LONDON ARBITRATION AWARD SET ASIDE BY ENGLISH COMMERCIAL COURT IN FAVOUR OF THE JURISDICTION OF HONG KONG

Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics [2015] EWHC 194 (Comm)

Introduction

In a decision handed down on 5 February 2015 in *Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics* [2015] EWHC 194 (Comm) the English Commercial Court upheld challenges to the jurisdiction of an arbitral tribunal brought pursuant to Section 67 of the Arbitration Act 1996.

Background

The Applicant and Respondent in the instant application were parties to an agreement to charter a vessel. The agreement contained the following at Clause 23:

"23. ARBITRATION: ARBITRATION TO BE HELD IN HONGKONG. ENGLISH LAW TO BE APPLIED."

The other terms and conditions to the agreement were to be taken from the Gencon 1994 Charter Party, Clause 19 of which provided three alternatives regarding the governing law of the charterparty agreement, the place of arbitration and the law applicable to the arbitration proceedings. One of the following options was to be selected, otherwise option (a) below would apply:

(a) the charterparty was to be governed by English law, disputes out of the charterparty would be referred to arbitration in London in accordance with the English Arbitration Act 1996;
(b) the charterparty was to be governed by the US Code and the Maritime Law of the United States, arbitration would be in New York in accordance with the rules of the Society of Maritime Arbitrators;
(c) arbitration would be at a place indicated on the completed form in accordance with the law of that place

The Gencon 1994 Charter Party provided that unless the parties could agree upon a sole arbitrator, then each would appoint one arbitrator and then the two party-appointed arbitrators would appoint a third arbitrator.

In February 2014, the Respondent in the instant application commenced arbitration proceedings in London against the Applicant. A sole arbitrator ("the Arbitrator") was appointed by the Respondent after the Applicant failed to respond to communications. The Arbitrator issued an Award addressing issues of jurisdiction, determining that the arbitration was subject to the English Arbitration Act 1996 rather than the Hong Kong Arbitration Ordinance, and that Clause 19 of the Gencon Form applied, having the effect that English law

was to be the governing law of the substantive issues in dispute.

The Applicant applied to the English Commercial Court seeking to have the Award set aside. The court had to consider first whether the law of the arbitral proceedings was to be that of England or Hong Kong, and secondly (if the arbitral proceedings were to be governed by English law) whether the Arbitrator had been validly appointed.

Decision

The court determined that the Award must be set aside for lack of jurisdiction.

The court held that arbitral proceedings under the charterparty were subject to the law of Hong Kong rather than English law. The court further held that, if the conclusion on the law of the arbitral proceedings was wrong, the appointment of the Arbitrator had been carried out invalidly.

The court considered that the wording of Clause 23 was plain in that it set out two matters. First, the arbitration was to be held in Hong Kong. Secondly, the law of the substantive issues in dispute was to be English law.

Contrary to the arguments of the Respondent, the court recognised that it is by no means unusual for there to be a "bifurcation" between the law of the substantive issues in dispute and the law of the arbitral proceedings.

Having reviewed authorities highlighting the confusion often caused by phrases such as "venue of arbitration" or "place of arbitration", the court held that an agreement for arbitration "to be held in Hong Kong" was an implied choice of Hong Kong as the seat of the arbitration (and therefore the choice of Hong Kong law as the procedural law of the arbitration). It would take strong clear words to overturn this position, and the choice of English law as the substantive law was insufficient in this respect.

Even if English law was the law governing the arbitral proceedings, the appointment of the Arbitrator was invalid. There was no agreement as to the number of arbitrators in Clause 23, and so the parties would have been bound to follow the procedures set out in the English Arbitration Act 1996. Since this procedure had not been followed, the appointment of the Arbitrator was invalid.

Concluding Remarks

Although the 2012 case of *Sulamerica* was not considered in the judgment, the central principle was followed – once the seat of the arbitration has been decided, that choice is the equivalent of a choice of the law of the seat as being the law of the arbitral proceedings, unless there are strong and clear factors that indicate that some other choice has been made.

The decision also emphasised the prestige of Hong Kong as an arbitration centre, highlighting the neutrality of the Hong Kong courts in their approach to arbitrations.

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