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Litigation & Arbitration Group

Client Alert

Arbitration Update: A Summary of Recent Developments

29 January 2021

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In this update, we summarise some of the key cases and developments in the London arbitration market during the second half of 2020.

We highlight: i) the impact of Brexit on international arbitration; ii) two Supreme Court cases that have brought clarity to the law governing arbitration agreements and arbitrator impartiality; iii) two important decisions relating to ICSID proceedings and/or the enforcement of ICSID awards; iv) updates which have been made to the arbitration rules of the ICC and the LCIA to increase efficiency and transparency; and v) other notable cases relating to challenges to arbitration awards and the English Court's pro-arbitration stance in the context of anti-suit injunction applications.

Brexit: a boost for arbitration?

The UK's withdrawal from the EU brings with it a number of legal uncertainties, but the recognition and enforceability of arbitration awards is, thankfully, not one of them. Brexit has not altered the enforceability of London-seated arbitration awards, which continue to be recognised and enforced under the New York Convention (to which 166 States are now party).[1] It is anticipated that this will likely increase the relative attractiveness of arbitration over litigation.

Arbitration is also likely to gain more prominence as a result of the UK and EU's adoption of independent arbitration as their dispute resolution mechanism under the Trade and Cooperation Agreement ("**TCA**"). Where this exclusive dispute resolution mechanism applies,[2] the State party alleging breach of an obligation under the TCA commences the process through a 30-day period of consultations with the other party, following which (if no resolution has been reached) the complaining party can initiate arbitration

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Sierra Leone became the 166th State party to the New York Convention in October 2020.

[2] Some provisions of the TCA fall outside this dispute resolution mechanism and can instead be resolved by the Partnership Council (Article INST.10).

proceedings. A three-member tribunal panel will be chosen by the parties for each dispute, and lists of potential independent arbitrators with relevant expertise in international trade are being drawn up by the EU and the UK. The arbitration procedure is fairly swift, with the tribunal being required to deliver a final decision within 160 days of its establishment, and the time periods can be halved if the matter is urgent.[3] If the tribunal determines that the respondent has breached its obligations under the TCA, the respondent must inform the complainant of measures that it has taken or will take to remedy the breach. Compliance with the tribunal's decision and remedying of the breach can be enforced through temporary compensation, or the suspension of the application of certain obligations under the TCA not exceeding "*the level equivalent to the nullification or impairment caused by the violation*".[4] These remedies are intended to be temporary only, and the tribunal can adjust the levels to ensure effectiveness.

The tribunal's decisions, which will be publicly available, will be binding on the EU and the UK, but not on investors or individuals.

Supreme Court clarifications: governing law and disclosure duties

In 2020, the Supreme Court handed down two much anticipated judgments in (1) Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb[5] and (2) Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd):[6]

- In Enka, the Supreme Court clarified the correct approach as a matter of English law for determining the law governing an arbitration agreement. Chubb had brought Russian Court proceedings against Enka in relation to Enka's installation of pipelines that Chubb contended caused a fire at a power plant. In the English proceedings (following an application by Enka for an anti-suit injunction), the Supreme Court was asked to determine the law governing the arbitration agreement contained in the contract engaging Enka (which provided for London-seated ICC arbitration), in order to rule on whether the Russian proceedings breached that arbitration agreement. The Supreme Court (by a 3:2 majority) found that English law governed the arbitration agreement and it upheld the anti-suit injunction granted by the Court of Appeal earlier in 2020[7] which restrained Chubb from pursuing the Russian proceedings. The Supreme Court clarified that the governing law of an arbitration agreement is either: i) the law chosen by the parties or ii) where they made no such choice, the law with which the arbitration agreement is most closely connected. It went on to provide that where the parties have not expressly chosen the law governing their arbitration agreement, the choice of law governing the main agreement (in which the arbitration agreement is contained) will generally apply to the arbitration agreement. Where (as in Enka), the parties have not chosen the law of the main agreement, the Supreme Court held that the default rule is that the law of the seat of the arbitration (as the law which is most closely connected with the arbitration agreement) should also be the governing law of the arbitration agreement.

  In addition to bringing welcome clarity to this area of arbitration law, Enka is an important reminder for parties to expressly agree the governing law of their arbitration agreements where more than one law is in play.

- In Halliburton, the Supreme Court provided guidance on arbitrators' duties of disclosure and set a high test for removing arbitrators pursuant to s.24 of the Arbitration Act 1996 even where they fail to meet that duty. The chairman of the Tribunal in an arbitration between Halliburton and Chubb arising from the Deepwater Horizon disaster had declared his appointments in previous arbitrations

[3] TCA, Article INST.19 and Article INST.20.
[4] TCA, Article INST.24.5.
[5] [2020] UKSC 38 (see our full briefing here).
[6] [2020] UKSC 48 (see our full briefing here).
[7] Enka v Chubb [2020] EWCA Civ 574 (see our full briefing here).

and pending references involving Chubb, but had failed to declare his subsequent appointments (including one by Chubb) in two further arbitrations that also related to the Deepwater Horizon disaster. Halliburton subsequently made an application to remove the arbitrator for apparent bias. This application was rejected by the High Court and Court of Appeal. The Supreme Court went on to uphold the position of the lower courts and unanimously dismissed the appeal. It held that while the arbitrator had breached his duty of disclosure (which is an objective test at the time of disclosure as to whether the relevant facts would or might reasonably give rise to justifiable doubts as to their impartiality, and taking into account the arbitrator's duty of confidentiality), this breach did not, on the facts, objectively give rise to a real possibility of bias (which the Supreme Court held was the applicable test under s.24 of the Arbitration Act).

