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A Case Study in Litigation in Support of Arbitration: China, England, and The Turks and Caicos Islands

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I. Introduction

Our Firm's Paris, London, and Shanghai Offices were recently successful in obtaining a US$ 10 million ICC award on behalf of a European client. The Arbitral Tribunal was composed of three distinguished arbitrators, and the seat of the arbitration was London. The language of the arbitration was English. English law was the governing substantive law.

The award was made jointly and severally against two Respondents, a Chinese company and a Turks and Caicos Islands ("TCI") company. Since the commencement of the arbitration, we have participated in multiple court proceedings in China, England, and the TCI in connection with the arbitration. The following is a chronological description of successes in obtaining relief in England and the TCI in support of the arbitration, defeating a challenge to the award in England, and difficulties enforcing the award in China and the TCI.

II. Injunction In The TCI

Over a year after the arbitration was commenced, we sought and obtained a freezing order (or *Mareva* injunction) from the TCI Supreme Court in support of the arbitration. The TCI court ordered the Respondent TCI company in the arbitration not to dispose of its assets up to a value of US$ 10 million, which was the ultimate value of the arbitral award.

The application to the TCI court was made pursuant to Article 23(2) of the ICC Rules, which provides:

> "Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority of such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal.
>
> Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof."

The procedure consisted of commencing an action and filing an application and affidavit with the TCI Supreme Court and attending for an *ex parte* hearing in

chambers before the Supreme Court judge, of which there was only one. The order was granted the same day as the *ex parte* hearing, was notified to the TCI company, and was never challenged, varied or discharged. The order was also notified to the ICC and to the Arbitral Tribunal in accordance with Article 23(2) of the ICC Rules.

III. Witness Summons In England

Also during the arbitration, we obtained a summons from the English court compelling a witness resident in England to testify in person during the hearing on the merits in the arbitration, which was held in London. This particular witness was a former employee of one of the Respondents.

We first wrote to the Arbitral Tribunal requesting that they summon the witness to appear at the hearing. This request was based upon the Terms of Reference in the arbitration, which expressly provided: "Upon request of either party, the Arbitral Tribunal may summon witnesses, either to appear at the hearings or to present evidence in such form as the Tribunal deems appropriate."

The Arbitral Tribunal asked for an indication as to (a) whether the witness had been asked to appear voluntarily and his response if any, (b) the specific nature and relevance of his expected testimony, (c) the legal procedure that would be used to compel the witness to testify and the form of summons sought from the Arbitral Tribunal, and (d) whether the witness would be offered remuneration and if so the amount.

We indicated that we had asked the witness if he would appear voluntarily and that he had agreed to do so. We also explained the nature and relevance of the expected testimony. With respect to the legal procedure and the form of summons, we relied on Section 43 of the English *Arbitration Act 1996* (the "English Arbitration Act"), which provides

"43. (1) A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.

(2) This may only be done with the permission of the tribunal or the agreement of the other parties.

(3) The court procedures may only be used if —

(a) the witness is in the United Kingdom, and

(b) the arbitral proceedings are being conducted in England and Wales or, as the case may be, Northern Ireland.

(4) A person shall not be compelled by virtue of this section to produce any document or other material evidence which he could not be compelled to produce in legal proceedings."

We referred to commentary on the English Arbitration Act, which states that "Section 43(1) contains the basic right of a party to use court procedures under the CPR to secure the attendance of witnesses and the production of documents or other evidence" (Robert Merkin, *Arbitration Act 1996 (London: Essential Law, 2000) at 99).*

The CPR (or Civil Procedure Rules) govern the practice and procedure of the Civil Courts in England and Wales (including the English High Court). Rules 34.2 and 34.3 of the CPR deal with the issue of a witness summons. What was then CPR Part 49 dealt specifically with "Specialist Proceedings," pursuant to which "Practice Direction—Arbitrations" (the "Arbitration Practice Direction") had been issued setting out procedures for dealing with matters and applications under the English Arbitration Act. (CPR Part 49 has since been replaced with a Part dealing specifically with arbitration proceedings—Part 62. The Arbitration Practice Direction is now the Practice Direction supplementing Part 62).

We referred to what was then paragraph 16 of the Arbitration Practice Direction (now Rule 7.1 of the Practice Direction to Part 62), which provided (it has since been slightly reworded):

"Securing the attendance of witnesses

16.1 A party to arbitral proceedings being conducted in England and Wales who wishes to rely on section 43 of the Arbitration Act to secure the attendance of a witness may apply for a witness summons in accordance with Part 34 of the CPR

to the Admiralty and Commercial Registry [of the English High Court] or, if the attendance of the witness is required within the district of a district registry, at that registry at the option of the party.

