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INTERNATIONAL ARBITRATION

Quarterly Review – June 2017

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Role of tribunal secretary in spotlight following application to remove arbitrators

P v Q and Others [2017] EWHC 148 (Comm) and [2017] EWHC 194 (Comm)

Summary

In two recent judgments, the Commercial Court rejected an application to remove two members of an arbitral tribunal under section 24(1)(d)(i) of the Arbitration Act 1996 (the **Act**) and a related disclosure application. At the centre of the complaint was an allegation of improper delegation to a tribunal secretary. Popplewell J made clear that best practice is to avoid involving a tribunal secretary in anything which could be characterised as expressing a view on the substance of that which the arbitral tribunal is called upon to decide.

Background

The Claimant (**P**) was a party to a dispute which was the subject of an LCIA arbitration being heard by a panel of three arbitrators. The Second and Third Defendants (the **Co-Arbitrators**) were party appointed arbitrators in the arbitration.

Popplewell J made clear that best practice is to avoid involving a tribunal secretary in anything which could be characterised as expressing a view on the substance of that which the arbitral tribunal is called upon to decide.

With the agreement of the parties, the Chairman of the arbitral tribunal appointed a tribunal secretary (the **Secretary**). In March 2016, the Chairman mistakenly sent an email which was intended for the Secretary to P's solicitors. The email read "*Your reaction to this latest from [Claimant]?*" P responded by requesting information on the tasks delegated by the tribunal to the Secretary and disclosure of communications between the Chairman, Co-Arbitrators and Secretary. The Chairman provided letters explaining the role of the Secretary but declined to disclose the documents requested.

P proceeded to apply to the LCIA Court to have all three arbitrators removed. The LCIA court revoked the Chairman's appointment on the ground that there were justifiable doubts as to his impartiality but dismissed the complaints made in relation to the Co-Arbitrators. P then applied to the High Court to have the Co-Arbitrators removed pursuant to section 24 of the Act.

Substantive Challenge

P sought to remove the Co-Arbitrators on the basis that they had failed to properly exercise their decision making functions thereby causing prejudice to P. P alleged, *inter alia*, that there had been an improper delegation of functions to the Secretary and that the Co-Arbitrators had failed to sufficiently participate in the arbitral proceedings and decision making process.

Popplewell J recognised that there are divergent views between practitioners and commentators as to best practice with respect to delegation to tribunal secretaries but noted that, for the purposes of section 24 of the Act, the use of a tribunal secretary must not be as a substitute for any member of the tribunal - taking account the rival submissions of the parties and bringing his own personal judgment to bear on the issue in question. The specifics of what is required in practice will depend on the nature of the decision and the circumstances of the case.

He went on to note that, while best practice is to avoid involving a tribunal secretary in anything which could be characterised as expressing a view on the substance of that which the arbitral

tribunal is called upon to decide, a failure to follow best practice is not synonymous with a failure to properly conduct proceedings within the meaning of section 24 of the Act**.** There is nothing improper about an arbitrator seeking or receiving the views of others (including the tribunal secretary) provided that he makes an independent judgment on the matter in question. Similarly the use of a tribunal secretary to analyse submissions and draft procedural orders does not constitute an improper delegation of decision making functions absent contrary agreement by the parties. On the facts of this case, the parties had agreed to the appointment of the Secretary and did not seek to place any constraints upon the tasks and functions he could perform to assist the tribunal.

The judgment also clarified that co-arbitrators do not each have a non-delegable duty to supervise a tribunal secretary. It is entirely proper for a tribunal secretary to work under the direct supervision of the chairman and co-arbitrators can proceed on the basis that the tribunal secretary will be tasked appropriately in the absence of something to alert them to the contrary.

