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Insights

Litigation & Arbitration Group

Arbitration Update: A Summary of Recent Developments

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In this briefing, we summarise some of the more noteworthy cases of the last 12 months or so, including decisions regarding: the circumstances in which an award may be challenged; the parties who are bound by arbitration agreements and/or awards (and the law that governs the same); and issues of disclosure and confidentiality.

Successful s.68 challenge based on an 'obvious' mistake

It is rare for an English court to uphold a challenge to an award on the basis that the Tribunal made a mistake. However, in *Ducat Maritime Ltd v Lavender Shipmanagement Incorporated,*[1] the High Court set aside part of an award under section 68(2)(a) of the Arbitration Act 1996 (the "**AA 1996**") for serious irregularity on the grounds that the arbitrator breached his general duty of fairness when making a clear mistake in the calculation of the sums awarded.

The arbitrator had mistakenly included the value of an unsuccessful counterclaim by the respondent in the calculation of interest on the amounts awarded to the claimant, and by doing so inflated the amount of the award by 33%. There was no dispute between the parties that there had been an error, but the arbitrator nevertheless refused to correct the award following two unsuccessful applications under section 57(3) of the AA 1996. Accordingly, the respondent applied to have that part of the award set aside on the basis that it constituted a serious irregularity under s.68(2)(a) of the AA 1996.

The Court held that the arbitrator's mistake constituted a serious irregularity for the purposes of s.68 and that it had caused substantial injustice to the respondent. Accordingly, and despite emphasising the "*high hurdle*" and "*high burden*" of this exercise, the Court set aside the part of the award concerning the mistaken calculation (and did not remit the award to the arbitrator, given the previously unsuccessful attempts to have the mistake corrected).

The Court acknowledged that it is not enough for the purposes of s.68 for the tribunal's award to have been illogical or irrational. Instead, the Court reasoned that section 68 was concerned with due process, as

[1] [2022] EWHC 766 (Comm).

opposed to finding whether the tribunal had made the 'right' decision. However, the Court held that gross and obvious accounting mistakes or arithmetic mistakes may well represent a failure to conduct the proceedings fairly because they reflect a departure from how the parties presented their cases without giving them an opportunity to respond. In any event, the Court also found that the arbitrator had, as a matter of fact, failed to adhere to the common ground between the parties without giving them an opportunity to comment (which constituted a breach of his duty to act fairly under s.33 of the AA 1996).

Governing law of arbitration agreement determines who is bound by that agreement; non-parties can apply under section 9 of the AA 1996

In *Lifestyle Equities CV and another v Hornby Street (MCR) Ltd and others,*[2] the Court of Appeal upheld a stay of court proceedings that had been started by the assignee of an arbitration agreement, in breach of that arbitration agreement.

The Court of Appeal relied on the recent Supreme Court decision in *Kabab-Ji*,[3] which had held that the parties to an arbitration agreement are determined in accordance with the governing law of the contract which contains the arbitration agreement. It went on to hold in this case that the same law should logically apply to the question of whether a non-party was bound by the arbitration agreement.[4] Thus, applying the Kabab-Ji decision, the Court of Appeal held that the assignee was bound by the arbitration agreement and, therefore, granted a stay under s.9 of the AA 1996.

Arbitral awards and non-parties

In *Vale SA and others v Steinmetz and others*,[5] the Court of Appeal held that an arbitral award between two parties will, save for limited purposes, have no binding effect in disputes between either of those parties and a non-party. In the Court's view, this reflects a "*clear and considered statement of principle*", founded on the consensual nature of arbitration.

Vale concerned an arbitration conducted under the Rules of the London Court of International Arbitration ("**LCIA**"), pursuant to which a contract between Vale SA and BSGR was rescinded on the basis of fraudulent misrepresentation. However, the award held that Vale was not allowed to recover from BSGR by way of restitution an amount that Vale's subsidiary had paid on Vale's behalf to BSGR (and part of which had been transferred by BSGR to another beneficiary).

In subsequent court proceedings to recover those amounts from the beneficiary, the beneficiary sought to rely on the award to bar Vale's claim. However, the Court of Appeal held that, just as the beneficiary was not bound by the arbitral award between Vale and BSGR, so too Vale was not bound (as against the beneficiary) by the tribunal's decision on restitution. Therefore, Vale was free to pursue its claim against the beneficiary.

Arbitral award confidentiality: is open justice turning the tide?

Confidentiality is often cited as an important benefit of arbitration, but critics argue that it comes at the expense of open justice and the development of the English Common Law. This tension was addressed recently by the Court of Appeal in *Manchester City Football Club Ltd v Football Association Premier League Ltd and others*,[6] when the Court decided to publish a challenge to an arbitral award, seemingly at the cost of confidentiality, and despite both parties to the proceedings objecting to that publication.

