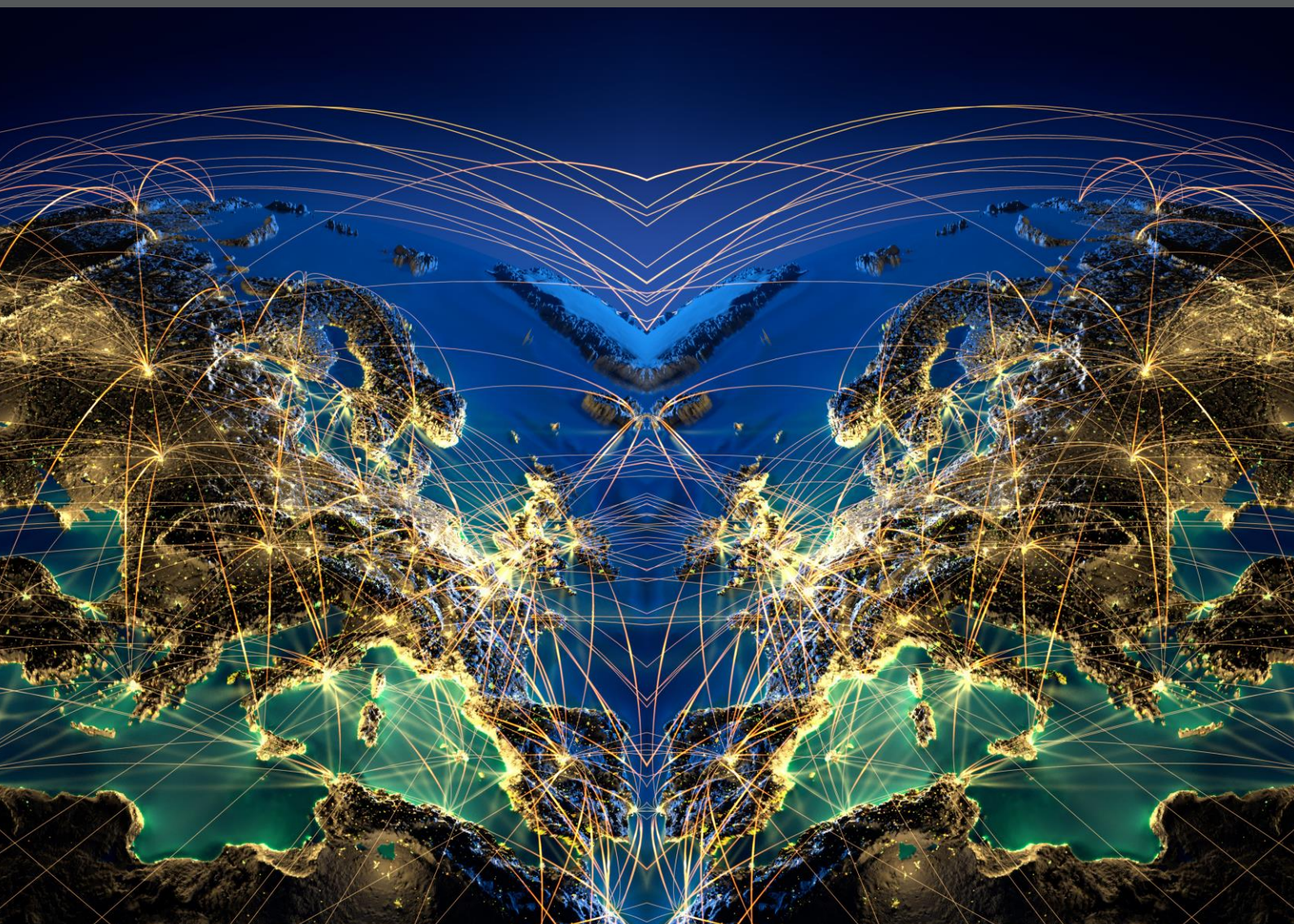
ADDLESHAW GODDARD

INTERNATIONAL ARBITRATION

Quarterly Review – October 2016



In this Issue...

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

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Third Party Funding – A New Era?

Summary

In a landmark decision, the English High Court has upheld the decision of the arbitrator in an ICC arbitration to allow the recovery of the costs of third party funding in addition to the award of legal costs and damages, finding that the arbitrator's general powers extended to include the power to award third party funding costs.

Whilst not a new issue, and indeed an issue explored at length by commentators and a number of the arbitral institutions, this decision propels into the spotlight the question increasingly being asked of arbitrators in often private and confidential proceedings, to award the cost of funding as well as the legal costs themselves.

