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WHAT PITFALLS SHOULD PARTIES BE AWARE OF WHEN STARTING ARBITRATION?

Starting a London arbitration is usually a simple matter, with few pitfalls. It is certainly easier than starting a claim in the High Court. However, it is important to bear in mind that certain pitfalls do exist, and these occasionally cause major problems for parties to arbitration.

The recent High Court case of ***Glencore v Conqueror*** *is the latest in a series of decisions that illustrate such risks. This article looks at the case alongside a number of other judgments that point out some of the traps that parties commencing arbitration should bear in mind.*

Introduction

Starting arbitration under English law is relatively easy. Section 76(3) of the Arbitration Act 1996 provides that a notice of arbitration can generally be served "by any effective means". This includes any recognised means of communication, such as post, fax, or e-mail.

However, s.76(3) does have some restrictions. The decisions referred to in this note demonstrate that *who* a notice of arbitration has been served on is equally important as *when* and *how* it is served. Some of the key rules to bear in mind are as follows:

(a) not all counterparts will have authority to accept service;

(b) if in doubt, ask your counterpart whether they have authority; and

(c) the cautious approach is to serve the notice of arbitration by fax and post plus email.

The risks should not be exaggerated. Thousands of London arbitrations are commenced every year simply by giving notice by email, and problems rarely arise. However, following the above simple rules will provide extra reassurance that your notice of arbitration will not be open to challenge.

(1) Not all company employees are authorised to accept service

In ***Glencore v Conqueror*** [2017], Glencore sought to set aside a final arbitration award by challenging the validity of the notice of arbitration, which had been sent by e-mail to one of Glencore's employees. Glencore took no part in, and claimed to have been unaware of, the proceedings until it received the final award by post. The question was whether service to the individual employee's e-mail address constituted an effective means of service under English law.

The High Court decided that the service was ineffective, holding that the relevant employee had no actual or ostensible authority to accept service on behalf of Glencore. Even though the employee in question had been communicating with Conqueror on behalf of Glencore's operational department, this did not mean that he was authorised to accept service of legal process.

(2) Not all insurers are authorised to accept service

In ***Lantic Sugar v Baffin Investments (The Lake Michigan)*** [2009], a notice of arbitration was given to a P&I Club. It was held that the Club did not have actual or ostensible authority to accept notice of arbitration on behalf of a member, despite being authorised to deal with a wide range of matters, including settlement negotiations. The position of P&I Clubs was said to be the same as solicitors, for whom even a wide general authority to deal with a case on behalf of a client will not, without more, translate into authority to accept service of legal process.

(3) Not all brokers are authorised to accept service

Sino Channel v Dana Shipping [2016] offers a reminder that brokers or other agents may also not be authorised to accept service of an arbitration notice. Although, on the facts, the relevant agent was ultimately determined by the Court of Appeal to have implied authority to accept service, the Court emphasised that it is only in very rare cases that such authority will be implied.

Conclusion

Making sure that your notice of arbitration is given to the correct party is important in preventing a later challenge to the validity of the arbitration proceedings. Best practice includes taking some of the following steps:

(a) ask your counterpart, whether they are a company employee, P&I Club claims handler, lawyer, or other, to expressly confirm that they are authorised to accept notice of arbitration;

(b) if they do not confirm this, or are not authorised, identify appropriate email address(es) to which to send the notice. For example, your opponents' general "claims" or "legal" email address;

(c) if in doubt, it may be safest to put the issue beyond doubt by sending the notice of arbitration by fax and registered post as well; and

(d) Particular care needs to be taken if the other party does not respond or participate in the arbitration, as this can be a sign that they will later claim that the notice of arbitration was not correctly served. If in doubt it may be advisable to re-serve the notice of arbitration by additional means, as discussed above, in order to eliminate, as far as possible, the possibility of a challenge.

Following the above simple rules will provide extra reassurance that no challenge can be raised concerning the validity of your notice of arbitration.

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