Arbitration Act 1996: key cases in 2016

Khawar Qureshi QC reviews key High Court decisions

IN BRIEF

- Mostly hopeless s 68 challenges dominate.
- Arbitrator bias context defined further.
- Emergency interim measures provided for by arbitral rules likely to preclude court relief.

In this past year, there were around 50 reported Arbitration Act 1996 (AA 1996) related court decisions. The most common provision invoked was in respect of failed challenges to arbitral awards pursuant to s 68 of AA 1996 on grounds of "serious irregularity". In addition, the Supreme Court and Court of Appeal both considered (and dismissed) challenges pursuant to the less frequently invoked s 69 of AA 1996 (appeal on a point of law) in the shipping cases of *Spar Shipping v Grand China Logistics* [2016] EWCA Civ 982, [2016] All ER (D) 67 (Oct) and *NYK Bulkship v Cargill* [2016] UKSC 20, [2016] 4 All ER 298.

In the case of *DB v DLJ* [2016] EWHC 324 (Fam), [2016] 4 All ER 298 Mostyn J considered the additional limitations applicable to enforcement of an arbitral award concerning family financial dispute issues (in respect of which a specific arbitral scheme was established in 2012), namely "mistake or supervening event".

Section 68 "high threshold" confirmed

In the case of *S v A* [2016] EWHC 846 (Comm), [2016] All ER (D) 180 (Apr), Sir Bernard Eder refused to grant an extension of time pursuant to s 80(5) of AA 1996 for a challenge to an arbitral award pursuant to s 68(2)(a) or (c) of AA 1996. The application had been made after 102 days and not the required 28 days. Sir Bernard conducted a detailed review of the principles applicable to extension of time applications, and questioned whether the existing guidance on the exercise of discretion in this context was still valid in the light of the "relief from sanctions" line of cases (*Mitchell v New Group* [2013] EWCA Civ 1537, [2014] 2 All ER 430, and *Denton v TH White* [2014] EWCA Civ 906, [2015] 1 All ER 880). Sir Bernard also considered and rejected the contention that there were substantive grounds for challenge of the award pursuant to s 68 of AA 1996.

In the case of *GNMTC v STX France* [2016 EWHC 1187 (Comm), Blair J dismissed a s 68 challenge rooted in the contention that an ICC arbitral tribunal sitting in Paris should not have allowed the shipbuilder respondent to deploy redacted documents relating to re-sale price, in respect of its damages counterclaim against a Libyan state entity which failed to pay for a cruise ship. His lordship observed that redaction of documents to exclude irrelevant or commercially sensitive information was common practice in commercial litigation and arbitration. In addition, there were multiple evidential sources which corroborated the re-sale price.

The former manager of Crystal Palace FC failed to persuade Sir Michael Burton that an arbitral award should be set aside pursuant to s 68 of AA 1996, in the case of *Tony Pulis v Crystal Palace* [2016] EWHC 2999 (Comm). The claimant had received a bonus shortly before announcing his departure from the club. The arbitral tribunal held that he was liable in damages for deceit in respect of the bonus as well as damages for repudiatory breach of his employment contract. The judge rejected the contention that crucial evidence was "entirely overlooked", finding to the contrary and not even calling upon the defendant's counsel.

Arbitrator bias reviewed & IBA guidelines doubted

As I have identified in previous articles, there is increasing concern that "repeat player" arbitrators emanating from a small pool may be susceptible to more than mere openness and empathy for the arguments of the party appointing them. Two cases within weeks of each other provide a vivid illustration of the importance attached to "due diligence" and "disclosure", as well as the practical limits placed upon bias challenges by the English courts —in a manner which is at odds with the IBA guidelines.

In the case of *Cofely v Bingham & Anor* [2016] EWHC 240 (Comm), [2016] 2 All ER (Comm) 129, Mr Justice Hamblen's judgment laid bare what must constitute a very stark illustration of grounds justifying removal of an arbitrator pursuant to s 24 of AA 1996 ("justifiable doubts... as to impartiality"). In essence, the sole arbitrator had been appointed on 4 February 2013 to determine a claim made by Knowles Ltd against Cofely Ltd for a success fee, in respect of its role in a dispute for monies allegedly owed to Cofely Ltd concerning its work on energy services for the Olympic Park and Westfield Shopping Centre. Cofely Ltd had settled with the employer directly, prompting the claim.

