ADDLESHAW GODDARD

INTERNATIONAL ARBITRATION

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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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Protecting International Investments in a World Turning Insular

A new wave of isolationism has been sweeping across the globe. Two of the most notable examples straddling the Atlantic are Brexit, on the one hand, and the election of Donald Trump as the 45th President of the United States, on the other. The rise of isolationism is founded in part on (mis)perceptions regarding the supposed perils of immigration, free trade, and the impact of globalisation on the average rank and file worker. Prime Minister Teresa May recently clarified her vision for a "hard Brexit" by declaring that "a vote to leave the EU would be a vote to leave the single market", a message which did not sit well with many investors who view the UK's access to the EU market as critical to their success. In a similar vein, Donald Trump's inauguration speech focused on his self-proclaimed "America First" ideology:

> "*From this moment on, it's going to be America First. Every decision on trade, on taxes, on immigration, on foreign affairs, will be made to benefit American workers and American families. We must protect our borders from the ravages of other countries making our products, stealing our companies, and destroying our jobs.*
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> . . .
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> *We will follow two simple rules: Buy American and hire American. We will seek friendship and goodwill with the nations of the world -- but we do so with the understanding that it is the right of all nations to put their own interests first*."

Following this proclamation, one of President Trump's first actions as the executive was to withdraw formally from the Trans-Pacific Partnership (TPP), a 12-nation trade deal viewed by the Obama administration as strategically critical to set the rules in some of the fastest-growing economies of the world. President Trump likewise vowed to renegotiate the North American Free Trade Agreement (NAFTA), a 23-year-old trade pact with Canada and Mexico that is viewed by many economists as one of the most successful trade agreements ever entered into by the United States.

... the "holy trinity" of investment protections – comprised of bilateral investment treaties ("BITs"), double-taxation treaties ("DTTs"), and Free Trade Agreements ("FTAs") – remains largely intact

Given the rise of what has been coined by some as neo-isolationism, individuals and corporates who find themselves investing in jurisdictions across the globe are understandably concerned. The silver lining for those investors, however, is that the "holy trinity" of investment protections – comprised of bilateral investment treaties ("BITs"), double-taxation treaties ("DTTs"), and Free Trade Agreements ("FTAs") – remains largely intact. If employed appropriately through the strategic (re)structuring of investments, these existing treaties provide the framework to maximize investor protection, notwithstanding President Trump's withdrawal from the TPP, the bleak forecast for the Transatlantic Trade and Investment Partnership (TTIP), or Britain's impending departure from the EU.

Indeed, by strategically (re)structuring their investments to benefit from existing treaties, individuals and corporations can ensure that they, and their investments, will receive the maximum protection provided for under international law, and that any grievances against a host government or its state-owned entities will be heard by a neutral body of decision

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makers rather than (potentially) bias national courts. The strategic (re)structuring of investments is therefore of critical importance to investors operating in this new climate.

What are BITs and who do they protect?

There are currently more than 3,000 BITs in existence. These agreements are concluded between two countries, and contain reciprocal undertakings for the promotion and protection of private investments made by nationals of the signatories in each other's territories. Perhaps most critically, BITs provide for investor-state dispute resolution, which gives the investor a direct cause of action against a host State, and the opportunity to resolve any dispute that may arise in a neutral forum which results in a final and enforceable award. This dispute resolution mechanism is of utmost importance because it provides foreign investors with an essential alternative to local courts, which may be biased in favour of host States or state-owned entities.

What protections do BITs usually afford?

The more than 3,000 BITs currently in force vary in scope and content. Generally speaking however, BITS typically provide foreign investors with certain protections under international law including:

Fair and equitable treatment: The fair and equitable treatment standard has been interpreted by arbitral tribunals to include a number of concepts including the protection of an investor's legitimate expectations arising from a government's specific representations or investment-inducing measures, and the prohibition against manifest arbitrariness in decision making, abusive treatment, discrimination, and denial of justice.

