ADDLESHAW GODDARD

INTERNATIONAL ARBITRATION

Quarterly Review – July 2016

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Welcome to Addleshaw Goddard's International Arbitration Quarterly Review. The aim of this publication is to capture significant arbitration cases and legal developments.

If you have any thoughts and comments on this publication, please contact the editorial team.

Brexit: what does it mean for international arbitration?

As most readers will by now be aware, on 23 June 2016 the British public voted to leave the European Union. Much has already been written about the many uncertainties this raises and it is not our intention to address all this again (see the Addleshaw Goddard briefing for the full analysis). However, we could not publish this edition without considering the impact Brexit might have on international arbitration.

By its very nature, international arbitration crosses boundaries within but also beyond the European Union. There is no European piece of legislation that specifically governs arbitration and it is specifically excluded from the scope of the recast Brussels Regulation on jurisdiction ((EU) 1215/2012)) on the recognition and enforcement of judgments in civil and commercial matters.

Arbitrations governed by English law are subject to the Arbitration Act 1996, which is unaffected by Brexit. English arbitration awards can be enforced under the New York Convention 1958 (**NYC**) in 156 states worldwide. Critically, all EU Member states are signatories to the NYC.

Given the many uncertainties that would surround enforcement of English judgments in EU Member states should Brexit lead to the UK not being part of the Brussels regulation regime, arbitration may well become more attractive for disputes that are due to be heard in the UK.

English courts are well known for their strong support of arbitration and their willingness to keep parties to their bargain once they have agreed to arbitration, usually via the use of anti-suit injunctions. Recent jurisprudence from the European Court of Justice (*Allianz SpA v West Tankers Inc* (Case C-185/07)) had restrained their ability to use such injunctions when another EU court had been seized first. Brexit could potentially give English courts the ability to deploy anti-suit injunctions again in such situations but much will depend on what deal is struck between the UK and the EU in terms of jurisdiction and enforcement.

All in all, it is fair to say that from a legal perspective Brexit would have a relatively minor impact on arbitrations that are subject to English law, including arbitrations under the LCIA rules. Nevertheless, there may be a wider economic impact if London and the UK become less attractive for international trade.

The 2015 International Arbitration Survey published by White & Case and Queen Mary University identified London as the "most used and most preferred" seat. It will be interesting to see whether this continues to be the case as Brexit unfolds.

... should Brexit lead to the UK not being part of the Brussels regulation regime, arbitration may well become more attractive for disputes that are due to be heard in the UK.

Richard Wise, London

Caroline Bell, London

Enforcement in Dubai: doors open wider for enforcement of foreign awards and judgments

These cases demonstrate the availability of a new, complex yet innovative mechanism of enforcement in the UAE reacting to the increasing demands of international commercial parties.

Summary

A number of recent high profile decisions in the DIFC Courts have opened the doors to enforcement of foreign arbitration awards and judgments in both the DIFC Courts and local Dubai Courts.

A number of test cases over the last three years have seen foreign arbitration award creditors relying on the reciprocal arrangements in place between the Dubai 'onshore' Courts and the DIFC Courts to potentially enforce arbitration awards recognised by the DIFC Courts against onshore assets in Dubai. A recent Court of Appeal decision in *DNB Bank ASA -v- Gulf Eyadah*[1] has now confirmed that foreign judgments recognised by the DIFC Courts may be enforced against onshore assets in Dubai using the DIFC as the conduit or 'gateway' jurisdiction.

As a result of these developments, international litigants are expected to become increasingly interested in seeking recognition and enforcement of foreign awards and judgments in the DIFC Courts before taking the resulting court order to the Dubai Courts for execution. This would (in theory at least) bypass any further consideration of the merits of the award or judgment by the Dubai Courts or any challenges brought by the debtor. It also opens the door for enforcement of foreign arbitration awards and judgments in the UAE and the wider GCC (under the various conventions between its member states).

The statutory framework

The DIFC Courts (a jurisdiction separate to the 'onshore' UAE legal system) have a reciprocal enforcement mechanism with the Dubai Courts under Article 7 of the Judicial Authority Law (**JAL**) which is intended to facilitate the free movement of decisions between the two court systems. Article 7 JAL expressly commits to the execution in Dubai of judgments, decisions and foreign arbitration awards that have been recognised in the DIFC Courts.

