Milbank

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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 – A Brief Summary of 2016

As an eventful 2016 draws to a close, we reflect upon some of the more notable developments that have taken place this year in the London arbitration market.

BREXIT

While it has been widely debated whether Brexit will make the English Courts less attractive as a dispute resolution forum for commercial parties, it is generally agreed that those concerns (if valid at all, which is unlikely) do not apply to London based arbitration proceedings.

In particular, the reciprocal enforcement of court judgments in Europe is a matter of European law that will, absent some other steps being taken, be affected by Brexit. In contrast, the worldwide enforcement of arbitral awards is governed by the New York Convention, to which the UK is a Contracting State irrespective of its position in Europe.

Accordingly, there is no reason for Brexit to cause any concern to parties who are considering referring their disputes to arbitration in London.

RECOVERABILITY OF THE COSTS OF THIRD PARTY FUNDING

In September, the English Courts upheld an ICC tribunal's decision to award the successful party its third party funding costs (*Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm)). The Tribunal held that Essar had used its superior financial power to try and thwart the claim against it, and that this conduct warranted an award of costs on an indemnity basis, including Norscot's costs that were funded, as is becoming increasingly commonplace, through a third party.

This was significant as it confirmed, for the first time, that the costs of third party funding in arbitration are recoverable (in principle at least), and might, therefore,

make arbitration more attractive to parties that anticipate relying on funding their case through third parties.

However, parties seeking to recover their third party funding costs in institutional arbitrations should bear in mind that it remains at the discretion of the tribunal and may therefore be limited to particularly egregious circumstances.

EMERGENCY RELIEF

Also in September, the English Courts clarified the appropriate means by which parties should seek urgent relief in LCIA arbitration. It had generally been accepted that, prior to the formation of the tribunal, parties had a choice between seeking urgent relief from the Court (under Section 44 of the Arbitration Act 1996) or from an emergency arbitrator or a tribunal formed pursuant to the expedited procedure (see Articles 9A and 9B of the LCIA Rules).

However, in *Gerard Metals SA v The Trustee of the Timis Trust & Others* [2016] EWHC 2327, the Court confirmed that it could only entertain Section 44 applications made by parties to LCIA-administered arbitration in circumstances where there was not enough time for the LCIA Court to appoint the emergency arbitrator (or tribunal) in order to grant the relevant relief. It is likely that a similar interpretation would apply to other institutional rules that incorporate emergency relief provisions (e.g. the ICC Rules, SIAC Rules and ICDR/AAA Rules).

ARBITRATOR BIAS

Several cases have been decided by the Court in 2016 in relation to applications made under Section 24 of the Arbitration Act 1996 to remove arbitrators on the basis of apparent bias. Given that the right to choose a tribunal is widely regarded as one of the key benefits of arbitration, these decisions shed further light on the protections that are in place to ensure that parties do not abuse that right.

In *Cofely Ltd v Anthony Bingham and Knowles Ltd* [2016] EWHC 240 (Comm), the Claimant had concerns arising from the Arbitrator's previous relationships with the Defendant, which had accounted for almost 20% of the Arbitrator's previous appointments (and 25% of his income). Cofely sought to obtain further information on their relationship, but the Arbitrator had aggressively resisted those requests, which the Court considered (in conjunction with the facts of the relationship itself) raised the real possibility of apparent bias.

In contrast, the Court refused an application in *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm) for the removal of an arbitrator on the grounds that he was a partner in the law firm that provided legal services to an affiliated company of the Defendant. Notwithstanding that this is a 'Non-Waivable' conflict under the IBA

Rules on Conflict of Interest in International Arbitration, the Court held that there was no apparent bias (largely because the Arbitrator claimed not to have been aware of his firm's work for the company until after the Award had been published).

Further, in *Enterprise Insurance Company plc v U-Drive Solutions (Gibraltar) Limited & James Drake QC* [2016] EWHC 1301 (QB), the Applicant applied, unsuccessfully, to remove the Arbitrator on the basis that he had made consistent procedural findings in favour of the Respondent and had given undue latitude to the Respondent in the face of persistent failures to comply with procedural orders. The Court did not consider that these were sufficient to justify removing the Arbitrator or that, in fact, the Court should attempt to "*substitute its view for the decisions made by the arbitrator*".

Accordingly, the bar continues to be set high for challenging an arbitrator's appointment under Section 24 (even where the grounds appear to fall foul of the IBA Rules).

ICC EXPEDITED PROCEDURE

Looking forward to next year, we await the ICC's new expedited procedure which comes into force on 1 March 2017 (and which follows recent similar changes to the SIAC and HKIAC Rules). The new procedure will be available for claims not exceeding $2 million (unless agreed otherwise) and will include, for example, the appointment of a default sole arbitrator, the dispensing with Terms of Reference and a requirement that the Award must be rendered within 6 months of the case management conference. The tribunal will also have discretion to adopt such procedural measures as it considers appropriate, and fees will be calculated on a new (reduced) scale.

LITIGATION & ARBITRATION GROUP

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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

2029 Century Park East, 33rd Floor, Los Angeles, CA 90067

Robert J. Liubicic	rliubicic@milbank.com	+1-424-386-4525
Jerry L. Marks	jmarks@milbank.com	+1-424-386-4550
Mark C. Scarsi	mscarsi@milbank.com	+1-424-386-4580

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
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
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. Zullow	fzullow@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	mnolan@milbank.com	+1-202-835-7524
Aaron L. Renenger	arenenger@milbank.com	+1-202-835-7505