Lewis Baach Kaufmann Middlemiss PLLC

April 2, 2020

The Second Act: So You've Won An Arbitral Award, Now What?

Long gone are the days when a successful award in international arbitration was accompanied by a congratulatory (or even grudging) phone call and wire payment confirmation.

The international arbitration system promotes and facilitates the transaction of global business across multiple jurisdictions. We have seen it work incredibly well. One expects that a party willing to agree to arbitration and go through the arbitration process also implicitly agrees to abide by the last step in the process—making payment on any award against it. But no system is self-executing and losing parties have various reasons not to pay. Some never intended to pay and decided to take a chance that they might win. Others lack the resources. Still others feel aggrieved about losing and come up with a myriad of reasons as to why the decision was misconceived: the arbitrators were biased; the witnesses lied; the panel misunderstood. More and more, arbitral awards are being challenged from the lowest to the highest courts in the relevant jurisdictions. These challenges are almost always unsuccessful, yet the counterparty still refuses to pay. Generally, it comes down to the ordinary impulse of human beings to avoid paying if they think that they don't have to. Parties are often caught off guard by the realization that the winning of the substantive arbitration award is often times just the beginning of a long and uncertain process to payment. Indeed, increasingly, the second act of enforcing the award and identifying recoverable assets is where the real battle is waged. This is especially true, the higher the amounts at stake.

What is the prevailing party to do? It has won the arbitral award. It has sought recognition and enforcement in the seat. It has defended challenges to the recognition and enforcement of the award in court. And, now what? What happens if the counterparty has no assets in the seat? Or, what happens if the counterparty's assets have been relocated in the midst of all of the preceding exercises or transferred to a web of trust structures? These scenarios are common; for arbitration claimants, we offer two pieces of advice. First, think about these issues early in the process, and, second, if you have ignored the first piece of advice and you find yourself with a chunky new award and no assets readily forthcoming, do not give up.

Thinking About Collectibility

For those contemplating the filing of an arbitration or those who are in the midst of an active arbitration, a moment of pause and consultation is encouraged. In addition to thinking about the likelihood of success on the merits of your arbitration, you should also seek counseling with respect to the recoverability prospects against your counterparty and any related entities—especially when the counterparty turns out to be a shell company or special purpose vehicle that was created solely for purposes of the project. Are there guarantors or other parties who can or

should be added to the arbitration proceedings or can be sued separately? Where does the counterparty have assets? Are the assets easily liquid? Are the assets in a jurisdiction that is likely to recognize and register an award? Is it a jurisdiction with a reliable and established process for freezing and seizing assets? If not, will the rules of the arbitration allow you to demand the posting of security? Are there pre-award remedies available in the relevant jurisdictions where assets are located? Remember that an award against an insolvent or defunct party is little more than ironic and expensive wall decoration. Arbitration is one area where you should count your chickens before they hatch to avoid egg on your face at the end of the process.

Enforcement and Asset Tracing

If you do end up with an award and a recalcitrant counterparty, it is critical to have an aggressive strategy to locate and seize assets. If an award is registered in the United States, it becomes an enforceable judgment. American courts have extensive mechanisms for post-judgment discovery. You will be able to subpoena bank records and corporate documents as well as take depositions of persons with knowledge in the United States. If your counterparty is in the United States, you have a good chance of using the discovery process to find out where the assets have gone and may well encourage a settlement once the counterparty knows that you are intent on finding and seizing assets. If the counterparty tries to dissolve the entity, you will be entitled to take discovery as to whether the assets have been transferred to a new entity doing the same business, conveniently shed of pesky liabilities. If trusts have been created, you will have the opportunity to try to undo the trusts as having been established in fraud of creditors. You may need to throw your counterparty into bankruptcy, where liquidators will be appointed to collect assets on behalf of creditors as well as to investigate any fraudulent disposition of the estate. There are as many remedies as there are schemes to avoid creditors. There are also now extensive mechanisms for cross-border cooperation in insolvency and asset tracing. Remember: if your counterparty had enough assets to be worth entering into a major contract with an arbitration clause, it is reasonably likely that those assets exist somewhere. Unless you can see how all the money was lost, keep pushing.

Litigation Finance & Other Tools Available to Assist

Enforcing a successful arbitration against a respondent can be a daunting and expensive task—especially where a sophisticated and well-resourced respondent actively seeks to stymie enforcement efforts. Successful enforcement will often require ancillary litigation proceedings in several jurisdictions concurrently. Moreover, it may well require a multi-faceted approach that is undaunted by the possibility of dead ends and anticipates a circuitous path to payment. Like the underlying arbitration, this can be distracting and financially burdensome for many claimants, most of whom simply want to move past the dispute and get on with their businesses.

Litigation finance may be one useful option to consider. Indeed, if the case was funded to begin with, then these issues may already be well provided for, as enforcement is an issue most

funders will consider and budget for at the outset, and it plays a key role in their decision making. If not, a claimant can seek funding for the costs of the enforcement and, in some cases, may be able to monetize a portion of the award.

Some litigation funders or other capital providers will purchase an award outright, allowing the successful claimant to monetize some portion of their award and move on with their business. While that may be attractive in some circumstances, it will typically only allow a claimant to realize a fraction of the award's value.

More commonly, a claimant will seek funding for the costs of enforcement only or, in some instances, may be able to monetize a smaller portion of the award. In this way, a claimant can retain the majority of the upside, while taking some money off the table to minimize the risk of an unsuccessful enforcement.

As with traditional litigation finance, funding an enforcement is non-recourse. If the award cannot be enforced, the claimant is not liable to the funder.

Finally, insurance is another tool that should be given careful consideration. Increasingly, a claimant with a strong claim or a successful award—particularly in the context of investor-state disputes—may be able to seek insurance against the risk that respondent will refuse to pay a successful award.

For further information please contact:

Eric L. Lewis at eric.lewis@lbkmlaw.com or +1.202.659.7203 or
Erika Levin at erika.levin@lbkmlaw.com or +1.212.822.0161

LBKM is grateful to Zachary Krug of Woodsford Litigation Funding for his assistance with the above.