Protection against expropriation: BITs protect investors' property and property rights by prohibiting illegal expropriation (direct and indirect) without the payment of prompt, adequate and effective compensation.

National and Most Favoured Nation Treatment: These standards of protection ensure that host States accord investors and their investments with treatment that is not less favourable than that of local investors or investors of third States.

Full protection and security: This standard requires host States to ensure the physical (and in some cases legal) protection of the investor and its investment.

No arbitrary or discriminatory measures: States are prohibited from treating foreign investors in an arbitrary or discriminatory manner.

Right to transfer capital: Under most BITs, investors are entitled to move capital relating to their investments freely, and in a convertible currency.

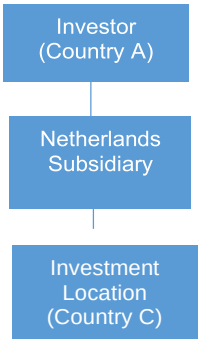
As noted, BITs typically provide for the resolution of investment disputes through international arbitration rather than through the host states' courts. Investors are often given a choice of fora to select from when initiating arbitration against a State, including arbitration under the World Bank's International Centre for the Settlement of Investment Disputes (**ICSID**), **UNCITRAL** (*ad hoc*) arbitration, and in some cases, arbitration under other institutional rules such as those of the Stockholm Chamber of Commerce (**SCC**) or the International Chamber of Commerce (**ICC**).

Initiating a treaty arbitration against a host State that has failed to abide by its commitments to the investor creates powerful leverage for settlement discussions because the mere existence of an investment claim is often viewed as tarnishing the reputation of the host State.

How Can an Investment Be (Re)Structured to Obtain Treaty Protection?

(Re)Structuring an investment to obtain the benefits of BIT protection can often be as simple as inserting a subsidiary company incorporated in a jurisdiction with favourable investment treatment within the overarching investment structure. For example, many investors choose to structure their investments through the Netherlands – which is known for its extensive BIT regimes and favourable tax treatment – in a structure which is often referred to as a "Dutch

Sandwich". In such a structure, a Dutch company is "sandwiched" between an investor from country A and its investment in country C. By inserting the Dutch subsidiary into the investment structure, the investor in country A is able to benefit from BITs the Netherlands has in force with country C.



There is broad consensus that (re)structuring an investment to achieve BIT (and tax) protection is entirely legitimate if it is done *prior to* a dispute arising between the investor and the host state. Once a dispute arises, however, any restructuring to achieve BIT protection generally would be considered an abuse of process. Accordingly, investors should consider how to (re)structure their investments at the outset of any investment or, alternatively, before any dispute arises with the host government.

Comment

(Re)structuring investments to achieve maximum BIT protection is a cost effective way to mitigate the risks of investing in jurisdictions around the globe. Such protections are more important than ever in light of the recent trend of nationalism and populism that is currently sweeping across the globe.

Sarah Vasani, London

The availability of urgent court assistance in arbitrations- more limited than previously thought?

Gerald Metals S.A. v Timis & Ors [2016] EWHC 2327 (Ch)

Background

Gerald Metals SA (Gerald Metals) was a commodities trader which entered into a financing agreement with Timis Mining Corp (SL) Limited (Timis) for the development of an iron ore mine in Sierra Leone. Timis Mining was controlled by Mr Timis, whose business interests were held by the Timis Trust. The Trustee of the Timis Trust, Safeguard Management Corp (Safeguard) provided a guarantee of all sums due to Gerald Metals under an offtake agreement, such guarantee being subject to arbitration in London under the LCIA Rules.

Following defaults under the offtake agreement, Gerald Metals commenced arbitration proceedings under the LCIA Rules under the guarantee. Before constitution of the tribunal, Gerald Metals applied to the LCIA for the appointment of an emergency arbitrator with a view to seeking emergency relief, including an order preventing Safeguard from disposing of assets. Safeguard responded to the application by giving undertakings not to dispose of any assets other than for full market value and at arm's length and to give 7 days' notice before disposing of any assets worth more than £250,000. The LCIA rejected the application for an appointment of an emergency arbitrator.

