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Client Alert

English courts' supportive approach to arbitration: a summary of recent case law

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The English courts are well known for their supportive approach to arbitration, and a number of recent decisions have further reinforced and justified that reputation. These include cases where the court exercised its powers under the Arbitration Act 1996 (the "**Act**") to support the arbitral process, either by way of granting anti-suit injunctions or robustly exercising its supervisory jurisdiction when determining challenges to awards.

1. Anti-suit Injunctions

During the second half of 2019, the High Court granted several anti-suit injunctions enforcing parties' agreements to submit their disputes to arbitration. This approach is in keeping with the Court of Appeal's historic guidance that the English courts should grant an anti-suit injunction in support of an arbitration agreement "*provided that it is sought promptly and before the final proceedings are too advanced.*"[1]

- In A and another v B and another [2019] EWHC 2478 (Comm), the High Court held that the mere possibility of reaching inconsistent decisions in different jurisdictions and/or allowing multiple proceedings to proceed[2] was not a sufficient reason to refuse an anti-suit injunction in circumstances where a clear arbitration agreement bound the parties. The court held that there must be a "*strong reason*"[3] not to enforce an arbitration agreement, which the defendants failed to show. The court proceedings which the defendants had started in Israel were not far advanced, and it was irrelevant to the question before the English court (as the supervisory court based on the seat of the arbitration) that the Israeli court would be determining its own jurisdiction. Mr Justice Jacobs stated that the possibility of multiple proceedings (because the Israeli proceedings would continue with certain defendants that were not parties to the arbitration agreement) is "*simply the natural consequence of the agreements which the parties have reached*"; it did not provide the required strong reason not to enforce the "*clear contractual bargain*" of the parties to arbitrate.[4]

- In Hiscox Dedicated Corporate Member v Weyerhauser Co [2019] EWHC 2671 (Comm), the High Court continued an anti-suit injunction restraining US proceedings issued in breach of an arbitration

[1] Millett LJ in The "Angelic Grace" [1995] 1 Lloyd's Rep, 87.
[2] In this case, in England and in Israel.
[3] A and another v B and another [2019] EWHC 2478 (Comm) at [9].
[4] Ibid at [18].

agreement that had been incorporated by reference into (rather than expressly set out in) an insurance policy. The court held that this was "*amply sufficient*"[5] to bind the parties to arbitrate and that the reference to the jurisdiction of the US courts in the policy's "*Service of Suit*" clause did not undermine this interpretation, since that clause related only to enforcement.

2. Reaffirmation of the courts' supervisory jurisdiction

In Minister of Finance (Incorporated), 1 Malaysia Development Berhad v International Petroleum Investment Company, Aabar Investments PJS [2019] EWCA Civ 2080, the Court of Appeal confirmed the English courts' limited but important supervisory jurisdiction under the Act.

In this case, the Court of Appeal overturned the High Court's decision to stay two applications to challenge an arbitration award, which had been brought under section 67 (lack of substantive jurisdiction) and section 68 (serious irregularity) of the Act. The Court of Appeal reasoned that such a stay would have prevented the claimants from exercising their statutory rights.

The High Court had originally granted a stay on the basis of avoiding delay, cost, disorder and uncertainty in circumstances where new arbitration proceedings had been commenced that addressed materially similar issues to the applications that had been brought under sections 67 and 68 of the Act. However, the Court of Appeal explained that the courts' supervisory powers were founded both on party autonomy and the public interest, and therefore such challenges could only be stayed where there were "*compelling grounds*"[6] to do so. By agreeing to an English-seated arbitration, parties agree to the courts' limited mandatory supervisory jurisdiction contained in the Act.

The Court of Appeal held that there were no compelling reasons to stay the claimants' applications, particularly as the defendants' actions (in commencing new arbitration proceedings) seemed to have been taken in order to frustrate those applications. The Court of Appeal also granted an injunction restraining the defendants from pursuing their new arbitration claims until the final determination of the claimants' applications (reversing the High Court's decision on that point as well). In doing so, the Court of Appeal confirmed that arbitration proceedings may be injuncted in exceptional circumstances.

