SUMMARIES OF ARBITRATION-RELATED DECISIONS FROM THE ENGLISH COURTS IN 2019[*]

İNGİLİZ MAHKEMELERİNİN 2019 YILINDA TAHKİME İLİŞKİN OLARAK VERDİĞİ KARARLAR

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Abstract

Considering the importance of English Courts in international commercial litigations and arbitrations, there are significant developments each year. While some of these decisions are welcomed among scholars and practitioners, some of them are highly criticised. This paper reviews some of the most critical arbitration-related decisions from the English Courts in 2019. These cases illustrate the pragmatic nature and pro-arbitration stance of the English Courts.

Keywords

Arbitration, anti-suit injunction, anti-arbitration injunction, set aside, suspension of enforcement of an award, correction of an arbitral award

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Anti-Suit Injunctions

In *Aqaba Container Terminal (PVT) Co v Soletanche Bachy France SAS*,[1] the Court granted an anti-suit injunction blocking Jordanian proceedings in the context of a foreign constitutional challenge.

Soletanche entered into a construction contract with ACT under which Soletanche was to carry out construction works at the Aqaba Container Terminal in Jordan. The contract contained an arbitration clause under which a dispute of any kind in connection with or arising out of the agreement or the execution of the works was to be referred to arbitration if not resolved otherwise. After Aqaba giving the notice to terminate the contract, Soletanche commenced an ICC arbitration in London for wrongful termination and repudiatory breach of the Construction Contract. In 2017 the tribunal decided that the ACT had validly terminated the construction contract. In July 2018 Soletanche commenced proceedings against Aqaba Development Corporation and ACT in the Jordanian courts, seeking a declaration that a law on which the construction contract has been based was unconstitutional and so the construction contract was null and void. It was argued that this constitutional claim was not arbitrable. As a result, Aqaba applied to the English Court for an anti-suit injunction.

The High Court in England granted an anti-suit injunction blocking Jordanian proceedings in the context of a foreign constitutional challenge. Although the constitutional issues raised in Jordanian proceedings were not justiciable in England, the Court decided that the constitutional law claim to invalidate the construction contract fell within the scope of the arbitration clause. The Court underlined that Soletanche agreed not to bring a civil claim when it entered into the arbitration agreement. The judgment highlighted the fact that the English Courts will not hesitate to grant an injunction to restrain parties from breaching an arbitration agreement, even after an award has been published.

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Anti-Arbitration Injunction

In *Sabbagh v Khoury*,[2] the English Courts granted an anti-arbitration injunction to restrain a foreign arbitration, where the underly-

[1] [2019] EWHC 471.

ing dispute has little or no connection with England. The Court of Appeal stated that the circumstance of the case was sufficiently exceptional to justify the grant of an anti-arbitration injunction because the arbitration proceedings were oppressive or vexatious.[3]

The Claimant, Sana, commenced litigation proceedings against her two brothers, three of her cousins and a number of companies within the CCG for asset misappropriation and share deprivation claims. One of the defendants was domiciled in England and Wales and used as the anchor defendant for the purposes of establishing jurisdiction against the other individual defendants. Following the proceedings in England, the defendants commenced arbitration proceedings in Lebanon pursuant to the arbitration clause in CCG's articles of association. As a result, the Tribunal in the Lebanese Arbitration decided that it has jurisdiction over the claims. Later, the Defendants, except the anchor defendant, challenged the jurisdiction of the English Court and applied for a stay of action.[4] In 2017, the Court held that neither the asset misappropriation claims, nor the share deprivation claim fell within the terms of the arbitration agreement.[5] Therefore, the Court refused to stay, stating that the claims did not fall within the scope of the arbitration agreement. The Claimant, Sara, applied to the Court for an injunction to restrain the arbitration appellants from prosecuting the Lebanese Arbitration. The Court of Appeal granted an anti-arbitration injunction and provided a useful guide on the powers of the English Courts to grant an anti-arbitration injunction against foreign arbitrations. Since the claims did not fall under the arbitration clause, the continuation of the arbitration would be vexatious and oppressive, regardless of England not being the natural forum for the underlying dispute.

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[2] [2019] EWCA Civ 1219.

[3] Ibid, [87].

