Kluwer Arbitration Blog

Examining the Jurisprudence of Extension of Time to Challenge Arbitral Awards under the 1996 English Arbitration Act

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The English Commercial Court's September 4, 2020 decision in *P&ID v. Nigeria (P&ID)* agreed to halt enforcement due to a *prima facie* case of fraud. This decision introduced a novel perspective to the legal discourse of extension of time to challenge an arbitral award. In particular, the court determined to extend the time to challenge an arbitral award beyond the 28-day statutory limit set by Section 70 of the 1996 English Arbitration Act ("1996 AA") to three years and one month after the arbitral award was issued. This post critically examines the jurisprudence surrounding the extension of time to challenge arbitral awards under the 1996 AA, with a particular focus on the *P&ID* decision and its implications for the global discourse on challenging arbitral awards.

Unravelling Arbitration: The 28-Day Challenge Window

Arbitration has often been promoted as a better alternative to traditional court litigation because of its speed and finality. However, the extent to which intervening factors affect these core characteristics of arbitration has been the subject of critical legal and policy discourse in the evolution of arbitration. The intervening factors may range from determining the place of public policy, legal principles, irregularities, and fraud in the issuance of an award.

The *P&ID* decision is not the first time English courts have extended the 28-day limit. For example, in *Minister of Finance (Incorporated) and another v. International Petroleum Investment Co. and another*, a 511-day extension was granted by the English Commercial Court in what was termed "an exceptional decision to meet the justice of an exceptional case." Indeed, the jurisprudence of extending the time for challenging arbitral awards under English law is very much unsettled.

While Section 70(3) of the 1996 AA provides a specified time limit of 28 days for the challenge of an award, Rule 62.9(1) of the Civil Procedure Rules grants the court discretion to vary the period. In this light, English courts have adopted various approaches to this limitation, ranging from refusing to extend the time as in *STA v. OFY* and *State A v. Party B*, among others, to extending the time as in the cases of *Re Minister of Finance (Incorporated) and another* and *P&ID v. Nigeria*, among others, thus giving the impression that even after several years after the issuance of an award, enforcement can be stayed on a mere *prima facie* case of fraud.

Court Discretion in Time Extensions: A Review of English Cases

As much as discretionary jurisprudence is established, English courts still maintain a pro-enforcement disposition and generally prefer to give effect to arbitral awards. However, the English courts only vary the limitation period under a narrow interpretation of the grounds strictly laid out. In this sense, the varying of the 28-day limitation has been subjected to the satisfaction of several considerations that have jurisprudentially evolved over the years and were more authoritatively laid out in *Kalmneft v. Glencore International AG*, further echoed in *Terna Bahrain v. Bin Kamil*, and approved by the Court of Appeal in *Nagusina Naviera v. Allied Maritime Inc*. These include:

1. the length of the delay;
2. the reasonableness of the applicant's conduct in allowing the delay to arise;
3. any contribution to the delay by the respondent or the tribunal;
4. any irredeemable prejudice that would be suffered by the respondent (in addition to the delay) if the extension were granted;
5. the impact of determining the challenge on any ongoing arbitral proceedings between the parties;
6. the strength of the challenge; and/or
7. the overall fairness of denying the applicant the opportunity to determine the challenge.

Even though these conditions and considerations were developed *conatu uno*, it does not appear that all of them must be satisfied concurrently, nor does the sense of reason and natural justice suggest that the satisfaction of just one of them will suffice to vary the provisions of Section 70 (3) of the 1996 AA.

Decoding the Criteria for Time Extensions: Insights from Key Cases

Interpreting and applying time limit provisions across various jurisdictions reveals a fascinating evolution towards a more discretionary approach by courts in other jurisdictions. This evolution, while maintaining adherence to a set of guiding principles akin to those established by English courts, forms the crux of our exploration in the subsequent discourse. Across jurisdictions, such provisions are found interspersed in their various arbitral laws. For example, in the United States, under Section 12 of the 1925 Federal Arbitration Act, three months are set for the limitation; in Canada, under Section 47 (1) of the Arbitration Act of Ontario, 30 days are set; in New Zealand, under Section 34 (3) of the Arbitration Act 1996, three months are set; and in Nigeria, under Section 55 (4) of the Arbitration and Mediation Act, 2023, three months are set. Interpretation and application have varied over time, eventually settling for the sparing discretionary application of the limitation by courts under strict application of the similar principles hitherto noted as guiding the grant of such applications before English courts.

In relation to the length of the delay, the position of the courts across jurisdictions and within England and Wales has never been defined in computational terms but has always been considered within the context of the other intervening factors in the criteria. Furthermore, it is easier to argue that the courts will dispense with this point in granting such applications than to say the opposite. As mentioned above, *in Re Minister of Finance (Incorporated) and another*, a 511-day extension was granted, while in *STA v. OFY*, a 65-day extension was refused. Given these varied outcomes,

what seems to be more important are the circumstances and intervening factors leading to the application for the extension of time than the length of the delay, given that the delay is the organic breach sought to be corrected. It is therefore academic and otiose to consider its length when, in essence, the end of justice represented by the intervening conditions will be considered and made prevalent.

Furthermore, on other considerations relating to the circumstances leading to the delay, the conduct of the parties, and the substantial justice of the grant of such an application, the consideration of the applicable standard of test evolved by the court is most important. However, all that has ever been said is that they must be serious enough. Yet, within this domain, the threshold of seriousness is still largely undetermined and often rests on the opinion of the court. However, at the expense of the possibility of abuse of this process, we must note the agelong principle that where discretionary powers are to be exercised, they must be exercised judiciously and judicially.

While this is true, it is apposite to note that the court is to consider the application for extension against the background of the grounds upon which the challenge is set, as under Sections 67 through 71 of the 1996 AA. Hence, a holistic approach to the determination of the merits of the application must be taken. This is to say, while appealing or challenging the awards of arbitral tribunals under the 1996 AA is a matter of right when filed within time, having expended the time stipulated, the instant right becomes extinguished and can only be aided by an order of leave of the court.

Within this premise, the practice has been to require the establishment of a *prima facie* case in support of the allegations, and this same requirement was applied to Nigeria for its fraud allegations. Beyond this, the degree of what is alleged must be serious enough to warrant an extension. Effectively, how well such a case is established goes a long way towards affecting the considerations for the extension of time. Thus, without the obvious and manifest *prima facie* case of large-scale fraud established by Nigeria in seeking an extension of time to challenge the arbitral award, the leave would not have been granted, particularly as it appears that the grant of the extension would cause substantial injustice to *P&ID.* Additionally, the issue of whether the party who permitted the time limit to expire and subsequently delayed it was acting reasonably in the circumstances and whether the respondent to the application or the arbitrator caused or contributed to the delay may not be resolved in favour of Nigeria. As such, the court, being constrained by judicial precedent, may have considered the issue of the length of the delay, which would have been manifestly disadvantageous to Nigeria.

Conclusion

As this analysis has demonstrated, the jurisprudence of the extension of time to challenge arbitral awards has grown beyond the considerations of the letters of the law concerning the length of the delay to the spirit of the law rooted in the achievement of the ends of justice. Hence, whenever it is in the interest of justice that time be extended irrespective of how long the delay, provided there has not been enforcement of the award so as to render such an application overtaken by circumstances, the courts are enjoined to give effect to the spirit of the law and grant latitude for the challenge of such arbitral awards.

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