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Procedural Issues Resulting From a Fraud Claim in International Commercial Arbitration: An English Law Perspective

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Allegations of fraud and corruption are increasingly encountered in international arbitrations but there is at times a perception that international arbitration, which is by nature a private and consensual dispute resolution mechanism, is ill-equipped to handle the challenges thrown up by such allegations. This is particularly so when looking at arbitral procedure. Is this perception justified or is international arbitration flexible enough a tool to overcome these challenges?

Is a dispute concerning fraud arbitrable?

In England there is no public policy requiring issues of fraud to be decided by the courts. Therefore, accusations of fraud are in principle capable of falling within the scope of an agreement to arbitrate. Whether they do so depends on the wording of the relevant arbitration agreement. At the outset of any contractual relationship, a party would not usually be anticipating fraud from its counter-party and hence, it is unlikely to expressly include language covering fraud in the arbitration agreement. However, the broad construction of arbitration clauses under English law may assist.

But what happens if a party claims that the main contract itself was induced by fraud? Generally, the doctrine of separability should mean that in such circumstances the arbitration clause will not be affected, so a tribunal will have jurisdiction to determine the dispute. In England, the application of the doctrine of separability was affirmed and explained by the House of Lords in *Fiona Trust v. Privalov* [2007] UKHL 40.

However, there are some grounds of invalidity that could affect the arbitration clause and the main contract equally. For example, the contract itself could be a forgery and had, in fact, never existed (*Nigel Peter Albon v. Naza Motor Trading SDN BHD* [2007] EWHC 665 (Ch)). The position is less clear as regards duress and the court in *Astrazeneca UK Ltd v. Albemarle International Corporation* [2010] EWHC 1028 (Comm) held that the alleged duress was not sufficiently related to the arbitration clause to impeach it. In any case, a high standard of proof is required to show that the agreement to arbitrate is itself invalid.

In most cases involving fraud, corruption and bribery, therefore, an arbitral tribunal will retain jurisdiction to determine the dispute.

Related proceedings: Staying an arbitration for criminal actions

In circumstances where a party to an arbitration alleges that fraud has occurred, it is not uncommon to find that there may be parallel court proceedings or regulatory investigations taking place. This may be particularly true in the context of ICSID and BIT arbitrations but can also occur in the context of commercial arbitration. In these circumstances, efficiency and the consistency of rulings might militate in favour of arbitral proceedings being stayed pending any parallel decision.

A common law court has an inherent jurisdiction to stay its own proceedings in the interests of justice and it is not a strict requirement that the parallel proceedings are between the same parties and/or concern the same cause of action.

In practice, however, a stay is not automatically granted. In *Akciné Bendrové Bankas Snoras v. Antonov and another* [2013] EWHC 131 (Comm), the Commercial Court held that it had discretion to stay civil proceedings, in this case in the UK, until related criminal proceedings, in this case in Lithuania, had been determined but it declined to do so after weighing the relative inconvenience and prejudice that would be suffered by the parties.

On the other hand, the right of an arbitral tribunal to stay proceedings is not universally established. Alexis Mourre in "Arbitration and Criminal Law: Jurisdiction, Arbitrability and Duties of the Arbitral Tribunal" notes that:

> "In most jurisdictions, an arbitral tribunal has no obligation to stay the proceedings when a criminal investigation is pending on facts which might be relevant for the arbitration. This principle was embedded by a resolution of the International Law Association adopted in 1996".

He argues that whilst criminal law ought not to be used to disrupt the arbitration, equally arbitrators should not let themselves be used as a tool for fraud.

