Litigation & Arbitration Group

Milbank

Client Alert

Arbitration Update: A Brief Summary of Recent Developments in 2020

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In this round-up of recent developments in the London arbitration market during the first half of 2020, we highlight key decisions of the English Court of Appeal in relation to (i) determining the governing law of arbitration agreements and (ii) the extent to which the English courts can make orders against non-parties to arbitration agreements. We also summarise some of the most notable cases (and recently published court statistics) relating to challenges to awards and enforcement proceedings. Finally, we look at some recent developments in the investment treaty arbitration market, including the agreement between EU Member States to terminate intra-EU bilateral investment treaties.

Governing law of arbitration agreements

There have been two significant Court of Appeal decisions this year, and we await a Supreme Court appeal in relation to one of those decisions, that will hopefully provide some welcome clarity on the English courts' approach to determining the governing law of an arbitration agreement.

First, in January 2020, the Court of Appeal issued its judgment in Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait),[1] in which it emphasised the primacy of express contractual language when interpreting arbitration agreements. In that case, the Court of Appeal held that the governing law of the arbitration agreement was English law (notwithstanding that the seat of the arbitration was Paris) because the main contract contained a governing law clause that the Court of Appeal considered, as a matter of contractual interpretation/construction, expressly covered the arbitration agreement as well.[2] However, the Court of Appeal chose not to answer the broader question of how the courts should determine the law of the arbitration agreement in the absence of an express choice (and where the seat of arbitration differs to the governing law of the main contract).

[1] [2020] EWCA Civ 6

[2] Interestingly, in June 2020, the Paris Court of Appeal refused an application to set aside the arbitral award, holding that French law governed the arbitration agreement (on the basis that the seat was Paris) and, applying French law, Kout was bound by the arbitration agreement. Accordingly, in circumstances that are reminiscent of the disagreement between the French and English courts in Dallah v Pakistan, this case serves as a reminder that the enforcement court does not have to follow the supervisory court (and vice versa). We understand that Kabab-ji is currently seeking leave to appeal to the Supreme Court though.

Fortunately, the arbitration community did not have to wait long for an answer. In April 2020, the Court of Appeal had to consider that precise issue in Enka Insaat ve Sanayi AS v OOO "Insurance Company Chubb"[3], when it granted an anti-suit injunction restraining the defendants from pursuing court proceedings in Russia that were in breach of a London-based arbitration clause. In doing so, the Court of Appeal confirmed that, where there is no express choice of governing law in the arbitration agreement itself, there is a strong presumption that the parties have impliedly chosen the law of the seat (rather than the governing law of the main contract, which had been the starting assumption based on the Court of Appeal's guidance in Sulamérica v Enesa Engelharia[4]). The Court went on to state that "*powerful countervailing factors*" would be required for the presumption to be rebutted. The Supreme Court is due to hear an appeal on the Court of Appeal's decision in July 2020.

Power of the courts to make orders against non-parties

In another noteworthy case, which has important implications for the gathering of evidence in arbitration proceedings, the Court of Appeal provided some welcome clarity in March 2020 as to the extent to which the English courts can make orders against non-parties in aid of arbitration proceedings.

In A and B v C, D and E,[5] the Court of Appeal held that section 44(2)(a) of the Arbitration Act 1996 (the "**Arbitration Act**") confers a power on the English courts to order a non-party witness to provide evidence (including by way of deposition in support of foreign-seated arbitrations, as long as the witness is resident in England and Wales). This decision helpfully removes some of the uncertainty that had previously existed with respect to the ability of the English courts to make orders against non-parties, albeit the Court of Appeal avoided making any determination as to whether any other powers vested in the court pursuant to section 44(2) are also exercisable against non-parties.

Anti-suit injunctions

In May 2020, the Commercial Court provided a helpful summary in Times Trading Corporation v National Bank of Fujairah (Dubai Branch)[6] of the relevant considerations that the English courts will take into account when faced with an application for an anti-suit injunction restraining the pursuit of litigation in breach of an agreement to arbitrate. In particular, the Court confirmed that anti-suit relief may be granted where there is a "*high degree of probability that there is an agreement to arbitrate which governs the dispute in question*" (which is referred to as the 'contractual test'). Alternatively, if there is no contractual basis for restraining those proceedings, then the court may nevertheless grant anti-suit relief if the litigation is "*frivolous or vexatious*". In both cases, the court should also be satisfied that there are no strong reasons to refuse the anti-suit relief and no other factors exist that point against granting the injunction.

