Successful challenge to award for failure by tribunal to allow parties to comment

Contributed by **Clifford Chance LLP**

February 26 2015

Authors

Marie Berard

Katharina Lewis

Introduction

As a matter of English law, unless the parties have agreed otherwise, an arbitral award made in London is immediately enforceable – subject only to the parties' right to challenge the award before the English courts. This right of challenge is limited to a number of grounds set out in the Arbitration Act 1996. One such ground is a challenge for serious irregularity affecting the tribunal, the proceedings or the award pursuant to Section 68 of the act. Section 68 defines a 'serious irregularity' as one that falls within a set list of irregularities and – in the court's consideration – causes substantial injustice to the applicant. The list of irregularities contained in the act includes failure by the tribunal to comply with its general duty to act fairly and impartially and to adopt suitable procedures pursuant to Section 33 of the act.

An application to challenge an award for serious irregularity must be made within 28 days of the award or, if the parties have agreed an appeal or review process before the arbitral tribunal, within 28 days of the date on which the applicant was notified of the outcome of that review process. If the applicant shows that there is a serious irregularity, the court may set aside the award, declare it to be of no effect or remit it to the tribunal for reconsideration.

The courts have construed Section 68 narrowly. As a result, challenges under Section 68 – while frequently made – rarely succeed. One such rare instance was the recent High Court decision in *Lorand Shipping Limited v Davof Trading (Africa) BV* [2014] EWHC 3521 (Comm), where the court set aside an arbitral award in part and remitted the matter to the tribunal for reconsideration.

Facts

The dispute related to a late and allegedly defective shipment of animal feed from the Ivory Coast to Morocco. The shipowner was Lorand Shipping Limited. The charterer was the respondent, Davof Trading (Africa) BV.

The charterparty provided for any dispute to be subject to English law and arbitration in London. It also included a time bar requiring any claim to be lodged within six months of discharge of the vessel.

Immediately following discharge, the shipowner gave notice of the appointment of an arbitrator and requested that the charterer appoint a second arbitrator, without specifying the claim that was being referred to arbitration. However, the charterer complied with the request and the arbitral tribunal was appointed. The shipowner served a claims document which claimed demurrage of around $90,000 and made reference to further indemnity claims relating to damage to the cargo. With respect to the indemnity claims, the shipowner submitted that the "Tribunal's jurisdiction [was] to be reserved… and the Claimants [would] seek an indemnity from the Respondents at the appropriate time".

In its defence, the charterer denied both the shipowner's claim for demurrage and the indemnity claims. When the shipowner clarified that only the demurrage claim was the subject of its claim submissions, the charterer reiterated that the shipowner had not substantiated the indemnity claims.

The tribunal rendered its award on the basis of the parties' written submissions only, without an oral hearing (as had been agreed). The tribunal found in favour of the shipowner with respect to the demurrage claim. As for the shipowner's indemnity claims, the tribunal refused the application on the basis of the length of time since the cargo had been discharged and the fact that the shipowner had provided no evidence that the cargo receivers intended to bring a claim. The tribunal noted that if any claim were made by the cargo receivers, the shipowner would have to "consider whether it [was] possible to start new arbitration proceedings against the Charterers".

The effect of the award, containing no reservation of the tribunal's jurisdiction over the indemnity claims, was to exhaust the tribunal's jurisdiction.

The shipowner accepted the tribunal's ruling on the demurrage claim. However, with respect to the tribunal's determination of its indemnity claims, it applied to the High Court to challenge the award for serious irregularity under Section 68 of the Arbitration Act. The charterer opposed the challenge. The High Court found in favour of the shipowner and ordered that the relevant paragraphs of the award be set aside, and remitted to the tribunal for reconsideration.

Decision

At the outset, the court accepted that the threshold under Section 68 is very high. It noted that Section 68 is 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.

However, the court went on to hold that it could not accept the charterer's submissions for the following reasons.

First, while there was uncertainty with respect to the original reference to arbitration and the shipowner's appointment of an arbitrator, it seemed plain that the shipowner's indemnity claims had indeed been referred to the tribunal – or at least that the parties had proceeded on that basis. The fact that no specific claims had been quantified at that stage was not fatal.

Second, where an arbitral tribunal wishes to adopt a course of action not advocated by either party, it is generally incumbent on the tribunal to give the parties an opportunity to address it on that possible course before it is finally adopted. In a paper arbitration, the temptation to arrive at a conclusion which might not have been envisaged by either party by reference to matters on which the parties had not had the opportunity to address the arbitrators might be a particular temptation which arbitrators should be careful to avoid. Depending on the circumstances, failure to give the parties an opportunity to address the tribunal's proposed course of action might amount to a serious irregularity.

Third, the course adopted by the tribunal had not been advocated by the shipowner or the charterer. It was adopted without proper notice to either party. The tribunal could have either determined that the shipowner's indemnity claims should be rejected on the merits, thereby acceding to the charterer's submissions, or accepted the shipowner's argument that the claims should not be determined for the time being and should be 'reserved'. However, the tribunal did neither of these things. Rather, it adopted a 'halfway house' and both refused to reserve its jurisdiction with respect to the shipowner's indemnity claims and declined to dismiss the claims in favour of the charterer.

Fourth, while such a halfway house might have some attraction, the parties should have been given an opportunity to address it before the tribunal adopted it in its final award. Failure to do so constituted a serious irregularity within the meaning of Section 68.

Fifth, this failure caused substantial injustice to the shipowner. The shipowner submitted that, as a result of the tribunal's ruling and the six-month time bar in the arbitration clause, it was now completely shut out from pursuing any further claims against the charterer. The court held that it did not need to be persuaded that the tribunal would necessarily have adopted a different course had the parties been given an opportunity to address the proposed approach. It was sufficient that the tribunal might realistically have reached a different conclusion. The court observed that it had borne in mind the charterer's submissions that the shipowner's indemnity claims lacked particularity. It agreed that an assessment of the strength of the shipowner's claims would potentially be relevant to determining whether the shipowner had suffered substantial injustice. If the shipowner's claims were bound to fail or extremely weak, the court might have been persuaded that the shipowner had not suffered substantial injustice. However, the court concluded, on the material before it, that it was impossible to reach such a conclusion. Accordingly, the shipowner's Section 68 application succeeded.

Comment

The court confirmed that the threshold for Section 68 applications remains high and Section 68 should be available only in extreme cases. Notwithstanding the decision to set aside part of the tribunal's award, successful Section 68 applications are therefore likely to remain rare.

However, for parties to arbitration proceedings, the High Court's decision serves as a reminder to use clear language when drafting submissions. Had the shipowner stated its position with respect to the indemnity claims in the arbitration more clearly at the outset, it may well have saved itself from the tribunal's halfway house determination of those claims and the need to apply to the High Court to set aside that determination. Clear drafting to safeguard against an unexpected determination by the tribunal is of particular importance in documents-only arbitrations which – while potentially faster and cheaper – leave the parties and the tribunal without the opportunity to discuss and clarify any issues at an oral hearing.

For arbitral tribunals, the ruling serves as a reminder that they should not adopt solutions, however beneficial they may seem, without giving the parties an opportunity to comment first.

For further information on this topic please contact Marie Berard or Katharina Lewis at Clifford Chance LLP by telephone (+44 20 7006 1000), fax (+44 20 7006 5555) or email (marie.berard@cliffordchance.com or katharina.lewis@cliffordchance.com). The Clifford Chance website can be accessed at www.cliffordchance.com.

Online Media Partners