Pursuant to Article 7 of JAL, there is no requirement for a debtor to have assets in the DIFC in order for a foreign award or judgment to be recognised by the DIFC Courts. Neither the New York Convention nor the DIFC Laws state that an order for recognition and enforcement can only be made if it has been proved that the debtor has assets to enforce against in that jurisdiction. Especially in the modern mobile financial world, it may be that a creditor wants to put itself in a position to execute immediately against a debtor's assets the moment they are introduced into a jurisdiction.

Relevant test cases

Foreign arbitration awards

Over the past two to three years, the DIFC Courts have overseen a number of cases that have established the above principles and interpreted the statutory framework in a way that is likely to attract international creditors seeking to enforce a foreign award in Dubai. The main cases are summarised below.

(1) Egan (2) Eggert v (1) Eava (2) Efa2

In this matter, the Claimants brought proceedings for recognition and enforcement of 22 arbitration awards issued in London under the LMAA Rules for a total sum of USD 26.5 million plus interest.

Relying on Article 42(1) of the Arbitration Law, Deputy Chief Justice Sir John Chadwick rejected a jurisdictional challenge that the DIFC did not have jurisdiction to recognise and grant leave to enforce foreign arbitral awards. The Defendants also unsuccessfully argued that to do so would be against public policy, as it would open the 'floodgates' for foreign arbitration award creditors, and it could not have been the intention of the legislators for the DIFC Courts to be used as a

[1] CA 007/2015, DNB Bank ASA -v- (1) Gulf Eyadah Corporation (2) Gulf Navigation Holdings Pjsc, 25 February 2016

[2] ARB 002/2013, case details formerly redacted as (1) X1, (2) X2 -v- (1) Y1, (2) Y2

gateway. The Court ruled that it was 'plain' that it was precisely the intention in Article 7 JAL that the DIFC Courts would have such powers.

In the subsequent substantive hearing of the matter, the Defendants argued that they had no assets in, nor any connection to the DIFC and that the Claimants were seeking ultimate execution in the Dubai Courts, i.e., outside the DIFC jurisdiction. As such, it would be contrary to UAE public policy to recognise and enforce awards in the DIFC in order to obtain an order to execute onshore.

It was further argued that the Claimants were in effect seeking to bypass the enforcement procedures in the Dubai Courts. This amounted to an abuse of process as it removed the rights which parties would have in the Dubai Courts under the CPC. Justice Sir Anthony Colman dismissed the defence and the application for recognition and enforcement succeeded.

Firstly, the Judge ruled that Article 7 of JAL expressly requires the Dubai Courts to execute a foreign arbitral award which has been recognised by the DIFC Courts. As such, the mechanism had been established by legislation which is a primary source of public policy.

The Judge ruled that Article 7 of JAL expressly requires the Dubai Courts to execute a foreign arbitral award which has been recognised by the DIFC Courts.

Secondly, the Dubai Courts would apply the same test for enforcement, i.e. are any of the New York Convention defences to enforcement made out? New York Convention defences relate to complaints about the award itself, not the procedural mechanism for enforcement. By way of example, if a party is unable to, or prevented from presenting its case or the arbitration agreement is not valid.

Banyan Tree-v- Meydan

In *Banyan Tree-v- Meydan*[3], a similar defence was raised that as there were no assets in, or connection with the DIFC, the Claimant's sole purpose was to side-step the process of the Dubai Courts and the UAE Civil Procedure Code (**CPC**) which would constitute an abuse of process. Meydan also raised a Forum Non Conveniens argument.

H.E. Justice Omar Al Muhairi rejected Meydan's argument on the basis that:

- Assets could come into the DIFC or be created there in the future;
- The DIFC enforcement mechanisms might assist, i.e., cross-examination of individuals on the location of assets;
- The reliance on the reciprocal enforcement mechanisms cannot possibly be an abuse, even less so, before it is even invoked; and
- The Forum Non Conveniens argument was rejected as only DIFC Courts can recognise and enforce awards within the DIFC.

