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United Kingdom

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A. Legislation and rules

A.1 Legislation

International arbitration in England and Wales¹ continues to be governed by the Arbitration Act 1996. There have been no amendments to the Arbitration Act since those amendments made to reflect the consequential references to the Consumer Rights Act 2015.²

Despite various speeches and other commentary³ suggesting potential reform of the Arbitration Act in support of litigation in the jurisdiction, no suggested amendments to the Arbitration Act have been put out for consultation or tabled in parliament.

A.2 Institutions, rules and infrastructure

The leading arbitral institution in the jurisdiction remains the LCIA. The LCIA has reported the volume of referrals under LCIA Rules in 2016 as “*virtually unchanged from 2015*” with 303 arbitrations

¹ England and Wales are two of the four countries that make up the United Kingdom. They have a common legal system, whereas the other two countries in the United Kingdom (Scotland and Northern Ireland) have separate systems. For the purposes of the current publication we intend only to refer to the laws of England and Wales. Any reference to “England” or “English” in this section should also be taken to include “Wales” or “Welsh.”

² The Arbitration and Mediation Services (Equality) Bill, which had its first reading in the House of Lords in May 2016, did not become law before the 2016-2017 session of parliament ended. It has not been reintroduced into the current parliamentary session. See <https://services.parliament.uk/bills/2016-17/arbitrationandmediationservicesequality.html>.

³ www.judiciary.gov.uk/announcements/speech-by-the-rt-hon-the-lord-thomas-of-cwmgiedd-commercial-dispute-resolution-courts-and-arbitration/;
www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf.

referred to the LCIA in 2016.⁴ The principal industries for arbitration under the LCIA Rules in 2016 were Energy and Resources (23%), Banking and Finance (21%) and Construction and Infrastructure (16%). 42% of the 2016 referrals were for over USD 5 million, with 18% being over USD 50 million. As for the constitution of tribunals, 2016 saw an uptick in the appointment of three-member tribunals (2016 - 62%, 2015 - 48%) over sole arbitrators (2016 - 37%, 2015 - 57%). Only six challenges were made to arbitrators appointed under LCIA Rules, of which only one was upheld (partially) by the LCIA Court.

The LCIA has updated its Notes for Arbitrators⁵ to clarify the role of the tribunal secretary. Parties will now have an opportunity to comment on (and potentially veto) the appointment of a proposed tribunal secretary if they have concerns about conflicts. Furthermore, the updated Notes for Arbitrators requires the parties to expressly consent to the fee rate for a tribunal secretary (suggested to be between GBP 50-150 per hour), and the tasks to be conducted by a tribunal secretary.

B. Cases

B.1 Enforcement

Given the flows of credit through London, England and Wales continues to be an important enforcement jurisdiction for international arbitral award creditors. Some significant decisions concerning enforcement of awards reached the appellate courts this year, including the Supreme Court (the highest court).

In *IPCO (Nigeria) Limited v. Nigerian National Petroleum Corporation* (“NNPC”),⁶ the Supreme Court determined that the New York Convention does not permit domestic courts to make the right to challenge enforcement of an award based on public policy grounds

⁴ www.lcia.org/News/lcia-facts-and-figures-2016-a-robust-caseload.aspx.

⁵ www.lcia.org/News/lcia-implements-changes-to-tribunal-secretary-processes.aspx.

⁶ [2017] UKSC 16.



conditional upon the payment of security. IPCO sought to enforce in England an award from a Nigeria-seated tribunal requiring NNPC to pay around USD 150 million plus interest at 14% per annum. Meanwhile, NNPC challenged the amount of the award in the Nigerian High Court. The English High Court ordered partial payment of the award for the undisputed amount and adjourned the enforcement proceedings conditional upon NNPC's payment of USD 50 million in security. Following delays in the Nigerian proceedings, the English High Court later ordered further partial payment of the award, which was also stayed conditional on NNPC providing further security of USD 30 million.

