Kluwer Arbitration Blog

The Primacy of the Court's Supervisory Powers Under Sections 67 and 68 of the Arbitration Act 1996 in Minister of Finance (Incorporated) & Or v International Petroleum Investment Company & Or

Jarret Huang · Thursday, May 28th, 2020

In *Minister of Finance (Incorporated) & 1Malaysia Development Berhad v International Petroleum Investment Company & Aabar Investments PJS* [2019] EWCA Civ 2080 ("*IPIC*"), Sir Geoffrey Vos, delivering the judgment of the England and Wales Court of Appeal, addressed the ambit of supervisory relief available before the English Courts under ss 67 and 68 of the Arbitration Act 1996 ("the Act").

Facts

This appeal arose out of allegations that a multi-billion dollar fraud had been carried out against 1MDB (the second claimant-appellant), a Malaysian state-owned investment fund. 1MDB is a wholly-owned subsidiary of the first claimant-appellant (collectively, the "claimants").

The claimants were engaged in a London-seated arbitration (the "first arbitration") against the respondent-defendants (the "defendants"). Subsequently, the parties entered into a settlement deed which culminated in a Consent Award made in May 2017. In the present proceedings, the claimants applied to have the Consent Award set aside on the basis of, *inter alia*, fraud. In response to the claimants' applications, the defendants commenced two fresh arbitrations (the "fresh arbitrations") against the claimants seeking declaratory relief that the settlement deed was valid, and payment of over US$1 billion which was alleged to have fallen due under the settlement deeds because of the claimants' application to set aside the Consent Award. In December 2018, the defendants applied to strike-out the claimants' application, and/or alternatively, for a stay of the claimants' application on case management grounds. The claimants then applied for an anti-arbitration injunction under s 37(1) of the Act.

The Judgment Below

At first instance, Mr Justice Knowles ("Knowles J") refused the claimants' application for an anti-arbitration injunction and the respondents' application for striking-out, but granted the defendants' application for a stay of court proceedings on case management grounds in order to allow the fresh arbitrations to proceed. The crux of Knowles J's reasoning centred on [70] of the first instance judgment, that there was an "equality in foundation" between the fresh arbitrations and the court's supervisory jurisdiction of the first arbitration under ss 67 and 68 of the Act because *both* those foundations centred on the litigants' consent to enter into arbitration in the first place. In other words, since *both* the exercise of the court's supervisory jurisdiction *and* the fresh arbitrations depended on the parties' consent, granting the anti-arbitration injunction would unjustly prioritise the court's supervision over the fresh arbitrations.

The Court of Appeal Judgment

The Court of Appeal disagreed with the fundamental premise of Knowles J's decision. At [1], the "primacy of the powers of the court" under ss 67 and 68 was emphasised. The fresh arbitrations were held to threaten or infringe the legal rights which the claimants had to recourse under ss 67 and 68. These legal rights, being mandatory rights within the meaning of s 4 of the Act, could not be said to be on equal footing to the consent of parties to enter into the fresh arbitrations. The Court therefore removed the case management stay, and granted the anti-arbitration injunction.

In relation to the case management stay, the Court accepted Knowles J's reliance on Lord Bingham's holding in *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 that "stays are only granted … in rare and compelling circumstances". However, the Court disagreed with Knowles J in the application of the test, holding that a) the Court was performing a public function as a branch of the state in resolving disputes under ss 67 and 68, b) it would be illogical to give precedence to the fresh arbitrations given that the fresh arbitrations were, in substance, mere reactions to the claimants' court application, c) a stay would not necessarily avoid duplication as this would depend on issue estoppels arising in the fresh arbitrations, d) a stay would only enable the arbitrators to reach at best a provisional decision as to their own jurisdiction under the *kompetenz-kompetenz* principle, in contrast to a final binding determination by the court, and e) it would be unduly burdensome for the claimants to have to first defend the significant financial claims in the fresh arbitrations.

In relation to the anti-arbitration injunction, the Court agreed with Knowles J that the correct test was that at [34] of *Claxton Engineering Services Ltd v TXM Olaj-es Gazkutato Kft (No. 2)* [2011] EWHC 345 (Comm) ("*Claxton*") to ascertain i) whether the claimants' rights had been infringed or threatened by the fresh arbitrations, ii) whether continuation of the fresh arbitrations would be vexatious, oppressive, or unconscionable, and iii) whether it would be just and convenient to grant an injunction. The Court held at [73] that the claims sought in the fresh arbitrations infringed and threatened the claimants' "undoubted legal right" to recourse under ss 67 and 68, and went on to observe that, notwithstanding the agreement of parties to such clauses, "[i]t is not legitimate … to enforce the clauses of the settlement deeds

that attempt to suppress the court's review of the consent award".

