ALERT MEMORANDUM

Judgment Creditor Successfully Challenges 'Uncertain' Arbitration Award in the English Court

16 July 2020

In the recent case of *Xstrata Coal Queensland Pty Ltd v Benxi Iron & Steel (Group) International Economic & Trading Co. Ltd (No. 2)*[1], the High Court upheld a challenge to an LCIA arbitration award which was brought under s.68 of the Arbitration Act 1996 (the "Act"). Unusually for an application under s.68 of the Act, the challenge was made by the award creditor (not the award debtor), on the basis that there was uncertainty or ambiguity as to the award's effect as it failed to address an inconsistency as to the identity of one the parties to the arbitration agreement. The case is a rare example of a successful challenge under s.68 of the Act, highlights the importance of ensuring that all parties are correctly and unambiguously identified at an early stage of proceedings so as to head off potential grounds for a post-award challenge and provides valuable guidance as to the calculation of procedural deadlines for challenging an award.

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[1] [2020] EWHC 324

Background

The underlying dispute arose out of an agreement (the "Sale Agreement") by which the Defendant committed to buy a substantial quantity of coking coal from a consortium of four sellers, the Claimants. By a 2010 LCIA award (the "Award"), the Claimants were awarded US$27.8 million in damages for the Defendant's non-performance of its obligations under the Sale Agreement. Following the Defendant's failure to pay the Award, the Claimants sought to enforce the Award in China under the New York Convention.

The Defendant resisted enforcement proceedings by arguing the identity of the fourth seller who was a party to the Sale Agreement was uncertain; at one point in the Sale Agreement the fourth seller was named as ICRA NCA Pty Ltd ("ICRA NCA"), at another it was ICRA OC Pty Ltd ("ICRA OC"). The Tribunal treated ICRA OC (and not ICRA NCA) as a party to the Sale Agreement, the arbitration and as a beneficiary to the Award, although this point was not addressed in the parties' submissions during the arbitration proceedings and the Tribunal's reasoning on the issue was not explained in the Award. The Chinese Court refused to recognise or enforce the Award, holding that, because the Sale Agreement named ICRA NCA as the fourth seller, there was no contractual relationship between ICRA OC and the Defendant, meaning that no agreement to arbitrate existed.

The Claimants then applied for and were granted an extension of time (under s.79 of the Act) to apply to the Tribunal to correct the Award pursuant to Article 27 of the LCIA Rules 1998[2] ("Article 27"). Article 27 is the equivalent provision to Article 57 of the Act. However, the Tribunal rejected this application (the "Article 27 Application"), emphasising that the identification of the fourth seller was not an issue considered by either the parties or the Tribunal during the arbitration, and that its powers under Article 27 were limited to the correction of "*computational, clerical or typographical errors or errors of a similar nature*". A finding as to the proper identity of a contracting party would be an addition to the Award, not a mere correction.

Shortly following the Tribunal's ruling, the Claimants applied to the Court under ss.68(2)(c) and 68(2)(f) of the Act, seeking to challenge the Award on grounds of serious irregularity (the "s.68 Application").

Decision

The two issues facing the Court in determining the Claimants' application were: (1) whether the application was time-barred, and (2) whether there was uncertainty or ambiguity as to the effect of the Award pursuant to s.68(2)(f) of the Act.

(1) Was the application time-barred?

Under s.70(3) of the Act, a s.68 challenge must be brought within 28 days of an award or, if there has been any arbitral process of appeal or review, within 28 days of the date on which the claimants were notified of that process's result.

It was common ground between the parties that, if a party successfully applies to the Tribunal to correct an award under Article 27, and if that application was "*material*" to the correction of the award, then the 28 day period outlined in s.70(3) of the Act would run from the date of the corrected award and not the date of the original award. The issue in this case, however, was that the Claimants' Article 27 Application had not been successful.

So the Court went on to consider whether the Article 27 Application was "*material*", and if so whether it should, irrespective of its failure, have the effect of delaying the start of the 28 day period in s70(3) of the Act to the date on which the outcome of the application was known. On the first question the Court found that the Article 27 Application was "*material*" to the s.68 Application; had the Article 27 Application succeeded, there would have been no need for the s.68

[2] *Xstrata Coal Queensland Pty Ltd v Benxi Iron and Steel (Group) International Economic and Trading Co Ltd* [2016] EWHC 2022 (Comm)

Application. On the second question, the Court found in the affirmative. Were the start of the 28 day period to remain as the date of the Award in these circumstances, it would encourage a proliferation of protective applications to the Court by parties making applications under Article 27 (or Article 57 of the Act). Such protective applications may include for example, an application for an extension of time to bring a subsequent s.68 application. This would be contrary to the principles of the Act, namely the avoidance of unnecessary expense and the restriction of interventions by the Court.

(2) Was there uncertainty or ambiguity as to the effect of the Award?

The Claimants argued that the uncertainty or ambiguity as to the effect of the Award has caused or will cause substantial injustice by rendering it impossible or difficult to enforce, as shown by the enforcement proceedings before the Chinese Court. The Defendant's position was that the Award was not uncertain or ambiguous, or if it was, this was limited to its reasoning and not its effect.

The Court sided with the Claimants. It may have been clear to an English lawyer that ICRA OC was treated as being a party to the Sale Agreement and would be entitled to recover under the Award, but these points were not unambiguously spelt out by the Tribunal and they could lead to misunderstandings by an enforcing Court. In this case, the uncertainty manifested itself in the difficulties which had been faced by the Claimants during the enforcement proceedings before the Chinese Courts.

The Court also rejected the Defendant's submission that a s.68 challenge could only succeed in extreme cases in which the Tribunal's conduct of the arbitration had "*gone wrong*". Rather, cases falling within s.68(f) of the Act might arise without default on the part of the Tribunal.

As the Claimants succeeded in their application under s.68(2)(f) of the Act, the Court did not deal with the Claimants' separate grounds under s.68(2)(c). The Court remitted the Award to the Tribunal.

Conclusion

By confirming that an award can be uncertain or ambiguous where it is merely capable of being misunderstood by an enforcing Court, even where the position is clear as a matter of English law, *Xstrata v Benxi* reinforces the pro-enforcement stance of the English Courts. It also underlines the importance of resolving any ambiguities with respect to the identity of the parties to the arbitration at an early stage of proceedings.

The Court's approach to determining when the clock starts to run under s.70(3) of the Act (being the date the outcome of a material application to correct an award is known) is also noteworthy. The Court considered the rule is not only "*clear and easy to apply*", but is consistent with the core tenets of the Act.

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