Thereafter, NNPC allegedly found evidence that fraudulent documents were used in the arbitration and applied to set aside the entire award in the Nigerian proceedings. There were further delays in the Nigerian proceedings. IPCO relied upon that delay as a change of circumstance that justified ending the adjournment. The English High Court rejected that argument. IPCO successfully appealed to the Court of Appeal, which remitted the case to the High Court to determine whether the fraud allegations should result in the refusal of recognition on grounds of public policy. The Court of Appeal also adjourned further enforcement of the award pending that determination if NNPC paid additional security of USD 100 million; failing which the adjournment would lapse and IPCO could enforce the award in full and draw down on the existing USD 80 million. NNPC appealed to the Supreme Court on the basis that (a) the Court of Appeal did not have jurisdiction to award additional security; and/or (b) the Court of Appeal's order was illegitimate in circumstances where NNPC had a good *prima facie* case of fraud, entitling it to resist enforcement of the entire award. The Supreme Court held that nothing in section 103 of the Arbitration Act or Article V of the New York Convention provided for an enforcing court to make the right to challenge enforcement of an award based on public policy grounds conditional upon the provision of security. The Court of Appeal erred in granting additional security because the relevant adjournment was pending the outcome of the High Court's decision on the section 103(3) challenge

(ie, public policy grounds) rather than the outcome of the Nigerian proceedings. The Supreme Court's willingness to consider the underlying provisions of the New York Convention by way of contextual background increases the precedent value of the judgment, especially for jurisdictions (unlike the UK) where the UNCITRAL Model Law has been adopted. However, it remains to be seen whether other courts will interpret Article VI of the New York Convention in the same way.

This decision has been followed subsequently in two Commercial Court decisions, *Eastern European Engineering Ltd v. Vijay Construction (Proprietary) Ltd*⁷ and *Micula v. Romania*⁸ (although the latter is, at the time of writing, under appeal).

Another case arising out of the enforcement of an arbitration award that reached the Supreme Court this year was *Taurus Petroleum Limited v. State Oil Marketing Company of the Ministry of Oil, Republic of Iraq*,⁹ which was decided on a thin 3:2 majority. This case concerned the application of the English court rules on third-party debt orders in the context of letters of credit, and changed the English law position on the situs of a debt due under a letter of credit from the place of payment to the place where it is recoverable. This removed an anomaly that had existed in English law that treated debts due under a letter of credit differently to other debts. The third-party debt order is a useful tool in the armory of international arbitral award creditors seeking to enforce against monies of award debtors passing through English banks and this decision is particularly important to those industries where letters of credit are widely used, such as oil and gas trading.

Finally, while not a Supreme Court decision, the case of *Maximov v. NMLK*¹⁰ is also worthy of mention. Here, the High Court refused to

⁷ [2017] EWHC 797 (Comm).

⁸ [2017] EWHC 1430 (Comm).

⁹ [2017] UKSC 64.

¹⁰ [2017] EWHC 1911 (Comm).



enforce a Russian arbitral award that had been set aside by the Russian courts. The English Commercial Court concluded that the relevant test as to whether the arbitral award should be recognized in England, notwithstanding the Russian Court decisions, was whether those decisions were so extreme and incorrect as not to have been decisions open to a court acting in good faith. This is a heavy burden to discharge and the English judge was not convinced that the Russian court decisions were so extreme and perverse that they could only be ascribed to bias. On the evidence available, no conclusion as to the bias alleged could be reached either way and, accordingly, the test could not be satisfied. This decision is a reminder of the importance of the choice of the seat of any arbitration. Careful consideration should be given to the ability and inclination of the courts of the seat to become involved in the arbitration, including setting aside any award, and whether one can expect a fair hearing before those courts.

B.2 Challenges to arbitral awards

A string of cases this year has added to the well-established position under English law that challenging an arbitral award for serious irregularity under Section 68 of the Arbitration Act is, itself, challenging. The three separate cases discussed briefly below all failed to meet the threshold of serious irregularity, leaving the arbitral award in each case unscathed.

*Union Marine Classification Services LLC v. The Government of the Union of Comoros & Anor*¹¹ saw a challenge brought on multiple bases, including that an arbitrator erroneously decided a question of fact and that it was in excess of the tribunal's jurisdiction to determine a question of termination of a contract. The latter point did not impress the English court in circumstances where the parties had agreed, following an exchange of emails between them, that after a first arbitral award further issues that were in dispute between them could be determined by the tribunal. It is open to parties to an existing arbitration to confer jurisdiction on an ad hoc basis, and that was

¹¹ [2017] EWHC 2364 (Comm).

precisely what the English court held had occurred in the email exchange. The court also confirmed that an allegation of an incorrect conclusion as to a question of fact cannot form the basis for any challenge under Section 68, which requires something exceptional to engage it.

