Arbitration: 2021 in review

Reasons (for claimants) to be cheerful: Donny Surtani assesses the past year in international arbitration

IN BRIEF

▶ The past 12 months have offered some positive developments for claimants in international arbitration cases, with key decisions providing greater certainty on governing law, enforcement and evasive debtors.

There have been some significant developments in (or relevant to) English law as it pertains to international arbitration in the past 12 months or so. In three key respects, the developments have been positive for claimants with strong claims that they wish to progress and monetise.

Greater certainty over governing law

Perhaps the most heralded decisions in English arbitration law in recent months were the Supreme Court's rulings in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, [2020] All ER (D) 36 (Oct), and *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, [2021] All ER (D) 89 (Oct).

Prior to these decisions, there had been some considerable uncertainty about how to ascertain the law governing an arbitration agreement when the parties had not expressly chosen one in their contract. In particular, when the substantive law of the contract was of Country X, but the seat of arbitration was in Country Y, which law should be used to construe the arbitration agreement? This may be critical when issues arise as to whether a party not expressly named in the original agreement may be bound by the arbitration clause. Doctrines such as subrogation, agency and assignment may be applicable, but only once it is clear which law applies to the arbitration agreement.

The Supreme Court has now made clear that, where the parties have chosen a law to govern the substantive provisions of a contract, that law will generally also govern the arbitration agreement, even if the seat of the arbitration is in a different jurisdiction. While *Enka* related to an English-seated arbitration, *Kabab-Ji* makes clear that the analysis is the same even for the enforcement in England of awards rendered elsewhere.

Why is this good for claimants? First, it confirms that English law will approach the issue in a manner consistent with other jurisdictions. Secondly, it brings (greater) certainty to the issue and reduces the potential for respondents to bring dilatory challenges to arbitration proceedings by reference to disputes over the proper law of the arbitration agreement. England is often an important enforcement jurisdiction for awards rendered in other jurisdictions, and so it is helpful to know that the courts will not allow much scope for debate over the proper law of the arbitration agreement. The investment of time by the parties in *Enka* and *Kabab-Ji* should thus yield benefits for award creditors in future.

No scope to frustrate enforcement with counterclaims

In *Selevision Saudi Co v Bein Media Group LLC* [2021] EWHC 2802 (Comm), the English court was presented with an application by a respondent, facing enforcement of an US$8m award rendered in Dubai under the Dubai International Financial Centre (DIFC)/London Court of International Arbitration (LCIA) Rules, seeking (a) to bring a counterclaim against the award creditor within the enforcement proceedings, and (b) a stay of the enforcement pending determination of the counterclaim.

The award creditor (Selevision) was in the business of providing broadcasting-related services in Saudi Arabia, and had entered into an agreement with the award debtor (BMG), a Qatari company, to distribute set-top boxes for BMG's media channels (which carried major sporting competitions). Disputes arose, with Selevision alleging that BMG had breached the agreement by suspending its access to BMG's systems, wrongfully terminating the agreement between them, and failing to pay sums owed. BMG counterclaimed, alleging that Selevision had breached the agreement. In June 2018, a DIFC tribunal sitting in Dubai rendered an award upholding Selevision's claim in the sum of US$8m, and dismissing BMG's counterclaim.

Selevision sought to enforce the award in England, where BMG had assets. BMG did not dispute the validity of the award, but instead applied to bring a counterclaim which (it stated) exceeded the value of the award debt, and also seeking a stay of enforcement of the award. The counterclaim was not the same as the one it had pursued in the arbitration, but rather a claim for damages against Selevision for allegedly committing piracy on a very large scale against BMG's intellectual property rights. It submitted detailed evidence in support of that application, including from

a whistleblower whose evidence suggested Selevision's complicity in the piracy.

Mr Justice Butcher in the High Court rejected Selevision's suggestion that BMG's evidence did not raise a serious issue to be tried. He accepted that 'there are grounds to believe that there have been strenuous attempts to cover up the identity of the perpetrators of the piracy. Notwithstanding this, there does appear to me to be evidence raising a serious issue as to the involvement' of Selevision.

