Hogan Lovells

Recent Developments in International Arbitration

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10 November 2017

Overview

Recent developments in international arbitration

- Third party funding
  - *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd [2016] EWHC 2361 (Comm)*
- The use of s.44 of the Arbitration Act 1996 against third parties
  - *DTEK Trading SA v Mr Sergey Morozov and another [2017] EWHC 94 (Comm)*
- Practice point: The meaning of "proper notice"
  - *Oao v Magneco Metrel UK Ltd [2017] EWHC 2208 (Comm)*
- Practice point: Service of an arbitration notice
  - *Sino Channel Asia Ltd v Dana Shipping & Trading Pte Singapore Ltd & Anr (A3/2016/2375)*
- International arbitration and human rights

Recent developments in international arbitration:

Third party funding

Recent developments in international arbitration

Third party funding (1)

- The use of third party funding in international arbitration has grown over the last few years.
- It is arguable that, in England, international arbitration may have gained an advantage over litigation when it comes to third party funding.
- See: *Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd [2016] EWHC 2361 (Comm)*
  - *Confirmed, obiter, that litigation funding costs are recoverable as "other costs" under s.59(1)(c) of the Arbitration Act 1996.*
  - *Potentially creates a distinction between litigation (where success fees are not recoverable) and arbitration.*

Recent developments in international arbitration

Third party funding (2)

- On 1 September 2017, the ICCA-Queen Mary Taskforce published its draft report on third party funding in international arbitration, with a final version of the report expected in April 2018.
- The Taskforce's intention is that parties, counsel and arbitrators may reference or invoke the principles of best practice (as set out in the report) to address issues that arise during an arbitration, when entering a funding agreement and in discussions about third party funding.
- The Taskforce suggests that:
  - *"A success fee payment to a funder results from a trade-off between the party and the funder and it is unreasonable for the respondent to be asked to pay the costs of a contract to which it is not a party. For these reasons, it is suggested that success fees or other premiums should not be included in costs awards".*
  - But, for arbitrations conducted under the under the English Arbitration Act, the funded party may recover the third-party funder's success fee under exceptional circumstances.

Recent developments in international arbitration:

The use of s.44 of the Arbitration Act 1996 against third parties

Recent developments in international arbitration

The use of s.44 of the Arbitration Act 1996 against third parties (1)

- S.44 of the Arbitration Act 1996 refers to the powers of the court exercisable in support of arbitral proceedings.
  - Section 44(2)(b) gives the court the power to make orders in relation to the preservation of evidence.
- CPR 62.5 provides that:

1. The court may give permission to serve an arbitration claim form out of the jurisdiction if
   a) […]
   b) The claim is for an order under section 44 of the Act.

Recent developments in international arbitration

The use of s.44 of the Arbitration Act 1996 against third parties (2)

- *DTEK Trading SA v Mr Sergey Morozov and another [2017] EWHC 94 (Comm)*
  - *On-going arbitration between Steel Mont and DTEK.*
  - *DTEK sought an order under s.44(2)(b) that Mr Sergey Morozov and Incolab (both based in Ukraine) be required to preserve and allow DTEK to inspect an original settlement agreement. DTEK sought permission from the court to serve the claim form out of the jurisdiction.*
- Question: Does the court have jurisdiction under s.44(2)(b) to make an order against third parties who are not party to the arbitration proceedings?
  - There was conflicting obiter comments in previous cases; however the court dismissed DTEK's arguments and held that "*the fact that there would be a lacuna is not a reason to find a jurisdiction which is not justified on the wording of the relevant sections against the relevant background*".
- The case is due to be heard by the Court of Appeal on 20 March 2018.

