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UK Arbitration H1 2020: 6 Months and 6 Key Messages from the English Courts, Part 2

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With an uptick in commercial wrangles expected as a result of measures taken to combat Covid-19, England is not alone in seeking to provide a welcoming jurisdiction to deal with such disputes.

We identified **6 key developments** in arbitration case law in England from the last 6 months. In Part 1 of the two-part post, we explained how:

1. The English Court will determine the applicable law to an arbitration agreement and hold parties to their bargain by enforcing such arbitration agreements …
2. …But only where clearly drafted. The Courts will not save a party from competing clauses.
3. The English Court limits when a non-party can rely on arbitration agreements.

In **Part Two**, we will cover how:

4. An English seated arbitration agreement can afford the protection of the English Court to contractual debts.
5. The English Court remains willing to support English and foreign seated arbitrations…by freezing orders (in the right circumstances)
6. …and by compelling non-parties to give evidence.

4. The English Courts' jurisdiction and protection extends beyond the arbitration agreement to assets arising under the matrix contract

In *SAS Institute Inc v World Programming*, the Court of Appeal considered the basis on which it will permit or prevent enforcement of a foreign judgment in a foreign court where such judgment involved assets in England. It also explained how a London arbitration agreement can result in a contractual debt being an English asset and so subject to the jurisdiction and protection of the English Court even when subject to foreign court proceedings.

The parties had been involved in a long running IP license dispute. WPL succeeded in the English Courts (with a reference to the CJEU) that the terms of the SAS-WPL license were null and void under EU law, but the North Carolina courts upheld the license finding WPL liable for breach of contract, as well as statutory and fraud claims and ordered WPL to assign to SAS the right to payment from certain of WPL's customers.

SAS's attempts to enforce its U.S. judgment in England failed, on grounds of public policy and issue estoppel.

The question for the Court of Appeal in May 2020 was whether an anti-enforcement injunction (against enforcement by SAS of the U.S. judgment in courts in the US) should be continued. It noted that the enforcement of judgments is territorial, took due note of the principle of comity but held that the assignment order was an exorbitant interference with the jurisdiction of the English Court so far as it extended to:

- debts due from WPL's customers in the UK, as these are English assets over which the English Court (and only the English Court) has subject matter jurisdiction; and
- debts due from WPL's customers whose license terms with WPL contained English exclusive jurisdiction clauses or English seat arbitration agreements. These debts are also situated in England.

Comment: a jurisdictional choice is about more than where disputes are heard; it can affect the characterization of your wider contractual assets. Where different jurisdictions take a very different view on an issue (witness the EU and US approach to IP rights here), this can have a decisive effect.

5. The English Court remain willing to support English and foreign seated arbitrations…by freezing orders (in the right circumstances)

In *Petrochemical Logistics & Anor v PSB Alpha & Anor*, the English High Court considered the level of connection with the English jurisdiction necessary for it to grant freezing injunctions in support of foreign-seated arbitral proceedings. While the Court has a clear jurisdiction to do so, this is a salutary reminder that the jurisdiction is a discretionary one and each case turns on its own facts.

Here, an injunction over shares in a Swiss company in support of a Swiss law, Swiss seated arbitration was not continued: the respondent's British nationality was not a sufficient connection to this jurisdiction where since he was not resident or domiciled in England; there was no evidence of a real connection to a subsequent English law SPA and there was a real risk of overlapping orders being sought in the Swiss courts.

Comment: Claimants seeking freezing injunctions in support of foreign-seated arbitral proceedings must show a real connection to England. English courts are rightly reluctant to grant such relief where the respondent is not resident or domiciled in, and holds no assets within, the jurisdiction.

6. …and by compelling non-parties to give evidence

Section 44 the UK Arbitration Act (the Act) sets out certain court powers exercisable in support of arbitral proceedings. In *A and B v C, D and E* overruling a High Court first instance decision, the Court of Appeal resolved a long-standing controversy and unanimously found that English courts have jurisdiction under s.44(a) to order a non-party witness resident in England to be deposed not just in support of a domestic arbitration but also in support of a foreign-seated arbitration (on the facts a New York seated arbitration). The Court of Appeal held:

- The courts have the same powers in this respect in relation to foreign-seated arbitration as they would have in English civil proceedings.
- The broad reference to "witnesses" in the Act covers all witnesses; not just those who are parties to the arbitration. Indeed, it is rare for a witness to be a party to the arbitration.
- The respondents' narrow interpretation of the relevant provision would mean it had "no or little content".

Comment: The Court did not overrule earlier authorities on other subsections of s.44; in particular orders relating to property (to inspect, sample or detain property) and the granting of interim injunctions where applications for orders against non-parties have been refused on the ground that that agreement-based arbitration mechanics ought only to be binding on the parties to such agreement. However, it did raise some doubts over those authorities which may embolden parties in cases where such evidence or asset preservation would be crucial. The door is open…

The above are illustrative case summaries only. If you are interested in understanding the full judgments or their relevance to your matter, please contact Dorothy Murray or your usual contact.

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