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ENGLISH HIGH COURT CONSIDERS ARBITRATION CHALLENGE

Primera Maritime (Hellas) Ltd & Ors v Jiangsu Eastern Heavy Industry Co Ltd & Anor [2013] EWHC 3066

Introduction

On 15 October 2013, the High Court handed down the reasons for its decision in *Primera Maritime (Hellas) Ltd & Ors v Jiangsu Eastern Heavy Industry Co Ltd & Anor* [2013] EWHC 3066, in which it dismissed a challenge to an arbitration award brought under section 68 of the Arbitration Act 1996.

Background

The dispute between the parties arose out of two shipbuilding contracts. The claimants were the buyers under the contracts in relation to two Kamsarmax bulk carriers to be built at the defendants' yard in China.

In arbitration between the parties, the claimants sought damages on the grounds that the defendants had been in anticipatory breach of contract by refusing to perform the contracts in accordance with their terms, specifically in relation to delivery by the contractual delivery dates, and hence renounced the contracts.

The arbitral tribunal dismissed the claims, holding that although the defendants had renounced the contracts in an email of 19 October 2007 and at a meeting on 6 November 2007, the claimants thereafter affirmed the contracts.

The claimants applied to the High Court under section 68(2)(d) of the Arbitration Act 1996 (which allows a claimant to challenge an award on the grounds of a serious irregularity affecting the tribunal, the proceedings or the award) to set aside the award and remit it to the tribunal on the grounds that the tribunal failed to deal with two issues: (i) that the renunciation by the defendants was continuous; and (ii) in relation to the quantum of the claimants' claim, that the claimants would have "flipped" the contracts (that is, sold the shipbuilding contracts to third parties at a profit).

Decision

Mr Justice Flaux concluded that the application should be dismissed at the hearing on 3 October 2013 and gave reasons for his decision on 15 October 2013.

In order to succeed under section 68, an applicant needs to show three things: firstly, a serious irregularity; secondly, a serious irregularity which falls within the closed list of categories in section 68(2); thirdly, that one or more of the irregularities identified caused or will cause the party substantial injustice.

Mr Justice Flaux emphasised that the key issue is that section 68 is about whether there has been due process, not whether the tribunal "got it right".

In the present case, the tribunal had addressed both of the issues identified in the challenge, with Mr Justice Flaux describing the claimants' argument that the tribunal had not considered the "continuing renunciation" issue as "hopeless".

Mr Justice Flaux held that it was clearly not appropriate to use an application under section 68 to challenge the findings of fact made by the tribunal, otherwise every disappointed party could say it had been treated unfairly by pointing to some piece of evidence in its favour which was not referred to in the tribunal's reasons or not given the weight it feels it should have been. The Court should not intervene in matters of fact and evaluation of the evidence, which were matters for the arbitrators alone.

In circumstances where a party considers the tribunal has not dealt with an issue, Mr Justice Flaux stated that the correct course of action was to raise the matter with the tribunal first, for the tribunal if appropriate to act pursuant to section 57 of the Arbitration Act 1996 (which allows for the correction of an award by the tribunal, either by its own initiative or on application of a party), before making an application to the court.

Comment

The decision in *Primera Maritime* is a reminder of the strict approach to challenges. Any party considering a challenge to an arbitration award under section 68 of the Arbitration Act 1996 should ensure that it has strong and sufficient grounds to bring a challenge, and that such a challenge is not simply founded on the basis that "the tribunal got it wrong".

12th November 2013