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Judicial assistance granted by the court – what if anything is permissible?

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Introduction

- A vast subject...
- A few pertinent comparisons
- Judicial assistance usually refers to pre-award intervention
- But – post award review also relevant as post-award actions can neuter the entire process and decisions.

What is the right approach?

- The modern approach: pre-award intervention should be kept to the very minimum
- To what extent do international arbitration agreements act as a warning notice to the Courts “this is private properly – keep out”.
- How far does assistance go?
- Interim measures (but only where the tribunal cannot act effectively)

1. Documentary production (third parties)
2. Compelling witnesses
3. Detention and inspection of subject matter

What is the right approach?

4. Sale of goods
5. Status quo injunctions (section 44 English 1996 Act)

Other important issues:

- Jurisdictional review of any kind pre-award ever justified? (see *Fiona Trust v. Yuri Privalov* October 2006 English High Court)
- Is intervention ever justified by a court other than at the seat?
- Does the proper law of the contract make a difference? Can a court intervene simply because it is the Court of the proper law?
- Is a court ever justified in restraining an arbitration (the so-called anti arbitral injunction)?

What is the right approach?

- Attitudes vary - over time and between jurisdictions
- As to time, a US judge once said of arbitrators..
- “They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually…” US Judge, Story J, 1845 *Tobey v. County of Bristol*

The “modern approach” in action

- *Weissfisch v. Julius and others* (2006, Eng CA)
- Swiss governing law / Geneva seat – an “extraordinary” arbitration agreement
- Disputes over trust funds between two brothers. Arbitrator had advised both brothers and mediated between them
- English proceedings by one brother against *inter alia* the other brother and the arbitrator seeking to have agreement declared void
- Also, claim that arbitrator had breached fiduciary duties to one brother
- Court of Appeal rejected an application for an interim injunction to restrain an arbitrator from holding a hearing to consider his own jurisdiction

The “modern approach” in action

- *“natural consequence of this Agreement was that any issues as to the validity of the unusual provisions of the Arbitration Clauses would fall to be resolved in Switzerland according to Swiss law”.*
- *So:*

1. Courts should (usually) not intervene where arbitrator has not considered own jurisdiction, and
2. More so where the seat is elsewhere

- What if the “foreign court” is simply assisting the arbitration, such as enforcing an injunction?

The not-so modern approach

- The court may intervene (at any stage) because it applies the proper law of the contract
- *OGNC v. Western Company of North America* (Indian Supreme Court 1987)
- Indian proper law / English seat
- Indian SC upheld an interim injunction restraining Western's attempts to enforce award in New York under New York Convention
- The choice of Indian law as the proper law of the contract gave Indian courts the inalienable right to review the award

The not-so modern approach

- The London award was in effect a domestic award
- As Fali Nariman said, this allowed the Indian party to an international arbitration to adopt a “heads I win, tails you lose advantage over his foreign counterpart”.
- The approach in OGNC (and *National Thermal Power v. Singer*) would “destroy the very foundations of international arbitration”.

The “modern approach” in action

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Where to draw the line at non-seat interference?

- What if the “foreign court” is simply assisting the arbitration, such as by giving effect to an injunction?
- *Attorney General of Belize v. Carlisle Holdings*, Belize Supreme Court 2005
- Injunction granted by tribunal in London
- No direct means of enforcing interim injunction in Belize
- Supreme Court granted an interim mirror injunction (Following English House of Lords in *Channel Tunnel v. Balfour Beatty*, 1993)

Where to draw the line? (cont./)

- Or - if the foreign court is requiring documents to be produced in the arbitration (especially from non- parties)?
- *Roz Trading Limited*, US District Court for Northern Georgia
- Arbitration before Austrian Federal Economic Chamber / Vienna seat
- Order made compelling US domiciled non-party to produce documents relevant to the arbitration
- Not clear whether the tribunal had been asked first to recommend the application
- Section 43 English 1996 Act

Where to draw the line?

- Not all intervention is a bad thing
- Professor Reymond (1993):

  "*It is increasingly realised in international arbitration circles that the intervention of the courts is not necessarily disruptive of the arbitration. It may equally be definitely supportive…*"

Where to draw the line?

- An effective stay power (in respect of court proceedings) is essential to enforce any limited intervention doctrine.
- Place of the seat is a relevant consideration
- Proper law of the contract is not.