they were "*vexatious and oppressive*" on account of those matters having already been determined in separate arbitration proceedings between MWP and Mr Emmott. Although the arbitration agreement between MWP and Mr Emmott purported to cover "*all disputes*" between them, the Court of Appeal held (notwithstanding the House of Lords' decision in *Fiona Trust*) that this did not extend to disputes arising from the assignment.

- The Commercial Court, in *Progas Energy Ltd v Pakistan* [2018] EWHC 209 (Comm), granted Pakistan's request for security for costs and, in doing so, provided further guidance on the relevance of third party funding to the issue of a party's ability to pay costs. Specifically, the Court held that a third party funder's promise (by way of letters to the claimant and to the Court) to ensure that its subsidiary would pay any adverse costs order which might be made against the claimant did not constitute a legally enforceable commitment and, therefore, it remained appropriate to grant an order for security for costs. This decision is likely to impact the structuring of third party funding arrangements in arbitration proceedings.

3. CHALLENGES TO ARBITRATORS

The Court has shed further light on the extent to which parties are able to challenge the appointment of arbitrators:

- In *Allianz Insurance and Sirius International Corporation v Tonicstar Limited* [2018] EWCA Civ 434, the Court of Appeal took a broad approach to a requirement that an arbitrator have "*not less than ten years' experience of insurance and reinsurance*", insofar as it held that this included experience of insurance and reinsurance law, rather than experience of working in the insurance or reinsurance industry directly.[6]

- The Court of Appeal has provided further clarification as to the circumstances that might indicate bias on the part of an arbitrator, and the extent of an arbitrator's duty of disclosure in this regard. In *Halliburton Company v Chubb Bermuda Insurance Ltd & Others* [2018] EWCA Civ 817, the Court of Appeal explained that arbitrators should, as a starting point, be "*trusted to decide the case solely on the evidence or other material adduced in the proceedings*" and that "*something more*" than the mere appointment of the arbitrator in

to interpreting the scope of an arbitration agreement should start with a presumption that the parties intended all disputes arising from their relationship to be decided by the same tribunal.

[6] Interestingly, this decision overturned the High Court's decision in *Company X v Company Y,* which had taken the opposite view in relation to a similarly worded requirement.

arbitrations with overlapping issues is required to establish bias. However, an arbitrator's duty to disclose is a separate obligation with a lower threshold – namely, an objective test of whether any particular circumstances "*would or might lead the fair minded observer … to conclude that there was a real possibility that the tribunal was biased*". Whilst a failure to disclose may not, in itself, amount to grounds for removal (hence, "*something more*" is required), it may be relevant to the question of whether "*circumstances exist that give rise to justifiable doubts as to* [the arbitrator's] *impartiality*".[7]

4. INSTITUTIONAL UPDATES

Finally, there have been several updates and publications from a number of the leading arbitral institutions that demonstrate the measures that those institutions are taking to ensure that they continue to meet their users' expectations:

- The LCIA published its guidance on using experts in arbitration, in which it recognised that the role of experts is increasingly expanding beyond the traditional remit (being drafting reports and testifying at hearings after being appointed by the parties) to include advising behind the scenes, acting as a tribunal-appointed expert or as an expert tribunal member. The notes also suggest practical ways for parties to optimise their use of experts.

- In response to concerns about the potentially improper delegation of duties to tribunal secretaries, the LCIA has joined other industry bodies in issuing guidance on their use. Published in section 8 of the LCIA's Notes for Arbitrators, the new guidance expressly prohibits delegation of the tribunal's decision-making function and emphasises the need for party consent by requiring that the identity, tasks and remuneration of the secretary be approved expressly by the parties.

- As noted in our earlier briefing (which can be accessed here), the ICC recently published guidance confirming that its current rules already incorporate the power to "*dismiss manifestly unmeritorious claims or defences*" on an expedited basis. This confirms that tribunals are able to render awards on a quasi-summary judgment basis, although the anecdotal evidence suggests that this power continues to be used very sparingly.

[7] Section 24(1) of the Arbitration Act 1996.

LITIGATION & ARBITRATION GROUP KEY CONTACTS

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.

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