Popplewell J also concluded that, in the context of a procedural decision, it was entirely reasonable for the Co-Arbitrators to leave it to the Chairman to prepare a draft decision, consider the draft and approve it or discuss revisions as appropriate. Such an approach was said to ensure that the decision reflected the views of all members of the tribunal without incurring unnecessary delay or expense in relation to procedural matters and to be in keeping with the way that arbitral tribunals function. Further, Popplewell J reasoned that since the LCIA rules entitled the Co-Arbitrators to delegate the authority to make procedural rulings to the Chairman alone, the parties had, by agreeing to submit their disputes to arbitration in accordance with the LCIA rules, agreed that the Chairman may take the lead in proposing a draft decision for the Co-Arbitrators consideration. The judge, relying on his own experience of litigation and arbitration, concluded that the time spent on the relevant matters by the Co-Arbitrators indicated that they had exercised their decision making functions appropriately.

... even in cases where the Claimant can show that an arbitrator has failed to conduct proceedings properly, it must also demonstrate that this has resulted, or will result, in substantial injustice

Finally, the judgment makes clear that, even in cases where the Claimant can show that an arbitrator has failed to conduct proceedings properly, it must also demonstrate that this has resulted, or will result, in substantial injustice. A court will only conclude that substantial injustice has resulted where the conduct of the arbitrator goes beyond anything that could reasonably be defended such that it can be said that the arbitrator is frustrating the object of the arbitration. A professed loss of confidence resulting from a finding of improper delegation does not constitute substantial injustice absent some concrete or substantive prejudice.

An important factor influencing the conclusions reached appears to have been that the LCIA Division had already considered and dismissed substantively the same allegations. Popplewell J cited with approval the extract from the Departmental Advisory Committee Report of February 1996 which states "*…it would be a very rare case indeed where the Court will remove an arbitrator notwithstanding that [an arbitral process] has reached a different conclusion*."

English Court's appetite to order disclosure in support of relief sought in an arbitration claim

P v Q and Others [2017] EWHC 148 (Comm) and [2017] EWHC 194 (Comm)

In support of P's application to remove two members of an arbitral tribunal (as described and commented on above), P sought disclosure of "instructions, requests, queries or comments from the Co-Arbitrators (or from [the Chairman] to which the Co-Arbitrators were copied) to the Secretary" and the Secretary's responses to such emails. P also sought disclosure of "All communications sent or received by the Co-Arbitrators which relate either: to the role of the Secretary; or to the tasks delegated to the Secretary."

Popplewell J set out the principles applicable to disclosure applications in support of relief sought in an arbitration claim:

- first, the claimant must show that the arbitration claim has a real prospect of success;
- second, the documents sought must be strictly necessary for the fair disposal of the arbitration claim; and
- third, in exercising its discretion the Court will have regard to the overriding objective and all of the circumstances of the case.

The judgment makes clear that, in exercising its discretion, the Court will pay particular regard to the fact that disclosure is not normally ordered:

- in relation to arbitration claims generally (on the basis that the Act envisages that arbitrations should proceed efficiently with minimum court intervention);
- where an arbitral institution with the power to order disclosure has declined to do so; and
- where the parties have expressly or impliedly agreed with each other and/or the tribunal that the documents in question should remain confidential.

..arbitrators would only be ordered to give disclosure of documents in cases where there are "compelling reasons" and "exceptional circumstances" justifying such an approach

The judgment also made clear that arbitrators would only be ordered to give disclosure of documents in cases where there are "*compelling reasons*" and "*exceptional circumstances*" justifying such an approach. Popplewell J rejected P's argument that a distinction should be drawn between documents which revealed the process of decision making and those which went to the substance of the decision-making. He concluded that all documents brought into existence for the purpose of the process of decision making, including for example, communications regarding when submissions will be addressed or who was to play what part in the process, form part of the deliberation process and should be protected from sight of the parties.

Samantha Hawley, London

On the facts, Popplewell J found that the documents sought were not strictly necessary for a fair determination of the application and that there were no compelling reasons to grant disclosure. It is clear from this judgement that it will only be in the rarest of cases that arbitrators will be required to give disclosure of documents in connection with applications regarding the conduct of an arbitral tribunal.