Gerald Metals then issued proceedings in the High Court under section 44 of the Arbitration Act 1996 (AA 1996), seeking a freezing injunction and ancillary orders requiring the provision of information regarding the value and location of the trust's assets.

The Law

Section 44 of the AA 1996 gives the court power to grant interim relief in support of arbitration. Section 44(3) and (5) provide:

"(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.

(5) In any case, the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively".

The LCIA rules contain a number of provisions designed to deal with applications for emergency interim relief:

Paragraph 9.1 of Article 9A provides that in cases of "exceptional urgency", any party may apply to the LCIA Court for the expedited formation of the arbitral tribunal.

Paragraph 9.4 of Article 9B provides that "in the case of an emergency", a party may apply to the LCIA Court for the immediate appointment of an emergency arbitrator to conduct emergency proceedings pending the formation or expedited formation of the arbitral tribunal.

Paragraph 9.12 of Article 9B provides that Article 9B shall not prejudice any party's right to apply to a state court or other legal authority for any interim or conservatory measures before the formation of the Arbitral tribunal.

Decision

It was common ground between the parties that the test of urgency under section 44(3) of the AA 1996 is to be assessed by reference to whether the arbitral tribunal has the power and practical ability to grant relief within the relevant timescale. It was also common ground that there can be situations where the need for relief, such as a freezing injunction, is so urgent that the power to appoint an emergency arbitrator is insufficient and the court may properly act under section 44 of the AA 1996 (for example if the application needs to be made without notice).

Counsel for Gerald Metals argued that the LCIA Rules create a gap in the relief framework for cases that are not "exceptionally urgent" or emergencies for the purposes of Articles 9A or 9B but are, nevertheless, cases of urgency within the meaning of s44(3) of the Act.

... Legatt J held that (...) the purpose of articles 9A and 9B of the LCIA rules is clearly to reduce the need to apply to the court for interim assistance in the case of emergencies ...

Legatt J held that it would be "uncommercial and unreasonable" to interpret the LCIA rules as creating such a gap and that the purpose of articles 9A and 9B of the LCIA rules is clearly to reduce the need to apply to the court for interim assistance in the case of emergencies, providing instead a mechanism by which relief can be obtained through the arbitral process. He considered a similar functional interpretation should be given to the test for "exceptional urgency" and an "emergency" under the LCIA Rules as has been given to section 44 (3) of the AA 1996 i.e. whether the situation is one in which effective relief could not be granted within the relevant timescale, that is the time it would take to form a tribunal or expedited tribunal. Therefore, it is only in cases where those powers under Articles 9A and 9B are inadequate, or where the practical ability to exercise them is lacking, that a court should act under section 44. This was not one of those cases- here, in light of the undertakings given by Safeguard, the LCIA had not been persuaded that the application needed to be decided before the arbitral tribunal was constituted. The LCIA did not consider that it lacked the power to act, but simply did not consider the application sufficiently urgent. The application was dismissed.

Comment

Whilst many arbitral institutions have introduced provisions which aim to offer parties interim and conservatory measures in emergency situations, this case means that the introduction of

such provisions may have in fact served to limit the parties' recourse to the courts in such situations. The case suggests that where a party to an arbitration is in need of emergency interim relief, it will need to ensure that effective relief cannot be adequately granted, or is unavailable, by operation of the LCIA (or other institutional) rules. It would appear that recourse to section 44 of the AA 1996 will be limited to cases that are too urgent to even wait for the appointment of an emergency arbitrator. This may leave parties feeling they lack sufficient security, given that the enforceability of decisions of emergency arbitrators is ambiguous. One solution may be for parties to consider opting out of the emergency arbitrator provisions in the LCIA Rules, thereby preserving their access to the English courts under section 44 of the AA 1996.

