Aiding the vigilant, not the indolent

Arbitration challenges of any description have a poor success record. All have strict time limits and these are strictly enforced. In two recently reported cases the Courts have clarified when time starts to run from when the tribunal is asked to clarify or correct an award; and in the second case dismissed a challenge as being out of time (especially as the claim was not perceived to have any real merit).

S.70 (2) & (3) AA 1996 provide:

"(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—(a) any available arbitral process of appeal or review, and (b) any available recourse under section 57 (correction of award or additional award)."

"(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."

In *Daewoo Shipbuilding v Songa Offshore* [2018] the Court addressed the issue of when time starts to run where a party seeks correction or clarification of an arbitral award as a precursor to challenging the award either under ss.67 or 68 or 69 of the AA 1996.

In summary, after a thorough analysis of the authorities, the Court held:

- The arbitral process of correction and clarification of an award by the tribunal is not "any arbitral process of appeal or review" under s.70(3) for the purposes of the running of the 28 days.
- Accordingly, simply applying for a correction will not, of itself, push back the start date for the running of time: the decision in *Surefire Systems v Guardian ECL* [2005] was wrong.
- But where a correction or clarification must necessarily be sought in order to be able to bring the challenge to the award itself (pursuant to s.70(2)), then time runs from the date of that type of correction or clarification being made (a 'material' correction).
- To give effect to that, the "date of the award" in s.70(3) is to be read as "the date of the award as corrected" by a material correction.

The Awards were published on 18th July 2017 so time expired on 15th August. On 4th August, Daewoo applied to the Tribunal for the correction of what it itself described as four "clerical errors in the Awards arising from accidental slips" such as transposing Songa for DSME, etc. The corrections were unopposed. The Tribunal issued a Memorandum of Corrections on 14th August (27 days after the Awards). On 8th September, 24 days late, Daewoo issued a claim seeking permission to appeal the Awards under s.69.

Songa applied to strike the application out as being out of time.

S.70(3) contains only two express start dates for the running of the 28 days for any challenge to the award: (a) "the date of the award" and (b) the date when the parties are notified of the outcome of "any arbitral process of appeal or review".

A connected issue is the need, reflected in s.70(2), to exhaust all available arbitral routes of recourse before being entitled to challenge the award.

Question (1): Can the correction / clarification process under s.57 be regarded as an "available process of appeal or review" under section 70(3)?

Daewoo's primary argument was that the term "any available process of appeal or review" in s.70(3) covered a correction or clarification process carried out by a tribunal itself. It argued that the process of correction involved, in one sense, a process of 'reviewing' the award and accordingly this was enough. It also relied upon the definition of a different term ("available arbitral process") in s. 82(1) as one which "includes any process of appeal or review by an arbitral or other institution or person" as showing that "appeal or review" did not just mean appeal or review by some other arbitral body (such as common forms of 'two-tier' arbitral procedures in commodity arbitration under GAFTA or FOSFA Rules) but must be wider and therefore had to cover an 'internal' corrective review.

Daewoo relied heavily on *Surefire Systems v Guardian ECL* [2005]. The Court rejected Daewoo's argument for three reasons.

1. The construction was contrary to the plain and ordinary meaning of the term "appeal or review" as used in s.70(3) which had to be viewed in the light of s.70(2). S.70(2) requires an applicant seeking to challenge any award to have first exhausted, as a pre-requisite to the right of challenge, all routes of recourse to the arbitral process. It distinguishes in this context between "any available arbitral process of appeal or review" (s.70(2)(a)) and "any available recourse under section 57" (s.70(2)(b)). The Judge held that this was "a clear, and indisputable, distinction".
2. It was consistent with the preponderance of authority: *Price v Carter* [2010]; *K v S* [2015] and *Essar Oilfields Services v Norscot Rig Management* [2016].
3. The guiding principles in s.1(1)(a): *"the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense"*. The principles of speed and finality would be undermined if the effect of making any application for a correction is that time for appealing runs from the date the appellant is notified of the outcome of that request.

Daewoo further argued that an award could not be regarded as final for the purposes of time running until and unless any process of correction started in respect of the award had been fully completed; that applied as much to a material correction impinging upon a potential ground of challenge as to an immaterial textual or other clerical correction. The date when the process was completed was the "date of the award" for s.70(3) purposes. This too was rejected as the purpose is to ensure that before there is any challenge, any arbitral procedure that is relevant to that challenge has first been exhausted. Thus if there is a material ambiguity that is relevant to the application or appeal it has to first to go back to the arbitrators.

In sum, the Court saw no difficulty with a 'materiality' test which is "clear and easy to apply". This is plainly right in light of the distinction in s.70(2).

If in doubt either issue the application to the extent you are able to do so or issue an application for an extension of time before the 28 day time period expires.

An unanswered question is as to the position if a material correction is sought but refused. How is the "date of award as corrected" test then to be applied? The answer is probably that it would be the date of the notification of the refusal to correct.

The court can extend the 28-day limit if it is satisfied that a substantial injustice would be done if it did not grant the extension.

