International Law Office

January 20 2022

Serious irregularity challenge for awarding third-party funding costs and for refusing to adjourn proceedings rejected

Clifford Chance | **Arbitration & ADR - United Kingdom**

MARIE BERARD

BENJAMIN BARRAT

ABIGAIL MATON-HOWARTH

In *Tenke Fungurume Mining SA v Katanga Contracting Services SAS*,[(1)] the High Court rejected a challenge to an arbitral award made under section 68 of the Arbitration Act 1996. The Court held that neither the tribunal's decision to award the costs of third-party funding nor its refusal to adjourn the proceedings because of issues relating to the covid-19 pandemic gave rise to a serious irregularity causing substantial injustice. The Court upheld the award and declined remit it to the tribunal for reconsideration.

Background

Section 68 of the Arbitration Act 1996 (the Act) allows a party to apply to the courts to challenge an award on the ground of serious irregularity. An exhaustive list of what is meant by "serious irregularity" is set out in section 68(2) of the Act. The list includes:

- section 68(2)(a) – a failure by the tribunal to comply with section 33 (which concerns the general duty of the tribunal). Section 33 obliges a tribunal, among other things, to give each party a reasonable opportunity to put forward their case and deal with that of their opponent; and
- section 68(2)(b) – the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction).

A successful applicant under a section 68 application must demonstrate a serious irregularity falling within one of the categories under section 68(2) and that the irregularity has caused or will cause substantial injustice to the applicant.

It is rare for section 68 challenges to succeed.

Facts

The arbitration concerned a mine in the Democratic Republic of Congo that was operated by Tenke Fungurume Mining SA (TFM). TFM had entered into a number of contracts with Katanga Contracting Services SAS (KCS). Those agreements were governed by English law and contained arbitration clauses providing for London-seated arbitration heard pursuant to the Arbitration Rules of the International Chamber of Commerce (ICC).

On 13 January 2020, KCS commenced two arbitrations against TFM that were later consolidated. TFM filed a counterclaim against KCS.

A merits hearing was scheduled to take place in March 2021. TFM applied for an adjournment of the hearing on the grounds that it was not possible to undertake a site visit to the mine due to the covid-19 pandemic. TFM argued that a visit was necessary to support its counterclaim. The tribunal rejected the adjournment application.

TFM subsequently requested the adjournment of the hearing for two months on the basis that its leading counsel had contracted covid-19. The tribunal rejected the second adjournment application, and the hearing took place in March 2021.

In its final award, the tribunal awarded the amounts claimed by KCS and dismissed TFM's counterclaim. KCS was awarded its costs, including:

- legal and expert costs amounting to $1.4 million;
- the costs of litigation funding for the payment of legal fees, advanced by way of a shareholder loan amounting to $1.7 million; and
- compound interest at 9%.

TFM challenged the final award under section 68 of the Act on four grounds, alleging that each amounted to a serious irregularity that caused it to suffer substantial injustice. The grounds advanced by TFM were the tribunal's:

- award of KCS's funding costs;
- failure to adjourn the proceedings to allow for a site visit made impossible by covid-19;
- failure to adjourn the proceedings due to the illness with covid-19 of TFM's leading counsel; and
- award of compound interest.

Decision

In her judgment dated 7 December 2021, Mrs Justice Moulder dismissed TFM's serious irregularity challenge on all four grounds.

Award of funding costs

In its award, the tribunal determined that the definition of legal and "other costs" within section 59(1)(c) of the Act and article 38(1) of the ICC Rules that could be awarded did include funding costs. The tribunal went on to consider whether those costs were reasonable as to the principle of such funding being obtained and as to the amount, and ultimately awarded KCS's costs of funding.[(2)]

Excess of powers

TFM challenged the tribunal's award of funding costs under section 68(2)(b) of the Act, asserting that the tribunal had exceeded its powers.

The tribunal had relied on the judgment in *Essar Oilfields Services v Norscot Rig Management*[3] in which the tribunal held that the definition of "other costs" under the Act and the ICC Rules could extend to funding costs. In a section 68 challenge to the *Essar* award, His Honour Judge Waksman QC considered whether to award third-party funding costs as "other costs" would amount to a serious irregularity.

HHJ Waksman considered the authorities including *Lesotho Highlands v Impreglio SpA,* in which the court emphasised that the erroneous exercise of a power that is available to a tribunal cannot by itself amount to an excess of powers for the purposes of section 68(2)(b).[4] HHJ Waksman held that if, in exercising the undoubted power under the Act and the ICC Rules to award costs, a tribunal made an award of third-party funding costs, then that would not amount to a serious irregularity. Any award of such costs would be subject, however, to the requirement of reasonableness.

TFM argued in its submissions to the court that *Essar* had been wrongly decided. Moulder J declined to depart from HHJ Waksman's judgment in *Essar*, however, agreeing that at most the award of third-party funding costs was an "erroneous exercise of an available power and not susceptible to challenge under section 68".[5] Any error on the tribunal's part could only be considered as an alleged error of law. In circumstances where the parties had agreed to exclude any right to appeal the tribunal's ruling on a point of law under section 69 of the Act, the judge stated that a party could not later seek to dress up "an alleged error of law as an excess of power" through a section 68 appeal.[6] Accordingly, the challenge in respect of section 68(2)(a) was dismissed.