This contractual test did not, however, apply easily to the facts in Times Trading, where the defendant was not, as a matter of English contract law, a party to the contract containing the arbitration agreement but was nevertheless seeking to enforce rights under it, and nor was the claim "*frivolous or vexatious*". In those circumstances, the Court held that it was a 'quasi-contractual' situation and so the Court was still entitled to restrain the pursuit of proceedings that breached the agreement to arbitrate. Accordingly, parties seeking to enforce rights under contracts to which they are not a party and which contain an agreement to arbitrate should be aware that they may be bound by that agreement.

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[3] [2020] EWCA Civ 574

[4] Sulamérica Cia Nacional de Seguros SA and others v Enesa Engelharia SA and others [2012] EWCA Civ 638; [2013] 1 WLR 102

[5] [2020] EWCA Civ 409

[6] [2020] EWHC 1078 (Comm)

Applications to set aside arbitral awards

(i) Statistics for 2018/2019: a decline in applications

In February 2020, the Judiciary of England and Wales published its annual report in respect of the Commercial and Admiralty Courts for the period 2018 and 2019. This included detailed information and statistics on applications to challenge arbitral awards under the provisions of the Arbitration Act. Notably, the report highlights a significant drop in applications on the grounds of serious irregularity under section 68 of the Arbitration Act (71 down to 19) and incorrect findings of law under section 69 of the Arbitration Act (87 down to 39). The report notes that there were even fewer hearings in relation to jurisdictional challenges under section 67 of the Arbitration Act.[7]

Consistent with our previous client alerts on the robust approach taken by the English courts when dealing with challenges to arbitral awards (available here), these statistics potentially reflect an increasing awareness amongst parties of the high hurdle, and the limited success rate, of such challenges to date (indeed, the report further explains that only two section 69 applications have been successful in total in the last three years).

(ii) Applications in 2020

In the first half of 2020, applications to challenge awards appear to have followed the same trend as in 2018 and 2019, in that they are relatively sparse and the courts continue to take a robust approach. That said, the courts have nevertheless demonstrated in a small number of cases that the bar to a successful challenge is not insurmountable.

- As regards unsuccessful challenges, there have been some notable cases that we highlight below:

    - In February 2020, the Commercial Court delivered its judgment on a number of section 67 and section 68 challenges made in (1) Reliance Industries Limited v BG and (2) BG Exploration and Production India Limited v The Union of India.[8] By way of background, an award had been issued in 2016 in an English-seated arbitration between the parties concerning costs that had been incurred under a production sharing contract for the exploitation of petroleum resources. The award was initially challenged and then remitted to the Tribunal on the basis that, amongst other things, there had been a serious irregularity due to the Tribunal's decision not to determine a particular issue. The Tribunal issued a further award in October 2018 addressing that issue (amongst others). The respondent subsequently challenged this award as well before the Commercial Court on the basis of a number of arguments pursuant to sections 67 and 68 of the Arbitration Act, including that the Tribunal had, essentially, used the remission to 'change its mind' which was not permissible as it would contravene the principle of finality in an award. The court rejected that argument and held "*the tribunal is not to be taken to have made up its mind until it issues an award that states what its mind is; until then it may change its mind*". Furthermore, the Court accepted that, when considering a case that had been referred back to the Tribunal on remission, "*there was jurisdiction to consider documents on the record and hear further argument in support of that case*" – hence, even if documents or arguments were not relied on originally, parties can nevertheless seek to rely on them at the remission stage.

    - In Filatona Trading Ltd and Ors v Navigator Equities Ltd,[9] the Court of Appeal rejected a section 67 application and provided guidance on when a non-signatory to a contract (including an arbitration agreement) can enforce its terms in circumstances where an agent has signed on its behalf. The dispute concerned the principal's right to directly sue

[7] For further information, see the report here.
[8] [2020] EWHC 263 (Comm)
[9] [2020] EWCA Civ 109

notwithstanding that the shareholders agreement described the contracting party (the agent) as the beneficial owner of the relevant shares. The Court of Appeal confirmed that there would need to be "*clear and unambiguous words or indications of an intent to exclude the known and identified principal*" and that there was a "*heavy burden of persuasion on a party who seeks to argue*" such an exclusion. Accordingly, the Court of Appeal found that the arbitration proceedings commenced by the principal were properly constituted. Not only is the judgment relevant to issues of agency in English law, it also reflects the English courts' typical pro-arbitration approach to interpreting the scope and application of arbitration agreements.