Nonetheless, he ruled that the relevant procedural rules did not permit the bringing of a counterclaim within a proceeding to enforce a New York Convention award, and even if they did, he would not have exercised his discretion to permit the counterclaim. He emphasised that proceedings to enforce a New York Convention award under Rule 62.18 of the English Civil Procedure Rules were 'clearly intended to be, in the absence of a challenge by the award debtor, highly summary and essentially quasi-administrative proceedings'. He also noted that the proposed counterclaim was unrelated to the subject matter of the award (otherwise it should have been raised in the arbitration) and that but for Selevision's enforcement attempt, there would have been no basis to suggest that the piracy issues should be heard in England.

While not a surprising result, it is striking that this conclusion was reached despite cogent evidence of a serious claim against Selevision, and real concerns that the piracy claim could not fairly be brought in Saudi Arabia. Together with the decision that the rules did not permit the bringing of a counterclaim, the judge's reasoning on how he would have exercised his discretion mean that it will be very hard indeed for future award debtors to adopt this strategy to prevent enforcement in England of a foreign award.

A key weapon against evasive award debtors

Although not a decision in an arbitration matter, the latest judgment in the long-running dispute between Lakatamia Shipping and Nobu Su represents an important development that will potentially be of great value to award creditors pursuing evasive debtors.

In *Marex Financial Ltd v Sevilleja* [2017] EWHC 918 (Comm), Robin Knowles J recognised that there was (at least) a good arguable case that in English law, inducing or procuring a violation of rights under a judgment would constitute an actionable tort. The context was an application for permission to serve a claim form out of the jurisdiction, and for that purpose he did not have to determine the parameters of the tort or whether it had been established.

However, in *Lakatamia Shipping Co Ltd v Su and others* [2021] EWHC 1907 (Comm), Bryan J in the High Court held various entities liable under *Marex* tort principles, and in doing so provided a framework for parties seeking to bring claims under this tort.

By way of background, in 2014 the court had found Mr Su liable to Lakatamia in breach of derivatives contracts and awarded damages of nearly US$38m. Mr Su subsequently claimed he was bankrupt and enforcement proceedings ran for an extended period. As part of these proceedings, Mr Su was cross-examined about his assets and implicated his mother (Madam Su) and other companies connected with his family in efforts to dissipate assets. Lakatamia then pursued these companies and Madam Su for unlawful means conspiracy and for intentionally violating its rights in respect of its judgment debt against Mr Su (the *Marex* tort).

In his judgment, Bryan J observed that the *Marex* tort has a close analogy with the tort of inducing or procuring a breach of contract (which has long been recognised in English law). He stated that there was 'no compelling reason why, in circumstances where the law protects against intentional interference by third parties with contractual rights it should not equally protect against intentional interference with rights established by judgments'. He set down the requirements of the tort as follows:

(i) a judgment in the claimant's favour;
(ii) breach of the rights under that judgment;
(iii) procurement or inducement of that breach by a third party;
(iv) knowledge of the judgment on the part of the third party; and
(v) realisation by the third party that the conduct it was procuring or inducing would breach rights owed under the judgment.

Further, while noting that there was (at least in theory) a justification defence available to a person accused of inducing a breach of contract, he did not consider that there was any scope for such a defence with respect to the *Marex* tort.

While the judgment does not expressly address arbitral awards, it is difficult to see why the result should be any different. An award creditor's right to be paid is both a contractual right arising under the arbitration agreement and a right akin to one arising pursuant to a judgment. Thus, if persons connected with an award debtor (perhaps directors or shareholders) take steps to dissipate its assets to frustrate enforcement of an award, they may open themselves up to tortious liability towards the award creditor.

Conclusion

There are still all too many opportunities for respondents to prevent or delay claimants' attempts to enforce their rights through arbitration and post-award enforcement. However, the above developments in English law in 2021 are welcome steps in the right direction, as they close off avenues for award debtors to cause delay, and further create jeopardy for those who would take steps to prevent enforcement of court judgments (and, it is to be hoped and expected, arbitral awards as well). NLJ

Donny Surtani, barrister at Crown Office Chambers (*www.crownofficechambers.com*).