16.2 A witness summons shall not be issued until the applicant files an affidavit or witness statement which shows that the application is made with the permission of the tribunal or the agreement of the other parties."

We invited the Arbitral Tribunal to confirm by way of letter that an application by our client to the Admiralty and Commercial Registry of the English High Court for the issue of a witness summons addressed to the witness would be made with the Arbitral Tribunal's permission. We also provided the Arbitral Tribunal with a suggested form of letter that we would enclose with our affidavit or witness statement made pursuant to what was then paragraph 16.2 of the Arbitration Practice Direction (now Rule 7.3(1) of the Practice Direction to Part 62). We explained that we anticipated that the form of the summons sought would be in accordance with the standard form prescribed by the CPR.

As to remuneration, we explained that we had offered to pay the witness a reasonable *per diem* rate for his time and to reimburse him for all reasonable expenses and that the witness had agreed with this.

The Arbitral Tribunal then asked, in light of the witness' willingness to appear voluntarily, why it would be necessary to invoke Section 43 of the English Arbitration Act and whether a witness statement would be presented for the witness. We explained that the witness was only willing to appear pursuant to a summons and did not want to sign a witness statement.

The Arbitral Tribunal granted our request for a witness summons on the condition that a brief summary of the expected testimony be provided. The Arbitral Tribunal provided an authorization letter in the following form:

"Pursuant to Claimant's request in the above-cited arbitration conducted under the Rules of the International Chamber of Commerce, and in accordance with Section 43 of the Arbitration Act 1996 (England & Wales), the Arbitral Tribunal grants permission to summon [the witness] (residing at [address]) as a witness at hearings scheduled to be held in London from [date]. Claimant may use the court proceedings authorized by Section 43 of said Arbitration Act."

A witness summons was obtained from the English court and sent to the witness. Following this, we provided a summary of the expected testimony to the Arbitral Tribunal and the Respondents, and the witness appeared and testified at the arbitration hearing on the merits.

IV. Challenge In England

Shortly after the arbitral award was rendered, the Respondent TCI company commenced a challenge in the English Commercial Court, London being the seat of the arbitration. The Respondent TCI company sought to set aside the award under Sections 67(1) and 68(1) of the English Arbitration Act on the basis that the Arbitral Tribunal lacked substantive jurisdiction and that there was a serious procedural irregularity.

The court dismissed the challenge on both grounds. With respect to the Arbitral Tribunal's substantive jurisdiction, the challenge was dismissed because an amended case pleading an entirely new set of facts had been submitted only days before the court hearing. The court refused to admit the amended case on the basis of the length of delay and the fact that the allegations were considered on their face to be inherently improbable. With respect to the allegation of serious procedural irregularity, the court found that there was a procedural irregularity caused by the Arbitral Tribunal "failing formally to record in writing the decisions which they had made during [a] telephone conference on 9 February to dispense with a further hearing … and then failing to notify all parties to the Arbitration of that decision," but this was not a serious procedural irregularity, nor one that caused substantial injustice to the TCI company.

The court awarded indemnity costs against the TCI company and refused to give the TCI company permission to appeal its decision to the English Court of Appeal.

In relation to arbitration applications, the Commercial Court (which is the only court in England to hear arbitration applications) has sole jurisdiction to give permission to appeal its orders (Sections 67(4) and

68(4) of the English Arbitration Act). Unlike appeals from most first instance decisions, the English appeal courts do not have jurisdiction to give such permission themselves *(Henry Boot Construction (United Kingdom) Limited* v. *Malmaison Hotel (Manchester) Limited [2001] QB 388).*

The Respondent TCI company nonetheless applied to first the English Court of Appeal and then the House of Lords for permission to appeal the decision of the Commercial Court. Each court rejected the application.

V. Enforcement In The TCI

Also shortly after the arbitral award was made, we sought and obtained an *ex parte* order from the TCI Supreme Court granting our client leave to enforce the arbitral award against the Respondent TCI company.

The TCI is not a New York Convention jurisdiction, and there is little precedent in the TCI for seeking the recognition and enforcement of a foreign arbitral award.