As discussed below, it is a decision that may embolden arbitrators faced with similar circumstances and similar arbitration agreements/rules. It will certainly encourage more parties to reach for the support of a funder when the cost of arbitration proceedings is overwhelming. It may also encourage parties to use funding for reasons other than necessity – such as where a party does not want the cost or risk of the proceedings on its balance sheet, or where a party wants to use the adverse cost risk as a tactical ploy (in a similar way to the manner in which Conditional Fee Arrangements were often used prior to Lord Justice Jackson's reforms).

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The judgment is good news therefore for funders and those with claims to pursue, but insufficient funds. On the flip side, the judgment is potentially extremely painful for the losing party. This leads us to question, does the decision open up the floodgates for recovery of third party funding costs in arbitration in a manner akin to the position of claimants in the English courts with condition fee agreements and ATE policies prior to 1 April 2013? Probably not, or at least not yet.

Background

Following a dispute relating to an offshore drilling platform, an ICC arbitration was commenced by Norscot Rig Management PVT Limited (**Norscot**) against Essar Oilfields Services Limited (**Essar**). In order to advance with the proceedings, Norscot entered into a third party funding arrangement consisting of an advance of approximately £650,000. The terms of the arrangement provided that, if successful, Norscot had to pay to the funder either 300% of the sum advanced or 35% of the damages received – whichever was greater.

When Norscot succeeded in the arbitration, it sought its costs from Essar including the costs of the third party funding. The arbitrator made an award ordering Essar to pay costs on an indemnity basis, including £1.94 million which Norscot had paid to its third party funder - Woodsford Litigation Funding - who had advanced a sum of around £647,000 to Norscot for the purpose of the arbitration.

The arbitrator was critical of Essar's conduct and concluded that Essar had deliberately put Norscot in a position where it did not have the resources to fund the arbitration and it was therefore reasonable for it to seek third party funding.

Essar proceeded to challenge the Award in the English High Court on the ground of serious irregularity under section 68(2)(b) of the Arbitration Act 1996 (the **Arbitration Act**), arguing that the arbitrator had exceeded his powers by extending the definition of "other costs" within section 59(1)(c) of the Arbitration Act to include third party litigation funding.

Judgment

The English High Court dismissed the appeal and upheld the arbitrator's ruling. The full transcript of the judgment can be found here. However, there are two key points to note:

- First, at the outset of his judgment, His Honour Judge Waksman QC, makes an important point of context by highlighting the limited scope of section 68 of the Arbitration Act quoting paragraph 280 of the DAC Report which said:

  "Section 68 is really designed as a longstop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected"

  In other words, the English Courts will only interfere with the decision of an arbitrator in very exceptional circumstances. The judgment goes on to conclude that there was no serious irregularity within the meaning of s.68(2)(b) of the Arbitration Act, and so even if the arbitrator had been wrong in his construction of "other costs" the appeal would have failed. This reinforces, yet again, the reluctance of the English courts to interfere with arbitral awards – an important reminder for parties considering the most appropriate seat in their arbitration agreements.

- Secondly, the judgment concludes that, in any event, the arbitrator was entitled to interpret "other costs" so as to include the costs of third party funding. There was therefore no error of law anyway. In reaching this conclusion His Honour Judge Waksman QC explored a number of issues that will be of interest to parties considering third party funding:

  - The approach taken by the English courts under the Civil Procedural Rules (where third party funding is not recoverable) as to what can and cannot be awarded by way of costs is of little direct relevance. The relevant context is the Arbitration Act itself and the scope of procedural powers conferred upon the arbitrator by the agreement between the parties.

  - The analysis of the arbitrator's power to award costs starts with the scope of the powers conferred upon the arbitrator by the agreement between the parties because section 63 of the Arbitration Act provides that *"[t]he parties are free to agree what costs of the arbitration are recoverable*". In this case the parties had agreed to arbitrate by reference to the ICC Rules (the 1998 version) and Article 31(1) of those rules states;

    "The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration"

  - The judgment explores the meaning of "costs of the arbitration" as defined by section 59 of the Arbitration Act and also used in Article 31(1) of the ICC Rules (1998 version). It concludes that the wording "other costs" – also used in both the Arbitration Act and ICC Rules - should to be "regarded in a broad sense" and can be construed as including third party funding. The right test to apply when assessing what should be classed as "other costs" is a "functional" one and the costs incurred in bringing or defending the claim should be considered.

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- The ICC Commission Report of 2015 - “Decisions on Costs in International Arbitration” - was "relevant" and "highly pertinent" and supported "the functional view" used to construe the meaning of "other costs". Whilst "not determinative" it does demonstrate the important role played by the large volume of commentary that surrounds this issue.