This decision was subsequently upheld on Appeal[4], adopting and approving the decision in the *Egan Eggert* case. Practically speaking, and as pointed out by Justice Sir Anthony Colman in that case, if a creditor has chosen to obtain an order for enforcement in a jurisdiction where it turns out there are no assets available for execution, that is his misfortune and not the concern of the judge making the order for recognition.

Foreign judgments

Despite the various developments in the enforcement of foreign arbitration awards in Dubai, the Court of First Instance in *DNB Bank ASA -v- (1) Gulf Eyadah Corp, (2) Gulf Navigation Holding PJSC*[5] distinguished this from foreign court judgments, finding that Article 7(2) JAL required the Dubai Courts to execute only (i) judgments of the DIFC Courts and (ii) arbitral awards ratified by the DIFC Courts and, therefore, impliedly *not* foreign judgments recognised by the DIFC Courts.

[3] ARB 003/2013, Banyan Tree Corporate Pte Ltd v Meydan Group LLC, 27 May 2014, regarding a Dubai International Arbitration Centre award
[4] CA-005-2014, Meydan Group LLC v Banyan Tree Corporate Pte Ltd, 3 November 2014
[5] CFI 043/2014, 2 July 2015

That decision was reversed when the Court of Appeal in February 2016[6] confirmed that parties may enforce foreign judgments in the DIFC Courts and then take the ensuing judgment to the Dubai Courts for execution.

Interestingly, the statutory basis for the Court's conduit jurisdiction did not originate from the relevant articles of the JAL. Rather, it referred to Article 24(1) of the DIFC Courts Law which grants the Court jurisdiction on common law principles of comity.

What happens next?

Armed with DIFC Courts judgment recognising their arbitration award or foreign judgment, judgment creditors may now proceed to a Dubai execution judge for enforcement. However, the question remains how the Dubai execution courts will approach those judgments. Justice Sir Anthony Coleman gave his unequivocal view in the Egan Eggert 2015 case:

> *"The effect of Article 7 [of JAL] is therefore that once an order for recognition and enforcement in respect of property in non-DIFC Dubai lands on the executive judge's table, he or she is bound to enforce it, provided the pre-conditions specified in Article 7(2)(a) and (b) are satisfied...What the executive judge is not permitted to do is to review the merits of the award or order."*

Accordingly, in theory at least, once the DIFC Courts have made an order recognising the foreign award or judgment, that order, like a judgment issued in the DIFC Courts, can be taken onshore to an execution judge of the Dubai Courts.

Summary of the key developments

These cases demonstrate the availability of a new, complex yet innovative mechanism of enforcement in the UAE reacting to the increasing demands of international commercial parties. In order to help navigate through the various developments, the current position can be summarised as follows:

- The DIFC Courts have the jurisdiction to recognise any foreign or domestic arbitration award subject to procedural requirements and Article 44 Arbitration Law defences (which includes the public policy defence).
- Unless a party can make out an Article 44 defence or show procedural requirements were not fulfilled, the DIFC Courts are required to enforce a foreign arbitration or domestic arbitration award. However, any such enforcement will be confined to assets within the DIFC.
- Location of assets or domicile of a party in the DIFC is not mandatory under the Arbitration Law or JAL - the assets may be mobile or a party may wish to take advantage of enforcement mechanisms available in the DIFC Courts (e.g. by cross-examination of debtors).
- The fact that Article 7 of the JAL gives the DIFC Courts exclusive jurisdiction excludes the operation of the doctrine of Forum Non Conveniens.
- The DIFC Courts have jurisdiction to recognise and enforce foreign judgments and again there is no requirements that the judgment debtor must be shown to have assets within the DIFC.
- Creditors are entitled to pursue execution proceedings in the Dubai Courts following an Order of the DIFC Courts although permission to do so may still be a matter for the Dubai Courts.

Paul Hughes, Dubai

Charlotte Bhania, Dubai

[6] CA 007/2015, 25 February 2016

Challenging an award under English law: beware the statutory time limit

In *S v (1) A (2) B* [2016] EWHC 846 (Comm) the Commercial Court refused to grant an extension of time to challenge an arbitral award, emphasising that the 28 day time limit for challenging an award prescribed by the Arbitration Act 1996 (the **Act**) runs from the date of the award itself, not when it is actually received by the parties. This places the onus on potential applicant to try to ensure that the award is released in sufficient time to enable them to meet the statutory time limit.

