

### **Delay in arbitration - DON'T GET CAUGHT NAPPING!**

Arbitration proceedings are generally considered to offer a more flexible dispute resolution process than court proceedings. As a general rule, deadlines are missed without serious consequences, timetables are seldom strictly followed, and time extensions can easily be agreed between the parties without the need to involve the tribunal.

However, it is not widely known that, in England and Wales, the Arbitration Act 1996 gives arbitration tribunals the power to strike out claims if there is excessive delay. Whilst this power is rarely exercised, the recent case of London Arbitration 8/17 emphasises that it can happen. In this matter a London arbitration was dismissed by the arbitrators for inexcusable delay, and their decision has now been upheld by the English High Court.

**The bottom line?** - A party failing to progress its claim in arbitration at a reasonable pace faces the risk of its claim being struck out for delay. If this happens an appeal to the High Court is unlikely to be met with much sympathy.

#### **LONDON ARBITRATION 8/17**

It is not necessary to set out the facts of the matter in detail in order to illustrate the general point. However, briefly, the arbitration involved owners claiming about USD 200,000 for loss and damage said to have arisen from the collapse of a crane during cargo operations. The matter progressed as follows:

- April 2002 – loss and damage allegedly incurred;
- April 2004 – arbitrators appointed, no further steps taken in the arbitration;
- September 2008 – owners allege that the parties have agreed a 50/50 settlement. Charterers challenge the jurisdiction of the tribunal to determine whether there was a settlement. The tribunal rules that it has jurisdiction.
- The tribunal was not thereafter asked to determine whether the alleged settlement was binding, and the arbitration proceedings went dormant again.
- 7 February 2014 – owners finally serve claim submissions.
- 22 April 2014 – charterers apply for owners' claim to be struck out pursuant to section 41(3) of the Arbitration Act 1996.

Section 41(3) states:

"(3) *If the tribunal is satisfied that there has been **inordinate and inexcusable delay** on the part of the claimant in pursuing his claim and that the delay -*

*(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or*

*(b) has caused, or is likely to cause, serious prejudice to the respondent, the tribunal may make an award dismissing the claim. "*

In August 2014, the tribunal issued its award dismissing owners' claim. It held that the delay ran either from 2002 or 2008 until 2014, and was inordinate and inexcusable. It determined that it would be impossible to have a fair resolution of the question of whether there had been a settlement as alleged, given the length of time that had passed in the meantime. Allowing the claim to proceed would risk serious prejudice to charterers.

Owners applied to the English High Court for leave to appeal under sections 68 and 69 of the Arbitration Act 1996. The difficulty owners faced was that the tribunal had found as a fact that there had been inordinate and inexcusable delay, and it is not possible to appeal findings of fact determined in arbitration. The appeal was therefore framed as: (i) a section 69 appeal on a point of law; and (ii) a section 68 challenge for serious irregularity.

The section 68 challenge was deemed by the Court to have no prospect of success and was dismissed without a hearing. As to the section 69 challenge on a point of law, it focused on a rather technical question as to whether the tribunal had erred in its application of the law relating to the fact that the limitation period applicable to the claim had expired as of the date upon which the application to dismiss the claim was heard. The question is likely to be of limited interest to non-lawyers, and is not covered by this note. Suffice to say that owners' section 69 application for permission to appeal was dismissed, the Court having determined that the tribunal correctly applied the law.

## CONCLUSION

Although arbitration is generally a flexible process, this decision underlines the fact that claimants cannot afford to start proceedings and thereafter simply do nothing. The informal nature of arbitration should not lull parties into a false sense of security. Once arbitration is commenced, it must be prosecuted with reasonable speed.

It might be rare for tribunals to strike out claims due to delay, but where the delay is indeed "*inordinate and inexcusable*", this is a serious risk.

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