Commercial Crime

Fraud Claims in International Arbitration

A. INTRODUCTION

Over the last decade, there has been an increase in fraud-related arbitration claims. This is due in no small part to a rise in energy-related arbitration emanating from, among other places, states with high levels of historic corruption. Consequently, an increasingly sophisticated body of caselaw has developed in the English courts at the intersection of fraud and international arbitration, focussing on various issues including: (a) the courts' willingness and ability to assist arbitrations with interim support (by way of freezing injunctions, Norwich Pharmacal orders and the like); (b) disclosure and the courts' power to assist tribunals in compelling parties to produce documents; and (c) parties' ability to challenge arbitral awards on the basis that they have been procured by fraud. This article examines this developing intersection between fraud, international arbitration, and the courts, including the important recent case *Nigeria v P&ID* [2020] EHWC 2379, a successful application to extend the time for challenging an arbitration award that had granted the claimant US$10billion in damages.

Since the seminal English case *Fiona Trust v Prvialov* it has been recognised in England & Wales that fraud disputes are arbitrable, where the arbitration agreement is apt to cover fraudulent disputes (i.e. the tort of deceit).[1] Nevertheless, arbitration is a creature of contract and only those who are bound by an arbitration agreement can be compelled to arbitrate. This poses unique issues in relation to fraud disputes, which frequently involve banks and other third parties, which are unlikely to be party to the arbitration agreement in question and therefore fall outside the jurisdiction of the relevant arbitral tribunal. Accordingly, fraud-based international arbitrations frequently involve the assistance of the courts for interim relief such as freezing injunctions, proprietary injunctions, Norwich Pharmacal relief (third party disclosure orders); and Anton Pillar orders (right to search premises and seize documents).

B. FREEZING INJUNCTIONS AND INTERNATIONAL ARBITRATIONS

Freezing injunctions can be divided into: (a) freezing orders sought against a contractual counterparty in an arbitration; and (b) freezing orders made against a third party.

a. Freezing Injunctions against Counterparties

Arbitral tribunals are generally regarded as unable to make freezing orders themselves. S.48(5)(a) of the Arbitration Act 1996 (the Act), might *seem* to provide a tribunal with the authority to make a freezing order. S.48(5)(a) provides: "*The tribunal has the same powers as the court— (a)to order a party to do or refrain from doing anything.*" However, in *Kastner v Jason*[2] the court held that s.48 applied not to interim remedies but only to final awards. Accordingly, tribunals could not use s.48 as authority to grant freezing injunctions at an interim stage, which is when they are usually sought. The only potential exception to this is if the parties expressly provide the tribunal with the right to treat a partial award as a final award, which *may* enable a tribunal to avail itself of powers

[1] *The London Steamship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain and The French State* [2015] EWCA Civ 333 at paragraph 78; *Fiona Trust & Holding Corporation* v. *Privalov* [2007] UKHL 40.
[2] [2004] EWHC 592 (Ch).

under s.39 of the Act. S.39 provides that: "*the parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award.*" However, whether this has the effect sought for has yet, to our knowledge, to be tested.

By contrast, there is a long history of the courts assisting arbitral tribunals by making freezing orders in assistance of an international arbitrations. Such applications can be made via s.44 of the Act. In order to invoke the courts' assistance, there application must be:

(a) Urgent[3]; or
(b) The tribunal, or the parties together, must formally request the relief on notice[4]; and, in either case
(c) The tribunal must have no "practical ability" to grant effective remedy.[5]