Background

The dispute involved the commercial sale of coal by S to two different buyers, A and B, under identical terms. The buyers subsequently claimed damages from S on the basis that the coal provided fell below the quality standards required by the express and/or implied terms of the sale of goods contracts entered into between the parties.

A and B commenced arbitration proceedings separately, but the two arbitrations were subsequently heard together. The three man tribunal made a single award in favour of the buyers on 27 March 2015, ordering the seller to pay specified sums as damages to both A and B. On 30 March 2015, the tribunal wrote to the parties to confirm that an award had been made on 27 March but that, as is 'normal' practice, the award would not be released until all its outstanding fees had been paid.

The 28 day time limit for challenging an award under the Act starts on the date of the award itself, not the date it is received, which in practice can easily be months later.

As a consequence, the award was not received by the parties until 20 June 2015.

A party to arbitration proceedings may apply to the court to challenge an arbitral award on the grounds that a serious irregularity has occurred and/or or to appeal on a point of law pursuant to sections 68 and 69 of the Act respectively. Section 70(3) of the Act is clear in that any such appeal must be made within 28 days of the date of the award.

On 7 July 2015, 102 days after the date of the award, S applied to the court for leave to appeal the award pursuant to sections 68 and 69 of the Act, applying retrospectively under section 80(5) for the court to grant a discretionary extension of time of 74 days to the statutory time limit.

Decision

Sir Bernard Eder refused to grant the extension of time, applying the seven principles set out in *Terna Bahrain v Al Shamsi* [2012] EWHC 3283 (Comm) to decide whether it was in the interests of justice to make an exception, the primary factors being (i) the length of the delay, (ii) whether the applicant had acted reasonably in delaying its application, and (iii) whether the respondent or tribunal had caused or contributed to the delay.

In the circumstance it was held that the length of the delay in making the application was unreasonable. A delay of even a few days would be a significant factor in any application but 102 days was clearly excessive in the context of the relatively short period provided by statute.

Further, whilst the delay could be said to have been caused by A and B, at least in part, for not having settled their outstanding fees until 29 May 2016, over two months after the award, Eder J confirmed that in reality this carried little weight. The onus is still very much on the party seeking to preserve its right to challenge an award to ensure that an award is rendered in sufficient time to enable an application to be made if necessary. Eder J highlighted that the outstanding fees remaining to be paid by A and B had been relatively modest (approximately £8,200) and S could have discharged this sum itself. At the very least S should have pursued his enquiries with more urgency rather than remaining silent in correspondence for long periods of time, and still taking 17 days to issue the court proceedings once the award had been received.

The court held that the application under sections 68 and 69 was, in any event, extremely weak and should therefore have been refused on its merits.

Emily Walters, Dubai

Comment

Whilst not 'new' law this decision acts an important reminder.

The 28 day time limit for challenging an award under the Act starts on the date of the award itself, not the date it is received, which in practice can easily be months later. A party to arbitral proceedings should always be mindful of this statutory time limit and do all it reasonably can to ensure the timely release of an award, and the promptness of any application that it may subsequently wish to make.

Appeal on a point of law reaches Supreme Court

Appeals on a point of law under section 69 of the Arbitration Act 1996 are few and far between and it is an unusual occurrence for one of these to reach the Supreme Court. However, this is was happened in the case of *NYK Bulkship (Atlantic) NV v Cargill International SA [2016] UKSC 20 ("The Global Santosh")*, which concerned the interpretation of the term "agents" in a common time charter provision.

Background

In September 2008 NYK Bulkship (**NYK**), a transportation company, chartered the vessel The Global Santosh to Cargill International (**Cargill**) under a time charter.

This agreement provided that the vessel would be "off hire" (i.e., unable to meet the requirements agreed under the time charter) for any period of detention or arrest, unless this was "*occasioned by any personal act or omission of default of the Charterers or their agents*" (**Clause 49**).

...this case's relevance lies in the fact that it is a rare instance of an appeal under section 69 of the Arbitration Act 1996 reaching the Supreme Court.

