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The English High Court of Justice Examines Corrections of ICC Awards in Obrascon

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In June 2020, the English High Court of Justice (Mr Butcher J) issued a judgment in *Obrascon Huarte Lain SA & Anor v Qatar Foundation for Education, Science and Community Development* dealing with an application under ss. 67 and 68(2)(b) of the English Arbitration Act 1996 (the "**Arbitration Act**") for the setting aside an Addendum issued by an ICC tribunal in respect of a Fourth Partial Award in an underlying arbitration proceeding. The case has attracted interest as it concerns important legal questions such as the scope of an ICC tribunal's power to correct and interpret its previous decisions and the scope of its substantive jurisdiction within the meaning of the Arbitration Act.

The following notes provide a summary and brief thoughts on the Judgment in *Obrascon*.

Background and Underlying Dispute

The underlying dispute related to the construction of a large hospital complex in Doha, Qatar under a construction contract signed in 2009 between the claimants (the "**JV**") and the defendant (the "**Foundation**") worth approximately GBP 1.8 billion. Throughout the years, many disputes have arisen between the parties and in July 2014, the Foundation terminated the contract and commenced an ICC arbitration. Among the myriad of matters in dispute between the parties was the JV's contractual entitlement to an extension of time for the completion of certain works and the associated prolongation costs. The importance of this issue was twofold: first, the JV's entitlement to time extensions meant that it had a counter-claim against the Foundation for the associated costs; and second, the extensions, if granted, would reduce JV's liability for liquidated damages.

In a Fourth Partial Award issued in November 2018, the ICC Tribunal determined that the JV was entitled to time extensions in relation to certain construction units, but also found that the Foundation had lawfully terminated the contract. Both parties submitted applications under Article 35(2) of the 2012 ICC Arbitration Rules (corresponding Article 36(2) of the 2017 ICC Rules) for the (1) correction of a clerical, computational or typographical error, or any errors of similar nature contained in an award; and/or (2) an interpretation of the award. The gist of the Foundation's Article 35 application was that the award did not address its submissions that the JV's entitlement to time extensions was subject to certain contractual prerequisites (which were not satisfied in the Foundation's view), including a notification requirement. The Foundation submitted that the parts

of the Fourth Partial Award dealing with this issue should be either corrected or interpreted by an Addendum as proscribed by Article 35(3) of the 2012 ICC Rules.

On 5 March 2019, the Tribunal issued an Addendum. The Tribunal first clarified, referring to the Handbook of ICC Arbitration, that the objective of the interpretation is to "*eliminate any ambiguities or uncertainties and clarify the meaning of a decision without modifying it. In other words, interpretation consists of restoring the true meaning of the decision where it has been improperly expressed …[or] it contains uncertainties or ambiguities.*" The Tribunal then pointed out that the Fourth Partial Award did not address any applicable contractual preconditions to the JV's rights to extensions of time and whether the JV had complied with such preconditions. The Tribunal had not intended to do so in this award as those issues were to be considered later in the proceedings. Accordingly, the Tribunal decided that the relevant paragraphs of the Fourth Partial Award should be corrected so as to reflect the Tribunal's underlying reasoning and clarify that the JV's entitlement to extensions of time and prolongation costs is "*subject to compliance with any contractual preconditions"*.

Following the issuance of the Tribunal's Addendum, the JV brought a challenge before the English High Court (the United Kingdom being the seat of arbitration) arguing that the Addendum should be set aside as, by issuing it, the Tribunal had acted outside of its substantive jurisdiction and/or had committed a serious irregularity by exceeding its powers causing substantial injustice to the JV.

The Court's Decision

Butcher J ultimately decided to dismiss JV's application in its entirety. He proceeded to analyse the applications under s. 67 and s. 68(2)(b) Arbitration Act separately.

Application under s. 67

The JV's position under this section was, in essence, that the Tribunal did not have jurisdiction to issue the corrections in the Addendum because, once issued, the Fourth Partial Award had become *functus officio*. What the Tribunal did with the Addendum was not to correct clerical, computational, typographical, or similar errors in the Award, or to interpret it, but it had instead altered the award. The Tribunal did not have substantive jurisdiction to do so according to the JV.