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2 [2022] EWCA Civ 51.
3 [2021] UKSC 48.
4 In a dissenting judgment, Snowdon LJ disagreed, noting that the governing law of the arbitration agreement (to which non-parties have not consented) cannot be the relevant law for determining whether those non-parties are bound by that agreement.
5 [2021] EWCA Civ 1987.
6 [2021] EWCA Civ 1110.

The Court of Appeal weighed the public interest and the opportunity for scrutiny afforded by the publishing of judgments against the desirability of preserving the confidentiality of arbitration and its subject matter. It confirmed the general principle set down in *Department of Economic Policy v Bankers Trust,*[7] that judgments should be published provided this can be done without the disclosure of significant confidential information.

The Court of Appeal found that there was no risk of disclosing significant confidential information, noting that the existence of the underlying investigation, dispute and arbitration were already public knowledge. As such, the suggestion that the points of issue in the underlying judgments constituted significant confidential information was deemed "*unreal*".[8] The Court of Appeal also noted that there was legitimate public interest in publishing one of the judgments as it had precedential effect, which meant that it "*must be available to all*".[9]

Notwithstanding this, the Court was clear in emphasising that there must be a "*careful*"[10] approach in any decision on publication so that genuinely confidential material is protected, given that parties often choose arbitration for this very reason.

Questions of law or findings of fact: Court dismisses section 69 appeal

In *Laysun Service Co Ltd v Del Monte International GmbH,*[11] the English High Court demonstrated the robust approach that it will take to challenges under s.69 of the AA 1996 that, on a proper analysis, are challenges to findings of fact as opposed to errors of law.

Laysun and Del Monte had entered into a contract of affreightment for the carriage of refrigerated bananas from the Philippines to Iran through 36 voyages. Del Monte tried to rely on a force majeure clause to escape its obligation to provide cargoes in light of: (i) the US sanctions imposed on Iran; and (ii) the restrictions imposed by the Iranian government on the issuance of import permits. The tribunal agreed, finding (as a fact) that Del Monte was entitled to rely on the force majeure clause. The applicants appealed under s.69 of the AA 1996 to the High Court on the basis that the tribunal's finding was an error in law.

The High Court dismissed the appeal. It found that the relevant questions of law were either premised on factual findings that the Tribunal had not made (and so the question of law did not arise), or they were not questions of law at all and were in fact questions of fact.

Arbitral award enforcement vs. state sovereignty: Court dismisses full and frank disclosure challenge

In *General Dynamics United Kingdom Ltd v the State of Libya,*[12] the enforcement of an arbitral award against a State was considered in the context of state immunity under the State Immunity Act 1978 (the "**SIA**"). The case is a reminder that a State's immunity from jurisdiction under the SIA is waived by its submission to arbitration, and that this waiver applies both to the arbitral proceedings themselves as well as any proceedings under s.101 of the AA 1996 for judgment on the award. However, the waiver does not apply to the State's immunity from execution of a judgment on the award.

An *ex parte* order made pursuant to s.101 of the AA 1996 granting permission to enforce (and entering judgment in terms of) an award against Libya was challenged on the grounds that the applicant had failed to give full and frank disclosure in support of its *ex parte* application. Specifically, it had failed to draw to

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7 [2004] EWCA Civ 314; [2005] QB 207.
8 Manchester City at [54].
9 Ibid at [64].
10 Ibid at [63].
11 [2022] EWHC 699 (Comm).
12 [2022] EWHC 501 (Comm). In related proceedings in 2021 (*General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22), the Supreme Court had also held that the order had been wrong to dispense with service against Libya, and thereby confirmed that service on a State should be effected through diplomatic channels (per s.12(1) SIA 1978).

the Court's attention that Libya benefited from state immunity under s.1 of the SIA. Libya argued that this failure risked allowing the applicant to *execute* the judgment on the award without bringing to the Court's attention that a State is immune from execution pursuant to s.13 of the SIA.

The Court dismissed Libya's challenge. In doing so, the Court acknowledged that s.9 of the SIA clearly disapplies s.1 when a State submits to arbitration (i.e., so that the State does not benefit from immunity from jurisdiction with respect to the arbitration and any court proceedings that relate to the arbitration), and so there was no benefit to the applicant in having failed to refer to it in the *ex parte* application (albeit the Court noted that it would have been preferable to do so). The Court also acknowledged that s.13 of the SIA does provide immunity from execution of a judgment on an award, but it considered that there were sufficient safeguards within the relevant procedural rules to prevent such execution being effected without having brought the issue of immunity to the Court's attention.

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