Landmark Development – Implications for Arbitration following Chinese PRC Court recognition of a Foreign Judgment based on Principle of Reciprocity for the First Time

Introduction

PRC Courts have long been criticized for their refusal to recognize and enforce foreign judgments based on the principle of "reciprocity". Unless a treaty applied, it was almost impossible to enforce a foreign judgment via the PRC courts. In December last year, for the first time in recent history, the PRC Court (Nanjing Intermediate People's Court in China) recognised and enforced a foreign judgment that had been rendered by the Singapore High Court based on the principle of "reciprocity" (the **Nanjing IPC Decision**). Prior to this reported decision, there was no statutory or judicial interpretation on what the principle of "reciprocity" involves and when exactly it is to be applied.

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Legal Requirements for Enforcement of Foreign Judgments under PRC law

As a matter of PRC law, there are only a few restricted bases on which the PRC courts will enforce judgments issued by foreign courts in civil and commercial cases.

- Firstly, the foreign court judgment must be "legally effective". That means the decision must be final and binding, and not subject to appeal in the jurisdiction where it was issued.

- Secondly, the enforcement of the foreign court judgment must not contradict the basic principles of the laws of the PRC nor violate "the national, social, and public interest of China".

- Thirdly, and most controversially, unless a treaty applies, "reciprocity" is the only other basis for the recognition and enforcement of a foreign court judgment. It has been commonly understood that the standard is generally considered to require proof that the foreign courts are willing to enforce a judgment issued by a PRC court, and some even suggested that there should be proof that the foreign courts have actually recognized and enforced PRC judgments.

... very positive development especially for parties doing business in the PRC.

The Nanjing IPC Decision

The underlying case involves a dispute between a Swiss company and a Nanjing based company over a sales agreement. The parties entered into a settlement agreement which provided that all subsequent disputes will be submitted to the Singapore High Court. The Nanjing company did not comply with the Settlement Agreement and the Swiss company commenced proceedings in the Singapore High Court which issued a judgment against the Nanjing Company. The Swiss company then applied to the PRC Court for recognition and enforcement of the Singapore Judgment.

The PRC Court ordered that the legal requirements for the PRC Courts to recognize and enforce a foreign judgment have all been satisfied. In particular, the PRC Court noted that the Singapore Court had previously enforced a court judgment issued by the Jiangsu Suzhou Intermediate Court (***Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd*** [2014] SGHC 16).

Secy Cheung, Hong Kong

Commentary

The Nanjing IPC Decision is a very positive development especially for parties doing business in the PRC. However it remains uncertain as to whether other PRC Courts will strictly follow the same approach and ruling of the Nanjing IPC Decision. As the enforcement of arbitral awards under the New York Convention (which has been ratified by more than 135 countries including the PRC) is much easier and provides more certainty, it is very likely that arbitration will remain the preferred option for many.

Supreme Court refuses to order award debtor to put up security pending resolution of challenge under section 103(2) and (3) of the Arbitration Act 1996

IPCO Ltd v Nigeria National Petroleum Corp [2017] UKSC 16

In the latest episode in a lengthy enforcement dispute, the Supreme Court found that it has no power to compel an award debtor to put up security when resisting enforcement under section 103(2) or (3) of the Arbitration Act 1996 (the **Act**). By contrast, when enforcement proceedings have been adjourned pending the outcome of set aside proceedings in the courts of the seat of arbitration, under section 103(5) of the Act the court has the express power to order a party to put up security.

Background

In 2004, a Nigeria-seated arbitral tribunal issued an award in favour of IPCO against the Nigerian National Petroleum Corporation (**NNPC**). The award was for approximately USD 152m plus interest. NNPC challenged the award before the Nigerian courts - first on jurisdictional grounds and later, on discovering new evidence, on grounds of fraud. These proceedings were subjected to extensive delays and remain ongoing. In 2009, the parties agreed to adjourn enforcement proceedings before the English courts pending the outcome of set aside proceedings in Nigeria on grounds of fraud, in accordance with section 103(5) of the Act. In support of this, NNPC provided security of approximately USD 80m.