An allegation of a tribunal failing to consider all issues before it so as to amount to “substantial injustice” (as set out by s.68(2)(d) of the Arbitration Act) was similarly dismissed by the English court in *Symbion Power LLC v. Venco Imtiaz Construction Co.*¹² In its application challenging the award, Venco complained that four aspects of its defense had not been dealt with by the tribunal. On a careful review of the evidence, the English court held that this challenge was unsustainable. The court highlighted the difference between an “issue” and elements of an argument. The former is essential to a reaching a decision and must be addressed by the tribunal; the latter is not. Of the challenges raised, the court determined, after careful analysis, that those which were properly “issues” and had been put to the tribunal, had been dealt with, and the challenge failed.

The final case concerns a challenge of failing to take account of evidence, which was held not to amount to a serious irregularity under Section 68. In *UMS Holding Ltd and others v. Great Station Properties SA and others.*¹³ In this case, the English court held that while a tribunal’s award must set out reasons, the award need not explicitly refer to counter-arguments or competing evidence. A tribunal is not required to deal with reasons on every single point and, in this instance, there was no basis for aggregating the various matters relied on to seek to reach the substantial injustice threshold. The starting point must be that each individual ground must independently fall within Section 68. The court confirmed that assessing and evaluating the points raised by the parties is a matter exclusively for

¹² [2017] EWHC 348 (TCC).

¹³ [2017] EWHC 2398.



the tribunal and that Section 68 is concerned not with the “correct” findings of fact, but whether there has been adequate due process.

B.3 Removal of arbitrators

The English courts continue to set a high bar for the successful removal of arbitrators, which was reinforced in two decisions of commercial court. In *P v. Q and others*,¹⁴ the court refused an application under Section 24 of the Arbitration Act to remove two co-arbitrators on the basis of improper delegation of responsibilities to a tribunal secretary (the chair had been removed by the LCIA on different grounds). The court held that even if the chair had improperly delegated powers to the tribunal secretary and that resulted in the loss of confidence in the whole tribunal by one party, loss of confidence did not itself constitute substantial injustice and cannot be a ground for removing an arbitrator. In *H v. L and others*,¹⁵ the court refused to remove an arbitrator on the basis of justifiable doubt as to his impartiality under Section 24 of the Arbitration Act. H commenced arbitration against L under an insurance policy underwritten by L. The commercial court appointed a chair, who disclosed that he had previously been appointed by L and was sitting in two other cases involving L. He then accepted appointments in two further claims, one of which involved L. Applying the fair-minded and informed observer test, the court held that the chair’s appointment in the other cases did not cause doubts about bias, and there was therefore no ground for removal.

C. Funding in international arbitration

In England and Wales, third-party funding has, and continues to, become more prevalent across the arbitration and wider legal world. This form of funding involves a third party unconnected to the arbitration agreeing to finance all or part of the costs of that arbitration on the basis that, if the funded party is ultimately successful, the third

¹⁴ [2017] EWHC 194 (Comm).

¹⁵ [2017] EWHC 173 (Comm).

party will receive a proportion of the proceeds from the arbitral award in return.

Typically, third-party funding arrangements have been seen as promoting access to justice, providing an important mechanism for parties seeking to pursue their legal rights in circumstances where the cost of doing so would otherwise be prohibitive. Increasingly, however, third-party funding arrangements are also used by sophisticated, multinational companies as a means of taking the costs of large-scale arbitration off the balance sheet, allowing capital that would otherwise be spent on legal fees to be spent or invested elsewhere by the business.

In the past, the common law doctrines against maintenance (litigation by a third party unconnected to the subject matter of the claim) and champerty (funding of legal proceedings by a third party in return for a share in any proceeds recovered) have acted as bars to third-party funding. These rules have been relaxed over time and so, while it remains important that a third-party funder must not be permitted to exert excessive control over the arbitral process, third-party funding has become a widely accepted practice. Indeed, one funder in the UK has purportedly raised three funds with over GBP 400 million of capital commitments to date.¹⁶ Furthermore, research suggests that 54% of UK lawyers who have not used litigation funding in the past expect to do so within the next two years.¹⁷

C.1 The cost benefits of third-party funding in arbitration

There have been a number of key developments over recent years in relation to the allocation of parties' costs in arbitration that have contributed to the increasing popularity of third-party funding arrangements.

¹⁶ See www.harbourlitigationfunding.com/about-us/our-funds/.

¹⁷ Burford Capital Litigation Finance Survey 2017.



C.1.1 When can a successful party recover its funded costs in arbitration?

