INTERNATIONAL ARBITRATION NEWS

Quadrant CHAMBERS

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EDITORIAL by SIMON RAINEY QC

The broadening of the scope of an arbitral tribunal's powers is usually seen as 'a good thing'.

It gives effect to Lord Hoffmann's observation in Fiona Trust that rational parties are presumed to have intended a one-stop shop for disputes of any kind between them under their contract. But, for such shopping to be effective, there must be also a full range of product lines, untrammelled by domestic litigation practice. The framers of institutional rules, like those of the Model Law, understandably therefore, adhere to the principle of "wider still and wider shall thy bounds be set".

Two recent decisions on the Arbitration Act 1996, discussed in this edition, illustrate different aspects of wider powers and also pose some timely questions.

Gerard Metals v Timis demonstrates that the increasing battery of 'emergency arbitrator' and 'expedited constitution' provisions in institutional rules may produce possibly unintended consequences. A common view was that such provisions added a complementary suite of urgent and interim relief options, building on national court powers, such as section 44. Perhaps logically, having regard to section 44 as "redefining the relationship" between court and tribunal (in the DAC's words), the Court has held that greater availability of arbitral powers will, on the contrary, potentially limit recourse to the Court. If there is time to obtain relief from an expedited tribunal / emergency arbitrator, the Court has no power to grant urgent relief. This may come as a surprise, leaving parties stuck with applying for arbitral relief where a Court order in support of the arbitration might have been more attractive and carried more mandatory impact. Commentaries suggest that it is doubtful that the restricting access to the court was intended, e.g. by the LCIA. Will this lead to more tailored solutions in agreements to arbitrate?

Essar v Norscot, on the question of the recoverability of litigation funding costs under section 59, reinforces the approach that the Act is to be construed as a free-standing, broad and flexible code of powers, and that CPR-like niceties will not govern its plain terms, such as the concept of "other costs". However, wider arbitral considerations seem not to have been considered: compare the detailed consideration of the topic in the Draft Report of the Subcommittee on Costs of the ICCA-Queen Mary Task Force on TPF in International Arbitration, (1st November 2015). Will we see attempts at more prescriptive 'costs recovery' provisions?

Much to think about and I hope this Newsletter helps in that process. It certainly plays its small part in consolidating Quadrant's presence and standing in international arbitration, evidenced by this year's Legal 500 International Arbitration Set of the Year 2017 Award

Are litigation funding costs recoverable in arbitration?

AUTHOR: Chirag Karia QC

The increasing use of litigation funding in international arbitration raises the question of who should bear its extremely high cost – often, the higher of 300% of the sum advanced or 35% of the recovery. Do arbitrators have the power to award such funding costs to the successful party or must that party bear those costs itself and thereby lose a substantial portion of its recovery? The English High Court decided that question in Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm).

Norscot had financed its arbitration against Essar with litigation funding of £647,000. Upon securing an award of US$12 million and defeating Essar's considerably larger counterclaim, Norscot claimed the £1.94 million it had become liable to pay its funder as "other costs" under section 59(1)(c) of the Arbitration Act 1996 and what is now article 37(1) of the 2012 ICC Rules.

The arbitrator awarded Norscot those costs,

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AWARDS

Quadrant Chambers has received the Legal 500 UK 2017 Award for **International Arbitration Set of the Year. Simon Rainey QC** was nominated for International Arbitration Silk of the Year.

UPCOMING EVENTS

Quadrant Chambers will be hosting an event on **Tuesday 29 November 2016** entitled "Arbitrator insights: What persuades?" which brings together a number of well-known practitioners and Arbitrators within this specialist field, including **Noradèle Radjai of LALIVE (Geneva), Carmen Martinez Lopez of Three Crowns LLP** and **Simon Rainey QC of Quadrant Chambers.** The event will be chaired by **Simon Croall QC of Quadrant Chambers.**

To register your interest in attending, please e-mail IAEvent@quadrantchambers.com

Quadrant Chambers is sponsoring part of the C5 Energy conference on **24 & 25 January 2017. Lionel Persey QC** and **Nigel Cooper QC** are confirmed speakers. They will be chairing sessions in relation to Upstream Construction Disputes and Disputes over Drilling Contracts respectively. Further details of the event can be found **here.**

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finding that Essar's deliberately exploitative conduct prior to and during the reference had forced Norscot to obtain litigation funding to prosecute its case. He found that Essar had deliberately set out to cripple Norscot financially and drive it 'from the judgment seat'.