In 2012, IPCO sought to renew its application for enforcement in England and to set aside the parties' agreement as to adjourn the English enforcement proceedings. The Court of Appeal,

finding *inter alia* that NNPC had a good prima facie case that the award was procured by fraud, refused either immediately to enforce the award or to continue the adjournment indefinitely pending the outcome of the Nigerian proceedings. Instead, it remitted the enforcement claim to the Commercial Court, for consideration of whether enforcement would be contrary to English public policy, under section 103(3) of the Act. In doing so the Court of Appeal imposed the condition that NNPC provide further security of USD 100m. NNPC appealed to the Supreme Court against the requirement that it provide further security before the fraud allegation could be determined.

The issue before the Supreme Court

The parties agreed that the allegations underlying the Nigerian challenge should be subject to determination in enforcement proceedings before the English courts. The only issue before the Supreme Court was whether NNPC was required to post further security pending resolution of the English enforcement proceedings. The Supreme Court analysed this issue under two heads. First, it considered whether to order security was justified by reference to section 103(5) of the Act. Second, whether it was otherwise justified by reference to courts' general procedural powers under the Civil Procedure Rules (**CPR**).

The Supreme Court's decision

The Supreme Court concluded that, in contrast to section 103(5) of the Act, which specifically provides that security can be ordered where there was an adjournment within its terms, there is nothing in section 103(3) which provides that an enforcing court can make determination of an issue raised under that subsection conditional on provision of security.

Section 103 of the Act incorporates into English law certain obligations of the United Kingdom under the New York Convention. It reads, in relevant part, as follows:

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—

…

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

…

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

…

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award.

It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

The parties agreed that sections 103(2)(f) and 103(5) address the situation where an award subject to enforcement proceedings in England and Wales is under challenge before the courts of the seat of arbitration. The Supreme Court held that it was in this context only that the express power to order security under section 103(5) applies. In the present case, the English courts had lifted the adjournment of their decision on enforcement, and were determining the merits of a challenge on public policy grounds under section 103(3). The Supreme Court found that section 103(5) could not be used as a means to impose conditions on an award debtor who was resisting enforcement on properly arguable grounds, independently of proceedings before the courts of the seat of arbitration.

...an English court will only order the award debtor to provide security where it defers its decision on enforcement pending the resolution of a challenge in the courts of the seat of arbitration

The Supreme Court also found that its ordinary procedural powers under the CPR could not be used as a basis for ordering security pending the resolution of a challenge to enforcement under section 103 of the Act. It noted that Part III of the Act gives effect to provisions of the New York Convention which are intended to create a 'common international approach' among the signatory states. Thus, the CPR could not be interpreted as limiting parties' ability to exercise a properly arguable right under section 103.

Comment

The decision clarifies unambiguously that in respect of enforcement of New York Convention awards, an English court will only order the award debtor to provide security where it defers its decision on enforcement pending the resolution of a challenge in the courts of the seat of arbitration. It confirms that Part III of the Act should be interpreted as giving effect to the underlying intention of the New York Convention, which cannot be undermined by reference to domestic rules.

Ben Burnham, London

As the Supreme Court noted, this does not rule out the possibility that award creditors can secure their award indirectly by seeking remedies such as freezing or disclosure orders in pending resolution of a challenge to enforcement under section 103(2) or 103(3) of the Act. Award debtors, meanwhile, are well advised to give careful consideration, depending on their particular circumstances, as to whether (a) to oppose enforcement in the courts of the seat of arbitration, given their susceptibility to an order for security, or (b) oppose enforcement directly under section 103(2) or 103(3) of the Act.

