WFW SUCCESSFULLY DEFEATS "SERIOUS IRREGULARITY" CHALLENGE TO LCIA ARBITRAL AWARD

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"Challenges to arbitral awards under the 1996 Act are not very common as the threshold for successful applications is high."

In a recent case, WFW's Dubai and London Dispute Resolution teams successfully defeated a challenge to an LCIA award brought under section 68 of the English Arbitration Act 1996 (the "1996 Act"). Challenges to arbitral awards under the 1996 Act are not very common as the threshold for successful applications is high.

Under the 1996 Act, an arbitral award may be challenged on one of the following limited grounds:

(i) that the award was made without substantive jurisdiction (section 67);

(ii) for serious irregularity (section 68); or

(iii) by way of an appeal on a point of law (section 69).

In this case, the arbitrator dismissed the claim in its entirety and awarded our clients its costs in the arbitration. Unhappy with the decision, the claimant applied to the English High Court to challenge the award under section 68 for serious irregularity.

Section 68(2) of the 1996 Act provides an exhaustive list of the types of irregularities which may be invoked, including:

(i) a failure by the tribunal to comply with its general duty under section 33 of the 1996 Act; section 33(1) provides that the tribunal should (a) act fairly and impartially, giving each party a reasonable opportunity of putting his case, and (b) adopt procedures suitable to the circumstances of the case. Section 33(2) further provides that the tribunal shall comply with that general duty "*in conducting the proceedings, in its decisions on matters of procedure and evidence*";

(ii) the tribunal exceeding its powers;

(iii) a failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; or

(iv) deal with all the issues that were put to it.

Section 68 is designed to remedy procedural failings by arbitrators and not to correct factual or legal errors. Section 68 also requires that the serious irregularity has caused or will cause *"substantial injustice"* to the applicant. This requirement is designed to eliminate unmeritorious applications. If the challenge succeeds, the award may either be remitted to the tribunal or set aside.

"The challenge was premised on the claimant's assertion that the arbitrator failed to comply with his duty under section 33(2) of the 1996 Act to act fairly."

In this case, the challenge was premised on the claimant's assertion that the arbitrator failed to comply with his duty under section 33(2) of the 1996 Act to act fairly:

(i) in his approach to certain parts of the oral testimony at the hearing; and

(ii) in failing to afford the parties an opportunity to comment on the other party's costs submissions before assessing costs.

"Agreeing with our arguments, the judge dismissed the challenge without a hearing on the grounds that it had no real prospect of success."

The challenge was entirely without merit, and we applied to the Court for a dismissal of the challenge without a hearing. In this context, Section 08.6 of The Commercial Court Guide provides that "*it is astute to do so in the case of challenges to awards under section 67 or 68 of the Act where the nature of the challenge or the evidence filed in support of it leads the Court to consider that the claim has no real prospect of success*".

A claim will have no real prospect of success where it is found to be fanciful and where it is beyond question that the claim is contradicted by all the documents or other material on which it is based (*Three Rivers No 3 [2001] UKHK 16).*

Agreeing with our arguments, the judge dismissed the challenge without a hearing on the grounds that it had no real prospect of success. As a result, the judge ordered the claimant to pay our clients its costs of and occasioned by the challenge.

In the reasoning part of the order, the judge noted that the question is "*whether the Arbitrator observed due process, not whether he arrived at the correct answer*". Relying on the leading case of *Lesotho Highlands Development Authority v Impreglio SpA* [2005] UKHL 43; [2006] 1 AC 221, they stated that an "*application will generally only succeed in an extreme case where the tribunal went so wrong in its conduct of the arbitration that justice calls out for it to be corrected*".

In the specific case, the judge noted that the issues in dispute in the arbitration were clearly defined and determined in the negative by the arbitrator adversely to the claimant following a "*thorough and meticulous examination of all the evidence in the case*" including the oral testimony of the witnesses. The judge further reminded that it is "*trite that the assessment of the facts is for the tribunal alone which is entitled to form a view on the evidence as a whole*" (*Sonatrach v Statoil Natural Gas LLC,* [2014] EWHC 875 (Comm); [2014] 2 Lloyd's Rep. 252). Challenges may only possibly succeed when a tribunal overlooked or ignored agreed or admitted evidence. However, in this case, as the judge observed, it was clear from the award that the arbitrator "*did not consider any admission had in truth been made. There can be no serious suggestion that he failed to act fairly in this respect*".

"The judge also dismissed the claimant's complaint that it was given no opportunity to comment on the quantum of our client's costs."

The judge also dismissed the claimant's complaint that it was given no opportunity to comment on the quantum of our client's costs. Following discussion at the conclusion of the hearing, the arbitrator directed those costs submissions be served by a certain date. Neither party requested that provision be made for responsive submissions. Nor did the claimant at any time following receipt of our client's costs submissions request an opportunity to comment prior to the issuance of the award. As a result, agreeing with us, the judge concluded that the arbitrator cannot be considered to have acted unfairly in proceeding to determine the incidence and quantum of costs in his award.

This order is a good example of the English Court's continued support to arbitration and deference to arbitral tribunals' decision making.

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