Further Observations

As explained above, seeking to recover the costs of third party funding in arbitration proceedings is not a new concept. However, arbitration proceedings are often concluded behind closed doors and shrouded in confidentiality and therefore it is difficult to conduct any proper analysis of the circumstances in which funding costs have been sought and awarded and the reasons for doing so.

This decision propels the confidential findings of the arbitrator in the Norscot proceedings into the public eye and will no doubt heighten interest in third party funding and alternative funding options for arbitration, particularly as the decision is contrary to the position on third party funding in litigation in the English Courts.

Third party funding is not a cheap option for progressing litigation or arbitration proceedings. In fact, as the Norscot decision highlights, the cost can often be high – in this case a 300% plus return for funders, which was accepted by the judge, on hearing expert evidence from a well known broker, to be a market rate (although for the right case, funding costs can be much lower). If funding costs are not recoverable, the issue facing many parties looking for funding is one of simple economics. Is the claim of sufficient value and the legal costs low enough to make funding a realistic commercial option? The answer is often no and even if the claim is of sufficient value, the prospect of giving away a substantial proportion of the award can be, at the very least, unpalatable. The upshot of this is that historically, third party funding has only been used by those who genuinely do not have the funds to progress the claim and/or with a strong enough case to negotiate better terms with funders.

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The decision of the English High Court in Norscot may well be a game changer – if there is a reasonable prospect of recovering the third party funding cost, then these historical concerns and the economics of funding arrangements are less problematic.

However, before potential claimants rush to obtain third party funding, a few words of caution.

First, the conclusion reached by the English High Court that the arbitrator **had the power** to award third party funding costs, was based on the specific wording of the Arbitration Act and the ICC Rules. Whilst many of the main arbitral institutional rules contain similar wording around "costs" (see comparison below), an arbitrator will only have the power to award funding costs if a) the arbitration agreement between the parties confers power to do so; and b) the law of the seat of the arbitration permits it.

Secondly, the decision is limited to the question of whether the arbitrator in the Norscot proceedings had the power to award third party funding costs. It does not address all the circumstances in which it will be appropriate for an arbitrator to award the costs of third party funding. For example:

- Essar's conduct in relation to the agreement and during the course of proceedings was criticised by the arbitrator. Is bad conduct a prerequisite to recovery?
- The arbitrator found that Essar had deliberately forced Norscot to seek third party funding; does the decision also apply to those parties who voluntarily choose a third party funding option?
- Would the decision extend to third party funding options which were not, as in this case, based on standard market rates?

A comparison of the cost provision in the main institutional rules (latest rules)

As the comparison below highlights, the majority of the arbitration institutions' rules, except for DIAC and HKIAC, provide that an arbitrator may award "other costs". Notably, under the DIAC rules, in the absence of any agreement by the parties or provision in the local arbitration law, the tribunal has no power to allow the recovery of legal fees at all. Under the HKIAC rules the provisions on costs extend to "legal representation and assistance". It may therefore be that "assistance" could be interpreted in the same way as "other costs".

The comparison below does not consider the law of the seat of the arbitration which will also need to be considered in an assessment of the likelihood of the recoverability of third party funding in any particular arbitration. However it is worth noting that:

- Whilst not yet widely used in the UAE, litigation funding is not contrary to UAE law. As a matter of practice, DIAC tribunals will typically record in the minutes of the preliminary meeting (or a separate Arbitration Deed or Terms of Reference) the agreement of the parties as to the issues which will be addressed in the arbitration. The Arbitration Deed will often vest the tribunal with the authority to include in its final award the issue of legal costs, which it will do taking into account the relative success and failures in each parties' case and the reasonableness of the fees claimed.

- Third Party Funding is not currently permitted under Singapore law. However, this is expected to change soon. Singapore's Ministry of Law published draft legislation (Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016) to put in place a framework for third party funding for international arbitration proceedings. The draft legislation was open for public consultation from 30 June to 29 July 2016. It is anticipated that the proposed legislative amendments will be passed by the Singapore Parliament in the near future.

- It has remained unclear as to whether or not the doctrines of champerty and maintenance also apply to third party funding for arbitrations taking place in Hong Kong. In 2013, the Chief Justice and the Secretary for Justice asked the Law Reform Commission of Hong Kong to review this subject. On 19th October 2015, the Law Reform Commission (the "Commission") released a consultation paper recommending that third party funding be permitted for arbitrations in Hong Kong (the "Consultation Paper"). The Law Commission's final report was published on 14 October 2016 and it recommends that the law should be amended to clarify that the common law principles of maintenance and champerty do not apply to arbitration and associated proceedings under the Hong Kong Arbitration ordinance, with appropriate safeguards in place.

