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Arbitration - United Kingdom

Courts reluctant to grant appeal of arbitral award on point of law

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Authors

Marie Berard

Katharina Lewis

Introduction

In an arbitration with a seat in England, the losing party can appeal to the High Court to review the arbitral award for substantive errors of law made by the tribunal. If the appeal is successful, the court will remit the award to the tribunal for reconsideration, vary it or set it aside in whole or in part.

This right of appeal under Section 69 of the Arbitration Act 1996 is a peculiarity of English arbitration law not found in many other jurisdictions. In practice, the courts generally respect the tribunal's award as the decision of the parties' choice and only sparingly exercise the power conferred by Section 69.

The right of appeal is subject to the following limitations:

- It is available only if not otherwise agreed by the parties. Parties routinely waive the right of appeal, either by express provision in the arbitration clause or by incorporating institutional rules that exclude it, such as those of the London Court of International Arbitration or the International Chamber of Commerce.
- Even where the right of appeal has not been waived or excluded, only questions of law – not questions of fact – can be appealed. They must be questions of English law and must substantially affect the rights of the parties.
- The appeal can be initiated only with the agreement of all parties or with leave of the court. Leave will be granted only if a number of conditions are satisfied. These include that the arbitral tribunal's decision on the question that is the subject of the appeal must be either obviously wrong or, where the question is one of general public importance, at least open to serious doubt.
- The right is available only for a short period of time. The application to the court must generally be made within 28 days of the date of the arbitral award or the applicant's being notified of the results of any arbitral review process (eg, by the arbitral tribunal or an arbitral institution).

The recent decision in *ED&F Man Sugar Ltd v Unicargo Transportgesellschaft GmbH*(1) provides a good example of the courts' approach to considering appeals of awards where the right of appeal has not been excluded.

Facts

Sugar trader ED&F Man chartered a vessel from Unicargo to load a cargo of sugar in Brazil and deliver it to Ukraine.

A week before the vessel arrived at the loading port, the local agents advised the parties that there had been a fire at the terminal normally used by the charterer, which was where it had initially scheduled the vessel to load. The fire had destroyed the conveyor belt system linking the terminal to the warehouse where the sugar was stored. The local agents advised that the charterer would need to transfer the sugar to another terminal.

This resulted in considerable delay. The owner claimed demurrage, arguing that the laytime allocated for loading in the charterparty had expired long before loading commenced.

The charterparty made reference to the vessel proceeding to "1-2 safe berths" for loading. It also contained an exclusion clause to the effect that if the loading of the vessel was prevented or delayed by a number of events – including "mechanical breakdowns at mechanical loading plants" and "government interferences" – time so lost would not count as laytime.

Relying on the exclusion clause in the charterparty, the charterer refused to pay the demurrage claimed.

Arbitral proceedings

The owner commenced arbitration under the charterparty. As is common for relatively modest claims of demurrage, the arbitral proceedings were conducted in writing, without an oral hearing.

The arbitral tribunal upheld the demurrage claim in favour of the owner. The tribunal's key findings were as follows:

- The reference to "1-2 safe berths" in the charterparty imposed an ongoing duty on the charterer to nominate safe berths. It had failed to name the first terminal in the charterparty and had not nominated another terminal after the fire. As a result, it was not entitled to rely on the exclusion clause.
- In any event, the exclusion clause made no mention of fire. The conveyor belt became inoperable as a result of damage due to the fire, rather than due to a mechanical breakdown.

High Court proceedings

The charterer appealed to the High Court.

The key questions of law identified for the court's determination were:

- whether delay in loading caused by a fire which destroyed mechanical loading equipment or the port authority's rescheduling of loading following such destruction counted as laytime under the exclusion clause in the charterparty; and
- whether the reference to loading at "1-2 safe berths" in the charterparty was relevant to the application of the exclusion clause.

The High Court judge dismissed the charterer's appeal and held as follows:

- The charterer was not required to nominate a berth as a precondition for the exclusion clause to apply. The tribunal's view that the exclusion clause could apply only if the first terminal had been named in the charterparty was incorrect.
- However, the tribunal was right to conclude that the exclusion clause did not apply. The destruction of the conveyor belt by fire was not within the scope of "mechanical breakdown" in the exclusion clause. It was not enough that the mechanical loading plant no longer functioned. The nature of the malfunction had to be a mechanical problem, as distinct from a wider external cause, such as fire damage.

The charterer sought, and was granted, leave to appeal the judge's finding that the inoperability of the conveyor belt system did not amount to a mechanical breakdown under the exclusion clause.

Court of Appeal proceedings

In the run-up to the hearing before the Court of Appeal, the charterer submitted fresh evidence suggesting that the fire had been caused by a mechanical problem. It argued that the arbitral award should be remitted to the tribunal, which could then determine whether it was prepared to accept the new evidence.

Confirming the High Court judge's decision, the Court of Appeal dismissed the charterer's appeal. The court held that the question of law identified by the charterer for the High Court's determination was whether delay in loading caused by a fire which destroyed mechanical loading equipment counted as laytime for the purposes of the exclusion clause. While that question encompassed the debate as to whether what had occurred amounted to a mechanical breakdown, consistently with the way in which the charterer put its case before the arbitrators, it did not suggest that it was relevant to investigate the cause of the fire.

The arbitral tribunal was invited to – and did – find that there had been no mechanical breakdown of the conveyor belt system. Further investigation, not undertaken by the parties before the arbitration, might have revealed that the fire had itself been the cause of a mechanical breakdown, but the charterer advanced no evidence before the arbitrators with a view to establishing that this was the case.

The Court of Appeal held that the fresh evidence now adduced by the charterer was

irrelevant. It would be inappropriate to remit the matter to the arbitrators. The charterer had taken its stand on an erroneous view of the law. The Court of Appeal concluded that the charterer should not be permitted to reopen the arbitration and introduce evidence which, had it thought it relevant at the time, it could have obtained for use at the arbitration.

Comment

In reaching its conclusion, the Court of Appeal appears to have balanced the desire to correct errors in the award against the need to prevent an open-ended appeal system that permits the unsuccessful party in the arbitration to have 'another bite at the cherry'.

However, before obtaining the Court of Appeal's confirmation of the award in its favour, the owner would have had to spend considerable time and money to go through three rounds of proceedings: the arbitration to pursue its claim for demurrage, and opposing the charterer's appeal to the High Court and its further appeal to the Court of Appeal.

The appeals could have been avoided if, in the charterparty, the owner had agreed to exclude the right of appeal on a point of law. The case illustrates that, as a general rule, it is advisable to do so.

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.

Endnotes

(1) [2013] EWCA Civ 1449.