As to the urgency requirement, ss.9A and 9B of the LCIA Rules 2020[6] now provide that the LCIA has the power to appoint an emergency arbitrator in order to grant urgent interim relief. In the recent case *Gerald Metals SA v The Trustees of the Timis Trust and others* [2016] EWHC 2327 Leggatt J held, in view of an earlier iteration of those rules[7], that where the LCIA had declined Gerald Metals' application for an emergency arbitrator, the requirement of urgency had not been met and the court declined to exercise its discretion to grant an *ex parte* freezing injunction in support of that arbitration. Although not entirely clear, that case appears to proceed *not* on the basis that an emergency tribunal could have granted a freezing injunction itself (which the tribunal would not be able to grant unless the parties had expressly permitted the tribunal to do so), but on the basis that the LCIA saw no urgency in the case. Accordingly, Gerald Metals was left with either seeking the agreement of the respondent (which was obviously unlikely to be forthcoming) or waiting until the tribunal was appointed and making an application for them to request the courts' assistance under s.44(4). As a consequence of Articles 9A and 9B it now appears that for LCIA arbitrations, and arbitrations subject to equivalent institutional rules (such as the ICC, SIAC, and the KLRCA), the s.44(3) gateway is unlikely to be available: either the LCIA will appoint an emergency arbitrator in which case the applicant can ask the arbitrator to apply to the court for assistance under s.44(4); or the LCIA will not appoint an emergency arbitrator, in which case the requirement for urgency is unlikely to be met. [8] This is unsatisfactory for a claimant who, under the CPR, would likely to be able to make an *ex parte* application but, under the new LCIA rules would likely be unable to do so, without making the respondent aware of their application.

b. Freezing Orders Against Third Parties (the "Chabra" Jurisdiction)

As regards freezing orders against third parties, arbitral tribunals could never grant freezing orders against third parties, because arbitration is a creature of contract. However, the courts

[3] (see s.44(3)). The requirement for urgency will be satisfied where there is a risk of dissipation (*Mobil Cerro Negro Limited v PDVSA* [2008] 1 CLC 542), however the Court may also have regard to whether the Tribunal could reach a decision on the point "in any relevant timescale" (*Starlight Shipping Co v Tai Ping Insurance Co Limited* [2007] EWHC 1893 (Comm)).
[4] S.44(4).
[5] S.44(5).
[6] Effective from 1 October 2020.
[7] LCIA Rules 2014.
[8] There remains some grey area as to whether an applicant could still apply for the court on the basis that even if an emergency arbitrator were appointed they still would have no practical ability to grant an effective remedy under s.44(5). See *Starlight Shipping v Tai Ping Insurance* [2008] 1 Lloyd's Rep 230.

can, and frequently do, issue freezing orders against third parties in support of arbitrations, pursuant to the Court's Chabra jurisdiction. For instance, in *PJSC Vseukrainskyi Aktsionernyi Bank v Maksimov and others* [2013] EWHC 422 (Comm) a Ukrainian bank obtained a freezing order against English third parties, in support of a English-seated LCIA arbitration.

In addition to freezing orders, s.44 of the Act can also be utilised by a party to an arbitration in order to obtain an order for Norwich Pharmacal relief and/or an Anton Pillar order. The same principles as apply to freezing orders apply to these forms of relief *mutatis mutandis*.

C. COMPELLING RECALCITRANT PARTIES TO COMPLY WITH DISCLOSURE ORDERS IN FRAUD-RELATED INTERNATIONAL ARBITRATION

Given the relevance of Norwich Pharmacal and Anton Pillar relief to fraud claims, it comes as no surprise that a related feature that often arises in fraud claims relates to document production and disclosure/discovery. The normal disclosure rules under English civil procedure rules require parties to disclose all documents on which they rely or which materially undermine their case. Generally, document production in international arbitration is more limited, with parties initially required only to produce the documents they wish to rely on, with no positive obligation to voluntarily disclose documents that may damage their case. If a party wishes for more extensive disclosure they must apply for specific disclosure – normally by way of a Redfern Schedule. However, what if one of the parties refuses to comply with a tribunal's order to produce documents?

If a party fails to disclosure documents it has been ordered to provide by a tribunal, the Act gives the tribunal a power, under s.41 to issue a peremptory order. If the defaulting party fails to comply with that order s.41(7) gives the tribunal various further powers to: (a) direct that the defaulting party will not be entitled to rely on any allegation or material that was the subject of the order; (b) draw inferences from such non-compliance; (c) proceed to an award on the merits on the basis of the materials that have been provided; or (d) make an appropriate costs order given the non-compliance. The tribunal does not have the ability to hold the defaulting party in contempt, however, the courts retain a power to assist under s.42 to order a defaulting party to comply with a peremptory order, failing which they will be in contempt of court.[9] This tool is a useful weapon when faced with a recalcitrant party that is seeking (one suspects) to withhold documents that may enable the claimant to prove fraud.