RULES	ARTICLE NO.	PROVISION
International Chamber of Commerce (ICC) Note – this is based on the current version of the ICC Rules, the Norscot decision was made by reference to the 1998 version of the rules, although the provision on costs is identical.	37.1	The costs of the arbitration shall include: ► the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court; ► the fees and expenses of any experts appointed by the arbitral tribunal; and ► the reasonable legal and **other costs** incurred by the parties for the arbitration.

RULES	ARTICLE NO.	PROVISION
The London Court of International Arbitration (LCIA)	28.3	The arbitral tribunal has the power to decide by an award that all or part of the legal or **other expenses** incurred by a party be paid by another party. The arbitral tribunal shall decide the amount of such legal costs on such reasonable basis as it thinks appropriate.
The London Court of International Arbitration - Mauritius International Arbitration Centre (MIAC)	28.3	The arbitral tribunal has the power to order in its award all or part of the legal or **other costs** incurred by a party, unless the parties agree otherwise in writing. The arbitral tribunal is able to determine and fix the amount of each item comprising such costs on such reasonable basis as it thinks fit.
Dubai International Arbitration Centre (DIAC)	2.1 of Appendix – Cost of Arbitration	The costs of the arbitration shall include: ► the Centre's administrative Fees for the claim and any counterclaim; ► the fees and expenses of the tribunal fixed by the Centre in accordance with the Table of Fees and Costs in force at the time of the commencement of the arbitration; ► any expenses incurred by the tribunal; and ► fees and expenses of any experts appointed by the tribunal.
Hong Kong International Arbitration Centre (HKIAC) - Institutional Arbitration Rules	33.1	The arbitral tribunal can determine the costs of the arbitration in its award. The term “costs of the arbitration” includes only: ► the fees of the arbitral tribunal, as determined in accordance with Article 10; ► the reasonable travel and other expenses incurred by the arbitral tribunal; ► the reasonable costs of expert advice and of other assistance required by the arbitral tribunal; ► the reasonable travel and other expenses of witnesses and experts; ► the reasonable costs for legal representation and assistance if such costs were claimed during the arbitration; ► the registration fee and administrative fees payable to HKIAC in accordance with Schedule 1.

RULES	ARTICLE NO.	PROVISION
American Arbitration Association (AAA) – International Dispute Resolution Procedures	34	The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case. Such costs may include: ► the fees and expenses of the arbitrators; ► the costs of assistance required by the tribunal, including its experts; ► the fees and expenses of the Administrator; ► the reasonable legal and **other costs** incurred by the parties; ► any costs incurred in connection with a notice for interim or emergency relief ► pursuant to Articles 6 or 24; ► any costs incurred in connection with a request for consolidation pursuant to Article 8; and ► any costs associated with information exchange pursuant to Article 21.
Singapore International Arbitration Centre (SIAC)	37	The tribunal has the authority to order in its award all or part of the legal or **other costs** of a party to be paid by another party.

Addleshaw Goddard – funding

Over the years, we have formed strong relationships with the leading brokers, insurers and funders, gaining a wealth of experience of how different options work in practice. Even if external funding is not appropriate for a case, ATE insurance may still be helpful, or we may be able to offer a range of other fee options, including conditional fees, fee caps, blended rates and fixed fee arrangements, all with the aim of ensuring our clients have greater cost control and certainty.

Nick Ashcroft, London

We believe our approach to dispute funding sets us apart from other commercial litigation firms, and we are determined to remain at the forefront in this area. We provide an integrated solution, including conditional fee agreements, after-the-event insurance and third party funding to provide clients with greater certainty over the potential financial outcomes. Damages based agreements (DBAs) may also have a place in certain types of disputes.

For more information please visit our website.

English Court grants retroactive extension of time to correct Award

Under Article 72 of the London Court of International Arbitration (**LCIA**) Rules 1998, arbitral awards can be corrected if the correction is notified to the tribunal by the parties within 30 days of receipt of the award. In *Xstrata Coal Queensland Pty Ltd and others v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd* [2016 EWHC 2022 (comm), the English High Court has used its powers under section 79 of the English Arbitration Act 1996 (**Arbitration Act**) to extend the time limit by a number of years to allow the tribunal to reconsider and amend its award.

This decision shows that the English High Court takes a pragmatic approach to such matters and is keen to promote a policy which, in the words of the judge, "*is designed to hold the parties to their agreement if they have agreed to arbitrate, and then of assisting the process of arbitration*".