Interim relief from an Emergency Arbitrator not available under the ICC Rules in context of a dispute arising out of a FIDIC contract

Summary

A party to a construction contract was refused interim relief pursuant to the ICC's Emergency Arbitrator Provisions on the grounds that, in incorporating the FIDIC "Pink Book" Conditions of Contract into their contract and thereby agreeing to a pre arbitral dispute board procedure, the parties had "*agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures*"

The Emergency Arbitrator refused the application on the basis that Article 29(6)(c) of the ICC Rules applied.

Background

A dispute arose in relation to a construction contract between parties A and B which incorporated the FIDIC 2010 MBD Harmonised Edition of the Conditions of Contract for Construction (frequently referred to as the "Pink Book" (the **GCC**)). In summary, the dispute related to what amounts were due to each party in connection with the contract. In accordance with the GCC, before arbitration proceedings could be commenced the dispute had to be referred to a Dispute Board and certain procedural steps followed.

Prior to the relevant procedural steps being completed to entitle party A to commence arbitration proceedings, party A sought (and obtained) interim relief from the English High Court to restrain a wrongful call by party B on certain performance securities pursuant to section 44(5) of the Arbitration Act 1996 on the basis that an arbitral tribunal was "*unable for the time being to act effectively*". The performance securities were a type of on demand bond that are commonly used in construction contracts and that party A had been required to obtain for the benefit of party B pursuant to the construction contract.

Application for Emergency Arbitration Provisions

Once party A was entitled, pursuant to the dispute resolution clause in the GCC, to commence arbitration proceedings, an application was made to the ICC for an Emergency Arbitrator to be appointed and for interim relief restraining B from making demands on the performance securities pending the formation of the Arbitral Tribunal and their determination of this issue. This was on the basis that party A was concerned that the English High Court would decline to continue the injunction on the basis that arbitration proceedings had been commenced and section 44(5) no longer applied.

Application Refused

The Emergency Arbitrator refused the application on the basis that Article 29(6)(c) of the ICC Rules applied. Article 29 (6)(c) provides that:

"*the Emergency Arbitrator Provisions shall not apply if:*

[…]

(c) The parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures."

The Emergency Arbitrator decided this on the basis that, pursuant to the agreement with the Dispute Board that the parties entered into (which incorporated the General Conditions of the Dispute Board contained in the Appendix to the GCC), the Dispute Board was required to "*comply with the annexed procedural rules*" and, critically, the 7th paragraph of the Procedural Rules defines the powers of the Dispute Board to include:

"The Employer and the Contractor empower the [Dispute Board], among other things, to:

[…]

(g) decide upon any provisional relief such as interim or conservatory measures"

Party A had argued that the dispute board procedure agreed by the parties in their FIDIC documentation is not a procedure that is equivalent to the one available under the ICC Emergency Arbitrator Provisions. In support of this argument party A had highlighted that while the dispute board procedure allows for an 84 day period for the dispute board to render a decision, the ICC Emergency Arbitrator Provisions provide for a 15 day time period. The Emergency Arbitrator said they had not been persuaded by this argument as the 84 day period constituted a "maximum" time period and they thought that it was open to the parties to seek to agree a shorter time frame for the Dispute Board to decide on provisional relief. The Emergency Arbitrator also rejected party A's argument that the Dispute Board only had the power to 'decide' on matters in dispute and had no power to grant or order a remedy in the way an Emergency Arbitrator can.

Comment

This decision is relevant to parties who are entering into or who have already entered into contracts that incorporate this or similar FIDIC documentation which provides for a pre-arbitral procedure and/or for the use of a dispute board that can issue interim measures. These parties are unlikely to be able to obtain interim relief from an Emergency Arbitrator prior to the formation of the arbitral tribunal.

Party A had argued that the dispute board procedure agreed by the parties in their FIDIC documentation is not a procedure that is equivalent to the one available under the ICC Emergency Arbitrator Provisions.

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