- This pro-arbitration approach was also demonstrated in the recent case of MPB v LGK,[10] where the High Court dismissed another section 67 application to set aside an arbitration award. In this case, the Court had to consider whether there was an agreement to arbitrate within a suite of construction contracts that contained various standard terms of the parties. The parties had engaged in a series of adjudication and arbitration proceedings based on LGK's standard terms, but MPB subsequently sought to challenge the jurisdiction of the arbitral tribunal on the basis that LGK's standard terms had not been incorporated into the final agreement between them. MPB asserted that its own standard terms (which had no dispute resolution clause) were to be given priority in the contractual hierarchy of the parties' agreements. On the facts, the Court of Appeal held that the arbitration agreement in LGK's standard terms was valid, not least because it was not inconsistent with MPB's terms, and, in any event, MPB had participated in the adjudication proceedings (pursuant to LGK's dispute resolution clause) and so it was not open to MPB to subsequently deny the validity of that clause in relation to the arbitration.

- In December 2019, the High Court also dismissed an application in Rabbi Moshe Avram Dadoun v Yitzchok Biton[11] to set aside an award pursuant to section 68 of the Arbitration Act, despite there having been unilateral and undisclosed communications between the defendant's brother and a member of the Tribunal that only came to light a few years after the award was issued. The court considered the relevant test for apparent bias (i.e. "*whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*" per Porter v Magill[12]) and referred to the Court of Appeal's guidance in Halliburton Company v Chubb Bermuda Insurance Ltd and others[13] that "*something more is required*" than the non-disclosure of a fact which does not give rise to justifiable doubts as to the arbitrator's impartiality. Applying that test, and on the facts of the communications in question, the Court held that there was no evidence of bias and dismissed the section 68 application.

- However, as noted above, the English courts have nevertheless shown that they are prepared, in the right circumstances, to uphold challenges.

  - For example, in the recent case of Tricon Energy Ltd v MTM Trading LLC,[14] the High Court allowed a challenge against an award pursuant to section 69 of the Arbitration Act, finding that the arbitral tribunal had been wrong to conclude that the claim was not contractually time barred. Although very fact specific (relating to the timely submission of supporting documentation for the calculation of demurrage), Tricon Energy Ltd is notable for being a rare example of a successful section 69 challenge.

[10] [2020] EWHC 90
[11] [2019] EWHC 3441 (Ch)
[12] [2001] UKHL 67
[13] [2018] 1 WLR 3361
[14] [2020] EWHC 700

- Similarly, Xstrata Coal v Benxi Iron & Steel[15] is a rare example of a successful section 68 challenge where – rather unusually – the successful party in the arbitration sought to have the Award remitted to the Tribunal under section 68(2)(f) on the grounds of "*uncertainty or ambiguity as to the effect of the Award*". The application was brought after the claimants failed to enforce the award in China because the name of one of the parties in the sale contract (containing the arbitration clause) was not the same as the party named as claimant in the arbitration (and the claimants had been unsuccessful in having the award corrected pursuant to Article 27 of the LCIA Rules 1998). The Court recognised that the ambiguity in the name of the claimant could give rise to difficulties in enforcing the award and therefore agreed to remit the award to the Tribunal for it to reconsider the identity of the claimant (thereby, ironically, reinforcing the English courts' *pro*-enforcement position by upholding a section 68 challenge).[16]

- In the recent case of Albion Energy Ltd v Energy Investments Global BRL,[17] the Court was asked to determine whether the subject matter of a dispute fell within the English jurisdiction clause of a SPA or the arbitration clause in a subsequent escrow agreement. In declining to stay the English summary judgment proceedings (which had been started pursuant to the jurisdiction clause in the SPA), the High Court held that the scope of the arbitration clause in the escrow agreement did not cover a dispute over non-payment under the SPA. Instead, the Court adopted a narrower interpretation to the effect that the escrow arbitration clause was limited to more localised disputes arising out of the escrow agreement itself. Although the High Court considered both agreements were intended to subsist together, Albion highlights the need to consider the scope of jurisdiction clauses when dealing with a suite of contractual documents executed at the same time and subsequently.

- Also, in June 2020, the Commercial Court set aside an award on jurisdiction in MVV Environment Devonport Ltd v NTO Shipping GmbH & Co.KG (MS Nortrader).[18] The Court did so on the grounds that the Tribunal had been wrong to determine that a party to the arbitration agreement had the requisite authority to enter into it as the agent of another party (and, therefore, there was no valid agreement to arbitrate). The Court's judgment included a detailed analysis of whether there was implied actual authority, or ostensible/apparent authority, for the agent to act on behalf of the principal, based on emails sent by the agent that referred to the principal as the party to the contract containing the arbitration agreement, and which the principal did not correct. In the Court's view, this was insufficient to establish the requisite authority.

Enforcement of arbitral awards

The English courts have also this year largely continued to take a robust approach to the enforcement of arbitral awards.

