Litigation & Arbitration Group

Milbank

# Arbitration case law update:

## Court of Appeal reinforces court's supervisory jurisdiction

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**Arbitration case law update: Court of Appeal reinforces court's supervisory jurisdiction**

*Minister of Finance (Incorporated), 1 Malaysia Development Berhad v International Petroleum Investment Company, Aabar Investments PJS [2019] EWCA Civ 2080*

The Court of Appeal ("**CoA**") has recently issued a rare and significant decision on an arbitration-related claim in the English court. Notably, it reversed a decision of the High Court to stay parties' applications to challenge an arbitral award under sections 67 and 68 of the Arbitration Act 1996 (the "**Act**") and, in doing so, has emphasised the important public function underlying the court's mandatory supervisory jurisdiction over arbitrations seated in England and Wales.

In broad summary, and as detailed further below:

- The High Court had granted a stay of the claimants' applications under sections 67 and 68 of the Act. It did so in order to avoid the risk of delay, cost, disorder and uncertainty arising from concurrent arbitration proceedings that had been commenced by the defendants shortly after the claimants' applications were served, which addressed materially similar issues to those set out in the claimants' applications (regarding the enforceability of settlement deeds between the parties).

- The CoA removed the stay, explaining that, in light of the principle of party autonomy and the public interest in the court's supervisory function when an arbitration award is challenged for lack of substantive jurisdiction or serious irregularity, compelling grounds are required to stay such proceedings. The CoA held that this test was not met in circumstances where the defendants' actions (in starting new arbitration proceedings) were deemed to have been taken in order to frustrate the claimants' applications to challenge the award.

- The CoA also granted an injunction restraining the defendants from pursuing their new arbitration claims until final determination of the claimants' applications (reversing the High Court's decision

on that point). In doing so, the CoA confirmed that arbitration proceedings may be injuncted in exceptional circumstances and reaffirmed the applicable three-stage test laid down in *Claxton*.[1]

## Background

*The First Arbitration*

The claimants (two companies wholly-owned by the Malaysian Government) and the defendants (two entities owned indirectly by the Government of Abu Dhabi) had been parties to an arbitration seated in London in relation to a binding term sheet. Those proceedings were settled pursuant to two settlement deeds. The tribunal then issued a consent award (the "**Consent Award**") reflecting the terms of that settlement.

*The Applications*

The claimants subsequently sought to challenge the Consent Award on the grounds that (i) the tribunal did not have substantive jurisdiction (pursuant to section 67 of the Act) and (ii) for serious irregularity because, the claimants alleged, the Consent Award had been procured by fraud or in a way that was contrary to public policy (pursuant to section 68 of the Act) (the "**Applications**"). Specifically, the claimants alleged that the Consent Award was part of an attempt by the then Malaysian Prime Minister to cover up his fraud, contrary to the interests of the claimants and the Malaysian people. Accordingly, the claimants alleged that the former Prime Minister lacked authority to enter into the term sheet and the settlement deeds.

*The Second Arbitrations*

The day after the Applications were served, the defendants commenced fresh arbitration proceedings (the "**Second Arbitrations**") against the claimants. They alleged that events of default under the two settlement deeds had occurred and sought declarations that the deeds were enforceable. The defendants then applied to stay the Applications. Subsequently, the claimants applied to the High Court for an injunction to restrain the defendants from pursuing the Second Arbitrations until final determination of the Applications.

*The High Court's decision*

The High Court granted a temporary stay of the Applications pursuant to the court's inherent case management power,[2] as (the judge reasoned) the alternative invited delay, cost, disorder and uncertainty. The judge refused to grant the injunction, concluding that it would not be just and convenient to do so.

## The CoA's Decision

*Questions for the CoA*

On appeal by the claimants, the CoA considered the following questions:

1. Did the judge exercise his case management powers to stay the Applications on the correct legal basis? If not, should the CoA stay the Applications?

2. Did the judge exercise his discretion to refuse an injunction restraining the Second Arbitrations on the correct legal basis? If not, should the CoA grant an injunction restraining the Second Arbitrations?

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[1] *Claxton Engineering Services Ltd. v TXM Olaj-Es Gazkutato Kft (No 2) [2011] EWHC 345 (Comm), [2011] 2 All ER (Comm) 128* at [34] ("***Claxton***").

[2] Notably, the judge did not apply section 9 of the Act because, in his view, there were concurrent jurisdictions that prevented the engagement of section 9 (i.e. the jurisdiction of the court under the Applications and the jurisdiction of the tribunal in the Second Arbitrations).

*No stay of the Applications*

The CoA held that the judge had been wrong to grant a stay of the Applications.