[4] According to art. 2(1) of Regulation 44/2001 and art. 6(1) of the Lugano Convention.

[5] Sabbagh v Khoury [2017] EWCA Civ 1120, [122]-[133].

Set Aside Award under Section 68 of Arbitration Act1996

In *P v D*,[6] the English High Court set aside an arbitral award for serious irregularity under section 68(2)(a) of the Arbitration Act 1996 due to the Tribunal's failure to cross-examine a witness on some material part of his claim.

D's claim in arbitration against P was for repayment of loans. P alleged that Mr E of P and Mr D of D had an agreement extending the time for repayment to 1 January 2020 and therefore estopped from demanding the repayment of loans before that date. The D argued that there was no such agreement to extend the time for repayment. There were no support for the alleged agreement in the documentary evidence.

The Tribunal decided that there was no agreement extending the period of the loan to 1 January 2020. P challenged the Award under section 68(2)(a) of the Arbitration Act 1996, arguing that the arbitrators breached their duty under section 33 of the Act to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent." Firstly, P argued that D's counsel did not cross-examine Mr E on his version of events at the meeting. Secondly, P argued the decision of the tribunal was based on a case which has not been properly argued. The English High Court held that the Arbitral Award should be set aside under section 68(2)(a) of the Arbitration Act 1996 and stated that there was a breach of the Tribunal's duty under s33 in relation to both of these grounds. This is a significant judgement to emphasise the importance of endorsing principles of fairness in arbitration and one of the rare cases where a challenge under section 68 of the Arbitration Act 1996 has been successful.

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Procedural Order or an Award

In *ZCCM Investments Holdings PLC v Kansanshi Holdings PLC&Anor*,[7] the English Court rejected a challenge under section 68 because a party to arbitral proceedings may only apply to the Court to

[6] [2019] EWHC 1277 (Comm).

[7] [2019] EWHC 1285 (Comm).

challenge an award in the proceedings. Therefore, for a successful section 68 challenge, the Tribunal's Ruling has to be an award.

KMP is a mining company which owns one of the largest copper mines in Zambia. ZCCM and KHL jointly own KMP. The first defendant KHL is a member of the FQ Group. The relationship between KHL, ZCCM and KMP is governed by an Amended and Restated Shareholders' Agreement (ASHA). KMP made certain transfers to FQMF, indirectly owns KMP. ZCCM, owned by Zambia, initiated arbitration to pursue a claim on behalf of KMP for breach of ASHA and its fiduciary duties. ZCCM also claimed that KHL misrepresented the nature of the Transfers. These claims can only be brought as a derivative claim because KHL owns 80% of the shares of KMP. Therefore, ZCCM applied the Tribunal for permission to continue a derivative claim on behalf of KMP. However, the Tribunal decided that ZCMM failed to establish a prima facie case against KHL and refused permission to continue the derivative claim.

ZCCM challenged the Ruling under s.68(2)(a)/(d) of the Arbitration Act 1996. The Commercial Court refused to allow a challenge under section 68. The Tribunal's decision in the present case was not an award but merely a procedural order, which is not capable of giving rise to a section 68 challenge. The Court gave weight to substance and not merely to form. Since the Ruling does not decide an issue of substance relating to the claim, it is a decision on a procedural issue. In other words, the arbitration is not over, and the Tribunal is not functus. Hence, the Court rejected a challenge under section 68.

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A Worldwide Freezing Order (WFO) in Support of a Foreign Arbitral Award

In *Arcelormittal USA LLC v Essar Steel Ltd and others*,[8] the Commercial Court upheld a Worldwide Freezing Order (WFO), Search Order, and Norwich Pharmacal Orders in support of a foreign arbitration award. The underlying arbitration proceedings arose from an agreement to supply iron ore pellets.

[8] [2019] EWHC 724 (Comm).