The enforcement proceeding was commenced by way of an action under the TCI Arbitration Ordinance and the filing of an application and affidavit to the only TCI Supreme Court judge. An *ex parte* hearing was held in chambers before the judge, who made an order granting our client leave to enforce the award subject to the Respondent TCI company having two weeks to apply to set aside the order.

The TCI company applied to set aside the order within the two-week period, and the enforcement order was suspended by its terms until final resolution of the set aside application. The TCI company followed this with an application to recuse the judge on the basis of a statement the judge had made in a separate TCI court proceeding. The judge dismissed both the set aside application and the recusal application, thus making the enforcement order effective.

However, the TCI company appealed these decisions to the TCI Court of Appeal. (The TCI Court of Appeal sat only twice a year for one week at a time, and was composed of three retired judges from other Caribbean countries). At the appeal hearing, the Court of Appeal ruled that the judge should have recused himself. However, the appeal from the decision dismissing the set aside application was not dealt with before the one-week Court of Appeal session concluded, and the next one-week session was not taking place for another six months. Therefore, our enforcement order (which had been made before the statement leading to the recusal of the judge) was still effective.

As a result of the ruling of the Court of Appeal on the recusal application, the TCI authorities had to seek a judge from outside the jurisdiction to sit as a TCI Supreme Court judge in any matters involving the TCI company and others concerned by the statement made by the recused judge. However, the judge eventually identified several months later turned out to be a former partner in a law firm acting for the TCI company in another jurisdiction and recused himself before any hearings were held. In the end, the TCI authorities appointed the TCI Supreme Court Registrar as a judge for the purposes of these proceedings and other related proceedings.

We then applied successfully to the Registrar sitting as a judge for the appointment of a receiver over the assets of the TCI company on the basis of our still effective enforcement order.

However, when the next session of the Court of Appeal took place, the Court of Appeal allowed the TCI company's appeal and overturned the recused judge's earlier decision to dismiss the TCI company's application to set aside our enforcement order. The Court of Appeal refused to re-hear the parties at that time on the set aside application and required that the parties return to the TCI Supreme Court to have the matter re-heard. We sought and obtained leave to appeal the Court of Appeal's decision to the English Privy Council.

The consequence of the Court of Appeal's decision was that the enforcement order still stood because it had been made before the judge's statement leading to his recusal. However, it was no longer effective because the TCI company's set aside application remained and had not yet been finally resolved. The receivership fell away as it had been based upon the recused judge's decision to dismiss the set aside application.

A petition with the English Privy Council was filed. However, in the end, it was not pursued, as the TCI Registrar sitting as a judge re-heard the parties on the set aside application and dismissed it (one year after the original enforcement order had been granted).

In the meantime, the Registrar sitting as a judge had granted an application to wind-up the TCI company and had appointed a liquidator.

The first liquidator resigned shortly after his appointment, and a new liquidator had to be appointed. We filed a claim in the liquidation on behalf of our client, but there were no longer any assets against which this claim could be realized.

A global settlement was later reached, which is referred to below.

VI. Enforcement In China

Shortly after commencing enforcement proceedings in the TCI, we also commenced enforcement proceedings in China, this time against the Respondent Chinese company (which was foreign-owned by the Respondent TCI company and others).

While China is a New York Convention jurisdiction and has arbitration legislation in place, its courts have little experience in enforcing foreign arbitral awards. Enforcement was commenced by way of action in the First Intermediate Court in Shanghai, the court with jurisdiction over the Chinese company, seeking recognition and enforcement of the award. Although we only wanted to enforce the award in China against the Chinese company, the court required us to make both the Chinese and TCI companies parties to the action. The court also required that notice of the action be served on both companies. The court was responsible for this notice and served the notice to the last known Chinese addresses of each company.

At the first hearing (at which the author was permitted to make submissions to the court through his associate in Shanghai acting as an interpreter), the Chinese company appeared, albeit through two different sets of representatives in disagreement over who was entitled to represent the Chinese company. The TCI company did not appear, and the court indicated that the notice it had sent out had been returned.

Despite our submissions that the TCI company was not necessary for the proceedings, the court decided that it could not proceed until the TCI company was properly served with notice of the proceedings. The court originally wanted to conduct diplomatic service through the Chinese government, the UK government, and the TCI government. Thus, the court fixed the next hearing for eight months later. However, we were successful in persuading the court to attempt personal service in Shanghai on a representative of the TCI company (then not yet in liquidation).