The factual context is very relevant and should be read as a "what NOT to do" guide by arbitrators. During the course of the arbitration, on 7 November 2014 the High Court delivered a judgment in a case (the *Eurocom* case) involving Knowles which strongly suggested that Knowles Ltd sought to manipulate the process for appointment of adjudicators in construction disputes, one of their nominees in that case having been Anthony Bingham. This prompted five detailed queries from Cofely Ltd on 11 March 2015 which Bingham did not answer, all relating to the extent of his connection with Knowles Ltd vis adjudicator/arbitrator appointments.

There followed a hearing on 17 April 2015 convened by Bingham where the transcript records that he was, inter-alia, hostile to Cofely Ltd's leading counsel and led to his "ruling" that he had no conflict of interest. Subsequently, Bingham eventually disclosed that 25 out of 137 of his appointments in the past three years had involved Knowles Ltd (constituting 18% of the total, and 25% of his total income). In response to a s 24 application seeking his removal, Bingham filed a witness statement which was "aggressive and unapologetic". All of these factors taken together were held to justify his removal.

W limited v M SDN BHD

In *W limited v M SDN BHD* [2016] EWHC 422 (Comm), [2016] All ER (D) 36 (Mar), W (a BVI company) contracted with the defendant ("M") (a Malaysian company) in respect of a project in Iraq. A dispute arose and a sole arbitrator was appointed by the London Court of International Arbitration (LCIA) pursuant to a request made in April 2012. The arbitrator was a Canadian QC ("the arbitrator") who was also a partner of a Canadian law firm ("the firm"). Two awards were made on 16 October 2014 and 26 March 2015. Both were challenged pursuant to s 68 of AA1996.

The claimant advanced its challenge (apparent bias based on alleged conflict of interest) by placing para 1.4 of the non-waivable red list within the *2014 IBA Guidelines on Conflict of Interest in International Arbitration* ("para 1.4 of the guidelines") at the "forefront". Paragraph 1.4 identifies a "non-waivable" situation where "the arbitrator or his or her firm

regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom".

There was no doubt that para 1.4 of the guidelines was engaged, as the arbitrator's firm (but not the arbitrator) regularly advised an affiliate of the defendant, and the arbitrator's firm (but not the arbitrator) derives substantial financial income from advising the affiliate.

Mr Justice Knowles reviewed the witness evidence of the arbitrator whereby he contended, inter-alia, that he had carried out conflict check before accepting the appointment on 18 May 2012 and had not been aware of any conflict, as well as the context that his law firm provided substantial legal services to the entity which became an affiliate of the defendant from December 2012 in a high profile acquisition.

The judge noted that the arbitrator (although a partner) effectively acted as a sole practitioner using his firm for secretarial and administrative assistance for his work as an arbitrator. The judge also observed (para 24) that "the fact that the arbitrator would have made a disclosure if he had been alerted to the situation shows a commitment to transparency".

In dismissing the challenge to the arbitrator, the judge made very important observations regarding the guidelines (which are considered by many to be increasingly persuasive), and remarked upon the apparent rigidity/inconsistency reflected in the "non-waivable red list" as compared with the "waivable red-list" (see paras 34-41 of the judgment). In some respects the "pragmatic/fact sensitive" approach of the judge is in mark contrast with the (perhaps) more rigid and strict US approach to conflict of interest which influenced the guidelines.

Emergency measures

In the case of *Gerald Metals SA v Tims* [2016] EWHC 2327 (Ch), [2016] All ER (D) 31 (Oct) Mr Justice Leggatt considered a claim for deceit and breach of contract in the context of a funding agreement for an iron order mine and refused an application for a freezing order against Mr. Tims. In addition, pursuant to s 44 of AA 1996, the judge was asked to grant, inter-alia, a freezing order in respect of assets of a trust which was party to an agreement subject to LCIA arbitration. The claimant had previously applied to the LCIA for the appointment of an emergency arbitrator which led to the provision of undertakings on behalf of the trust. The LCIA rejected the application after the undertakings had been given.

The judge noted the LCIA decision not to appoint an emergency arbitrator, and considered Arts 9A and 9B of the LCIA Rules, which provided for expedited formation of an arbitral tribunal and appointment of an emergency arbitrator respectively. He concluded that it was "only in cases where those powers as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the court may act under s 44".

Concluding observations

The cases illustrate the importance attached to non-intervention/court support as reflected in the AA 1996 and applied by the courts. While the potential bar to seeking emergency/interim measures from the courts pursuant to s 44 of AA 1996 (vis *Gerald Metal* case) may come as a surprise to many, the perceived (if nothing else) problem of arbitrator conflict of interest, and the importance of disclosure/due diligence continues to loom large. **NLJ**

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