The CoA noted that the court's supervisory powers in respect of challenges to awards on section 67 and section 68 grounds were founded both on party autonomy and the public interest. By agreeing to an English-seated arbitration, parties agree to the court's limited mandatory supervisory jurisdiction permitted by the Act, including under sections 67 and 68. These safeguards perform an important public function and have effect notwithstanding agreement to the contrary. This is because valid arbitration awards are enforceable worldwide through the New York Convention using coercive state powers (i.e. an award, once recognised, can typically be enforced in the same manner as a national court judgment). It is in the public interest that only awards that the arbitrator had jurisdiction to make, and which do not cause substantial injustice due to serious irregularity, should benefit from that coercive power.

Further, until a challenge under section 67 or 68 is determined, the award's status is uncertain: some jurisdictions may enforce the award while others may not. Thus, section 67 and 68 challenges should be determined promptly and with finality. The CoA therefore held that a stay should only be granted if there were compelling reasons to do so.

At first instance, the judge had held that granting a stay would wrongly elevate the court's supervisory jurisdiction above the Second Arbitrations' concurrent jurisdiction, when both were derived from party autonomy. In the CoA's view, this approach ignored the public function of the supervisory jurisdiction. Notably, the CoA declared that "*courts exercising their supervisory role…do so as a branch of the state, not as a mere extension of the consensual arbitration process*".[3] The judge had therefore used the wrong starting point to assess whether there were compelling reasons for a stay and the CoA considered this anew.

On the facts, the CoA held there were no compelling reasons to stay the Applications:

- The parties' rights to bring proper challenges under sections 67 and 68 were necessary in the public interest.
- It would be illogical to prioritise the Second Arbitrations by granting the stay, where those proceedings were, in the CoA's view, a reaction to the Applications (as it would amount to an ouster by contract of the claimants' statutory right to make an application under section 67 and/or section 68 of the Act, which are mandatory provisions).
- The stay would not avoid unnecessary duplication and there could feasibly be further court proceedings to determine the same question. The CoA was also wary of, in effect, delegating the Applications (which arise from mandatory supervisory powers) to the arbitrators in the Second Arbitrations.
- Party autonomy pointed against the stay since the parties agreed to the court's supervisory jurisdiction in the term sheet's arbitration clause.
- The stay would impose an unfair burden on the claimants who might have to face the defendants' large financial claims in the Second Arbitrations before the Applications were decided.

Accordingly, the CoA determined not to exercise its case management power to grant a stay of the Applications.

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[3] *Minister of Finance (Incorporated), 1 Malaysia Development Berhad v International Petroleum Investment Company, Aabar Investments PJS [2019] EWCA Civ 2080* at [54].

*Injunction to restrain the Second Arbitrations*

The CoA reaffirmed that the court may grant injunctions to restrain arbitration proceedings in "*exceptional circumstances*".[4] Relying on the test set out in *Claxton*,[5] the CoA considered the three questions that the court must assess in that regard: (1) whether the claimants' rights were infringed or threatened by the continuation of the Second Arbitrations; (2) whether continuation would be vexatious, oppressive or unconscionable; and (3) whether granting the injunction would be just and convenient.

On the facts, the CoA found that the first and second questions were satisfied because the settlement deeds (which provided that the Applications themselves were events of default) attempted to prevent the claimants from enforcing their statutory rights and the Second Arbitrations sought to impose large financial penalties on the claimants for exercising those rights. As such, the claimants' rights to pursue their Applications were infringed and threatened by the continuation of the Second Arbitrations (which were vexatious and oppressive).[6]

Exercising its discretion under the third question, the CoA found that it would be just and convenient to grant the injunction because it would end the defendants' vexatious conduct and remove the risk of parallel proceedings.

## The significance of the CoA's decision

The CoA's decision is significant for all parties to English-seated arbitration proceedings because it emphasises the English court's approach to protecting parties' mandatory rights under the Act (including the right to challenge an award).

The reasoned decision provides helpful guidance as to the nature of the court's role in relation to arbitration proceedings and demonstrates the court's focus on both party autonomy and public interest. The CoA's decision is also helpful in that it reaffirms that the court will, in appropriate circumstances, grant an injunction to restrain the pursuit of arbitration proceedings (and usefully sets out the applicable test for determining when it is appropriate to do so).

[4] Ibid at [67]. The CoA noted that the relevant test is set out in *Claxton*.

[5] At [34].

[6] Sir Geoffrey Vos noted that Knowles J's reasoning was hard to follow and that he applied the wrong test. He should have answered the first two questions directly to establish whether there was a basis for the injunction. Then, when exercising discretion under the third question, he should not have done so on the premise that the stay was being granted.

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