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ENGLISH HIGH COURT UPHOLDS QATAR FOUNDATION ARBITRATION AWARD

Obrascon Huarte Lain SA (t/a OHL Internacional) & Anor v Qatar Foundation for Education, Science & Community Development [2019] EWHC 2539 (Comm) (02 October 2019)

Introduction

In a decision handed down on 2 October 2019, the English High Court rejected a challenge brought under Section 68 of the Arbitration Act 1996 to an arbitration award handed down in the proceedings between OHL Internacional and Qatar Foundation over the construction of Sidra hospital.

Background

In 2009, a joint venture between the claimants (OHL and Contract) entered into a US\$1.9 billion contract with Qatar Foundation for the construction of Sidra, a state-of-the-art hospital complex in Doha. The contract was governed by Qatari law and provided for the resolution of disputes through arbitration under the ICC Arbitration Rules.

In July 2014, Qatar Foundation (through ASTAD, the project manager) served Notice of Termination of the contract, and subsequently went on to call on a performance and advance guarantee (worth £190 million), both of which have since been drawn down.

Qatar Foundation commenced arbitral proceedings against the joint venture in July 2014 claiming damages estimated at over £1 billion on the basis that it had validly terminated the contract when Notice of Termination was served. The joint venture disputed that Qatar Foundation had validly terminated the contract.

Three partial awards were issued between December 2015 and February 2018, addressing agreements to settle claims, defects and potential variation claims.

The fourth partial award, which was the subject of the present challenge, was published on 21 November 2018. Broadly, the Tribunal (consisting of the Right Honourable Sir Stanley Burnton (as President), Mr. Richard Wilmot-Smith QC and Mr. Richard Fernyhough QC) found that the JV was entitled to certain (but not all claimed) extensions of time; that the JV had acted in default in many respects and on occasion in bad faith; (centrally for present purposes) that Qatar Foundation had lawfully exercised the termination

provisions for default under the Contract; and that Qatar Foundation had been entitled to make its calls on performance and advance payment guarantees.

In the present challenge, the joint venture sought remission of the issue of whether Qatar Foundation had validly terminated the contract in circumstances where termination was effected by service of a notice and not court (or arbitral) order on the basis of serious irregularity. In particular, relying on section 68(2)(a) of the Arbitration Act 1996 (failure by the tribunal to comply with section 33 (general duty of tribunal)), the joint venture alleged that the Tribunal decided the termination issue in Qatar Foundation's favour on the basis of a legal analysis which was not explored fairly or properly with the parties.

Decision

The High Court (Mrs. Justice Carr) rejected the section 68 challenge.

Mrs. Justice Carr observed that section 68 imposes a high threshold for a successful challenge, reflecting the purpose of the Arbitration Act 1996 which is to reduce the extent of court intervention in the arbitral process. It is not to be used simply because one of the parties is dissatisfied with the result, but rather as a longstop in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice "calls out for it to be corrected". The court's general approach is to strive to uphold arbitration awards and to read an award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault.

In determining whether there has been a breach of the tribunal's duty, the court will have regard to the following principles:

i) There will generally be a breach of s. 33 of the Act where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him;

ii) If a tribunal considers that the parties have missed the point and/or contemplates a completely different basis for a decision, the parties need to be given notice and a proper opportunity to consider the position and respond. This does not mean that every nuance or inference which the tribunal wishes to draw needs to be put to the parties if it differs from that which has been precisely contended for in the arbitration;

iii) A tribunal does not have to set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration and a tribunal can deal with a number of issues in a composite disposal rather than address each issue seriatim;

iv) (Save possibly in exceptional cases) s. 68(2)(a) in referring to the general duty of fairness in s. 33 does not allow a party to contend that the tribunal has disregarded or overlooked a particular piece of evidence since that amounts to an assertion that the arbitrators made mistakes in their findings of primary fact or drew unsustainable inferences from the primary facts;

v) In determining whether there has been substantial injustice, the applicant does not need to show that the result would necessarily or even probably have been different. He simply has to show that the tribunal

might well have reached a different view and produced a significantly different outcome. It is enough for the applicant to show that the arbitrator reached a conclusion unfavourable to him which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is reasonably arguable.

In the present case, the joint venture had failed to satisfy the high threshold which a successful section 68 challenge required. It was clear from the transcripts and the Award itself that the Tribunal approached its task with care and diligence, and fully engaged with the issues. There was no irregularity for the purpose of section 68(2)(a).

Concluding Remarks

This decision provides a sharp illustration of the high threshold that a challenging party must overcome when seeking to persuade an English court that an arbitral tribunal has committed a fundamental error of procedural unfairness in breach of its general duty to act fairly and reasonably as between the parties.