Recent developments in international arbitration:

The meaning of "proper notice"

Recent developments in international arbitration

The meaning of "proper notice" (1)

- *Oao v Magneco Metrel UK Ltd [2017] EWHC 2208 (Comm)*
  - Zavod Ekran OAO (Ekran) and Megneco Metal UK Ltd (Magneco) entered into a contract containing an arbitration clause providing for arbitration under the International Commercial Arbitration Court (ICAC) at the Russian Chamber of Commerce and Industry under Russian law. The language of the arbitration was to be Russian.
  - The ICAC sent Magneco a letter, almost entirely in Russian, which enclosed the arbitration claim form and documents. Ekran did not attempt to notify Magneco directly of the arbitration.
- Question: Had Magneco received *"proper notice"* of the arbitration for the purposes of s.103(2) of the Arbitration Act 1996?
- Answer: Yes
  - *"In the context of international commerce, the fact that notice of an arbitration is received in England in a language other than English should not in itself affect the validity of the notice, though it may do so, depending on the circumstances"*.

Recent developments in international arbitration

The meaning of "proper notice" (2)

- Practice points:
  - The case provides some clarity on the meaning of "*proper notice*":

    "In the context of s.103(2)(c) Arbitration Act 1996 "proper notice" is such as is likely to bring the relevant information to the attention of the person notified, taking account of the parties' contractual dispute resolution mechanism, including any applicable institutional arbitration rules".
  - To avoid dispute consider providing a translation of the arbitration notice in the defendant's language.
  - Parties which enter into arbitration agreements should also ensure that everyone in their organisation understands the potential significance of a document which refers to arbitration, even if it is in a foreign language.

Recent developments in international arbitration:

The service of an arbitration notice

Recent developments in international arbitration

The service of an arbitration notice (1)

- *Sino Channel Asia Ltd v Dana Shipping & Trading Pte Singapore Ltd & Anr (A3/2016/2375)*
  - A contract of affreightment (COA) was agreed between Dana as owner and Sino as charterer. The COA was negotiated on Sino's behalf by BX and Dana only ever communicated with either employees of BX or through the agreed broking channel (which in turn communicated with BX).
  - An arbitration notice was passed to the BX employee with whom Dana had communicated and who appeared to be the relevant person at Sino. Sino did not participate in the arbitration and brought a claim to set aside the award on the basis it had not been served with proper notice.
  - Question: Did BX have authority to receive the arbitration notice on behalf of Sino?
  - Answer: The Court of Appeal held that in the circumstances of the case, the agent had both implied actual and ostensible authority to receive the notice.

Recent developments in international arbitration

The service of an arbitration notice (2)

- Practice points:
  - The Court of Appeal made clear that this was a "rare" case and that arbitrating parties would be well advised to also serve any arbitration notice by the methods in s.76(4) Arbitration Act 1996:

    "(4)If a notice or other document is addressed, pre-paid and delivered by post—

    (a)to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or

    (b)where the addressee is a body corporate, to the body's registered or principal office,

    it shall be treated as effectively served."

Recent developments in international arbitration:

International arbitration and human rights

Recent developments in international arbitration

International arbitration and human rights (1)

- Shifting international focus to the third pillar of the UNGPs: Access to Effective Remedy.
- 13 February 2017: The proposal for the *"International Arbitration of Business and Human Rights Disputes"* was published.
- According to the proposal, arbitration could be used in BHR disputes either:
  - By victims of human rights violations who wish to bring claims against businesses; or
  - To resolve disputes involving human rights-related claims between commercial parties.
- The working group is in the process of convening a drafting committee to develop tailored arbitral rules.

Recent developments in international arbitration

International arbitration and human rights (2)

- Potential questions for discussion include:
  - How would businesses and victims of human rights violations submit to arbitration in practice for disputes not arising out of an existing contract containing an agreement to arbitrate?
  - What norms or laws would be applied by the arbitral tribunal?
  - Is a private forum like arbitration appropriate for resolving human rights disputes?
  - How would victims of human rights violations afford the costs of arbitration?
  - What recourse would a defendant business have to dismiss unfounded claims?

Questions?