Comment

The Court's decision is largely explicable on the mandatory statutory framework the Act provides for. Per s 4(1) of the Act, mandatory provisions "have effect notwithstanding any provision to the contrary". The Departmental Advisory Committee on Arbitration Report on the Arbitration Bill 1996 specifically described mandatory provisions as ones which "cannot be overridden by the parties" at [28] of the report. These mandatory provisions are further described at s 1(b) of the Act as "safeguards as are necessary in the public interest", and the cumulative effect of these extracts underscores two points:

First, mandatory provisions like ss 67 and 68 are specifically envisaged as going towards a *public* interest which Parliament clearly intended that parties cannot derogate from. This ensures that, in the contexts of serious irregularity and/or where the substantive jurisdiction of the tribunal is impugned, justice can be done. Because a public interest is invoked, it cannot be said that the applications of ss 67 and 68 are *solely* manifestations of the consent which undergirds the arbitration in the first place.

Second, the mandatory framework is rightly described at [39] as part of the balance provided for by the architecture of the Act. On one hand, court intervention in arbitral proceedings is carefully limited so that the parties' wishes are given appropriate weight. For instance, s 1(c) of the Act provides that the court should not intervene except as provided for by the Act. On the other hand, the mandatory framework, and in particular ss 67 and 68, apply even if parties would rather avoid them. This is an appropriate balance to strike – ss 67 and 68 go towards the heart of the consent to arbitrate in the first place. After all, a party cannot be taken to consent to arbitration which is marred by serious irregularity or fraud.

Viewed in this context, it is unsurprising that there is extensive authority outlining the reasoning for how ss 67 and 68 come to apply. In *C v D* [2007] EWCA Civ 1282 at [17], Lord Justice Longmore observed that "the parties incorporated the framework of the 1996 Act" by virtue of their choice of seat for the arbitration. The *IPIC* judgment makes clear that the consent of the parties is not the sole jurisprudential basis for the application of ss 67 and 68. Rather, the public interest outlined above is another foundation for its application. To this, one might add that the very framework of the Act provides for ss 67 and 68 to apply in the manner the Court adopted. In practical terms, therefore, practitioners should note that agreeing to a London-seated arbitration brings as a corollary supervisory oversight by the English courts.

This decision, while providing welcome clarity on the ambit and application of ss 67 and 68, leaves open a number of issues. First, where the subject matter of the arbitration is one that is determined in part by the courts and otherwise by arbitration, such as in certain insolvency contexts, does the fact that the courts are exercising public functions in those contexts necessarily mean that the court process should "trump" the arbitration? Second, what provisions will be seen as attempts to

contract out of the mandatory provisions under the Act? As regards the former, it is unclear how the nexus of court determinations and arbitral proceedings will operate in such contexts. The Court in *IPIC* hinted at the role issue estoppel can play, though it is unclear how that will operate if a court proceeding and an arbitration are found to not be "on equal footing". As for the latter, the instant facts represented a clear instance of a party's rights under ss 67 and 68 being fettered. However, it remains to be seen how protective the Court will be of attempts to impose contractual consequences for the challenge of consent awards. In other words, could a watered-down version of the consequences the defendants imposed be found to *not* fall foul of the *Claxton* test?

Conclusion

A jurisdiction's arbitration-friendliness is often assessed by reference to how willing courts are to intervene in arbitration. *IPIC* is a timely reminder that non-intervention is not the be-all-and-end-all to determining that issue. The consent of parties is at the heart of arbitration, and a state's arbitration-friendliness can also be evidenced by its willingness to ensure that the consent underpinning arbitration is not vitiated. If challenges on the basis of serious irregularities or substantive questions of jurisdiction are disallowed *inter partes*, the *effective* consent of the parties may be undermined. In *IPIC*, the English courts have shown that they will intervene in such contexts.

The author wishes to thank Ms Jenna Hare for her insightful comments on this article. This case note is written in the author's personal capacity, and the opinions expressed in the case note are entirely the author's own views. All errors herein are my own.

This entry was posted on Thursday, May 28th, 2020 at 8:00 am and is filed under Anti-arbitration Injunction, Consent awards, English Arbitration Act, Injunction
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.