For a more extensive discussion of this case, please see our recent case summary here.

3. Robust approach to determining challenges to awards

In addition to defending the proper ambit of their supervisory jurisdiction, the English court has maintained its robust approach to dealing with challenges to awards under sections 67, 68 and 69 of the Act.

- In Islamic Republic of Pakistan and another v Broadsheet LLC (in liquidation) [2019] EWHC 1832 (Comm), the claimants challenged a tribunal's damages award under section 68 of the Act on the ground of serious irregularity, because, in the claimants' view, the award did not contain sufficient reasons. The High Court dismissed the application and held that inadequate reasons cannot amount to a serious irregularity under section 68. In doing so, the court applied the following principles to the claimants' challenge: (i) section 68 is concerned with due process, not with whether the tribunal made the right decision; (ii) an assessment of the adequacy of reasons would involve an evaluation of the evidence by the court, which would be contrary to the tribunal's role as the sole judge of fact; and (iii) such scrutiny would amount to impermissible supervision over arbitrations. The court emphasised that a major purpose of the Act was to reduce court intervention in arbitrations and it, therefore, would be inconsistent with this purpose to interpret section 68 broadly. This was particularly so when section 70(4) of the Act already enabled the court to require tribunals to provide further reasons in connection with an application under sections 67, 68 and 69 of the

[5] Hiscox Dedicated Corporate Member v Weyerhauser Co [2019] EWHC 2671 (Comm) at [44].
[6] Minister of Finance (Incorporated), 1 Malaysia Development Berhad v International Petroleum Investment Company, Aabar Investments PJS [2019] EWCA Civ 2080 at [47].

Act. This case is yet another example where the courts have "*repeatedly stressed*"[7] the importance of upholding arbitration awards, reinforcing the high hurdle and narrow scope for claimants to challenge an English-seated arbitral award.

- In Quiana Navigation SA v Pacific Gulf Shipping (Singapore) PTE Ltd, "Caravos Liberty" [2019] EWHC 3171 (Comm), the owner of a vessel unsuccessfully appealed a partial final award pursuant to section 69 (appeal on a point of law) of the Act. The appeal concerned the proper interpretation of a BIMCO Non-Payment of Hire Clause (a standard form clause) and, in dismissing the appeal, the court praised the tribunal's award as showing no "*signs of being rushed or underthought*."[8] Notably, the judge confirmed that the court "*is always adjured to treat the Awards of arbitrators with respect*" and that this was "*perhaps a paradigm case for so doing*".[9] Thus, where section 69 of the Act has not been disapplied by the parties, the court can (and will if required to do so) review questions of law arising from a tribunal's decision, but the judge's comments in Quiana suggest that the court will, in doing so, treat the underlying award with a high degree of deference.

4. Challenges to Enforcement

In Process & Industrial Developments Limited v The Federal Republic of Nigeria [2019] EWHC 2241 (Comm) and [2019] EWHC 2541 (Comm), the court rejected two grounds for resisting the enforcement of a London-seated arbitral award. Those grounds were that (1) the tribunal should not have found that London was the seat of arbitration, and (2) the compensatory damages awarded by the tribunal were said to be excessive and, therefore, were contrary to public policy.