Lara Melrose, London

Court protects Arbitration from disappearing into a 'black hole' following corporate merger

A v B [2016] EWHC 3003 (Comm)

The Commercial Court in *A v B* [2016] EWHC 3003 (Comm) has rejected yet another challenge to an arbitral award, this time based on substitution of parties effected under Indian law. The issue raised was whether the ICC tribunal had acted within its jurisdiction and powers when it permitted the substitution of the claimant in the arbitration, after it merged in India with two other companies in the claimant's group. Addleshaw Goddard acted for the successful respondent to this challenge.

Background

The arbitration related to a long term contract for the supply of iron ore fines between the original Claimant (**P**) and company E (**E**), which was governed by English law. During the course of the arbitration, P had made an application for the substitution of P, an Indian company, by another Indian company, (**F**).

The application was made to the ICC Tribunal (**the Tribunal**); as a result of orders made by the Goa Bench of the Bombay High Court (**the Orders**). The Orders were made in accordance with the Indian Companies Act 1956 and denoted that P had merged with F on 7 February 2015 under a scheme of amalgamation. According to Indian law, the effect of the merger meant that P had ceased to exist as a legal entity and that "*all of P's assets were vested in F, further any suits actions or proceedings would not be abated discontinued or prejudiced but would be continued and enforced by F*". The Tribunal considered the application and permitted the substitution before proceeding to grant a second partial award of US$39,472,800.00 in favour of F (**Award**).

E disputed that the Tribunal had the jurisdiction or power to grant the substitution and proceeded to challenge the validity of the Award under s67 and or s68 of the Arbitration Act 1996 (**AA 1996**).

Appeal of the Award under s67

E challenged the Tribunal's replacement of P (as the Claimant) with F on the grounds that the Tribunal lacked jurisdiction. E argued that the transfer of rights from P to F could not be defined as universal succession as this was not recognised by English or Indian law. Instead, and with reference to *Baytur SA v Finagro Holdings SA* [1992] 1 Lloyds Rep 134, E advocated that the merger should in fact be defined as an equitable assignment. It was submitted that in order to effectively swap the parties by way of equitable assignment, notice should have been given to the Tribunal before P was dissolved.

As notice had *not* been given to the Tribunal prior to the dissolution of P, E contended that there was no effective assignment of the rights. E indicated that without valid assignment of the rights to F, the arbitration would perish because it would have in effect "disappeared into a *black hole*".

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The Court highlighted that in relation to providing notice of the merger to the Tribunal, in accordance with the Indian orders the newly merged company, F, would be required to give notice on its own behalf or as necessary on behalf of P the dissolved company. Therefore, given that the assignment to F and the dissolution of P were simultaneous, notice could never be given to the Tribunal before P was dissolved.

The Court distinguished the facts of the matter from *Baytur SA v Finagro* and disagreed with E's submission that the merger was an equitable assignment. In particular, it held that it was not widely accepted that the Indian scheme of amalgamation was equivalent to equitable assignment. Therefore, when determining the effect of the merger, the Court instead focused on the Indian law and authorities. It concluded that F had validly succeeded P's rights and obligations because all of the requirements of Indian law had successfully been complied with. The Tribunal was therefore bound by the orders of the Indian court.

Challenge under s68

E also brought a challenge under s68(2)(b) and / or (e) and (c) of the AA 1996 by suggesting that the Tribunal lacked power under the 1998 ICC rules to permit substitution of F for P.

The Court disagreed. It concluded that whilst the ICC rules did not contain any power to substitute one party for another, the Tribunal did not need an express rule to grant the application to substitute P for F. In addition, E was prohibited from raising this objection under the statutory waiver provisions within s73 of the AA 1996. E had participated in the arbitration without taking that objection and knew (and could with reasonable diligence have discovered) the grounds for the objection at the time. The parties' behaviour indicated agreement that the Tribunal would determine the substitution issues. The Tribunal's decision could therefore not constitute a serious irregularity under s68 of the AA 1996.