In addition to obtaining disclosure from a counterparty to arbitration, a party may wish to obtain disclosure from a third party. The courts have frequently assisted in this exercise via ss. 43 and 44 of the Act. However, applications need to be made for focussed requests: the courts will not permit a party to arbitration to use ss.43 and 44 to avail themselves of the disclosure regime under the civil procedure rules for wide ranging disclosure. The request must be targeted.[10] An application under ss.43 or 44 is not an opportunity to circumvent this requirement.

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[9] S.42(1).

[10] In *BNP Paribas* v. *Deloitte & Touche LLP*), the court held that section 43, while giving the court powers to compel a witness to bring evidence (akin to a *subpoena*), did not give the court power to order general disclosure against a third party, as is available under the CPR63); In *Tajik Aluminium Plant* v. *Hydro Aluminium AS,* the Court of Appeal reiterated the decision in *BNP Paribas:* section 43 of the 1996 Act is not to be used as a means of obtaining general disclosure of documents from a third party.

A final point to make regarding disclosure, is that an arbitral tribunal cannot order pre-action disclosure. The reason for this is obvious, the tribunal can do nothing until the action is instigated and the claim brought – for the tribunal's jurisdiction does not bite until they are empanelled.

D. CHALLENGING ARBITRAL AWARDS IN INTERNATIONAL ARBITRATION

At the end of an arbitration (or at an interim stage, for instance, following a hearing on jurisdiction) a tribunal will publish a final award (or partial award if the award is one relating to jurisdiction). Occasionally, an arbitration award will be challenged on the basis that it was procured by fraud. (This argument is frequently run simultaneously with an argument that the tribunal lacked any substantive jurisdiction because the contract and the arbitration agreement were also procured by fraud).

Ordinarily, there is a 28-day time limit for bringing such challenges,[11] however, s.80(5) of the Act provides a discretion as to whether to extend this in certain exceptional circumstances. In relation to that discretion, Colman J developed a set of six factors to weigh when considering whether to extend the time for making a challenge in the case *Kalmneft v Glencore* [2001] 2 All ER (Comm) 577 (the so-called Kalmneft factors). At [59] he outlined these considerations as:

> (i) the length of the delay;
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> (ii) whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;
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> (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
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> (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
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> (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred in respect of the determination of the application by the court might now have. (vi) the strength of the application;
>
> (vi) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

The six factors and the caselaw interpreting these factors, have been reconsidered in the important recent case *Federal Republic of Nigeria v P&ID* [2020] EWHC 2379 in which P&ID had been awarded the sum of US$10billion by an extremely experienced arbitration tribunal for repudiation of a gas processing contract. In that case Cranston J, summarising the caselaw explained:

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[11] S.70(3).

(a) The Kalmneft factors are generally regarded as exhaustive considerations [155];

(b) none of the factors are of any more importance than any others. The weight attaching to each will depend on the facts of the case [160];

(c) Parliament and the court have repeatedly emphasised the need for finality and time limits in arbitration [161]; and

(d) delay has to be judged against the yardstick of the 28 days provided for in the Act: a delay measured even in days was significant, one measured in many weeks or in months is substantial [164].

Notwithstanding point (d) above, Cranston J held that while a delay of over three years was significantly longer than the 28-day time period provided for under s.70, the facts of the application demonstrated that Nigeria had made out a *prima facie* case of fraud and, weighing all the factors, it was right to extend the time within which Nigeria could challenge the award. Specifically, drawing on submissions from counsel Cranston J explained that: "*an award that is liable to be set aside as having been procured by fraud is, in legal terms, worthless*." The judgment provides particularly useful guidance regarding the time limit issues in relation to challenging an award. Indeed, it is by far the longest delay beyond the 28-day time limit to be successful.

E. CONCLUSION

The interrelationship between fraud and international arbitration is constantly developing, both within England & Wales and globally. That applies to developing caselaw in the courts and also to the rules of the various arbitration institutions which are frequently being updated to streamline the arbitral process. It may be the case that in the next round of revisions some institutional rules will expressly grant tribunals the power to grant freezing injunctions against contractual counterparties. If so, it remains to be seen whether a freezing order granted by a tribunal could be successfully challenged in the courts by way of reference to *Kastner v Jason*. The likely answer, in our view, is that if such rules did so provide, then this would constitute an express agreement to permit the tribunal to grant a freezing order and would therefore be distinguishable from *Kastner v Jason* and, therefore, permitted.

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