The judge (in person), together with police and an associate of our Shanghai Office, attended at the apartment of the representative of the TCI company. The representative was present but adamantly refused to accept service and literally slammed his apartment door shut in the face of the judge and the police. The judge and the police said that there was nothing they could do.

Shortly thereafter, the TCI company was put into liquidation in the TCI, and a liquidator was appointed (as described above). We were successful in persuading the Shanghai court to accept service of the relevant documents on an agent of the TCI liquidator in China. However, the TCI liquidator refused to appoint an agent in China until the question of his fees (which were unusually high) was resolved.

In the end, diplomatic service by the Shanghai court to the TCI liquidator was required and was carried out. This took several months, by which time the second hearing date in Shanghai had been postponed indefinitely pending service on the TCI company.

Diplomatic service was successful in that the documents arrived in the TCI. However, they were received at the TCI Supreme Court, although addressed to the liquidator. The documents were only located as a result of a telephone call by us to the liquidator and then by the liquidator to the courthouse to inquire if any such documents had been received.

Following this lengthy exercise in getting the Chinese action notified to the TCI company in a manner acceptable to the Shanghai court, the liquidator refused to sign and return the documents to the Shanghai court, a step required by the court to proceed. The basis for the refusal was again the issue of the liquidator's fees.

Despite this refusal, we succeeded in persuading the Shanghai court to accept that satisfactory service had been made and notice had thus been given to the TCI company of the proceedings in China. The Shanghai court then made an order

recognizing the award. This was almost two years after the recognition and enforcement proceeding had been commenced.

Once recognized, the Shanghai judge transferred the case file to another judge responsible for executing the arbitral award. At about the same time, the parties to the dispute reached a global settlement, and the enforcement of the award in China was stayed.

Since then, the case file has been transferred to yet another judge in order to consolidate proceedings related to the same subject matter. Meanwhile, the settlement agreement was subject to notarization by a Chinese notary. This process took some six months and much negotiating with the notary before being completed.

The notarization certification in connection with the settlement agreement was received three years after the commencement of the Chinese proceedings.

VII. Some Lessons Learned

The arbitration-related litigation described above demonstrates the importance of the jurisdictions in which a party's contractual counterparties are incorporated and their assets are located, as well as the importance of the jurisdiction of the seat of the arbitration.

Before commencing an arbitration (and indeed before drafting an arbitration agreement), it is important to consider what assets are likely to be available if an arbitration claim is successful, and where those assets are located, *i.e.*, where a party would have to go to realize upon its arbitral award if its contractual counterparties refuse to honour the award voluntarily. It is also important to consider the arbitration law in those jurisdictions, as well as in the jurisdictions where any counterparties are incorporated and at the seat of the arbitration. This allows a party to know in advance for each jurisdiction (1) what interim relief from the courts might be available in support of the arbitration, (2) how a challenge to the award would normally be dealt with, and (3) how recognition and enforcement of the award would normally be dealt with.

One of the factors that should be taken into account in this assessment is the efficiency or inefficiency of the relevant national courts. In the case described in this article, there were examples of both efficiency and inefficiency on the part of the national courts (sometimes examples of both in the same jurisdiction). Choosing local counsel wisely and using local counsel effectively, as well as engaging in a constructive dialogue with the relevant national courts as permitted in each jurisdiction, can improve the efficiency of national courts in conducting arbitration-related litigation.

However, the arbitration referred to in this article is a good example of a case where the cost of the arbitration continued well after the arbitral award was made, despite the award being procedurally and substantively strong and made by three distinguished arbitrators.

All of the above highlights the importance of evaluating the post-arbitration risks before commencing an arbitration, as opposed to during the arbitration or, even worse, after an arbitral award has been made.

[Editor's Note: Andrew McDougall is a partner with the Paris office of White & Case and specializes in international commercial arbitration and commercial litigation. He has appeared before a variety of international arbitral tribunals and has substantial oral advocacy experience in both English and French. His sector experience includes international joint ventures, oil and gas, aerospace, construction, professional services, intellectual property, mining, defense, energy, and investment. A Canadian and French national, he has worked with the common and civil laws of numerous jurisdictions, and has represented clients from diverse cultural and geographical backgrounds. He is on the ICC Canadian National Committee's Panel of Arbitrators, and has been recognized as a Recommended Lawyer for Dispute Resolution in France by the 2005 edition of PLC Which Lawyer? He is a Solicitor Advocate in England & Wales and is admitted to the Paris, Ontario, and Québec Bars.
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