The Court disagreed and found that s. 67 did not apply at all. It first reiterated that, according to the Arbitration Act (s. 30(1)), substantive jurisdiction relates to three issues:

- Whether there is a valid arbitration agreement;
- Whether the tribunal is properly constituted;
- What matters have been submitted to arbitration pursuant to the arbitration agreement.

While it was evident that the JV's application did not relate to the first two instances, Butcher J analysed the third issue more closely. He ultimately determined that it was also inapplicable. In doing so, the Court relied on a previous case law finding that a tribunal's decision to correct and/or interpret previous decisions does not relate to substantive jurisdiction within the meaning of the

Arbitration Act. Second, the Court found that in deciding to make a correction to an award, the tribunal is exercising a power which the parties have conferred upon it by accepting the relevant arbitration rules. Finally, the Court found that its finding was also in line with an important policy consideration – deciding that the tribunal's power to correct and/or interpret its award is subject to a judicial review under s. 67 would open the door to setting aside of corrections/interpretations without regard to the question whether they had caused any substantial injustice (which is a requirement under s. 68, but not s. 67 of the Arbitration Act). According to the Court, this result would run afoul the policy of Part I of the Arbitration Act. (para. 21 of the Decision).

Application under s. 68(2)(b)

Under this section, the Court examined two issues – (1) whether the Tribunal had exceeded its powers at all; and (2) if it had, had that caused or would it cause substantial injustice. The Court answered both questions negatively.

In finding that the Tribunal did not exceed its powers by issuing the Addendum, Butcher J relied on two key points. First, the Tribunal's powers conferred by the parties import the power to make certain evaluative judgments which entails a degree of latitude as to what errors may be corrected. Second, when a court is asked to consider whether a tribunal has exceeded its powers, "*it needs to respect what might by analogy be called the margin of appreciation accorded to the tribunal*". (para. 26). In this particular instance, Butcher J noted that he would find it difficult to say that the corrections done by the Tribunal could not reasonably be regarded as corrections of errors of similar nature under Article 35 of the 2012 ICC Rules.

To complete its analysis, the Court considered whether the Addendum could have caused any substantial injustice to the JV. In finding no such injustice, the Court took into account the fact that the effect of the changes made to the Fourth Partial Award through the Addendum was that the contractual preconditions, including the notification issues, would be heard and determined at a later date. To the Court's mind, "*there [was] no substantial injustice to the JV in these issues being considered on their merits by an impartial tribunal as opposed to being passed over by reason of a mistake*". (para. 31).

Key takeaways from the Court's Decision

Obrascon Judgment deserves attention for several reasons. First, it shows that sometimes it is especially tricky to find the boundary between accidental slips, on the one hand, and re-examination of previous arbitral findings, on the other. While the first can usually be corrected and/or clarified through a subsequent interpretation under institutional rules and legislative acts (so-called "slip rules" such as Article 35 of the 2012 ICC Rules and Article 57 Arbitration Act), the latter is impermissible according to the *functus officio* rule (once an arbitrator makes an award on a given issue, it could not be re-examined absent parties' agreement). Here, what the Tribunal purported to do is simply to reinstate and clarify its original reasoning, but not to make any modifications or reconsiderations of that reasoning. In other words, it was clear in the arbitrators' minds that the JV's entitlement, acknowledged in the Fourth Partial Award, was subject to contractual preconditions which were to be considered and analysed later in the proceedings – it was the text of the award that did not properly reflect the Tribunal's thinking. The Court accepted

this explanation and found it permissible.

Second, the judgment strengthens the perception that English courts pay a high level of deference to tribunals' exercise of powers conferred upon them and will abstain from questioning that exercise absent compelling reasons. This impression was signalled through (1) Butcher J's reliance on the narrow construction of the matters which concern the Tribunal's substantive jurisdiction (s. 30(1) Arbitration Act) developed in previous case law; and (2) the accordance of a "margin of appreciation" to the Tribunal in assessing whether it had exceeded its powers.

Finally, the Court's pragmatic approach in clarifying the interplay between challenges concerning lack of substantive jurisdiction (s. 67) and exceeding of powers (s. 68(2)(b)) deserves praise. Indeed, it would make little sense if tribunals' decisions correcting or interpreting previous awards could be set aside without the Court's inquiry into whether such acts have caused a substantial injustice to the moving party that is being undertaken under s. 68 Arbitration Act.

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