COMMERCIAL COURT DENIES CHALLENGE TO ARBITRATION AWARD ON GROUNDS OF SERIOUS IRREGULARITY

UMS Holding Ltd v Great Station Properties SA [2017] EWHC 2398 (Comm)

Introduction

In a decision handed down on 5 October 2017, the English Commercial Court in *UMS Holding Ltd v Great Station Properties SA* [2017] EWHC 2398 (Comm) dismissed an application under Section 68 of the Arbitration Act 1996 to set aside an arbitration award ("the Award") ordering the Applicants to pay US$55.8 million to the Defendants in connection with a Joint Venture Agreement ("the JVA") and also to pay US$250 million as the price payable in respect of the exercise of a "put option" by the Defendants. Teare J rejected allegations of "serious irregularities" and refused to set aside the Award.

Background

The case involved a Cypriot joint venture vehicle known as Stremvol Holdings Limited, through which the Defendants (who were the claimants in the arbitration) and Applicants (who were the respondents in the arbitration) held a number of companies, including NPO, a company based in Ukraine and involved in the manufacture of gas compressors. There were in essence two disputes. The first related to the JVA, in which the Defendants alleged that the Applicants perpetrated an "illicit scheme" whereby they covertly diverted profits and opportunities away from NPO to two companies connected to them; this was said to be a breach of the JVA and alleged to have caused damage to the Defendants in the sum of US$55.8 million. The second related to the exercise of a put option under the option agreement relating to shares in Stremvol, and were so entitled to a sum of US$250 million. The Applicants denied there was any illicit scheme, and with regard to the option agreement, alleged that the business of Stremvol had been conducted oppressively by the Defendants such as unfairly to prejudice the shareholders of Stremvol; under the Cyprus Companies law, they were therefore entitled to an order that the Defendants sell their shares in Stremvol at the market price of no more than US$4 million. The parties proceeded to arbitration, and on 9 May 2016, the Tribunal (consisting of Sir Gordon Langley, Sir David Steel and L. Yves Fortier QC) published the Award in which the Defendants' claims succeeded.

The Applicants challenged the Award on grounds of "serious irregularities" within the meaning of Section 68 of the Arbitration Act 1996. Section 68(2)(d) of the Arbitration Act 1996 allows a party to challenge the award if there has been a "failure by the tribunal to deal with all the issues that were put to it". Section 68(2)(a) of the Arbitration Act 1996 allows a party to challenge the award if there has been a "failure by the tribunal to comply with section 33", which in turn requires a tribunal to "act fairly and impartially as between the

parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent". The Applicants put forward several factual allegations:

1. The tribunal improperly rejected a reflective loss argument based on considerations upon which the Applicants did not have the opportunity to put on a case, the illogicality of that rejection, and the allegation that the Tribunal had overlooked, misunderstood, or not properly considered evidence in regards to their reflective loss argument;

2. The tribunal overlooked, fundamentally misunderstood, or failed to give proper consideration to evidence presented by the Applicants regarding several factual elements of the claim.

Judgment

Teare J dismissed the Applicants' Section 68 challenge to the Award.

Teare J first surveyed and summarised existing authority regarding allegations that an arbitral tribunal has overlooked evidence, concluding that a contention that the tribunal has ignored or failed to have regard to evidence relied upon by one of the parties cannot be the subject matter of an allegation of serious irregularity within Sections 68(2)(a) or 68(2)(d) of the Arbitration Act 1996 for four principal reasons:

1. The tribunal's duty is to decide essential issues put to it and give reasons for doing so. It does not have to deal in its reasons with each point made by a party in relation to those essential issues or refer to all relevant evidence;

2. The assessment and evaluation of such evidence is a matter exclusively for the tribunal. The court has no role in that regard;

3. There are many reasons why a tribunal may not have referred to a piece of evidence which a party considers crucial. An inquiry into why the tribunal did not refer to it would be impermissible because it is the tribunal, not the court, that assesses the evidence adduced by the parties. A tribunal may have had a different view of the importance, relevance or reliability of the evidence, so an inference of irregularity cannot be drawn;

4. Section 68 is concerned with due process; it is not concerned with whether the tribunal has made the "right" finding of fact or the "right" decision in law. The suggestion that it is a serious irregularity to fail to deal with certain evidence ignores that principle. By choosing to resolve disputes by arbitration, the parties clothe the tribunal with jurisdiction to make a "wrong" finding of fact.

It is only in exceptional cases when findings of fact by the tribunal can be disturbed; there cannot be such an exceptional case where the allegation of exceptionality involves the court in assessing the evidence before the tribunal to decide whether it has been overlooked.

As regards the reflective loss argument, Teare J analysed the basis upon which compensation had been provided. Although the tribunal had mentioned that there could be recovery "on the basis of unjust enrichment", the Award is structured such that compensation sounds in damages. The Applicants had therefore been able to put their case.

Teare J dismissed the Applicants' other evidentiary arguments made in respect of Section 68 above. However critical the Applicants believe their evidence to be, allowing the determinations of the tribunal to be disturbed would be inconsistent with his interpretation of Section 68 and the overall purpose of the Arbitration Act 1996, which is to uphold arbitral awards.

The Applicants also submitted that, on a Section 68 challenge, higher standards of review by the courts are appropriate in the instant case where the arbitral tribunal chosen by the parties consisted of former Commercial Court judges and a distinguished international lawyer, where considerable resources were spent on the arbitration and where leading solicitors and barristers were instructed. Teare J considered it was "appropriate to have in mind the type of tribunal which wrote the award", but held that the court's approach to reviewing awards "must apply to all arbitration awards, whoever the arbitrators might be".

Conclusion

This case yet again demonstrates the pro-arbitration approach to arbitration taken by the English courts when reviewing arbitration awards. Section 68 of the Arbitration Act 1996 serves only as a backstop, and is available only in extreme cases where the tribunal has gone so far wrong in its conduct of the arbitration that justice calls for it to be corrected.

On 6 October 2017, the Applicants' application for permission to appeal was refused by Teare J ([2017] EWHC 2473 (Comm)).