Investment Treaty Arbitration

There were two particularly notable developments in the field of investment treaty arbitration last year.

- First, in August 2020, the ICSID Tribunal in Portigon AG v Kingdom of Spain (ARB/17/15) rendered its decision on jurisdiction which, for the first time, afforded investment treaty protection to a third-party project finance lender (in this case, Portigon AG) whose projects were alleged to have been adversely affected by measures taken by a State (in this case, Spain's repeal of its 2013-2014 renewable energy incentive regime). Whilst the Tribunal's decision has not yet been published, it is understood that the Tribunal made two significant findings that could pave the way for project finance lenders to bring investment claims against States, being:
    - Project finance is a protected investment under both the Energy Charter Treaty ("**ECT**") and the ICSID Convention (and no distinction had to be made between equity and debt for the purposes of complying with the requirements of the ECT (see Article 1(6)) and Article 25 of the ICSID Convention); and
    - The lender's financing of the projects did give rise to a direct relationship with the dispute (i.e., whether Spain's repeal of the incentive regime breached the ECT).
- Second, in Union Fenosa Gas SA v Egypt,[8] the High Court confirmed that: a) the English Civil Procedure Rules (CPR 62.21) do not require the claim form to be served on a state in order to register an ICSID award; and b) a party can apply to register an ICSID award by way of a without notice application. The Court reasoned that it would be inconsistent to require a claim form to be served in relation to ICSID awards, in circumstances where the same is not required in relation to non-ICSID awards (which do not require a claim form to be served, unless the Court makes such an order). This is a welcome clarification in respect of a procedural point relevant to the recognition and/or enforcement of ICSID awards in England.

Institutional rules updates: efficiency and transparency

In the second half of 2020, two of the world's leading arbitration institutions (the ICC and the LCIA) released a set of updates to their arbitration rules,[9] which reflect changes in working practices and demand, and seek to improve efficiency in arbitral proceedings.

Both sets of rules now place greater emphasis on technology, with electronic communication and service by electronic means now standard practice. Reflecting the increasing use of virtual hearings (particularly

[8] [2020] EWHC 1723 (Comm).

[9] The updates to the LCIA rules took effect on 1 October 2020 (see our full briefing here) and the updates to the ICC rules took effect on 1 January 2021 (see our full briefing here).

due to Covid-19), they both also expressly provide for the evolution of technology beyond videoconferencing.

Both institutions have expanded and clarified their provisions on the consolidation of cases, thereby providing greater flexibility for complex cases. The ICC rules have also introduced an exception to the rule requiring unanimous consent for the joinder of additional parties after the confirmation or appointment of the arbitrator, this is however on condition that the additional party agrees to the constitution of the Tribunal and the Terms of Reference. Under the LCIA rules, the parties can now commence multiple arbitrations by filing a single composite Request for Arbitration, but the cases would still need to be consolidated by the LCIA Court or the Tribunal to be heard together.

In line with other leading institutional rules, the LCIA rules now include an express power of Early Determination, to encourage tribunals to dismiss meritless proceedings. There is also a new obligation on tribunals to endeavour to render their final award no later than three months following the parties' final submissions.

The ICC rules have also made significant changes designed to increase efficiency, as well as the fairness and transparency of arbitration. Parties can now apply for additional awards for claims that have been omitted from an award despite the issue in question having been heard by the tribunal (rather than potentially having to challenge the award in court, or start fresh proceedings), whilst the expedited arbitration procedure will now automatically apply to cases with a value of up to USD 3 million. Perhaps more controversially, the ICC Court now has the power to deviate from the parties' choice of arbitral Tribunal in "*exceptional circumstances...to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award*"[10] and the Tribunal may exclude party representatives in order to avoid disruption caused by tactical changes to counsel. Another timely change (given the recent Halliburton judgment) imposes new obligations on parties to disclose third party funding arrangements, to better enable arbitrators to comply with their disclosure duties.

Court intervention: correcting arbitrators' mistakes

Doglemor Trade Limited v Caledor Consulting Limited[11] is a pertinent example of the circumstances where the English Court will exercise its limited, but important, powers of intervention in relation to awards. In Doglemor, the Tribunal had admitted to making a computational error in assessing the value of shares, with the result that the damages figure was USD 54 million higher than if the error had not been made. Doglemor requested that the Tribunal correct the error pursuant to rule 27.1 of the LCIA Rules, but the Tribunal refused to do so on the basis that it considered that the resulting figure would not be a reasonable and fair assessment of the loss. Doglemor therefore challenged the award under s.68 of the Arbitration Act.