In *Telecom of Kosovo v Dardafon.Net* [2017] Dardafon ("D") and Telecom of Kosovo ("K") had entered into a contract containing an ICC arbitration clause with a London seat. A dispute arose between them, which D (the claimant in the arbitration and respondent in the Court proceedings) referred to arbitration.

K challenged the tribunal's jurisdiction and defended the case on the merits. On 21 November 2016, the arbitrators issued a partial award dismissing K's jurisdictional challenge. The final award, which determined the merits in favour of D, was sent to the parties in mid-December 2016. Having lost the substantive merits, K decided to challenge the outcome of the arbitration and on 6 January 2017, 18 days after the 28-day time limit for challenging the partial award had expired, K issued its claim form and obtained an order for permission to serve the claim form out of the jurisdiction and for a retrospective extension of time. D applied to set aside the order.

In *AOOT Kalmneft v Glencore* [2002], the Court had explained that the following seven criteria were likely to be relevant to applications to extend time:

1. The length of the delay.
2. Whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances.
3. Whether the respondent to the application or the arbitrator caused or contributed to the delay.
4. Whether the respondent would by reason of the delay suffer irremediable prejudice in addition to mere loss of time if the application proceeded.
5. Whether the arbitration had continued during the period of delay and, if so, what impact a determination of the application might have on the progress of the arbitration or the costs incurred.
6. The strength of the application.
7. Whether, in the broadest sense, it would be unfair to the applicant to deny him the opportunity to have the application determined.

That list of factors was endorsed in *Terna Bahrain v Al Shamsi* [2012], adding that:

- The length of the delay must be judged against the yardstick of the 28 day time limit in the AA 1996, so even a delay measured in a period of days is significant, and a period of weeks or months is substantial.
- When addressing the reasons for the delay, it is for the applicant to adduce evidence explaining its conduct, unless that is impossible, in which case adverse inferences may be drawn.
- In considering whether the party who has delayed has acted reasonably, the question will be whether that party intentionally made an informed choice to delay the application.
- The court will not normally conduct a substantial investigation into the merits of the challenge application, but if the challenge can be readily seen as intrinsically strong or weak, that is a relevant (though not a primary) factor.

As part of its submissions, D referred to the "asymmetry" between the *Glencore* factors (iv) and (vii), (whether the respondent to the application would suffer irremediable prejudice and whether it would be unfair to the applicant in the broadest sense for him to be denied the opportunity of having the application determined). D argued that the *Terna Bahrain* principles should be refined to enable the court to have regard to whether, in the broadest sense, there would be prejudice to the respondent if the challenge went ahead. Accordingly, it argued that where an applicant seeks the indulgence of the court by way of an extension of time, unfairness in the broadest sense should be taken into account.

The Court granted the application and set aside the orders extending time for challenging the award and granting permission to serve the claim form outside the jurisdiction.

Referring to the principles set out in *Terna Bahrain*, those particularly relevant to this case were:

- **The length of the delay.** In this case the delay of 18 days was "quite significant but not inordinate".
- **The reasonableness of the claimant's conduct in allowing the time-limit to expire.** K asserted that part of the reason for the delay was that it had not entirely understood the negative consequences of the partial award, and had been shocked by the final award. This was not accepted. A claimant, as well advised as this claimant was, would have understood that the partial award determined the issue of jurisdiction, and that it would be followed by a final award making a determination on the merits. The evidence showed that the claimant's legal advisers had told the claimant that it could challenge the partial award in the courts, and that it had 28 days in which to do so. Instead of so proceeding, the claimant chose to wait for the final award to see if it had won on the merits. That was not an acceptable or reasonable basis upon which to allow the time limit to expire.
- **Prejudice/unfairness to the defendant in allowing the extension.** The court had to consider whether the defendant would suffer irremediable prejudice by reason of the delay, and whether it would be unfair to the claimant "in the broadest sense" if the extension were to be refused. The defendant had not established that it would suffer serious and irremediable prejudice by reason of the delay. However, the judge concluded that it was not necessary for him to go further and reach a definitive conclusion on D's submission regarding the asymmetry between factors (iv) and (vii), though he was inclined to the view that such asymmetry in the consideration of prejudice/unfairness as between claimant and defendant was deliberate, reflecting the determinative effect of not extending time.
- **Strength of application.** K's case was inherently weak. The s.68 challenge related to the exclusion of evidence based on a procedural order to disregard evidence of witnesses who were not available to be questioned. As such, the challenge was unarguable. In relation to its s.67 challenge, K sought to argue that under the governing law of the arbitration agreement, the agreement was invalid. Although a similar tactic had been successful in *Sulamerica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012], it was arguable that that case was distinguishable. K's contention was not seriously arguable.

Accordingly, the judge concluded that the time limit for challenging the partial award had expired in the period when K hoped that it would win on the merits. Although there would not be irremediable prejudice to D from the delay, it was a case which, even on a brief perusal of the papers, was inherently weak. Therefore, it did not justify an extension of time.

As illustrated by both cases waiting to make a challenge can, therefore, have fatal consequences.

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