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Background

The Defendant in the arbitration contracted to buy significant quantities of coking coal from four Sellers (**Contract**). The Sellers of that coking coal were either:

- The four named Claimants (1) Sumisho Coal Australia Pty Limited (2) Xstrata Coal Queensland Pty Limited (3) Itochu Coal Resources Australia Pty Limited and (4) ICRA OC Pty Ltd (**Claimants**); or
- The first three above named Claimants and another company ICRA NCA Pty Ltd (**ICRA NCA**) in place of the similarly named, but different, fourth claimant ICRA OC Pty Ltd (**ICRA OC**).

The confusion regarding the identity of the fourth Seller was as a result of the description of the Sellers in the Contract. The relevant clause stated that the Sellers were the "Oaky Creek Joint Venturers" and named Claimants 1-3 above, but then named ICRA NCA, rather than ICRA OC. The relevant joint venture agreement had been entered into between the four named Claimants, and they had therefore brought the action in the arbitration. The Claimants were successful in the arbitration and received an award against the Defendant in the sum of US$27,846,000 (**Award**).

The Claimants subsequently applied for recognition and enforcement of the Award against the Defendant in the People's Republic of China, where the Defendant was incorporated and conducted business. In the enforcement proceedings, the Defendant was successful in arguing that recognition and enforcement should be refused on the grounds that the Contract named the Sellers as including ICRA NCA, which was not a Claimant in the arbitration, and not ICRA OC Pty Ltd. The Shenyang Intermediate People's Court refused recognition and enforcement on the ground that ICRA OC was not a party to the Contract, including the arbitration agreement.

The Award did not directly address the issue of the naming of ICRA NCA, as opposed to the fourth Claimant ICRA OC in the Contract. As such it was unclear how the Tribunal had reached a decision to make the Award in favour of ICRA OC, if at all.

The Law

Correction of Awards under Article 27 of the LCIA Rules 1998

Under Article 27.1 of the LCIA Rules 1998, a party can within 30 days of receipt of any award request the arbitral tribunal to:

"*correct in the award any errors in computation, clerical or typographical errors or any errors of a similar nature*".

Under Article 27.3 a party can within 30 days of receipt of any award request the arbitral tribunal to:

"*make an additional award as to claims or counterclaims presented in the arbitration but not determined in any award".*

By the time that the application for recognition and enforcement of the Award had run its course, a number of years had passed. The Claimant approached the Tribunal to amend the Award or make an additional award under articles 27.1 and 27.3 of the LCIA rules respectively, but the LCIA confirmed that in the absence of agreement of the parties, the Tribunal was *functus officio,* that is, that it had concluded the arbitration and could not therefore hear the new application.

Application under section 79 of the English Arbitration Act 1996

Section 79(1) of the Arbitration Act provides that "*the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings"*. Section 79(3) Arbitration Act goes on to provide that a Court will not exercise this power unless it is satisfied that a substantial injustice would otherwise be done. Section 79(4) Arbitration Act confirms that such an extension can be made by the Court after the time limit has already expired.

The Decision

The Court considered the powers of the Tribunal to correct their award by analogy to the provisions of section 57(3)(a) Arbitration Act which, although not directly applicable in this case as article 27 of the LCIA Rules applied, permits an arbitral tribunal to "*correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award"*. In the Judge's reasoning, the clarification or removal of ambiguity from an award referred to in section 57(3)(a) could be said to fall within the meaning of the words "*any errors of a similar nature"* in article 27.1 of the LCIA Rules.

When applying these provisions to the facts, the judge considered that the failure of the Award to address the discrepancy between the wording of the Contract and the true identity of the "Oaky Creek Joint Venturers" was an omission from the reasons in the Award which led to ambiguity and uncertainty about the Award. In particular, it was unclear as to whether the Tribunal had determined whether there was a direct contractual relationship between all of the Claimants, including ICRA OC. That uncertainty had led to the decision in the People's Republic of China not to allow recognition and enforcement. The Judge therefore determined that there would be substantial injustice if the Tribunal were not to review the Award, that justice required that the uncertainty be resolved, one way or another, and that it was a just and reasonable approach in the case.

Comments

The decision shows that the English High Court is willing to interpret arbitral rules and the Arbitration Act in a practical manner so as to support the arbitration process. This gives certainty to parties that their decision to refer a dispute to arbitration will be enforced and facilitated by the English Courts where necessary. This is a pragmatic decision which ensures that an arbitration award can be revisited, if necessary, provided that there is a genuine mistake or omission in the award which ought to be addressed further by the tribunal.