The Commercial Court dismissed Essar's challenge under section 68 of the 1996 Act, holding that as a matter of language, context and logic "other costs" in section 59(1)(c) "can include the costs of obtaining litigation funding". It emphasised that it was up to arbitrators how they exercise that discretion.

This ruling is likely to make arbitration more attractive to parties likely to require litigation funding and make respondents who know that the claimant has such funding more wary of the costs implications of losing.

There will undoubtedly be an increase in the number of applications by successful claimants to recover litigation funding costs. As far as English law is concerned – and probably also in all ICC arbitrations regardless of the chosen law, given the wording of art.37(1) of the 2012 ICC Rules – the tribunal will have the discretion to award successful claimants such costs.

Chirag was counsel for Norscot, the successful party, in the ICC arbitration and the Commercial Court. He has a broad commercial and international arbitration practice including multi-jurisdictional disputes in the oil and gas, commodities and shipping fields. He appears regularly in ICC, LCIA and LMAA arbitrations and most recently sat as an arbitrator in the Dubai International Arbitration Centre.

Urgent relief under s. 44 of the 1996 Act where institutional rules provide for comparable remedies

AUTHOR: Nevil Phillips

Discussion

Urgent interim relief is available under s 44(3) of the Arbitration Act 1996. However, s 44(5) of the Act limits that to cases where the arbitral tribunal or institution "has no power or is unable for the time being to act effectively".

In Gerald Metals SA v Timis [2016] EWHC 2327 (Ch), the High Court declined relief under s 44(3) where corresponding relief could also be granted under the LCIA Arbitration Rules 2014.

The Applicant sought a Freezing Order under s 44(3). Leggatt J agreed that (i) the test of urgency under s 44(3) was whether the arbitral tribunal has the power and the practical ability to grant effective relief within the relevant timescale, and (ii) the need for relief may be so urgent that the "urgent" powers of an arbitral tribunal or institution are insufficient, permitting the Court to act (e.g. if the application is one that needs to be made without notice).

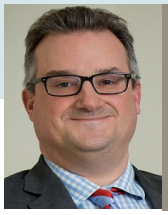
Leggatt J held, however, that there was sufficient time for the Applicant to obtain relief under Articles 9A and/or 9B of the LCIA Rules, and that,ergo, he did not have power to grant urgent relief under s 44(3).

Thus, the Judge held that only where (i) the powers granted by arbitral rules and (ii) the powers of a tribunal constituted in the ordinary way are inadequate, or (iii) where such powers are not practicable, can the Court act under s 44.

Points to take away

The availability of appropriate relief under institutional rules may preclude the grant of urgent relief under s 44. This is consistent with other remarks regarding the interaction between s 44 of the Act and urgent relief available under the ICC Rules (see Seele Middle East FZE v Drake & Scull International SA Co [2013] EWHC 4350 (TCC)).

If parties wish to maximise access to s 44 relief in arbitration with an English seat or applicable law, they may prefer expressly to exclude the "urgency" relief available under institutional rules.



Nevil is a leading junior in international and domestic arbitration (institutional and ad hoc), as well as litigation (at first instance and appellate level) and other aspects of dispute resolution. His practice encompasses the broadest spectrum of commercial disputes and remedies, including international trade, commodities, shipping, energy, insurance/reinsurance, and finance.

On **8th September 2016**, Quadrant Chambers sponsored the 2nd IPBA Asia-Pac Arbitration Day in Kuala Lumpur.

Luke Parsons QC delivered a paper on "Independence, Impartiality and Conflicts of Interest in Arbitration", which also reflected on his involvement (leading **Caroline Pounds**) on the highly published Judgment of **W -v- M**

Luke's paper and additional information about this event can be found **here.**

Chirag Karia QC secured a landmark ruling from the Commercial Court that an arbitral tribunal has the power to award litigation funding costs under s.59(1)(c) of the Arbitration Act 1996 (an appeal from an ICC arbitration).

As reported on the World Bank Website, **Guy Blackwood QC** has been appointed as lead advocate in ICSID arbitration Case No. Arb/16/20, Safa v. Hellenic Republic, a bilateral investment treaty dispute (Greece/ Lebanon 1997). A fuller recital of the matters in issue was reported by Global Arbitration Review. Arbitral confidentiality precludes discussion of the issues here.

If there are any topics you would like covered in future editions of the newsletter or enquiries arising out of this edition please contact Simon Slattery.

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