In Carpatsky Petroleum Corp v PJSC Ukrnafta,[19] the Commercial Court allowed the enforcement of a Swedish arbitral award and, in doing so, demonstrated the English courts' respect for decisions of the supervisory court and provided some helpful guidance on issue estoppel in that context.

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[15] [2020] EWHC 324

[16] The case is also notable for the Court's confirmation that the time for making a section 68 application runs from the date on which a decision on any application to correct the award (e.g. pursuant to Article 27 of the LCIA Rules) has been made.

[17] [2020] EWHC 301

[18] [2020] EWHC 1371

[19] [2020] EWHC 769

- Carpatsky had obtained an award in a Swedish-seated arbitration, and had successfully resisted a challenge by Ukrnafta in the Swedish courts based on alleged procedural irregularities. Carpatsky subsequently obtained permission to enforce the award in England, and the English court had to consider a number of issue estoppel arguments.
    - First, the Court held that Ukrnafta was estopped from arguing that the governing law of the arbitration agreement was Ukrainian law in circumstances where it had argued during the arbitration that the governing law was Swedish law.[20]
    - Second, Ukrnafta sought to rely on certain procedural irregularity arguments, which the English court held Ukrnafta was estopped from doing given that "*substantially the same factual allegations*" had been raised, and rejected, by the supervisory court in the set aside proceedings.[21] The English court reasoned that there was a public interest in sustaining the finality of the decision of the supervisory court, unless "*exceptional circumstances*" apply.[22]
- The English court also confirmed that, if a party applies to the supervisory court to have an award set aside and fails to raise arguments in those proceedings that it could and should have raised, then raising those arguments in subsequent enforcement proceedings may amount to an abuse of process (thereby preventing that party from relying on those arguments to resist enforcement).[23] However, the Court stressed that a party does not have to make a set aside application in order to be entitled to resist enforcement.[24]
- This case is also notable for the English court's decision that, even if there was no valid agreement to arbitrate in the contract (which was an issue in dispute), Ukrnafta's participation in the arbitration without reserving its rights as to jurisdiction in itself constituted an agreement to arbitrate.

However, in April 2020, in a separate case, the Commercial Court delivered a warning to claimants seeking to enforce awards that there must first be a clear "*right to payment*" before the award can be enforced. In A v B,[25] the award had determined that certain sums were payable by way of instalments, with a right to accelerate (and claim interest) if those instalments were missed. The claimant had obtained an *ex parte* order recognising the award, but on an application to set aside that order, the Court held that the judge should have first determined whether the principal sums were, in fact, payable on an accelerated basis (as claimed by the claimant). As the judge had not done so, the Court set aside the order and held that that a factual hearing was required before it could grant leave to enforce.

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[20] Notably, the Court held that, even if Ukrnafta was not estopped from arguing that Ukrainian law applied, the proper law of the arbitration agreement was Swedish law, largely because the seat of arbitration was Sweden. See our discussion above on Enka v Chubb and Kabab-Ji v Kout in relation to recent developments on this topic.

[21] The English court also opined that a similar principle should apply to arguments raised in other enforcement proceedings (see para 126 of judgment). On the facts of this case, and in demonstration of the English courts' pro-enforcement stance, it held that an estoppel was created by a decision of the Texas courts on the procedural arguments relied on by Ukrnafta, but no such estoppel arose from a decision of the Ukrainian courts as to the governing law of the arbitration agreement because there was no "*identity of subject matter*" (see para 108 of judgment).

[22] The English courts have not defined what "*exceptional circumstances*" are, but they have previously shown that they are willing to go against the decisions of the supervisory courts (e.g. famously in Dallah v Pakistan and, more recently, in Kabab-ji v Kout (as discussed above) where the Court of Appeal decided not to adjourn enforcement proceedings pending the decision of the Paris Court of Appeal, which was the supervisory court and which subsequently refused a set aside application in contradiction to the English court's decision on enforcement).

[23] This principle of abuse of process comes from Henderson v Henderson [1843] 3 Hare 100. The court in Carpatsky did not go so far as to say that is also applies to arguments that could or should have been raised in other enforcement (rather than set aside) proceedings, but it did not necessarily rule it out either.

[24] See paragraph 120 of the judgment.

[25] [2020] EWHC 952 (Comm)

Arbitrability of claims

In June 2020, the Court of Appeal delivered its judgment in Bridgehouse (Bradford No 2) Ltd v BAE Systems plc,[26] and dismissed an appeal to overturn a stay of court proceedings under section 9 of the Arbitration Act. The decision is noteworthy for two main reasons.

