CHINESE SHIPYARD SUCCESSFULLY RESISTS A MULTI-MILLION DOLLAR CLAIM IN LONDON ARBITRATION PROCEEDINGS

PRIMERA MARITIME (HELLAS) LIMITED AND OTHERS V JIANGSU EASTERN HEAVY INDUSTRY CO LTD AND ANOTHER [2013] EWHC 3066 (COMM)

SNAPSHOT

The English Commercial Court's recent decision in *Primera Maritime (Hellas) Limited and Others v Jiangsu Eastern Heavy Industry Co Ltd and Another* confirmed that matters of fact and evaluation of evidence are for the arbitrators, and it is precisely such situations where the Court ought not intervene.

In an application under section 68(2)(d) of the *Arbitration Act 1996* to challenge an award for serious irregularity, on the basis the tribunal failed to deal with certain issues put to it by the parties, the Court confirmed that an applicant should not subject each sentence of the tribunal's reasoning to a minute textual analysis with a view to demonstrating that the tribunal has failed to deal with a particular issue. That is the wrong approach. The losing party to an arbitration should not nitpick and look for inconsistencies and faults in the award.

The Court held in the present case that the tribunal's reasons was perfectly reasonable and explicable. However, even if they were not and the tribunal's conclusion could be said to be surprising, unusual or even wrong, it was a conclusion of fact which is not susceptible to review by the Court, whether under section 68 of the *Arbitration Act 1996* or otherwise.

DLA Piper Hong Kong represented both the Chinese shipyard, Jiangsu Eastern Heavy Industry Co., Ltd., and the Chinese trading house, Ningbo Ningshing International Inc., in successfully defending the arbitration proceedings and the application to challenge the Award in the English High Court. The team was led by Ernest Yang and supported by Sharon Leung of DLA Piper Hong Kong.

PARTIES

Jiangsu Eastern, a shipyard in China, and Ningbo Ningshing the trading house responsible for obtaining refund guarantees, also based in China (collectively the "**Sellers**") entered into two shipbuilding contracts dated 12 July 2007 with Primera Maritime (Hellas) Limited, buyers based in Greece ("**Primera**") for the construction and delivery of two bulk carriers. Primera subsequently nominated two companies, Astra Finance Inc and Comet Finance Inc, as the buyers (the "**Buyers**") and were collectively the claimants in arbitration proceedings commenced under the LMAA Terms 2006 in August 2008.

THE ARBITRATION

The three arbitrator tribunal consisted of Mr. Michael Howard QC, Mr. Mark Hamsher and Mr. David Aikman.

The basis of the Buyers' claim for damages was that the Sellers had (from the middle of October 2007 by way of an email and in subsequent meetings) acted in renunciation of the contract by refusing to perform the contracts in accordance with their terms, specifically in relation to delivery by the contractual delivery dates in 2011.

The arbitration hearing took place over two and a half weeks. The written submissions of the parties ran to over 700 pages. The tribunal produced an Award dismissing the Buyer's claims in November 2012 supported by detailed reasoning (the "**Reasons**"), deciding that although the Sellers renounced the contracts in an email of 19 October 2007 and at a meeting on 6 November 2007, the Buyers subsequently affirmed the contracts.

THE SECTION 68 APPLICATION

Summary

The Buyers applied under section 68(2)(d) of the *Arbitration Act 1996* to challenge the Award and to remit it to the tribunal, on the grounds that the tribunal failed to deal with two issues that had been put before them, namely:-

(1) that the renunciation by the sellers was continuous; and

(2) in relation to the quantum of the Buyers' claim, that they would have "flipped" the contracts, i.e. the Buyers would have sold the contracts to third parties at a profit.

The English High Court heard the Buyers' application to challenge the Award in October 2013 and concluded that the application should be dismissed at the end of the oral hearing on the same day. The Court took the view that the Buyers' real complaint was that they felt the tribunal had reached the wrong result, which was not a matter in relation to which an arbitration Award is susceptible to challenge under section 68.

Legal Principles

Section 68(2)(d) of the *Arbitration Act 1996* provides as follows:-

> "*68 Challenging the award: serious irregularity.*
>
> *(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.*
>
> *A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*
>
> *(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—*
>
> …

(d) failure by the tribunal to deal with all the issues that were put to it;"

The legal principles applicable to section 68(2)(d) was discussed in the judgment. In order to succeed under section 68(2)(d), the applicant needs to show:-

(1) a serious irregularity;

(2) a serious irregularity which falls within the closed list of categories in section 68(2); and

(3) that one or more of the irregularities identified caused or will cause the party substantial injustice.

The Court also confirmed that the focus of the enquiry under section 68 is due process and not the correctness of a tribunal's decision. The section is only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be correct. The four questions for the Court in a section 68(2)(d) application are:-

(1) whether the relevant point or argument was an "issue" within the meaning of the sub-section;

(2) if so, whether the issue was "put" to the tribunal;

(3) if so, whether the tribunal failed to deal with it; and

(4) if so, whether that failure has caused substantial injustice.

There is a distinction between, on the one hand, "issues" and, on the other hand, "arguments", "points", "lines of reasoning" or "steps" in an argument.

Issue 1: Continuous Renunciation

Whether there was an "issue" within the meaning of the sub-section

The Buyers submitted to the Court that there were two distinct issues, one in relation to repeated renunciation and the other in relation to continuing renunciation. In dealing with the case presented by the Buyers to the tribunal on renunciation and affirmation, the Court was asked to look at the Buyers' written closing submissions from the arbitration where the

question of affirmation was dealt with in detail, and that the delineation the Buyers sought to rely on to differentiate certain "issues" which was found to be absent.

