Kluwer Arbitration Blog

The Devil is in the Detail: Unpacking the Judgment in Xstrata v Benxi Iron & Steel

Dilpreet Dhanoa (Squire Patton Boggs) · Sunday, August 30th, 2020

The judgment issued by the High Court of England and Wales in Xstrata Coal Queensland P Ltd & Anor v Benxi Iron & Steel (Group) International Economic & Trading Co *(Xstrata)* is a rare example of a successful challenge brought under section 68 of the Arbitration Act 1996 ("the Act"). It serves as a reminder of the importance of paying close attention to detail at every stage of the proceedings in an arbitration.

Background

The factual matrix is relatively simple but the timeline of this case is critical to understanding why this challenge was successful. It should be noted that this was not the first application made by the claimants to the High Court in this dispute.

The underlying dispute concerned a contract for the sale of coking coal with disputes to be resolved via LCIA arbitration. There were four sellers, and the contract named one of them as "ICRA NCA". When a dispute did arise, it was referred to arbitration and upon issuing the award, the Tribunal referred to "ICRA OC" as a party to the contract and beneficiary of the award. Upon failure of the defendant to pay, the claimants applied to enforce the award in China. Recognition and enforcement were refused by the court, on the grounds that ICRA OC was not in a contractual relationship with the defendant, and therefore the arbitration agreement was not valid thus rendering the award unenforceable.

The claimants initially made an application under section 27 of the LCIA Rules 1998 ("the Rules") seeking clarification from the Tribunal as regards to what was meant by "ICRA OC". The LCIA's position was that: *"while sympathetic to the claimants' position, …absent agreement of the parties or an order from a competent court extending time from the application* [the Tribunal was] *functus officio"*. In other words, the Tribunal had fulfilled its mandate and could not hear the application. As English law was both the governing and curial law, the claimants then applied in 2016 to the High Court under section 79 of the Act (for time to be extended to make the Article 27 application), which grants the court power to extend time limits relating to arbitral proceedings. In granting the application, Mr Justice Knowles noted that in practice, the time limit under Article 27 of the Rules would *"almost always expire before the outcome was known of a contested attempt under the New York Convention to obtain recognition and enforcement of an award in another*

country".

The Tribunal refused to correct the award on the basis that the identity of the relevant party had never been addressed during the proceedings, and so was not the subject of any finding in the award. Furthermore, the Tribunal noted that Article 27's application was *"limited to correction of computational, clerical and typographical errors or errors of a similar nature."* In relation to the identity of a contracting party, the Tribunal's position was that this would be an *"addition to the Award, not a mere correction"*.

This prompted the claimants to make an application under section 68. The function of section 68 of the Act serves to challenges "serious irregularity" concerning an arbitral award. Section 68(2) provides a detailed list as to what constitutes "serious irregularity", and in particular the claimants' application sought to persuade the court that sections 68(2)(c) and 68(2)(f) had been engaged. Namely, that there had been a serious failure by the Tribunal to: conduct the proceedings in accordance with the procedure agreed by the parties; and, that there was uncertainty or ambiguity as to the effect of the award. The application was hindered by considerable delay, and so when the case came before the Court, it considered two key questions: first, whether the application had been made in time; and, secondly, whether section 68(2)(f) was engaged.

Analysis

Was the application brought in time?

The Defendant opposed the application on the grounds that under section 70(3) of the Act, any challenge to an Award under section 68 should be brought within 28 days of the Award, or the date on when the applicant was notified of the result. The Claimants advanced the argument that the application had been made timeously as the 28-day period only ran from the date of the Tribunal's rejection – under Article 27 of the Rules.

In considering when the relevant date was to be determined for the purposes of the section 70 time limit, Mr Justice Butcher made it clear that English case law *"provide*[s] *clear support to the proposition that, if there is a material application for a correction under section 57 of the Act, or an agreed process to the same effect such as Article 27 of the LCIA rules, and if that leads to a correction, then on the proper construction of section 70(3), the 28 day period runs from the date of the award as corrected."* This conclusion is in line with Mr Justice Teare in *K v S*, where he noted that what constituted a 'material application for correction of an award' is *"where the correction is necessary to enable the party to know whether he has grounds to challenge the award"*.

The Court concluded that the Article 27 application was *"directly relevant"* to the section 68 application now being made, insofar as had it been successful, there would have been no basis for the section 68 application. In other words, the entire premise of the section 68 application was materially dependent on the outcome of the Article 27 application. In looking closely at numerous authorities, Mr Justice Butcher held that the arbitration claim initiating the section 68 challenge was brought in time – within the 28-day period from the relevant date for the purposes of section 70(3).

This question highlights the importance of following procedure as set out by the curial law of any

arbitration, and substantively being able to support the same. In this instance, the English courts also looked to what would be fair, just and reasonable in the circumstances. A strict application of the 28-day limit would have meant that the Claimant would have missed the deadline for submitting its appeal. However, the Court considered the factual matrix to be critical. In this instance, the Claimant waited for the outcome of the Chinese Court proceedings before initiating its application before the LCIA. The LCIA Rules are changing with effect 1 October 2020, and Article 27 is one of the provisions which has been updated. The main changes it now contains is a reference to including an addendum dealing with costs relating to such applications – so this will be something for those making applications pursuant to this Article to bear in mind more consciously in the future.

Is Section 68(2)(f) engaged?

The arguments advanced by the Claimants were that that there was uncertainty or ambiguity as to the effect of the Award, which would cause *"substantial injustice by rendering it impossible or difficult to enforce the Award as it stands"* – as demonstrated in the Chinese Courts. The Defendant argued that there was no such uncertainty, and that the Chinese Courts had simply determined that the Award should not be enforced. The Defendant went further to submit that if such an application were to be granted, it would open the doors to a host of unmeritorious applications and that such a challenge should only be permitted 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"*.

The Court agreed that section 68 should be applied where the Tribunal had gone wrong in its conduct of the arbitration, but that its remit was not confined to such circumstances. Accordingly, it was held that there was uncertainty and ambiguity as to the effect of the Award, as was manifested in the enforcement proceedings.

Accordingly, the Claimants' application under section 68(2)(f) was granted, and the Award was remitted to the Tribunal to once more reconsider the identity of the parties to the contract.

It is demonstrative of the English Courts' willingness to embrace the arbitral process, and recognise the arbitral 'self-correcting' mechanism to be engaged that resulted in this successful challenge. The Court did not consider it should be constrained by the Tribunal's earlier decision that *"the grounds for granting corrections are narrow in scope"*. Rather, the Court expressly acknowledged that the *"arbitral tribunal will carefully control the process"*. Furthermore, the Court alighted upon the absence of any explanation by the Tribunal as to how it had dealt with the identity of the parties as it been the subject of this strand of litigation. It made clear that it would *"just and reasonable"* for the Tribunal to provide some further explanation.

Conclusion

This is a rare example of a successful section 68 challenge, but it falls neatly in line with a strong line of authorities in the English Courts (particularly the Commercial Court) demonstrating its pragmatic and pro-arbitration position in recent years. It has shown that the English Courts are prepared to deal robustly with ambiguities or uncertainties, and that wide consideration will be

given to follow the maxim of permitting the arbitral process being allowed to self-correct. Detail is clearly critical in any arbitration, and *Xstrata* serves as a timely reminder of the importance paying close attention at all stages to the minutiae – no matter how trite they may seem at first blush.

This entry was posted on Sunday, August 30th, 2020 at 8:00 am and is filed under Arbitration Act 1996, English courts, ICC Rules, International arbitration, LCIA Arbitration, LCIA Rules, Section 68 challenge
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.