

**ENGLISH HIGH COURT ALLOWS SECTION 68 CHALLENGE TO  
ARBITRATION AWARD**

*Transition Feeds LLP v Itochu Europe Plc* [2013] EWHC 3629 (Comm)

**Introduction**

On 15 November 2013, the High Court handed down its decision in *Transition Feeds LLP v Itochu Europe Plc* [2013] EWHC 3629 in which it held that in arbitration proceedings, the Federation of Oils, Seeds and Fats Associations (“FOSFA”) Board of Appeal had manifested a serious irregularity within s.68(2)(d) of the Arbitration Act 1996 by failing to deal with two issues before it.

**Background**

In August 2008, Transition Feeds LLP (the “Buyer”) and Itochu Europe Plc (the “Seller”) entered into a supply agreement for the supply of crude palm oil feed grade and palm fatty acid distillate for three years. The supply agreement was subject to FOSFA rules, the FOSFA arbitration clause and, where otherwise applicable, FOSFA contract provisions.

In November 2008, during the shipping of the goods, the vessel was seized by Somali pirates and was detained by them for three months. As a result of the detention of the vessel and its cargoes, the Buyers contended that the goods were not of contract quality in that they were no longer of good merchantable quality and would not be allowed to be used in the feed industry for which they had been purchased. The Buyers proposed that the Sellers replace the shipment with conforming goods. The Sellers refused and demanded payment, to which the Buyer responded by saying that that was a repudiatory breach for which they were terminating the contract. In turn, the Seller treated the Buyer as being in repudiatory breach and discharged the goods at Rotterdam where they were sold.

Following an arbitration in front of the First Tier Tribunal, both sides appealed to the FOSFA Board of Appeal. In its decision, the Board held, among other things, that the Buyer had been in breach of contract in refusing to accept the goods.

The Buyer made two applications to the English High Court -

- The first was an application under section 68(2)(d) of the Arbitration Act 1996 for the remission of an arbitration award on the basis that the FOSFA Board of Appeal had failed to deal with all the issues that were put to it, and in particular, had failed to deal with a price adjustment issue and the inapplicability of the Rotterdam resale prices.

- The second were are two appeals under section 69 of the Arbitration Act in respect of in respect of costs orders made by the same FOSFA Board of Appeal in two further arbitrations between the Buyer and Seller.

## **Decision**

The High Court granted the section 68 challenges, but dismissed the section 69 applications.

### *Section 68*

Mr Justice Field, citing previous authorities, noted that in order to succeed under section 68 an applicant needs to show three things: a serious irregularity; a serious irregularity which falls within the closed list of categories in section 68(2); and that one or more of the irregularities identified caused or will cause the party substantial injustice.

In relation to a section 68(2)(d) challenge, Mr Justice Field noted there are four questions for the court: (i) whether the relevant point or argument was an "issue" within the meaning of the sub-section; (ii) if so, whether the issue was "put" to the tribunal; (iii) if so, whether the tribunal failed to deal with it; and (iv) if so, whether that failure has caused substantial injustice.

In determining whether there had been substantial injustice, the accepted test was that there is substantial injustice if it can be shown that the irregularity in the procedure caused the arbitrators to reach a conclusion which, but for the irregularity, they might not have reached, as long as the alternative was reasonably arguable. There are very few successful Section 68 challenges in practice.

In the circumstances of the case, the FOSFA Board of Appeal had failed to deal with the price adjustment issue and the inapplicability of the Rotterdam resale prices issue, which had caused substantial injustice and therefore the section 68(2)(d) challenges succeeded.

### *Section 69*

Mr Justice Field noted that in considering the costs orders, the FOSFA Board of Appeal should have had regard to both the outcome of the Buyers' appeal and the outcome of the Sellers' cross-appeal, and not only the Buyers' appeal.

On that basis, both of the section 69 appeals brought by the Buyers succeeded, with the result that the costs orders in both of the challenged awards had to be set aside and the question of costs remitted to the Board to be determined on the basis that there were two events and not one.

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