The Court agreed with the Sellers, that in the Buyers' written submissions in the arbitration, no separate argument was made on repeated renunciation on the one hand and continuing renunciation on the other. The submissions essentially dealt with them as aspects of the same issue. The Court was therefore of the view that continuing renunciation was one argument within an issue as opposed to an "issue" within the meaning of the sub-section.

Whether the tribunal had failed to deal with the "issue"

Nonetheless, the Court went on to decide that even if the "issue" was the narrower one of continuing renunciation, the tribunal did clearly deal with that issue. Although the Buyers directed the Court to consider specific sentences of the Reasons, the Court held that parts of the Reasons could not be taken in isolation but must be read as a whole. The Court considered the Reasons of the tribunal in detail and concluded that it was impossible to contend that the tribunal did not have in mind the argument of whether there was a continuing renunciation. The references made by the tribunal clearly demonstrated that the tribunal had continuing renunciation in mind.

The minute textual analysis used by the Buyers in considering the Award is not only the wrong approach, it also did not assist the Buyers' case and instead demonstrated that the tribunal had dealt with the argument about continuing renunciation. After analyzing the Reasons, the Court stated that the argument by the Buyers that the tribunal did not deal with the issue of continuing renunciation was "*frankly hopeless*".

There was also nothing to suggest that the tribunal had applied the wrong test in law in relation to revival of the right to terminate. Taking the Reasons as a whole and applying a broad test of reasonable construction, it was impossible to say that the tribunal had applied the wrong test in law. What the Buyers' submission amounted to is that because the tribunal reached a conclusion on the facts which they did not like, the tribunal must have applied the wrong legal test. The Court went on to say that that submission was misconceived. Whether there was a renunciation is clearly a question of fact for the tribunal. The tribunal had carefully considered whether there was continued or repeated renunciation by the Sellers after

the Buyers' affirmation and concluded that there was not, which was the conclusion which emerged from the Reasons and was a perfectly reasonable and explicable one.

The Tribunal clearly dealt with the issue of continuing or repeated renunciation and once it is recognized that it had dealt with the issue, there is no scope for the application of section 68(2)(d). Primera therefore failed in their argument that there was an "issue" *and* that the tribunal had failed to deal with it.

Issue 2: Quantum

The Court found the Buyers' argument that the tribunal had not dealt with an issue in relation to the quantum of their claim highlighted the extent to which the Buyers' application was "*an impermissible attempt to go behind the tribunal's findings or fact*".

In light of the Court's finding in relation to the "issue" of continuing renunciation, the argument relating to quantum was academic. Even if there were anything in this point, the application would bound to fail as the quantum point would not make any difference to the overall decision of the tribunal and the Buyers would not be able to show that any serious irregularity has caused or will cause substantial injustice to them.

Nonetheless, the Court dealt with the issue briefly. The Buyers' argument was that the tribunal failed to deal with the Buyers' case that they would have "flipped" the contracts had the Sellers not renounced the contracts. The Reasons were considered by the Court which found that the Buyers could not "*seriously begin to suggest that the tribunal has not deal with an issue and what this part of the application really is, is a scarcely veiled attempt to challenge the findings of fact of the tribunal which the claimants do not like*". Even if the tribunal had overlooked a particular piece of evidence in reaching its finding of fact, which was not in the case in this matter, that is not susceptible to challenge under section 68 or otherwise.

The Court held that it is clearly not appropriate to use an application under section 68 to challenge findings of fact made by a tribunal, otherwise, every disappointed party could say that it had been treated unfairly by pointing to some piece of evidence in its favour which was not referred to in the Reasons or not given the weight it feels is should have.

Court's Conclusion

In conclusion, the Court held that the Buyers' application under section 68 of the Arbitration Act 1996 was misconceived and must be dismissed.

IMPACT

This case highlights the general rule that the English High Court will not interfere with an arbitral tribunal's decision on questions of fact. Subjecting each sentence of a tribunal's Reasons to a minute textual analysis with a view to demonstrating that the tribunal had failed to deal with an issue under a section 68(2)(d) application is the wrong approach. The Court confirmed the position set out in a number of cases which came before it where it was emphasized that the Court should read the Award in a reasonable and commercial way and not by nitpicking and looking for inconsistencies and faults. The Court will not be persuaded in cases where parties make semantic distinctions in trying to establish "issues" when making an application under section 68(2)(d).

In practice, the Court's decision demonstrates that any veiled attempt to challenge the findings of fact of a tribunal that a party does not like under section 68(2)(d) of the Arbitration Act 1996 will not be entertained by the Court. There is a need for losing parties, whether they truly feel disappointed with the result and simply wishing to delay matters, to be cautious about pursing applications to challenge awards, especially on the ground of serious irregularity under section 68.

Given the large number of international parties whom choose to arbitrate in London generating many awards each year, in our view, the English High Court's decisions in relation to section 68 applications reinforces the position that it will not be easy for losing parties to attempt to challenge conclusions of fact in an award which are not susceptible to review by the Court. The Court's decision will hopefully deter losing parties from attempting to rely on this section of the Arbitration Act to challenge conclusions of facts which they do not like giving the winning party some comfort in the finality of the matter.

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