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Primera v Jiangsu – Challenging an Award on the Ground of Serious Irregularity: English Courts Criticise Attempts to Nitpick an Award

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In a recent decision of the English Commercial Court, Flaux J restated the general principle that the focus of an enquiry under Section 68 of the Arbitration Act 1996 ("the Act") is to ascertain whether due process has been observed in the making of an Award. It is not designed to be a qualitative assessment of the correctness of the Tribunal's decision. The case demonstrates that a veiled attempt by a party to appeal an award on the facts or law under the guise of a challenge under Section 68 (no matter how sophisticated the concealment) will not be entertained.

The dispute concerned the Claimant, Primera's claim that the Defendants, a Chinese shipyard and trading house respectively, were in anticipatory breach of two shipbuilding contracts entered into in 2007, on the basis of the shipyard's refusal to deliver the vessels by the contractual delivery dates in 2011. In a fully reasoned Award running to 84 pages, the Tribunal dismissed the claims, holding that although the Defendants had renounced the contracts in an email of 19 October 2007 and at a meeting on 6 November 2007, the Claimants had thereafter affirmed the contracts.

The Claimants applied under Section 68(2)(d) of the Act to set aside the Award and remit it to the tribunal, on the grounds that the tribunal failed to deal with two issues which the Claimants had put before them: (i) that the renunciation by the Defendants was continuous; and (ii) in relation to the quantum of the Claimants' claim, that the Claimants would have "flipped" the contracts.

Before examining the Court's decision in further detail, it is helpful to consider the relevant provisions of section 68, which are as follows:

> *"Challenging the award: serious irregularity*
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> 68(1) A party to arbitral proceedings may (upon notice to the other parties and the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

> 68(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the application –
>
> (d) failure by the tribunal to deal with all the issues that were put to it;"

In considering an application under section 68(2)(d), the Court would need to answer the following four questions: (i) whether the relevant point or argument was an "issue" within the meaning of the sub-section; (ii) if so, whether the issue was "put" to the tribunal; (iii) if so, whether the tribunal failed to deal with it; and (iv) if so, whether that failure has caused substantial injustice.

As regards the first question, the Claimants contended that two separate issues (one on repeated renunciation of the contracts and one on continuous renunciation) had been presented to the Tribunal, and that the Tribunal had dealt with the first of these arguments (on repeated renunciation) but not the second (on continuous renunciation). The Court found that the distinction sought to be made by the Claimant was one of semantics and that the Claimants' written submissions in the arbitration essentially dealt with the two arguments as aspects of the same overall issue. Having identified the "issue" for the purposes of section 68(2)(d), the Claimants' contention that the Tribunal did not deal with it in its Award (in effect answering the second and third questions above) was, in Flaux J's judgment, *"unarguable"*. The Court cited numerous extracts from the Award which demonstrated that the Tribunal clearly had both concepts (repeated renunciation and continuous renunciation) in mind when making its findings.

Once it had been recognised that the Tribunal dealt with the relevant issue, there was no scope for the application of section 68(2)(d). Provided the Tribunal dealt with the issue therefore, it did not matter whether it did so well, badly or indifferently.

In reaching this conclusion, the Court found that the Claimants' approach of *"effectively subjecting each sentence* [of the relevant paragraph of the Award] *to a minute textual analysis with a view to demonstrating that the tribunal had failed to deal with the question of continuing renunciation"* was *"the wrong approach"*. The Court reiterated that in considering an award to decide whether a tribunal has dealt with an issue, the approach of the court (on this as on other questions) is to read it in a *"reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it"*. In other words, there is a presumption in the Tribunal's favour that the Award is unlikely to contain any obvious errors, and therefore to pull apart an Award to the level of *"nitpicking"* is an unhelpful method of analysis. Indeed, where there is an error in an award, or where a claim has been presented to the tribunal but not dealt with in an award, the proper approach for a party to take is to apply to the tribunal under section 57(3) of the Act, a point made *obiter* by the Judge in the concluding part of the Judgment.

As regards the second part of the Claimants' application, in respect of the Tribunal's findings on quantum, the Court found that the issue did not arise and was academic given the Tribunal's finding that it was the Claimants who had in fact repudiated the contracts. Even if the issue did arise (so that the first three of four questions put to the Court under section 68(2)(d) were answered in the affirmative), the application would be bound to fail because the Claimants could not demonstrate that it would make any difference to the overall decision of the Tribunal and therefore could not show that any serious irregularity had caused or would cause substantial injustice to the Claimants.

The Court's decision in this case must be correct. This case was yet another example of a party seeking to use section 68 as a means of appealing an Award in which they have lost (see, for example, *Abuja International Hotels v Meridian SAS* [2012] EWHC 87 (Comm) in which the Claimant invoked all three sections 67, 68 and 69 in an attempt to challenge the award). The Court's response was to reiterate that it is not appropriate to use an application under section 68 to challenge findings of fact made by a tribunal. It reminds us that the threshold for a challenge under section 68 is high. As stated in paragraph 280 of the Departmental Advisory Committee Report of 1996, section 68, *"is really designed as a long stop, available only in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected"*.

This judgment will provide comfort to parties as to the finality of an arbitration award in cases where parties have excluded the right to appeal on questions of law. Conversely, it is also perhaps incumbent upon parties' legal advisors to ensure that their clients have a proper understanding of the nature of section 68 before embarking upon a challenge under that section. There can be little satisfaction for a party who expects to be able to have a second bite at the cherry in putting its factual case only to find (after incurring the costs of doing so) that its application will not be entertained by the Court.

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