BCLP. Client Intelligent

Insights

TIME LIMITS FOR AWARDS: THE DANGER OF DEADLINES

Jul 05, 2023

SUMMARY

Cost and delay remain the two areas of greatest concern to parties in arbitration. A particular source of frustration is that it can sometimes take many months for arbitrators to deliberate and issue an award. As a result, we are increasingly being asked whether arbitration agreements should include a deadline for the delivery of an award. This article considers some of the pros and cons of setting a deadline for the delivery of an award.

In recent years there's been a great deal of focus on techniques for controlling time and cost in arbitration proceedings. However, it's not only arbitration proceedings that can take a long time. Perhaps the biggest source of frustration for parties, and their advisers, is that it can sometimes take months for the arbitrators to issue an award.

As a result, we are increasingly being asked whether a time limit should be prescribed in arbitration agreements within which the tribunal must make an award. The intention behind the imposition of a time limit is to ensure that the arbitration is concluded quickly and efficiently and that an award is issued promptly. However, in our experience, it is a strategy that can sometimes prove to be counter-productive, because it can allow respondents to frustrate the arbitral process and potentially leave an award vulnerable to challenge.

A number of arbitral institutions do set deadlines for the delivery of awards.

The ICC Arbitration Rules 2021 include a deadline of six months from the last signature to the terms of reference and the SCC Arbitration Rules 2023 also set a six month deadline from the date on which the arbitration was referred to the tribunal. Other institutions, like the LCIA, simply provide that an award should be made as soon as reasonably possible from the date of the last submission. Though the 2020 LCIA Rules now include an additional provision requiring the tribunal to make its final award as soon as reasonably possible and to endeavour to do so no later than three months following the last submission from the parties.

The advantage of choosing institutional rules which set a time limit for the delivery of an award is that they also include provisions which allow the time limit to be varied if circumstances are such that the award cannot be delivered on time. On the face of it this may seem to defeat the objective of setting a deadline; but, in fact, it's an important consideration.

Unlike court proceedings, arbitrators derive their jurisdiction from the parties' agreement to arbitrate. Where a time limit is imposed within which the tribunal must make its award, failure to deliver an award within the specified time limit may mean that the parties' consent to arbitration has lapsed and any arbitration award issued after the deadline may be unenforceable.

Take, for example, an arbitration agreement that fixes a time limit for the delivery of an award from the date of the appointment of the tribunal or the date of commencement of the arbitration. If that time limit can be extended only by agreement of the parties, one party may try to frustrate the arbitration by delaying the process and refusing to agree any extension of time for the delivery of an award. Where the seat of the arbitration is in England, the court may have the power under Section 50 of the Arbitration Act 1996 to extend time for making an award. However, where the seat of the arbitration is not in England, similar powers may not be available under the applicable law.

The problems that this can create are illustrated in the recent Privy Council decision in Alphamix Ltd v The District Council of Rivière du Rempart (Mauritius) [2023] UKPC 20. In an appeal from the Supreme Court of Mauritius, the Privy Council upheld an arbitrator's award, where the award had been annulled by the Mauritian court for being given three days after the date specified for providing an award. Under the provisions of the Mauritian Civil Procedure Code (which govern domestic arbitrations in Mauritius) the mandate of an arbitrator - if no time limit is fixed by the arbitration agreement - lasts for six months from the date of appointment. This period may be extended by agreement of the parties. One of the grounds (set out in article 1027-3 of the Code) on which an arbitration award may be annulled is if the arbitrator's decision is not within the mandate conferred on him by the parties ("l'arbitre a statué sans se conformer à la mission qui lui avait été conférée"). The arbitration was commenced in 2015 and there had been several extensions to the date for the award. On 29 November 2018 a "final extension" was agreed to 31 December 2018. The award was prepared by this date and the parties met with the arbitrator on 31 December 2018 to discuss delivery of the award. At this point, neither party objected to the arbitrator taking a little more time – he was ill and the next working day would be 3 January 2019. The Privy Council found that the above demonstrated "*an unequivocal common intention of the parties formed and manifested on 31 December [2018] that delay until 3 January [2019] in providing the final, signed version of the award would not result in the award being invalid. That amounted to a tacit agreement to extend the time limit for rendering the award until (at the earliest) 3 January 2019. The award provided on that day was therefore within the arbitrator's mandate.*"

Another important consideration is whether the time limit imposed is realistic. Parties may be keen to include short deadlines for the resolution of disputes at the contract drafting stage. However, in practice, it is not always easy to foresee the nature and complexity of disputes that may arise in the

future. As indicated by the LCIA data on the average duration of an arbitration, it is unlikely that an arbitration in relation to a substantial dispute could be completed within a time scale of less than six months.

The danger of setting an unrealistic deadline is that the tribunal may be forced into a situation where, in order to comply with the time limit, it is forced to issue an award without giving both parties a reasonable opportunity to present their case. It may also have insufficient time to deliberate and issue a properly reasoned award. In both scenarios, the ultimate award would be vulnerable to challenge for lack of due process.

For parties who are considering prescribing a deadline for the making of an award, the choice of institutional rules which include a deadline may well be the answer. This combines certainty with a degree of flexibility, designed to prevent one party from frustrating the process.

Parties who still wish to prescribe their own time limits in an arbitration agreement should consider the important following factors:

- Make sure that the time limit does not enable one party to frustrate the arbitration. Link the time limit to the closure of hearings, not the appointment of the tribunal or the commencement of the arbitration.
- Make sure that time can be extended if necessary without the consent of both parties.
- Make sure the time limit is realistic. It simply may not be possible to resolve any dispute that may arise under a contract within a three month time scale. You need to allow time for both parties to present their case and for the tribunal to deliberate and issue a reasoned award.

It is frustrating for parties, and their advisers, if a tribunal takes many months to deliberate and issue an award. However, deadlines for the delivery of an award need to be considered carefully to ensure that they are realistic and cannot be used to frustrate the arbitral process or as a basis for challenging an award.

RELATED CAPABILITIES

- International Arbitration
- Litigation & Dispute Resolution

MEET THE TEAM

Victoria Clark

London

victoria.clark@bclplaw.com
+44 (0) 20 3400 3095
