

Kluwer Arbitration Blog

England and Wales: Arbitrability of Claims which Involve Alleged Criminal Conduct

Richard Davies (Church Court Chambers) · Tuesday, May 5th, 2015

The recent Court of Appeal of England and Wales (“the Court”) judgment in the case of *The London Steamship Owners’ Mutual Insurance Association Ltd v The Kingdom of Spain and The French State* [2015] EWCA Civ 333 (“*the Judgment*”) will make interesting reading for those concerned with the subject of arbitration. The judgment rendered covers different topics within that legal field. The matter that will be presented in this blog post is the findings of the Court with respect to the arbitrability of claims which involve alleged criminal conduct.

The case originates from an oil spill off the coast of France and Spain. The governments of France and Spain sought legal redress against various parties including proceedings in Spain (Judgment, paras. 2-3). One such party was the insurers of the vessel that the oil spill came from. The insurers took pre-emptive action by commencing arbitral proceedings for declaratory relief: a declaration that France and Spain were bound by the arbitration clause provided in the insurers’ rules and that the insurers were not liable under the underlying contract. The relief sought was granted in favour of the insurers in the form of arbitral awards (Judgment, para. 5). The seat of the arbitration was England.

The insurers attempted to enforce the arbitral awards in England before judgment was rendered in the Spanish legal proceedings (Judgment, para. 7). France and Spain opposed this enforcement of the arbitral awards on various grounds. One such reason, which was raised on behalf of Spain, was that the matter was incapable of being resolved by arbitration since the liability under Article 117 of the Spanish Penal Code (“SPC”) requires a criminal conviction and this was an essential element of the cause of action against the insurers. It was claimed that because an arbitral tribunal cannot render a criminal conviction, such a claim, in accordance with Article 117 of the SPC, cannot be dealt with in arbitral proceedings. The court of first instance in England found, however, this matter to be arbitrable (Judgment, para. 8). France and Spain subsequently appealed.

The Court ruled that the question of arbitrability was not a barrier because although the matter appeared in the SPC, the relevant provisions are civil in nature. Furthermore, even though procedurally the public prosecutor has the right to bring the claims, it is the claimant itself who benefits from the claim, not the public prosecutor (Judgment, paras. 77-82).

In the case at hand, the Court dealt with the issue of the interaction between criminal law and arbitration in a specific set of facts. However, examining the matter in a broader sense, the key part of the Judgment is the Court’s statement that an arbitrator has the jurisdiction to find facts that

constitute a criminal offence and even find that a criminal offence has been committed (Judgment, para. 78). This statement raises concerns from an English criminal law perspective.

The first concern is the applicable standard under which such a criminal offence must be proved in arbitration proceedings. It is not clear whether this would be the usual criminal standard that the decision maker must be sure or whether this would be the usual civil standard on the balance of probabilities.

The second issue is related to the restriction of a decision making body to a single arbitrator or an arbitral tribunal. Considering the context of arbitration to judge commercial matters, it is most likely that the criminal accusation will be one of fraud. Within English criminal law, this is classed as an “*either way offence*” meaning that it may be decided upon by a jury, a bench of magistrates or a single judge. Such an outcome on the applicable decision making personnel is dependent on the seriousness of such fraud taking into account factors which include inter alia the number of fraudulent activities, financial value of said activities, the longevity of such actions and the wishes of the accused with respect to the decision making venue. It might appear restrictive if under civil law this right was restricted to just an arbitral tribunal but if the same accusation was put in a criminal context, the accused would have the right to have the matter heard before a wider range of decision makers in the form of twelve jurors.

Thirdly, any decision on criminality within English criminal courts would have a wide range of evidence available for such a decision. One example in such a criminal case would be the option to examine the bad character of the accused or the party making the accusation in terms of, for example, any previous convictions that such a party may have if said previous convictions and/or other bad character evidence were found to be applicable to the current dispute. For example, if a case involved an accusation of fraud then it is possible that those involved would have their records examined to see if they had been convicted of fraud in the past.

In contrast, one of the main features of arbitration proceedings is that they are confidential, unless the parties agree otherwise. Therefore, arbitral tribunals cannot automatically examine previous arbitral awards involving any of the parties before them. Thus, if, in a previous arbitral award, a party had had a finding made against it that it had acted in a criminal manner or had committed a criminal offence, this is not something that the current arbitral tribunal could automatically enquire about. Therefore, findings of criminal liability could be made in current arbitral proceedings without the full range of evidence regarding the parties’ previous conduct at the disposal of the arbitral tribunal. Such evidence would be, on the other hand, available to the equivalent decision makers if the matter was before a criminal court.

These points are highlighted because, although an arbitral tribunal does not have the ability to render a criminal conviction, it has the ability to find that a criminal offence has been committed. Equally, whilst an arbitral tribunal cannot render a custodial sentence, it can award damages. These damages may contain a punitive element based on findings of criminality. This appears to be similar to the ability of the criminal courts to recover money which is found to have been obtained from criminal conduct. It can be argued that this overlap described above between criminal law and arbitration is a step too far in an English context given the substantive and procedural shortcomings that such a decision would have in the arbitration context compared to the equivalent methodology that would occur within the normal criminal investigation and prosecution route.

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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