The judge briefly addressed TFM's submission that the tribunal's award of costs was contrary to public policy, thereby amounting to a serious irregularity under section 68(2)(g). Referring to the test in *Process & Industrial Developments v Republic of Nigeria*,[7] the judge considered whether there was any element of illegality to the award or whether the enforcement of the award would be clearly injurious to the public good and wholly offensive. The judge ruled that this test had not been met and as such the public policy challenge failed.[8]

Tribunal's refusal to allow cross-examination of witness regarding funding

TFM submitted that the tribunal's refusal to allow TFM to cross-examine KCS's chief financial officer on the company's funding arrangements amounted to a serious irregularity under section 68(2)(a). TFM relied upon *P v D*,[9] in which the court held that arbitrators had breached their duty under section 33 of the Act to act fairly by denying a party the opportunity to cross-examine another party's main witness on a core issue. Moulder J distinguished *P v D* on the facts as in that case the main issue in contention was the credibility of the witness. In *Tenke*, the relevant issue was whether recourse to third-party funding was reasonable. The conclusion that cross-examination on this issue was not necessary did not satisfy the requirement in *Kalmneft v Glencore International AG*[10] that the decision be such that no reasonable arbitrator could have arrived at the same conclusion.[11]

Refusal to adjourn proceedings due to Covid-19

Unavailability of leading counsel

TFM alleged that the tribunal had failed to properly account for the illness with covid-19 of its leading counsel, which had resulted in his being unable to attend the merits hearing. TFM contended that the failure to adjourn amounted to a serious irregularity under section 68(2) as:

- the tribunal had failed to give TFM a reasonable opportunity to put its case; and
- the tribunal had failed to adopt procedures suitable to the circumstances of the case before it.

The tribunal had noted that TFM instructed a "highly qualified" legal team,[12] including a senior partner with considerable experience as counsel in international arbitration. Further, the judge recognised that TFM had the opportunity to appoint another lead counsel at least four-and-a-half weeks before the merits hearing and chose not to do so. The tribunal was required to weigh up these factors against the delay that would be caused by an adjournment.[13]

The judge noted that a tribunal had a duty under the Act to progress matters in a timely manner and avoid unnecessary delay. Further, the tribunal was entitled to take into account the fact that the arbitration clause in question required the arbitration to be conducted as "expeditiously as possible".[14]

The judge held that the threshold for serious irregularity had not been met; while another tribunal might have arrived at a different decision, the decision was not one that no reasonable arbitrator could have reached.[15] The Court's power to intervene in the tribunal's discretionary decision would not be engaged unless it was clear that the tribunal had failed to have regard to the relevant facts and its duty under section 33.[16]

Site visit

TFM argued that a visit to the site by its expert was necessary in order to substantiate its counterclaim. TFM's expert had declined to make the visit on the grounds of covid-19 restrictions. TFM submitted again that the tribunal's decision not to adjourn the proceedings amounted to a serious irregularity under section 68(2)(a).

The judge ruled that the tribunal had weighed up the effect of an adjournment taking account of expert evidence on the utility of a site visit, including a joint report in which both experts had agreed that a site visit was not necessary. The tribunal's decision not to adjourn proceedings for an uncertain period was, again, not one that no reasonable arbitrator could have arrived at and did not give rise to a serious irregularity.[17] While not required to consider whether the decision had resulted in a "substantial injustice", the judge held that TFM's counterclaim had not failed due to the lack of a site visit.[18]

Compound interest

TFM also failed in its submission that the tribunal's decision to award compound interest was contrary to section 33 and as such amounted to a serious irregularity under section 68(2)(a). Additionally, TFM argued that the award of compound interest was contrary to public policy, thereby amounting to a serious irregularity under section 68(2)(g). In respect of public policy, the judge held TFM's submission to have failed the test set out in *Process & Industrial Developments*, referenced above in relation to third-party funding costs.[19]

Accordingly, TFM's challenge was dismissed and the award was upheld.

Comment

The judgment is significant in underlining that a challenge to an award of third-party funding costs on the grounds of serious irregularity is unlikely to succeed. It remains to be seen how the English courts may determine whether such funding costs are recoverable in the context of a section 69 challenge. However, as in this case, parties can exclude the right to appeal on a point of law under section 69. In those circumstances, the English courts will be reluctant to find that a tribunal's decision to award third-party funding costs amounts to an excess of powers for the purposes of section 68.

Also of particular interest is the Court's deference to the tribunal's discretion to make procedural directions and determine an appropriate timetable in the context of disruption caused by the covid-19 pandemic. Only in rare and extreme cases will the courts seek to interfere with a tribunal's procedural discretion. Overall, the judgment highlights the English courts' reluctance to uphold serious irregularity challenges to arbitral awards and its enforcement-friendly stance.

For further information on this topic please contact Marie Berard, Benjamin Barrat or Abigail Maton-Howarth at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com, benjamin.barrat@cliffordchance.com or abigail.matonhowarth@cliffordchance.com). The Clifford Chance LLP website can be accessed at www.cliffordchance.com.

Thomas Luck, trainee solicitor, assisted in the preparation of this article.

Endnotes

(1) [2021] EWHC 3301 (Comm).

(2) Paragraphs 74-75.

(3) [2016] EWHC 2361 (Comm), [2017] Bus LR 227.

(4) [2005] UKHL 43, [2006] 1 AC 221, paragraph 32.

(5) *Tenke*, paragraph 94.

(6) Paragraph 95.

(7) [2019] EWHC 2241 (Comm).

(8) *Tenke,* paragraphs. 96-98.

(9) [2019] EWHC 1277 (Comm).

(10) [2002] 1 All ER 76, paragraph 85.

(11) *Tenke,* paragraphs 69-71.

(12) Paragraph 58(iv).

(13) Paragraph 60.

(14) Paragraph 58(i).

(15) [2002] 1 All ER 76, paragraph 85.

(16) *Tenke*, paragraph 62.

(17) Paragraph 48.

(18) Paragraph 50.

(19) Paragraph 103.