

ENGLISH COMMERCIAL COURT SETS ASIDE ARBITRATION AWARD DUE TO SERIOUS IRREGULARITY

Lorand Shipping Ltd v Davof Trading (Africa) BV (The Ocean Glory) [2014] EWHC 3521 (Comm)

Introduction

Where the English High Court considers that an arbitral award is affected by serious irregularity and that the irregularity will cause substantial injustice to a party, it may set aside the award pursuant to Section 68 of the Arbitration Act 1996 (“the 1996 Act”). Successful applications to set aside an award are comparatively rare.

However, in *Lorand Shipping Ltd v Davof Trading (Africa) BV (The Ocean Glory)* [2014] EWHC 3521 (Comm) (30 October 2014), Eder J decided that the decision of the arbitral tribunal to adopt a course not advocated by either party, without allowing the parties to make representations on that course, was likely to cause substantial injustice. Accordingly, the award was partially set aside.

Background

The Claimant shipowners and the Defendant charterers fell into dispute surrounding significant delays to the delivery of cargo as a result of the vessel losing its rudder on a voyage from the Ivory Coast to Morocco. The condition of the on-board cargo deteriorated significantly as a result of the delay.

Pursuant to the terms of the charterparty, the dispute was referred to arbitration in London.

The Arbitration

The Claimant sought an interim award in respect of “demurrage” (the charges that the charterer pays to the shipowner for its extra use of the vessel caused by the delay).

The Claimant asked the Tribunal (Mr David Barnett and Mr Alan Oakley) to reserve its jurisdiction in case the Claimant was in the future sued by any third party cargo owners. If such claims were brought, the Claimant would wish to seek an indemnity from the Defendant.

The Defendant accepted the demurrage claim but denied liability for any future claims against the Claimant by third parties.

By agreement the Tribunal made its decision on the basis of the parties' written submissions, without an oral hearing.

The Tribunal held in a decision described as its "Final Award":

"in the event that the cargo receivers / interests do make a claim, doubtless the Owners will consider whether it is possible to start new arbitration proceedings against the Charterers. It follows that this award is not made on an interim basis, but is final in respect of the issues decided herein".

This course had not been advocated by either party and neither party had been given the opportunity to make written or oral submissions on it.

Challenge under Section 68 of the 1996 Act

The Claimant applied for the award to be set aside under Section 68 of the 1996 Act on the grounds that the Tribunal had failed to comply with its mandatory general duty under Section 33 of the 1996 Act to act fairly and impartially as between the parties, and to give each party a reasonable opportunity of putting its case.

Eder J held:

- (a) that it was well understood that there was a very high threshold for an application under Section 68 of the 1996 Act;
- (b) that it was unfair to decide a case against a party on an issue which was not raised in the case without allowing representations to be made or further evidence to be adduced;
- (c) that it was a fundamental aspect of the arbitral process generally that the tribunal is in effect obliged to determine the claim one way or another. An arbitral tribunal has no power to simply decline to act;
- (d) that whether substantial injustice had been caused did not depend on the court being satisfied that the tribunal would have reached a different view if it had complied with its general duty, but only that it "might realistically" have done so.

Concluding Remarks

The High Court's decision reaffirms the very high threshold for applications under Section 68 of the 1996 Act and demonstrates the importance of understanding that arbitral awards are in general unlikely to be successfully challenged.

The judgment is also notable for Eder J's determination that the term "Interim Award" is a constant source of confusion, does not appear in the 1996 Act, and should be abandoned. This further demonstrates the finality of arbitration awards.

2 December 2014