The vessel carried a shipment of cement from Sweden to Nigeria under a contract of sale between Transclear SA (**Transclear**) and IBG Investments Ltd (**IBG**). Under the terms of this contract, IBG was responsible for discharging the cargo and also paying any demurrage due if unloading was delayed.

Upon arrival in Nigeria the vessel was turned away and instructed to return to anchorage because of overcrowding in the port. Transclear then obtained an arrest order to secure its claim to demurrage against IBG, which resulted in further delay. Following an agreement between Transclear and IBG, the vessel completed discharge on 26 January 2009, more than three months after its arrival.

A dispute arose between Cargill and NYK after Cargill withheld hire for the period of the arrest. NYK disputed this relying on Clause 49, arguing that Transclear and IBG had been Cargill's *agents* and that it was their actions which caused the arrest. The issue was referred to arbitration in London.

The proceedings and appeals

In the arbitration, it was determined that Clause 49 did not apply during the period of the arrest.

NYK successfully appealed this award to the High Court under section 69 of the Arbitration Act 1996.

The High Court found that the tribunal had erred in law as it had not considered the question of whether IBG's delay in unloading the cargo had caused the arrest of the vehicle and subsequent loss. However, it also found that it remained for the tribunal to determine this. Both Cargill and NYK were dissatisfied with this judgment and appealed.

The Court of Appeal dismissed their appeals, also finding that the causation question should be considered by the tribunal (though for different reasons than the High Court's). Cargill appealed to the Supreme Court.

Decision

The Supreme Court allowed Cargill's appeal. It held by a majority that the original conclusions of the arbitration tribunal were correct, in that (a) the vessel was "off hire" during the period of arrest and (b) Clause 49 was not engaged on the facts of the case. The Supreme Court therefore dismissed NYK's appeal under section 69 of the Arbitration Act 1996.

The Supreme Court's decision turned on the meaning of the term "agents" in Clause 49. Put very simply, the Supreme Court found that there was not sufficient causal nexus between the arrest and the functions which the subcontractor (IBG) was performing as "agent" of Cargill. Therefore IBG's failure to discharge the cargo sooner could not be seen as a vicarious breach of Cargill's obligations.

Comment

Given that it relates to the interpretation of a common term in time charters, this decision is of real significant significance to the Shipping industry. It certainly exemplifies one of the points made recently in a speech by the Lord Chief Justice of England and Wales on the need to 'rebalance' the relationship between the courts and arbitration, where he laments the "*diversion of more claims from the courts to arbitration [which] reduces the potential for the courts to develop and explain the law*".

For international arbitrators, this case's relevance lies in the fact that it is a rare instance of an appeal under section 69 of the Arbitration Act 1996 reaching the Supreme Court. It shows how difficult such appeals can be, especially given that the courts repeatedly referred the issue back to the tribunal, and ultimately upheld its decision and dismissed the section 69 appeal.

Canelle Goldstein, London

Incorporation of an arbitration clause by reference to standard terms

In *Barrier Limited v Redhall Marine Limited* [2016] EWHC 381 (QB), the English High Court considered the principles of incorporation of an arbitration clause in the context of an application for pre-action disclosure.

Background Facts

In December 2001, Redhall Marine Limited (**Redhall**) entered into a contract with BAE (**Main Contract**) for the construction of six submarines. The Main Contract included an arbitration agreement.

In January 2002, Redhall sub-contracted part of the work under the Main Contract (**Sub-Contract**) to Barrier Limited (**Barrier**). The Sub-Contract was only for three submarines, Boats 1 to 3. However, it was common ground that the Barrier carried out work on three other submarines, Boats 4 to 6. The works were carried out pursuant to the following:

- Redhall's purchase order dated December 2001 which stated "*The terms overleaf must be read and strictly adhered to*". Redhall's standard terms included an arbitration clause. The evidence established that there are at least two copies of each purchase order – the top copy is designed to be sent to the client has the standard terms printed on the back, the carbon copy (which has nothing on the back) is retained by Redhall. For some unexplained reason, the carbon copy of the purchase order with no terms on the back was sent to Barrier.

