INTERNATIONAL ARBITRATION: THE GAMES LAWYERS PLAY TO MESS UP, DODGE AND MAKE PEOPLE PAY UP AFTER ARBITRATIONS

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As the ingenuity of man increases, so do the bright ideas for wrecking a perfectly reasonable arbitration. Ever so often, statutes emerge which stop some of us using some of these bright ideas and people go back to the drawing board to come up with others.

The classic Anglo-American way to halt an arbitration was until recently to apply for a declaration or an injunction to stop an unwanted case. In England, this was outlawed in the 1996 Arbitration Act. In the US, the common law injunction received a form of statutory recognition when in 1988, someone dropped mention of it into a reform of the Federal Arbitration Act. In Sweden, even under the new statute, the declaration can be applied for at the start of the proceedings. All the other major arbitration centers, including the UNCITRAL Model Law countries, have blocked off this route of attack.

This is actually a shame since it is in the interest of the winning side in the arbitration to have any jurisdictional objection cleared up once and for all. As we will see, it deprives someone wrongly sucked into an arbitration of some much-needed protection.

The conventional wisdom reflected in Swiss, English and the UNCITRAL Model Law is to give the arbitrator the right to choose whether to issue an award or decision on jurisdiction. If they do so, one can attack it. If they do not, one has to wait until a final award is delivered to attack the arbitration. By then, it may be too late. France, Belgium and Holland do not seem to give the arbitrator the choice of rendering a decision upholding jurisdiction during the arbitration and leaving it open to attack. According to the statute, it is “final award” or bust.

More creativity is needed. The ideal move has always been to start a lawsuit and thereby force the court to resolve the jurisdictional issue when the defendant moves for a stay or dismissal of proceedings. This always looks better on paper than in reality. After all, one has to find a forum, ideally the place of arbitration, where the customer can be sued. The English courts’ hostility to the use of negative injunctions does not help with the formulation of the claim.

Nevertheless, where all the other elements fit together, it has a reasonably good strike record for flushing out jurisdictional disputes. Courts will look at the merits in a more detailed way than they would consider a problem with appointing an arbitrator in Switzerland, Holland, Belgium and UNCITRAL Model Law countries. This can produce our first inter-jurisdictional war. Even in France, before the arbitration has begun, the court may rule on the authority of the arbitrator if the decision is obvious.

Where countries, or sometimes just judges, hold different views on a given case, a French court may reject an application to dismiss and an English court can see the case another way. This happened in the case of The Heidberg. There, the problem related to the incorporation of an arbitration clause contained in a charterparty into a bill of lading that was then assigned by transfer to the consignee of goods. The French courts do not like binding the consignee in that situation. Where there are clear words of incorporation in the bill of lading, the English courts do not have the same problem. This all goes back to the English Bill of Lading Act 1855. The traditional approach of the English courts was straightforward. They will issue an

antisuit injunction. This was done in support of arbitration in the Tracomin affair involving Switzerland. Now, the question arises as to whether that is not a breach of the Brussels Convention. After all, the Convention contains no exception to jurisdiction for a valid arbitration agreement unlike the English Civil Jurisdiction and Judgements Act.

The problem anyway with antisuit injunctions is that one needs in personam jurisdiction against the defendant to make them work. This is often a great deal easier said than done. One case where it could have worked involved Kenya. There the respondent to the arbitration issued proceedings in Nairobi alleging fraud against his former hotel partner. The allegation was trumped up and was clearly designed to use the old English law argument that in fraud cases, arbitration cannot be used to defend the honour of a gentleman. The error in that argument should be apparent in that the English courts have always held that it only applies to the defendant not the claimant. However, a now-deceased judge who was rumoured to be "ethically unaligned" ruled that the equivalent Kenyan enactment applied and allowed the court case to proceed. His decision was reversed on appeal after about five years of pointless litigation. The defendant was actually amenable to English jurisdiction and should have been on the receiving end of an antisuit injunction.