Whilst the tribunal is indeed mandated to decide the dispute referred to it without unnecessary delay and a claimant has a right to have its claims determined, such considerations ought to be balanced against the need to avoid inconsistent decisions and the ultimate objective of achieving a fair result as between the parties. In these circumstances a tribunal may well consider it prudent to stay proceedings. Indeed the International Law Association ("ILA") recommends that:

> "…as a matter of sound case management, or to avoid conflicting decisions, to prevent costly duplication of proceedings or to protect a party from oppressive tactics, an arbitral tribunal requested by a party to stay temporarily the Current Arbitration, on such conditions as it sees fit, until the outcome, or partial or interim outcome, or any other pending proceedings (whether court, arbitration or supra-national proceedings), or any active dispute settlement process, may grant the request, whether or not the other proceedings or settlement process are between the same parties, relate to the same subject matter, or raise one or more of the same issues as the Current Arbitration, provided that the arbitral tribunal in the Current Arbitration is:

> • not precluded from doing so under the applicable law;
> • satisfied that the outcome of the pending proceedings or settlement process is material to the outcome of the Current Arbitration; and
> • satisfied that there will be no material prejudice to the party opposing the stay. [Recommendation 6 of Resolution 1/2006 adopted at the 72nd Conference of the International Law Association]"

The ILA Final Report cites English authorities to support the proposition that an arbitral tribunal can stay its proceedings if there is an overlap with court proceedings, certainly those of the court with supervisory jurisdiction over the arbitration. In *Northern Regional Health Authority v. Derek Crouch Construction Co Ltd* [1984] 2 All ER 175, Browne-Wilkinson LJ held that "in law the arbitrator is entitled to refuse to decide any issues which overlap with the High Court proceedings and that he is [in] the best position to decide whether such overlap does exist."

Enforcing an arbitral award where issues of fraud are raised

If a tribunal proceeds to issue an award in an arbitration where issues of fraud are raised, this very fact may lead to a challenge at the enforcement stage. In particular, such an award may be liable to be set aside under the public policy exception if it is found at the enforcement stage that the tribunal had failed to adequately investigate issues of fraud.

The scope of the public policy exception is normally narrowly interpreted but has been applied to include matters which are considered international public policy. As such courts often need to check the existence of transnational public policies objectively by identifying them through international conventions, comparative law and arbitral awards. Matters such as bribery and corruption have generally been considered to justify a refusal to enforce arbitral awards.

For instance, enforcement was refused on the basis of public policy in *Soleimany v. Soleimany* [1999] QB 785. In Soleimany, the contract in dispute provided for carpets to be illegally smuggled out of Iran. The Beth Din tribunal had found that the transaction in question was an illegal smuggling operation, but the illegality did not affect the parties' rights under Jewish law. The English Court of Appeal refused to enforce an award which had recognised on its face that the transaction in question was illegal. The court stressed that they were dealing with a judgment which found as a fact that it was the common intention to commit an illegal act, but enforced the contract. Accordingly, different considerations might apply where there is a finding by the foreign court to the contrary or simply no such finding, and one party now seeks such a finding from the enforcing court.

In the leading case of *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [2000] QB 288, the court hearing the enforcement action reasoned that the arbitral tribunal had considered the issue of illegality and held that the contract was not illegal under the applicable law or the law of the seat of arbitration (in both cases Swiss law). In the interests of the finality and respect for arbitration awards, the court enforced the contract. The enforcing court did not re-determine the issue as the facts supporting the allegation of fraud had already been considered by the tribunal. However, it was clearly envisaged that a failure by the tribunal to consider allegations of illegality and fraud adequately could potentially give rise to a successful challenge on enforcement based on public policy grounds. Moreover, the court ruled that where evidence was adduced, following an award, that there was illegality at the heart of the disputed contract, the court would have to

balance the public policy considerations of illegal contracts with the public policy considerations of the finality of awards when making a determination on whether to enforce the award.

Conclusion

Allegations of fraud may create challenges to arbitral procedure and to the successful enforcement of arbitral awards. On occasion, they may even prevent a tribunal from having jurisdiction. If any external investigations or parallel litigation are taking place, it may in certain circumstances be preferable to stay arbitral proceedings in the interests of good case management. In any case, in order arguably to comply with the tribunal's duty to make every reasonable effort to ensure that an award is legally enforceable, tribunals should ensure that allegations of fraud are fully considered before an award is delivered and that full reasoning is given therein.

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