Decision

The Court concluded that the Tribunal's decision could be viewed as a 'model of clarity' and that E's challenge should be dismissed.

Comments

The Court's refusal to accept E's characterisation of the merger as an equitable assignment highlights a commitment towards respecting foreign law decisions where the foreign law process and formalities have been executed correctly. Departing from good Indian law by redefining an Indian merger in accordance with English law would have set an unhelpful precedent.

In addition, if the Court had characterised the merger as an equitable assignment, it would have pushed the arbitral proceedings into a 'black hole'. This consequence would have been highly disproportionate, especially when considering the time and effort which had been invested into the arbitral process and also given the large value of the Award.

This decision provides yet another example of English courts not allowing parties to obstruct the arbitration process by raising unwarranted challenges under sections 67 and 68 of the AA 1996.

Richard Wise, London

Sophie Taylor, London

Emmott v Wilson saga update: English High Court continues anti-suit injunction order

John Forster Emmott v Michael Wilson & Partners [2016] EWHC 3010 (Comm)

In John Forster Emmott v Michael Wilson & Partners [2016] EWHC 3010 (Comm), the English High Court continued an anti-suit injunction to restrain the Defendant (**Mr Wilson**) from taking further steps in ongoing proceedings in New South Wales (**NSW**) and from commencing or pursuing any other substantive claims against the Claimant (**Mr Emmott**). This was done on the ground that the NSW proceedings were in breach of an arbitration clause in an agreement made between the parties.

A key question before the Court was whether the assigned claims brought by Mr Wilson in the NSW proceedings fell within the scope of the arbitration clause. In determining the scope of the arbitration clause, the Court looked at the purpose of the clause, the intention of the parties and the language and words used in drafting the clause. The Court found that the arbitration clause was sufficiently widely drafted such that the relevant claims fell directly within its scope. Therefore, it found that the NSW proceedings had been commenced in breach of the arbitration clause and ordered that the anti-suit injunction be continued.

... In determining the scope of the arbitration clause, the Court looked at the purpose of the clause, the intention of the parties and the language and words used in drafting the clause.

Background

Mr Emmott, and Mr Wilson are both qualified English solicitors. Mr Wilson controls Michael Wilson & Partners (**MWP**), a company incorporated in the BVI with an established legal practice in Kazakhstan. The underlying dispute arose out of an agreement dated 7 December 2001 (**MWP Agreement**) made between Mr Emmott and MWP whereby the parties agreed to operate as a 'quasi partnership', share clients, contacts and information and profits in the business. The arbitration clause of the MWP Agreement provided: *'This Agreement shall be governed by and interpreted in accordance with the laws of England and Wales and all and any disputes shall be referred to and subject to arbitration in London.*'

In December 2005, Mr Emmott entered into a co-operation agreement with two other MWP employees (**Employees**) for the establishment of a consultancy to be owned by Temujin International Limited and Temujin Services Limited, both incorporated in the BVI (**Temujin**). Shortly after the establishment, the Employees left MWP to join Temujin. In 2006, the partnership between Mr Emmott and Mr Wilson came to a bitter end.

In August 2006, MWP gave notice of arbitration to Mr Emmott seeking relief for breach of contractual and fiduciary obligations, including claims for account of profits and equitable compensation. MWP succeeded in some claims but lost others. In 2010, the tribunal awarded sums to both parties, with a net sum due to Mr Emmott.

The NSW proceedings and the assignments

In October 2006, MWP also commenced proceedings in NSW bringing claims against the Employees that largely mirrored the allegations made against Mr Emmott in the arbitration (**First NSW Proceedings**). Following a number of appeals, eventually in 2012, the NSW Court of Appeal gave judgment against the Employees.