As the Laker Airways litigation of the 1980s showed, antisuit injunctions have one structural flaw: they can be used both ways simultaneously! One country's courts can stop the defendant from either continuing with the injunction or the underlying suit or arbitration. It then becomes a matter of chance or commercial risk as to which courts' orders either side least minds ignoring. Here, though, common law countries do have some type of "edge" in that their continental European counterparts do not seem to have an antisuit or anti-arbitration weapon in their civil procedure armouries. Excessive use of these types of weapons may yet make a French or Swiss court invent an appropriate process. (After all, both of these countries discovered a "common law" way of reversing awards by way of "révision" in the 1990s.)

The last classic way of messing up an arbitration is to fail to appoint an arbitrator. This device has never worked well in England where the default process whereby the other party can have its nominee made the sole arbitrator has usually prevented this method working. Countries such as Belgium and Holland will simply decline to hear any challenges to jurisdiction in this context. Others, notably France and Switzerland allow the respondent to argue that there is obviously no valid arbitration agreeement covering the dispute. A delaying party can now challenge jurisdiction twice over at the appointment stage and then after the ruling on jurisidiction. The English Act is unclear and other countries such as the US and Sweden permit full jurisdictional challenges anyway. So, messing up the appointment process may not deliver any extra results. Increasingly, though, failing to appoint an arbitrator has proved an ineffective way of arbitration. Many arbitration agreements have either institutional clauses or even ad hoc ones with default appointment provisions.

Another trick of doubtful appropriateness has always been to refuse to pay the deposit in an institutional case. This can put so much cash flow pressure on your opponent that it may force an early settlement. Article 30 of the ICC Rules still makes this a weapon when money is tight on the part of the claimant.

The English approach to protecting vulnerable arbitration proceedings has always been to blindly slap on a Mareva injunction. This reached its high-water mark in the early 80s. A

slightly more restrained attitude is taken now. The sheer threat of it and the corresponding dislocation of banking facilities produces bank guarantees and keeps things reasonably solid. The other route much favoured in shipping circles is the arrest of the ship. This was a doubtful proposition in Beirut during the height of the civil war. Otherwise, it works reasonably well. The extent to which English courts will issue injunctions in aid of a foreign arbitration was of course the subject of the Channel Tunnel case the decision in which is reversed by the 1996 Act. Certainly, the English have been far more asset-freezing happy than other countries. The consensus on the continent is the provisional measures should only be available if the arbitrator clearly lacks those powers and as a last resort. Clear arguments can be raised to say that cases fit within both categories. Unfortunately, where the position is fairly wooly, protracted litigation and erratic results can result.

The US position since McCreary has been nothing short of chaotic. It is something of a mystery how a case so widely criticised by commentators has lasted so long. It basically says that the New York Convention precludes the use of interim measures by the courts. Vast numbers of courts have evaded, distinguished and in some cases just ignored this decision. It remains, though, an obstacle that can be hit by the unwary.

So, you have your award. You merely now have to collect on it. Your opponent bristles (perhaps justifiably) that the arbitrator seems to have taken his jurisdiction from a contract between the parties which has nothing to do with the dispute in question, the relevant agreement being silent on the subject. Do not waste time. Apply for enforcement wherever the customer has any assets of a size worth seizing. After decades of caselaw, we know that the New York Convention does not allow the parties to delay in enforcement while waiting for the outcome of setting aside proceedings. Unless the award is fairly useless or you run into a sovereign immunity from execution from problem, you should at least obtain security for the award. Your application for enforcement should carry with it at least a possible application for a Mareva.

It is an interesting tactical question as to whether you should apply to convert your award into a judgement. The judgement will fall outside the Lugano and Brussells Convention. That, though, does not make it a useless weapon. You can of course enforce in the place of arbitration. Swiss bank accounts after a Geneva arbitration are not to be taken lightly (if only you can identify them). There is English and US caselaw to show that one can enforce a judgement confirming an arbitration award as a judgement. This blocks out any non-public policy concerns about whether the arbitrator had jurisdiction. Where a reasonable result is reached even if the arbitrator did not give a proper hearing or behave terribly well, it can help.

In the US, in domestic cases, a drafting hole in the Federal Arbitration Act led courts to hold that unless personal jurisdiction could be established or the parties agreed to it, one could not have an arbitral award confirmed. This changed at least for international cases with the 1970 ratification of the New York Convention. Chapter 2 of the FAA has a confirmation provision which turns every enforcement case involving foreign elements into a mandatory federal jurisdiction. This does, though, explain some rather claustrophobic drafting in arbitration clauses prepared by American lawyers.