On the first issue regarding the seat of arbitration, the court held that the right to resist enforcement of an award based on the tribunal's decision as to the seat of arbitration was lost in circumstances where no challenge had been made within the relevant timeframes (which, depending on the nature of the challenge, would likely be pursuant to sections 67- 69 of the Act).[10] Notably, the court also considered that the tribunal's decision had created an "*issue estoppel*"[11] which precluded any further argument on the point and, in any event, the court held that the proper seat was London, largely because the parties had agreed that the "*venue of the arbitration*" shall be London.[12]

On the second issue regarding public policy, the court was clear that there was no public policy which required the court to refuse to enforce an arbitral award, "*which is intended to and is expressed as awarding compensatory damages*".[13] That is so even if the damages awarded by the tribunal were higher than the court would consider correct. The court reasoned that enforcing the award "*would not be 'clearly injurious to the public good' or 'wholly offensive to the reasonable and fully informed member of the public'*".[14] Further, the court noted that the public policy in favour of enforcing arbitral awards was strong, and, if a balancing exercise was required at all, it outweighed any public policy arguments against enforcing an award of

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[7] Islamic Republic of Pakistan and another v Broadsheet LLC (in liquidation) [2019] EWHC 1832 (Comm); [2019] Bus. L.R. 2753 at [17].

[8] Quiana Navigation SA v Pacific Gulf Shipping (Singapore) PTE Ltd, "Caravos Liberty" [2019] EWHC 3171 (Comm) at [32].

[9] Ibid at [34].

[10] As the seat of arbitration was London, the enforcement was sought pursuant to section 66 of the Act. The position may therefore be different in relation to enforcement of New York Convention awards pursuant to sections 101-103 of the Act.

[11] It is established law in England that an "*issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue*" (Arnold v Natwest Bank plc [1991] 2 AC 93 at 105-106).

[12] Process & Industrial Developments Limited v The Federal Republic of Nigeria [2019] EWHC 2241 (Comm) at [85].

[13] Ibid at [97].

[14] Ibid at [102], as required by Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al-Khaimah National Oil Co [1987] 3 W.L.R. 1023.

excessive compensation. The Commercial Court therefore granted the application and made an order pursuant to section 66 of the Act enforcing the award in the same manner as a judgment.

However, in September 2019, the Commercial Court provided the defendant with permission to appeal its order, including on the public policy ground (and granted a stay of execution of the award on the condition that the defendant paid into court a sum of $200 million). The court noted that the size of the award ($6.6 billion) meant that it was of national importance to Nigeria, which amounted to a compelling reason for an appeal on this issue. However, the court rejected an application for permission to appeal that was based on an argument that a non-supervisory court had purportedly set aside a related award on liability (as the ability to set aside an award lies with the supervisory court alone). The decision of the Court of Appeal will certainly be one to watch in 2020.

5. Challenges involving entities in administration

In BSG Resources Ltd v Vale SA and others [2019] EWHC 2456, as one of a number of applications, the court was asked to consider a defendant's application for security in respect of the award sum,[15] in circumstances where the claimant was in administration.

The court rejected the defendant's application, and emphasised that an application for security should not be used as a way to enforce an award through alternative means. The court held that the applicable standard for an order under section 70(7) of the Act was similar to that for a freezing injunction: there must be a risk of asset dissipation, and in that regard the court took into account the fact that the claimant was in administration. The court found that:

- the administrators controlled the assets of the claimant, notwithstanding that the administration was being funded by a connected company, and those administrators had a duty to act in the interests of creditors (which the evidence showed they were doing to the appropriate standard). Therefore, the directors of the claimant (whose past conduct gave rise to potential concerns) no longer had the power to dissipate assets; and

- the defendant's concerns that the challenge to the award prejudiced its ability to commence winding up proceedings in the US were misplaced, because that would amount to using the application for security for the purposes of enforcement (and, in any event, the administrators were under a duty to take reasonable care to obtain the best realisation of the asset and to distribute the value appropriately).

Looking forward in 2020

With regard to particular cases to look out for in 2020, the judgment of the Court of Appeal in Process & Industrial Developments (discussed above) will certainly be interesting. The eyes of the arbitration community are also firmly fixed on the Supreme Court as we await its judgment in Halliburton Company v Chubb Bermuda Insurance Ltd (UKSC 2018/0100), in what is likely to be a significant decision on the impartiality of arbitrators and their duties of disclosure.

[15] Pursuant to section 70(7) of the Act.

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