Arbitral tribunals in the UK enjoy a wide discretion to allocate costs across parties as they see fit. Indeed, the English High Court recently declined to overturn a decision that a successful claimant in arbitration was able to recover its third-party funding costs on the terms agreed with the funder and in addition to the principal award.¹⁸ Those terms included that the funder would receive the greater of 300% of the funding amount or 35% of the amount recovered in the case of a “successful” outcome (as defined in the funding agreement). A tribunal’s jurisdiction to make such an order stems from the Arbitration Act, which gives a tribunal general power to award costs as it sees fit, and that those costs can include “*legal and other costs of the parties* (emphasis added).”¹⁹ The English court held such costs may include a third-party funder’s commission. However, in this specific case, the respondent’s conduct had put the claimant under significant financial pressure, effectively forcing it to seek third-party funding. It remains to be seen if a similar award would be granted where the paying party’s conduct is not at issue.

C.1.2 Will a third-party funder be liable for another party’s costs in arbitration?

Arbitral tribunals do not have the jurisdiction to issue an adverse costs order against third-party funders because the funder is not typically a party to the arbitration agreement. Under Section 61 of the Arbitration Act, a tribunal does not have jurisdiction to make a costs order against a non-party to the arbitration. Third-party funders are therefore protected from adverse costs orders when funding arbitration proceedings, as any such adverse costs order will be made against the party being funded. Therefore, funded parties will often purchase ATE Insurance to protect against adverse costs orders (and may be required to do so by their funder).

¹⁸ Essar Oilfields Services Limited and Norscot Rig Management PVT Limited [2016] EWHC 2361 (Comm).

¹⁹ Sections 59(1)(c) and 63(3) of the Arbitration Act 1996.

C.2 What do third-party funders look for in a case?

Professional funders invest in cases with a view to making a profit, with a clear understanding that they stand to lose everything if their investment fails. To minimize the risk of their investment, each funder will consider, among other things: (a) the value and legal merits of the case; (b) the amount and timing of investment that will be required; and (c) the ability of the respondent to pay damages if the claim is successful. The reputation, jurisdiction and creditworthiness of the respondent are therefore key considerations and a requirement for detailed due diligence on that party is to be expected whenever this type of funding is sought.

C.3 What does a typical third-party funding agreement look like?

The terms of any third-party funding arrangement will differ from case to case. However, arrangements should not allow a third-party funder too much scope to interfere in the management of the case or provide the funder with an unreasonably high return in the event of success.

Third-party funding agreements are often high value with substantial up-front costs and complicated pricing and payment mechanisms. Time should be invested to establish the contractual footing from the offset. In particular, lawyers for a funded party should be prepared to enter into negotiations with the third-party funder in relation to: (a) the legal structure of the funder's interest in any proceeds of the case, including the biting point for monies becoming "proceeds" for the purpose of payment to a funder; (b) how those proceeds are held and distributed; (c) the termination rights of the funder and/or the funded party in the contract; and (d) the reporting requirements to the third-party funder. Other forms of less traditional third-party funding are also available in appropriate circumstances, such as a funding drawdown facility for a law firm to use to fund the cases it wishes to fund.



C.4 Regulation of third-party funders

A voluntary Code of Conduct for Litigation Funders was developed in 2011 by the Association of Litigation Funders and was most recently revised in 2016. However, this Code applies only to those funders who subscribe to the Association, and so a large proportion of the UK funding market remains completely unregulated. Given the rapidly growing nature of the industry, and as third-party funding becomes a more established feature of the arbitration landscape, the issue of regulation will become increasingly important. The UK government stated in early 2017 that it had no plans to introduce mandatory regulation of the funding market, although it did give an assurance that it will keep third-party funding under review and will assess the voluntary Code of Conduct as and when it becomes necessary to do so.²⁰

C.5 Looking forward

The growth seen in the third-party funding market in England and Wales shows no sign of slowing. As corporates and their legal teams are under increasing pressure to reduce legal spend, third-party funding represents a clear opportunity for parties to pursue their legal rights while at the same time responding to that pressure to limit costs.

The popularity of third-party funding arrangements in arbitration is all the greater in light of the benefits that can be accrued when it comes to dealing with costs. The acceptance of third-party funding by the English legal system is yet another reason why the popularity of London as a seat for arbitration shows no sign of waning and, along with it, the number of professional third-party funders getting involved in the arbitration market.

²⁰ www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2016-12-19/HL4216/.