- First, the Court of Appeal confirmed that the type of disputes that are capable of being resolved by arbitration can, in certain circumstances, extend to disputes relating to statutory provisions rather than just pure contractual disputes. In Bridgehouse, the dispute concerned a question as to whether a party was entitled to terminate a contract in circumstances where the other party had been struck off the Register of Companies, but had subsequently been restored to the Register pursuant to section 1028(1) of the Companies Act 2006 ("**Companies Act**"). In arbitration proceedings to resolve that dispute, the arbitrator had held that the contract had been validly terminated – this prompted Bridgehouse to then apply to the Court for retrospective relief under section 1028(3) of the Companies Act.[27] BAE obtained a stay of that application, which was upheld by the Court of Appeal. In its judgment, the Court of Appeal dismissed Bridgehouse's argument that applications under section 1028(3) were not arbitrable because they engaged matters of public policy and were ancillary to applications to restore companies to the Register. The Court of Appeal explained that there was nothing in the Arbitration Act preventing a tribunal from determining an application for relief under section 1028(3) of the Companies Act, and that such relief does not normally affect anyone other than the company and certain specific individuals – therefore, it was distinguishable from statutory provisions with a public policy motivation and which are to be determined by the courts.

- Second, the Court of Appeal's decision demonstrates the English courts' broad approach to interpreting the scope of arbitration agreements. The parties' arbitration agreement covered disputes that "*arose out of the provisions of the Contract*", which Bridgehouse argued did not cover disputes as to whether statutory relief should be granted pursuant to section 1028(3) of the Companies Act. The Court of Appeal disagreed, and instead followed the presumption in Fiona Trust[28] that the parties are likely to have intended any dispute arising from their relationship to be decided in the same forum. Interestingly, the parties had also included in their contract an exclusive jurisdiction clause in favour of the English courts, but the Court of Appeal did not consider that this affected the validity of the arbitration agreement. Instead, the Court of Appeal held that the exclusive jurisdiction clause, in this particular contract, referred to the English courts having jurisdiction over issues arising from arbitration proceedings.

Investment Treaty Arbitration

There have been two particularly notable developments in the field of investment treaty arbitration this year.

- First, in February 2020, the Supreme Court lifted the stay on the enforcement of a £150 million ICSID award in Micula and others v Romania,[29] (which related to state incentives to invest in food production).
    - See our client alert here for a more detailed analysis, but, in summary, the decision is significant because, in lifting the stay, the Supreme Court held that: (i) the English court did not have the power to prohibit the "*enforcement of the Award on substantive grounds*" and (ii) the English court's obligation to enforce an award under the ICSID

[26] [2020] EWCA Civ 759

[27] Section 1028(3) of the Companies Act gives the court the power to "*give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register*".

[28] Fiona Trust and Holding Corporation and Others v Yuri Privalov and Others under name of Premium Nafta Products Ltd (20th Defendant) & Others v. Fili Shipping Co Ltd (14th Claimant) & Others [2007] UKHL 40

[29] [2020] UKSC 5

Convention took precedence over the UK's obligation under the EU Treaties (and, therefore, the enforcement of an ICSID award could not be affected by any EU Treaties, including, by way of a stay of enforcement in England).

- Second, on 5 May 2020, 23 EU Member States entered into the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (the "**Termination Agreement**").
    - This follows (i) the 2018 decision of the CJEU in Achmea, which held that the arbitration clause in the Netherlands-Slovakia bilateral investment treaty was incompatible with EU law,[30] and (ii) the EU Member States' political declaration in which, following Achmea, they expressed their intention to terminate all intra-EU bilateral investment treaties.[31] As a result, investors will no longer be able to initiate proceedings in respect of intra-EU bilateral investment treaties which are covered by the Termination Agreement. The position in relation to existing proceedings is more complex and should be carefully considered by parties – however, if proceedings had been initiated before 6 March 2018 (the date of the Achmea decision) and have not yet concluded, or they were initiated on or after 6 March 2018, then the parties must, inter alia, inform the relevant tribunals of the effect of the Achmea decision on the relevant Investment Treaty.
    - The Termination Agreement is subject to ratification and will enter into force 30 calendar days after the date on which the Secretary-General of the Council of the European Union receives the second instrument of ratification, approval or acceptance. The Termination Agreement "*cover*[s] *all investor-State arbitration proceedings based on intra-EU bilateral investment treaties under any arbitration convention or set of rules…and ad hoc arbitration*". It also terminates any sunset clauses in previously-terminated intra-EU bilateral investment treaties.

[30] Slovak Republic v. Achmea B.V. (Case C-284/16)

[31] See our client briefing on this here.

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