Subsequently, the Employees went bankrupt and the Temujin entities were wound up. In late 2015/early 2016, the liquidators of Temujin assigned to MWP claim or cause of action arising against Mr Emmott in connection with Temujin. Similarly, the trustees in bankruptcy of the Employees assigned to MWP claims connected with the Temujin business and the NSW proceedings.

With these assigned rights, in February 2016, MWP commenced legal proceedings in NSW against Mr Emmott, seeking an order for contribution in respect of the liability of Temujin and the Employees under the First NSW Proceedings and an account of the fees, commissions, shares and other benefits of the Temujin business (**Second NSW Proceedings**). It is against this background that Mr Emmott applied to the English High Court for an anti-suit injunction against MWP.

Decision

An applicant for an anti-suit injunction must show a high degree of probability that there is an arbitration agreement that governs the dispute in question. Therefore, the primary issue for the Court to determine was whether any of the claims brought by MWP in the Second NSW Proceedings fell within the scope of the arbitration clause.

When examining the scope of the arbitration clause, the Court considered and followed Lord Hoffmann's approach in the Fiona Trust case (*Premium Nafta Products Limited v Fili Shipping Company Limited* [2007] UKHL 40). He held that it is necessary to inquire into the intention of the parties as expressed in their agreement and the purpose of the arbitration clause, giving effect, so far as the language used by the parties will permit, to the commercial purpose of the arbitration clause. The Court also looked at the matters of the 'quasi partnership' relationship that was governed by MWP Agreement which included provision for 'clients, contacts and business to be shared, as well as provision for sharing profits in the business'. In conclusion, the Court found that the arbitration clause was drafted in 'wide terms' and stated that *'it is likely that the parties intended that any dispute arising out of or connected with their "partnership arrangement" at MWP, particularly any disputes concerning the fruits of the business, should be decided in arbitration'*.

In determining whether the assigned claims fell within the scope of the arbitration clause, the Court rejected MWP's argument that the claims were bought by it as an assignee, and since the assignors (i.e. Temujin and the Employees) were not parties to the MWP Agreement, MWP was not bound by the arbitration clause. The Court explained that the effect of an assignment is to transfer the rights of the assignor to the assignee, such that the assignee is entitled to bring those claims of the assignor in its own name without having to join the assignor as party.

As noted above the arbitration clause was drafted sufficiently widely to cover disputes that arise out of or in connection with the MWP Agreement. Thus the assigned claims, which were derived from the assignments concerning the partnership and arrangements between Mr Emmott, the Employees and the Temujin entities, fell within the scope of the arbitration clause. In the circumstances, the Court was satisfied to a high degree of probability that there is an arbitration agreement that governs the disputes in question.

In determining whether to exercise its discretion to grant an anti-suit injunction, the Court examined common law principles of estoppel and finality in the litigation process. While the causes of action in the arbitration proceedings and in the Second NSW Proceedings were different, the Court found that the underlying issues for determination were common and that an issue estoppel arose in respect of those issues. The Court criticised MWP for bringing the Second NSW Proceedings stating that such conduct amounted to an abuse of process, as it was clear that it was an attempt by MWP to obtain further compensation in respect of the same issues that were the subject of the arbitration so as to defeat the arbitration award. In the circumstances, the Court considered that it was in the interests of justice to exercise its discretion and ordered that the anti-suit injunction against MWP be continued.

Comments

The decision is another recent example of the English' courts willingness to adopt a robust approach in the construction of arbitration agreements.

The Court's criticism of MWP's conduct in bringing the NSW proceedings to re-litigate issues that have been considered and determined in the arbitration proceedings, and its decision that this is an abuse of process, is a timely reminder that the policy of finality of awards granted in arbitration proceedings is equally important as it is in court proceedings.

An application to appeal has been made to the English Court of Appeal. The CA will be equally willing to protect arbitration but this is a case that raises complex issue such as assignment, cause of action and issue estoppel.

Yolanda Lau, Hong Kong

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