The English Court also noted that in the vast majority of cases, the time limit for submission of corrections to the tribunal under article 27 of the LCIA Rules will have elapsed where a party has waited until after enforcement steps have been taken under the New York Convention. Whilst the Court was willing to extend time significantly in this case, parties should still seek to make any requests for corrections or further reasons as soon as possible, in order to maximise the chances of obtaining such an order to extend time.

Ryan Geldart, Leeds

Submitting to a foreign jurisdiction - the "Golden" rules

The Commercial Court in *Golden Endurance Shipping SA v RMA Watanya SA and others [2016]* had to consider whether the Claimant was estopped from having its case heard before an English Court because it had submitted to the jurisdiction of the Moroccan Courts. The case is a useful reminder of the rules that apply when considering jurisdiction issues outside the Brussels Regulation regime, something which may well become more common for English practitioners in the future.

Background

The claimant Golden Endurance Shipping SA (**GES**) was the owner of a cargo ship carrying wheat bran pellets from three ports in Africa to Morocco. Upon arrival in Casablanca, the cargo was found to have been damaged by insects and mould. The defendants were the cargo receiver and their insurers (**Insurers**) (together the **Defendants**).

The case is a useful reminder of the rules that apply when considering jurisdiction issues outside the Brussels Regulation regime...

The cargo was subject to three separate bills of lading, which were issued at each port, however all were governed by English law and incorporated the **Hague Rules** (the International Convention for the Unification of Certain Rules Relating to Bills of Lading 1924). Conversely, Moroccan law expressly applies the **Hamburg Rules** (the United Nations Convention on the Carriage of Goods by Sea 1978) to cargo claims, which are regarded as less favourable to ship owners.

The Insurers brought proceedings before the Moroccan Courts in March 2014 (the **Moroccan Proceedings**). As part of the Moroccan Proceedings, GES raised a number of defences and filed a Rebuttal Memorandum asserting that all three bills of lading contained arbitration clauses. In July 2014, GES commenced proceedings in the English Commercial Court seeking, *inter alia*, an anti-suit injunction and a declaration of non-liability (the **English Proceedings**), and in October started arbitration proceedings in London (the **Arbitration**). Judgment in the Moroccan Proceedings was announced in early 2015, awarding damages to the Insurers and an appeal by GES was rejected.

GES applied for summary judgment as part of the English Proceedings. The Defendants sought to have the Moroccan judgment recognised by the English Proceedings and pleaded that GES had voluntarily submitted to the jurisdiction of the Moroccan Courts by appearing in the Moroccan Proceedings.

Decision

The key issue the English Court had to determine was whether GES had submitted to the Moroccan jurisdiction and therefore whether GES was estopped from pursuing the English Proceedings.

The Court reiterated the common law principle that once a party has voluntarily submitted to a jurisdiction by appearing before it, it cannot then dispute its jurisdiction. It also considered s.33(1)(b) of the Civil Jurisdiction and Judgments Act 1982 (**CJJA**), which provides an exception to this if the person against whom judgment had been entered had only appeared before the foreign court to either;

- contest jurisdiction; or
- ask the court to dismiss or stay proceedings in favour of arbitration or the courts of another country.

The English Court considered expert evidence on Moroccan law and process, and found that GES had consistently appeared before the Moroccan Courts to request that the claim be dismissed in favour of the Arbitration. It was held that GES had "*no choice but to defend the merits of the case at the same time*" and therefore came within the exception in s. 33(1)(b) CJJA.

The Court also rejected the Defendants' argument that it was an abuse of process to allow GES to rely on its case in the Moroccan Proceedings because it was inconsistent with its stance in the English Proceedings. GES had pleaded that two of the bills of lading contained an arbitration clause in the Moroccan Proceedings but not in the English Proceedings, although

GES had not positively pleaded that the bills contained no arbitration clause either. The Court said that this was not an example of a party taking diametrically opposite views even though there was a "*degree of tension*" between GES' position in the English and Moroccan Proceedings. It realistically pointed out that this was the type of situation that would happen where several parallel proceedings were pursued.

Hence, the English Court would not recognise the Judgment in the Moroccan Proceedings and therefore it could consider the Claimant's case.

Comment

Although this case is particular to its facts, it highlights the practical approach that the English Courts take when deciding if a party has submitted to a jurisdiction. The Court rejected the suggestion by the Defendants that it could "*exercise its discretion as between a range of permissible answers*". A party has either submitted to jurisdiction, or it has not and it is "*a question of mixed law and fact*" but there is no discretion once this is established.

This case is of particular significance in the context of potential uncertainties surrounding Brexit. Currently all jurisdictional disputes as between the UK and other EU Member States are governed by the Brussels Regulation Recast. However, in the long term Brexit may mean a return to common law principles to determine jurisdiction issues within the EU.

