

**TWO RECENT DECISIONS FROM THE COMMERCIAL COURT ON THE
APPLICATION OF SECTION 67 OF THE ARBITRATION ACT, 1996**

Lisnave Estaleiros Navais SA v. Chemikalien Seetransport GmbH [2013] EWHC 338 (Comm) (27 February 2013) and *Hyundai Merchant Marine Company Limited v. Americas Bulk Transport Limited* [2013] EWHC 470 (Comm) (08 March 2013)

Introduction

In two recent cases, *Lisnave Estaleiros Navais SA v. Chemikalien Seetransport GmbH* [2013] EWHC 338 (Comm) (27 February 2013) and *Hyundai Merchant Marine Company Limited v. Americas Bulk Transport Limited* [2013] EWHC 470 (Comm) (08 March 2013), London’s Commercial Court considered the interpretation and application of section 67 of the Arbitration Act, 1996. Section 67 allows parties to challenge an arbitral award on the grounds that the tribunal lacked substantive jurisdiction.

Background

Lisnave Estaleiros

An application was made by the claimant (Lisnave) under section 67(1)(a) of the Arbitration Act, 1996 to set aside a majority arbitral award which upheld the arbitration tribunal’s substantive jurisdiction over a claim brought by the defendant (Chemikalien) against Lisnave under the terms of a written Ship Repair Fleet Agreement. The issue before the court was whether the Fleet Agreement incorporated, by prior course of dealing, the arbitration clause contained within Lisnave’s General Conditions of Contract for Dry Docking, Conversion, Maintenance and Repair of Vessels and Off-shore Units (“the General Conditions”), absent any reference to these conditions within the Fleet Agreement itself.

Hyundai Merchant

Three applications were brought under sections 67, 68 (serious irregularity), and 69 (error of law) of the Arbitration Act, 1996 challenging an arbitral award relating to a purported contract for a time charter. It was alleged by the defendant (HMT) that negotiations conducted by phone and email between two individuals on behalf of the parties resulted in a binding contract which also contained an arbitration agreement. The claimant (HMM) objected to the jurisdiction of the arbitration tribunal on the basis that there was no such binding charter party or arbitration agreement. The tribunal rejected this objection and went on to enter an award for the HMT.

Judgments

In both cases the arbitral awards in question were set aside on the grounds that the respective tribunals lacked jurisdiction. Both involved the careful construction of the purported arbitration agreements and the contracts in which they were said to subsist. In *Lisnave Estaleiros* it was found, on the facts, that the prior course of dealing relied upon by Chemlikalien was not sufficient to incorporate the arbitral provisions of Lisnave's General Conditions. In the course of his judgment, Colin Edelman QC (sitting as a Deputy Judge of the High Court) cited as factors recommending particular caution in finding in favour of Chemlikalien's prior dealing argument, that the dispute involved a formal and detailed contractual document which did not even contain a reference to the General Conditions, and that Chemlikalien sought to incorporate only one isolated clause of the General Conditions as a whole. The standard for the implication of terms, he commented, was, and must remain necessity not reasonableness, as it is not for the courts to remake commercial agreements.

In *Hyundai Merchant*, moving straight to a consideration of HMM's application under section 67, which involved a full rehearing, Eder J was of the view that its other applications fell away. He went on to find that, contrary to what was contented on behalf of HMT, if there had been no consensus between the parties as to the charter there could have been no binding arbitration agreement between them either. There was no evidence to suggest the parties intended the arbitration agreement to take effect separate from the main agreement. Consequently, the validity of the contract and arbitral agreements stood or fell together. It was his further view that, on the facts, the main agreement was not made out.

15th April 2013