- The Sub-Contract (for Boats 1 to 3) provided in Clause 9 that "*The terms of the [Main] Contract shall be incorporated into this Agreement..*" but made no express reference to the arbitration clause in the Main Contract. The Sub-Contract also provided in Clause 10 that Redhall's "*...standard terms and conditions, a copy of which was on the reverse of*

the [Redhall's] purchase order dated 21 December 2001 shall be incorporated into this Agreement"

- It appeared that instructions were given orally for Boats 4 to 6. Instructions for Boats 4 and 5 were evidenced in the written minutes of the 29 October 2012 meeting. Boat 6 was not mentioned in any written document.

This case highlights the different approach that English Law takes to incorporation of an arbitration clause where two parties had previously contracted and where only one of the parties or none had contracted on the relevant terms before.

Disputes arose, and Barrier sought pre-action disclosure relating to payments it believes had been wrongfully withheld by Redhall.

Redhall argued that the Sub-Contract incorporated an arbitration agreement and therefore the court has no jurisdiction to make an order for pre-action disclosure. Barrier did not accept that any arbitration agreement was incorporated and it argued that even if the Sub-Contract for Boats 1 to 3 incorporated the arbitration clause, this was not the case for Boats 4 to 6.

The High Court's decision

The High Court held that the arbitration clause contained in the Redhall's standard terms were incorporated and therefore dismissed the application for pre-action discovery.

Boats 1 to 3

- The judge considered the authorities and noted the different approach that English law takes to incorporation of arbitration clauses where the clause would bind (i) two parties who have previously contracted, (ii) one of the parties and a third party or (iii) two other parties .
    - In cases where the same two parties had previously contracted, general words of incorporation will suffice, there is no need to refer expressly to the arbitration clause.
    - Where the attempt is to incorporate the arbitration clause between one of the parties and a third party two other parties, express reference to the arbitration clause is required to incorporate the arbitration clause.
- In the present case, the judge decided notwithstanding that the purchase order sent to Barrier had no terms on its back, a reasonable person reading Clause 10 of the Sub-Contract would have no doubt that the Redhall's terms were incorporated and it was open to the Barrier to request a copy of the terms.
- However, incorporation of the arbitration clause in the Main Contract was more difficult. This was because Barrier was not a party to the Main Contract, and therefore clear words of incorporation are required. The High Court held that since significant modifications would be required and it was not easy to see how the arbitration clause in the Main Contract could be adapted without doing significant violence to the wording, the Sub-Contract wording was not sufficiently clear to incorporate the arbitration clause in the Main Contract.

Boats 4 to 6

- With respect to Boats 4 to 6, a further question arose as to whether there was any agreement in writing within the meaning of the Arbitration Act 1996.
- The High Court held that the contracts for Boats 4 and 5 were evidenced in writing in the minutes of meeting which incorporates the work for these two boats into the Sub-Contract.
- There was no written document that mentioned Boat 6. However, the judge found on the evidence that parties agreed work on Boat 6 would be carried out subject to the Sub-Contract. This would therefore be an agreement "by reference to terms which are in writing" within section 5(3) of the Arbitration Act 1996, and accordingly the contract in respect of Boat 6 also incorporated the arbitration clause in the Redhall's standard terms. Mr Justice Behrens noted that even if his view on incorporation of the arbitration clause was wrong, pre-action disclosure in respect of only Boat 6 would still be refused as a matter of discretion.

Comments

This case highlights the different approach that English Law takes to incorporation of an arbitration clause where two parties had previously contracted and where only one of the parties or none had contracted on the relevant terms before. In this particular case, this means the arbitration clause in the Redhall's standard terms was incorporated into the Sub-Contract even though there was no specific reference to it. In contrast, the general words of incorporation in the Sub-Contract (between Barrier and Redhall) were not sufficiently clear to incorporate the arbitration clause in the Main Contract (between the Redhall and a third party).

This shows English courts recognise course of dealing and will apply common sense when considering an ongoing commercial relationship. This is also evident in this court's approach to the requirement that the arbitration agreement should be in writing under the Arbitration Act 1996.

Nevertheless, it is important for parties to take note of any reference to standard terms and conditions in their contracts or purchase orders, and to request a copy of the terms if it has not been provided.

Adeline Chung, Singapore

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