The worry about applying to confirm an award in the place of arbitration where there may be no assets is that one may be provoking setting aside proceedings. One solution is to wait until

the deadline has passed. That, though, may take away one of the advantages of confirmation, triggering a submission to the jurisdiction which will enable the judgement to be enforced elsewhere. The best scenario is where an application has been made by the losing party but rejected as being out of time. In some countries, such as Switzerland, that will block a defense to enforcement. In the US, the circuits have persistently been divided on this issue. A complete bar should be the answer but you never know. In England, we continue to allow people who miss deadlines to unmiss them by applying to court late.

The first concern, though, is setting aside proceedings. At various times since the war, Switzerland, France and to a much lesser extent Germany have flirted with the notion that an award rendered there without any great connection to a location in that country. Belgium recently repealed its bizarre statute which barred setting aside proceedings when all parties were non-Belgian in almost every way. The trend now is to allow exclusion agreements by statute. We see this in Switzerland, Sweden and now Belgium. A party who will accept any arbitral outcome however horrific may agree to one of these exclusions. Where, though, the arbitrator has strayed from the scope of the arbitral agreement in tackling a dispute which lacks the appropriate connection, one can argue that the exclusion agreement does not cover the case. This argument is likely to remain fairly elusive since exclusion agreements are very unusual.

Now, though, in almost all cases, the losing party in an arbitration can apply to set aside the award of arbitration. The US Supreme Court recently heard an appeal from a decision rejecting the notion that the application can be made before a court that would ordinarily have had in personam jurisdiction.

If applying to set aside an award where enforcement proceedings are pending, you should be forced to put up security at least. The court, though, may follow the lead of the Swedish Supreme Court in Gotaverken and order enforcement anyway. You could apply for an injunction to stop enforcement. This is one of those subjects that apparently bind India and Pakistan together. Their courts have both issued these types of injunctions. The English courts have done so in one case which was reported on every subject but that one. There the English High Court had given leave to appeal under the 1979 Act when a French court ordered enforcement of the award. (The appellant in London had actually missed the deadline for appealing against the exequatur (provisional enforcement order). The English courts then dismissed the appeal and so the case quietly died.

If you have had to pay on an award that has subsequently been set aside elsewhere, can you recover the money? There are legal problems with the different laws of restitution which tend to require that the enrichment be somehow unlawful or be based on a mistake of fact. This all presupposes that the assets of the successful claimant are subject to a jurisdiction where you can make your claim.

Anyway, can you resist enforcement on the basis that the award has been set aside in its place of origin? The straight answer in the French courts is: no. This explains why countries who prevent a party from stopping the arbitration pre-award create real problems where relevant assets may be located in France. The old French code did not list setting aside in the place of origin as a ground for resisting enforcement which led to the Cour de cassation decision in Pabalk c/ Norsolor. The NCPC is even clearer on the subject. Article VII of the New York Convention merely states what is apparent from the rest of the Convention. That document

does not prevent municipal laws and treaties from making enforcement easier than is provided for under the Convention. It just cannot be made more difficult. Against this background, the French courts' decisions in Hillamarton and Chromalloy could hardly have been a surprise. The only complicating factor was the way in which, in the former case, the Swiss arbitrator to whom the matter was remitted then reached the opposite conclusion to his predecessor. In effect, there were now two awards in circulation: the first dismissing the claim, the second upholding it. Faced with applications to enforce or recognise both, the French courts had to give precedence to the first award (which was also the first receive recognition) to prevent logical chaos.

What was far more disturbing was the way in which the District Court Judge handled Chromalloy in the US. There the Egyptian courts set aside the award in the place of arbitration. The judge somehow referred herself back for the grounds for resisting enforcement to Chapter 1 of the FAA relying on the catch-all provisions of §208 which apply that chapter where it is not in conflict with the Convention. §9 says that awards can be confirmed unless they are vacated in accordance with the next section. From this court deduces that an award set aside on a ground that is not listed in §10 cannot be refused enforcement on that basis. It is neat and it makes complete nonsence of the wording and context of the Act. §§9-10 do not relate to setting aside abroad. There is no conflict between the New York Convention which chapter 2 applies to the enforcement of foreign and international awards and Chapter 1 which does not deal with that subject. To howls of juridical derision, enforcement was ordered.