The High Court held that the Tribunal's computational error was a serious irregularity in the award, which was admitted by the Tribunal and fell within the scope of s.68(2)(i). The Court found that the error caused or would cause substantial injustice to the Doglemor parties because had the Tribunal had "*an opportunity to address the point, [it] might well have reached a different view and produced a significantly different outcome*".[12] The High Court therefore remitted the award to the Tribunal to correct the error.

Successful challenges under s.68 are rare, but this case exemplifies the importance of this remedy as an ultimate backstop for arbitration parties.

[10] Article 12(9) of the 2021 ICC Arbitration Rules.
[11] [2020] EWHC 3342 (Comm).
[12] Ibid at [63].

Award challenges: unprecedented extension of time

In The Federal Republic of Nigeria v Process & Industrial Developments Limited,[13] the High Court confirmed the applicable test when considering an application for an extension of time to bring challenges under sections 67 and 68 of the Arbitration Act.

In this long-standing dispute concerning a gas processing contract between the two parties, Nigeria sought an extension of time to challenge a final award that had been rendered in 2017 ordering Nigeria to pay damages in excess of USD 6 billion, on the basis that the award (and the arbitration clause) had been procured by fraud on the part of Process & Industrial Developments ("**P&I**").

In evaluating Nigeria's application, the Court referred to the factors set out in AOOT Kalmneft v Glencore [2001] 2 All ER (Comm) 577 (and the fact that the weight of each factor varies with the context of each case):

i. The length of the delay;

ii. The party's reasonableness in all the circumstances in permitting the time limit to expire;

iii. Whether the respondent caused or contributed to the delay;

iv. Whether the respondent would suffer irremediable prejudice due to the delay (in addition to the mere loss of time);

v. Whether the arbitration continued during the period of delay (and the related impact);

vi. The strength of the application; and

vii. Whether it would be unfair more broadly to the applicant to be denied the opportunity to have the application determined.

In the Judge's view, there was a strong *prima facie* case that the relevant agreement between the parties was procured by bribery, and that P&I's main witness provided perjured evidence to the Tribunal. In relation to the delays in bringing this application, the Judge found that: a) at the time of the arbitration, Nigeria made a good case that it did not know and could not with reasonable diligence have discovered the grounds it now advances; b) following the final award, there was nothing to suggest that a deliberate decision was taken not to investigate fraud or to proceed slowly on the part of Nigeria; and c) to date, as a result of the requirement in this jurisdiction for cogent evidence to plead fraud, Nigeria needed to see the "*different building blocks*"[14] of the fraud, and, therefore, behaved reasonably.

Although this judgment afforded an 'unprecedented' extension of time to a party in order to challenge an arbitral award (in circumstances where the award had been rendered three and a half years previously and s.70(3) of the Arbitration Act imposes a 28-day limit to such applications), it also demonstrated the high threshold parties need to overcome for such applications and the need for substantial evidence in support of the same, proving that such extensions of time will very much remain the exception, as opposed to the rule, in the English Court.

Anti-suit injunctions: pro-arbitration stance

The judgment of the High Court in Riverrock Securities Limited v International Bank of St Petersburg[15] once again demonstrated the pro-arbitration stance of the English Court in upholding arbitration agreements, and confirmed that claims arising out of an insolvency are capable of being resolved by arbitration if they are

[13] [2020] EWHC 2379 (Comm).
[14] Ibid at [259].
[15] [2020] EWHC 2483 (Comm).

contractual in nature. In this case, the Court granted RSL's application for an interim anti-suit injunction, restraining IBSP from pursuing claims against RSL in Russian bankruptcy proceedings. This was on the basis that pursuing the claims in Russia would be in breach of the arbitration agreements in the securities contracts between them, which provided for London-seated LCIA arbitration. In the Russian proceedings, the DIA (the official receiver for IBSP) had sought to avoid or invalidate the securities transactions under Russian bankruptcy law and the Russian Civil Code.

The High Court rejected the argument that the Russian claims were not made by IBSP (the party to the arbitration agreement) – finding that the official receiver brought those claims on IBSP's behalf. The Court found that there was no presumption in English law that an arbitration agreement would not apply to claims that only arose on insolvency, and (noting the generous approach of English law to the construction of arbitration agreements) held that the Russian claims were contractual in substance and therefore fell within the scope of the arbitration agreement.[16] The Court also held that the claims were arbitrable because: i) they sought relief that the arbitration Tribunal was able to grant; ii) they did not engage third party interests;[17] and iii) there was no relevant countervailing public policy to override the "*clear policy of English law of upholding arbitration agreements*"[18] – noting particularly the importance that the English Court gives to forum selection agreements even where the defendant is involved in a foreign insolvency process. The Court therefore granted the anti-suit injunction sought.

[16] Following the approach of the Court in Nori Holding Ltd v PJSC Bank Otkritie Financial Corp [2018] 2 Lloyd's Rep 80, on similar facts.
[17] Except to the extent that "*any creditor of an insolvent company will benefit from its success in arbitration*" (Riverrock Securities Limited v International Bank of St Petersburg [2020] EWHC 2483 (Comm) at [87]).
[18] Ibid, at [87].

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