Layla Sousou, London

For more legal news and general updates relating to Brexit, please visit our Brexit Box.

Hong Kong Update

Hong Kong CA refuses to set aside ICC Final Award

Background

In the Judgment in *Tronic FaInternational Pte Ltd v Topco Scientific Co Ltd and Others*, CACV 235/2013, the Hong Kong Court of Appeal dismissed an appeal by Tronic FaInternational Pte Ltd (**TF**) to set aside a Final Award in an ICC arbitration.

The arbitration concerned disputes arising out of four agreements (two between TF and the 1st Defendant, and one each between TF and the 2nd and 3rd Defendants respectively (together, **Defendants**)). TF claimed that the Defendants had breached the agreements. The Defendants counterclaimed that TF had wrongfully terminated the agreements. TF's case was dismissed by the Tribunal and the Defendants' counterclaims were allowed.

TF, relying on Articles 34(2)(a)(ii) and (iii) of the UNCITRAL Model Law, applied to have the Final Award set aside in the Hong Kong Court of First Instance.

Pursuant to Article 34(2)(a)(ii), an arbitral award may be set aside if the applicant can prove that:

"the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his case".

TF claimed that it was unable to present its case for a number of reasons, including the fact that the Tribunal had refused to stay the arbitration pending the outcome of criminal proceedings brought against employees of the Defendants in Taiwan.

Pursuant to Article 34(2)(iii), an arbitral award may also be set aside if the applicant can prove that:

"the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration

can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside".

TF contented that issues surrounding the Hong Kong Sale of Goods Ordinance (**Ordinance**) fell outside the scope of the arbitration because the Ordinance was not raised in the pleadings.

This application was rejected by the Court and TF appealed.

CA Decision

The CA upheld the decision of the lower Court and refused to grant an application to set aside the Final Award.

The CA held that the arbitral process was fair throughout. In relation to TF's argument that the Tribunal refused to stay the arbitration pending the outcome of the criminal proceedings, the Court held that it is an issue concerning the merits of the dispute, which was not the subject of the appeal. Therefore there was no infringement of Article 34(2)(a)(ii).

As regards the second ground for the application, the CA noted that Article 19 of the ICC Rules allows parties or even the Tribunal to raise new issues, provided the parties are given an opportunity to make submissions on that issue, which had happened here. Therefore there was no infringement of Article 34(2)(a)(iii).

Comments

This case is a good reminder of the principles that the Hong Kong Court will apply under the UNCITRAL Model Law for setting aside an arbitration award. Firstly, the Court will be concerned whether the arbitral process is fair, but it will not consider the merits of the dispute or the outcome of the dispute. Secondly, if parties are given the opportunity to make submissions on a particular issue, irrespective of whether or not the issue was envisaged, there is no violation of Article 34(2)(iii).

Hong Kong CA rejects anti-suit injunction due to delay

Background

In *Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Limited* [2016] HKEC 1150 the claimant vessel owner (**SP**), applied for an anti-suit injunction against the defendant bank (**BC**), to restrain the bank from continuing proceedings against it (**Mainland Proceedings**) commenced in the Qingdao Maritime Court (**QMC**) in breach of an arbitration clause. The lower Court dismissed the application and SP appealed to the Hong Kong Court of Appeal.

There was little dispute in relation to the facts. SP had not taken any substantive step or submitted to the jurisdiction of the QMC and it was trying to evade service. As a result, by the time the claim was successfully served on SP, the limitation period had already expired. SP challenged the jurisdiction of the QMC in the Mainland Proceedings. However, once that challenge was first rejected, SP waited for over a month to apply for an anti-suit injunction in the Hong Kong Court (although they had lodged an appeal which was ultimately unsuccessful).

SP sought the anti-suit injunction in the Court of Hong Kong pursuant to section 21L of the High Court Ordinance. This gives the Court discretion to order such an injunction if it finds it is "*just and convenient to do so*". The jurisdiction is therefore discretionary and is not exercised as a matter of course.

The Hong Kong Court considered all relevant factors, including:

- the contractual limitation period for bringing a claim in the agreed forum
- how far the foreign proceedings had gone; and

- the tactical motive behind the delay (SP had deliberately delayed its application to deprive BC of a remedy).

The Court of first instance dismissed SP's application and the CA upheld the dismissal on the grounds of delay and comity.

Secy Cheung, Hong Kong

Comments

This case is a good reminder that, notwithstanding the fact there is a contractually agreed forum to resolve a dispute, a party's right can be lost if it does not seek an anti-suit injunction promptly.