The Second Circuit appeared to repair some of the damage in Baker Marine v. Chevron. In that case, the court applied Article V(1)(e) to decline enforcement of a Nigerian award that the Nigerian courts had set aside. The court seems to say that where an arbitration agreement provides for arbitration abroad under the local law, there is no place for applying §§9-10 of the Federal Arbitration Act. That would straighten out the first problem in Chromalloy. It then quite rationally rejects the argument based on the fact that the Convention gives the enforcing a court a discretion as to whether to permit enforcement of an award coming within one of the article V(1) defenses. The judge remarks that he cannot see any particular reason not to recognise the decision of the Nigerian court.

Unfortunately, in an attack of judicial politeness, the court distinguishes Chromalloy on the basis that the Egyptian court there failed to apply its own law and the agreement expressly provided for no appeals. This is simply not good enough.

Either way, one is left with US courts happily exercising their discretion as to whether to enforce awards set aside in their place of origin. The original rejection of the mandatory "shall" during the travaux preparatoires of the New York Convention is finally coming back to haunt people.

The mess created by any refusal of the enforcing court to recognise the setting aside decision of the court of the seat is well documented. The losing side in the arbitration has to fight enforcement proceedings wherever he has assets. If his claim has been wrongly rejected in the arbitration, he has to find a forum to generate an enforceable judgement outside France and possibly elsewhere.

At the end of the day, though, the winning side in an arbitration needs to obtain enforcement.

That unfortunately is not the same as obtaining money, as the winning party in the surreal Dalmia Dairies litigation of the 1970s will tell you. The award strangely ordered the loser to pay money in a particular location. Enforcement proceedings in England failed initially under the New York Convention on the basis that such an order could not be converted into an English judgement. The poor claimant had to start a writ action claiming damages for breach of the agreement to arbitrate.

The last thirty years has seen a proliferation of messy cases where the losing party to the arbitration is slightly the wrong party. The bank account in a jurisdiction has been identified but it belongs to a parent or sister company. The lawyer should never forget his corporate veil and agency argument. In France, we add the group of companies' category. The position there is that where the contracting party is part of a group and another part of the group plays a significant role in performing the contract, it becomes a party to the agreement. The phenomenon could almost be an example of the Eurymedon phenomenon much beloved of English and Commonwealth law students. The idea is that there is an offer issued to a third party to perform the contract with its original terms which is accepted by the third party's starting to perform. All these pieces of ammunition must be used. The Swiss courts can be fairly severe when asked to mess with the corporate veil. The American courts have shown partiality in some cases at least for the agency argument.

Beyond all these arguments, there is one other trick to be used with care and in the right situation. In Soinco, the sister companies were trading on the London Metal Exchange. Magically, though, the defendant didn't seem to have any assets; the other company did. So, a garnishee order was slapped on the bank account of the "senior sister" company. It was reinforced by a Mareva injunction and eventually by the appointment of a receiver. The thinking was that the company with the account had to owe money to the company that did not. Otherwise, how come money was clearly being funnelled from one to the other? A large seven figure sum of money was recovered through this.

What is a little curious about this case is that nobody ever relied on the Swiss judgement that was obtained on the award in the Soinco case. Yet it may have had a benign influence for the claimants. The award had two potential problems with it: a possible illegality/public policy under Russian law and some fairly lose reasoning on jurisdiction in the award. Nevertheless, only the public policy point was ever taken in the English courts. This is in spite of a clear submission to the Swiss jurisdiction brought about by two failed applications to set aside the award in that country.

Two old flatmates enjoy gently bitching with each other about this whole subject. One cited an article by the other as "the Wings of Silence" after a serious attack of Miltonian excess afflicted one of the outpourrings in this area. The ugly truth is that in the messy world of international arbitration, the going can become distinctly messy. It is all a bit more like Wim Wenders' angel coming crashing down to the earth in Wings of Desire. After all the esoteric discussions about the amicable conciliatory nature of the arbitral process, there is occasionally a nasty job to be done.