The circumstances of this case are unusual and therefore this decision should not be seen as evidence that the Hong Kong Courts are departing from their pro-arbitration stance. Each case will be decided on its own facts but the Court will not allow delay to affect the ruling by a foreign Court.

Africa Update

Angola accedes to the New York Convention

On 12 August 2016, by virtue of resolution number 38/2016, the Angolan National Assembly approved Angola's accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the **New York Convention**). It will become the 34th African country and the 157th overall signatory to the New York Convention once the ratification has taken effect.

Under Article XII(2) of the New York Convention, effective accession will occur 90 days after Angola formally notifies the United Nations of the ratification by depositing an instrument of ratification with the Secretary-General. It is as of yet unclear when Angola will kick-start this process.

Most readers will be familiar with the New York Convention, which is widely recognised as a fundamental instrument in international arbitration, and which developed as part of an international effort to increase certainty in arbitration. It does this by requiring the courts of signatory states to recognise and enforce arbitral awards made in other signatory states. It also limits the grounds upon which the domestic courts in a signatory country can refuse to recognise and enforce a foreign arbitral award.

In the few jurisdictions where the New York Convention does not apply, parties are only be able to enforce awards against assets via the domestic courts where individuals states have enacted laws which permit for the reciprocal enforcement of foreign judgments. Uncertainty and inconsistency remain a major barrier to enforcement in these jurisdictions.

The New York Convention in Angola

More than half the states across the African continent are party to The New York Convention. Angola follows the Democratic Republic of Congo, Burundi and Comoros, as African nations which have recently acceded to the New York Convention.

Over the last decade, Sub-Saharan Africa has been viewed as one of the fastest growing regions in the world; Angola, specifically, has made substantial economic and political progress. However, since 2014, growth has slowed. Angola's economy has been negatively impacted by falling commodity prices in relation to oil and gas, its main exports. Combined with other challenges such as diversifying its economy (beyond the oil industry) and developing its infrastructure, Angola would benefit significantly from international investment.

The signing of the New York Convention is likely to be a step towards promoting Angola as an attractive location for foreign investors. As a result of the certainty it affords to arbitration proceedings, the New York Convention is widely considered to be a driving force behind international investment. It provides reassurance to international investors that arbitration

awards can be enforced against assets in foreign countries, enhancing their sense of security in their investments there.

The New York Convention may be especially helpful to Angola given the sectors in which it trades. Whilst any investment is subject to risk and the potential of disputes, sectors which are affected by fluctuating commodity prices, such as oil and gas, generally face a higher risk in this respect. By acceding to the New York Convention Angola will represent that it is actively taking steps to promote a stable investment climate, which again may make it more attractive to investors in these sectors.

Several countries in Africa such as Chad, Somalia and Ethiopia have yet to become signatories to the New York Convention. It is possible that Angola's initiative may encourage other countries in the region to follow suit.

Comments

Whilst Angola's being on the path to the effective ratification of the New York Convention is likely to have a positive effect on local investment, it is as of yet unclear how the New York Convention will be implemented by local courts in Angola in practice.

Even where the domestic courts of signatories comply with the New York Convention and directly recognise and enforce awards under it, the effectiveness of such enforcement will depend in practice on the efficiency of the courts themselves.

Currently, the Angolan legal system suffers with issues of capacity and inefficiency. The World Bank's "Doing Business in 2016" survey ranks Angola at 185 out of 189 on contract enforcement, and estimates that enforcement of a claim takes on average 440 days. Effective enforcement of awards under the New York Convention will be affected by this, unless some sort of fast track system is adopted.

In addition, it may be that Angola will chose to have its own distinct rules and procedures for the enforcement of foreign awards, which differ from usual procedures. Care will need to be taken from a party wishing to enforce in Angola to clarify these procedures from the outset.

Further, it remains to be seen whether and when Angola will enact domestic legislation to ive effect to its new obligations under the New York Convention. Examples of major delays in enacting the required domestic legislations exist, such as the case of Myanmar, which acceded to the New York Convention in July 2013 but only implemented the necessary legislation in January this year. During this period, any award obtained outside the jurisdiction could not be enforced in Myanmar under the New York Convention. If Angola encounters a similar delay in implementing domestic legislation, it could be months or even years before the New York Convention can fully take effect in the country.

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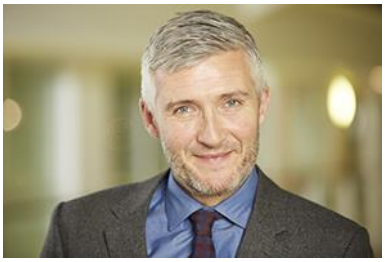

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