A Minnesota-seated tribunal of the ICC International Court of Arbitration issued an award against Essar Steel Limited (ESL), a Mauritius incorporated company. The Claimant, Arcelormittal USA LLC (AMUSA), is a company incorporated under the laws of the State of Delaware. AMUSA tried to enforce the Award in a number of jurisdictions, including England under s101 of the 1996 Arbitration Act to enforce the ICC Award as a judgment of the High Court. AMUSA also sought a WFO against Essar Steel. This is an exceptional case because the Defendant was a foreign company with no substantial assets in England.[9]

The Court held that there was a solid evidence of a risk of dissipation of assets[10]and it was just and convenient[11] to grant a WFO against ESL. There was evidence of actual or attempted past dissipation of assets on a massive scale, which was sufficient enough for the Court to exercise its powers of intervention in cases of international fraud or something very close to it.

There was no substantive claim for fraud. However, Jacobs J took a purposive approach and stated that even though there is no clear definition of international fraud, the phrase was not confined to cases where the underlying cause of action is a claim in deceit or a proprietary claim relating to the theft of assets. The Judge also added that "If there is a strong case of serious wrongdoing comprising conduct on a large or repeated scale whereby a company, or the group of which it is a member, is acting in a manner prejudicial to its creditors, and in bad faith, then I see no reason why the English court should not be willing to intervene rather than to stand by and allow the conduct to continue and, to put the matter colloquially, to let the wrongdoer get away with it."[12]

This case is a good example of the circumstances under which the English Courts are likely to grant a WFO in support of a foreign arbitral award against a foreign company with no substantial assets in England.

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[9] Its only assets in England are two bank accounts with very small sums.

[10] [2019] EWHC 724 (Comm), [17]-[18], [67]-[68].

[11] Ibid, [69]-[83].

[12] Ibid, [75].

Suspension of Enforcement of an Award

In *Leidos Inc v The Hellenic Republic*,[13] the Claimant, Leidos, was granted an ICC arbitration award against the Hellenic Republic. The Republic challenged the Award in the Greek courts. While there was an ongoing challenge, Leidos tried to enforce the Award in Greece. The Greek Supreme Court issued an interim order to suspend the enforcement of the Award until the outcome of the challenge proceedings.

Leidos applied to enforce the Award in England. Teare J granted an order on a without notice basis for enforcement. The Hellenic Republic proposed to stay that order due to the ongoing challenge in the Greek courts. The Claimant refused this offer. While applying to the Court for a without notice application, the Claimant did not disclose the possibility of defence under section 103(2)(f). Therefore, the Hellenic Republic applied to set aside the without notice order according to section 103(2)(f) of the Arbitration Act 1996 stating that the Greek Supreme Court suspended the Award. However, a few days after the application to set aside being made, the Greek Supreme Court dismissed the challenge, which as a result lifted the suspension on the Award. The Defendant withdrew its set aside application and paid the Award. Then the Court had to decide on the costs of the enforcement order and the set-aside application.

The English Court decided that both sides should bear their own costs. According to the general rule stated in CPR 44.2, the unsuccessful party will be ordered to pay the costs of the successful party. However, the Claimant failed to draw the Court's attention to the potential defence under section 103(2)(f), which is a sufficiently serious omission justifying a departure from the general rule stated in CPR 44.2. The Court also stated that there is no difference between suspension of the Award and suspension of the enforcement of an award. This is the first decision interpreting the meaning of the suspension of enforcement of the Award for purposes of section 103(2)(f) of the Arbitration Act 1996.

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[13] [2019] EWHC 2738 (Comm).

A Tribunal's Power to Correct Arbitral Awards

In *Mobile Telecommunications Co KSC v HRH Prince Hussam Bin Saud Bin Abdulaziz Al Saud and others,*[14] the English Commercial Court considered the scope of Article 27.1 of The London Court of International Arbitration (*LCIA*) Rules 1998. The rule states that a party to an arbitration proceeding may request the Arbitral Tribunal to correct any errors in computation, clerical or typographical errors or any errors of a similar nature in the Award within 30 days of receipt of any award.

The underlying proceeding arose from an arbitral award against Prince Hussam arising out of a 2010 loan agreement. The Tribunal held that the claimant, MTC, is entitled to payment of the sum of US527,208,529 from the respondent. When the claimant sought to enforce the Award in Saudi Arabia, the Saudi enforcement court held that the Award was not enforceable due to the wording used by the Tribunal not being explicit. MTC asked the Tribunal to correct or clarify its Award. However, the Tribunal said it could not do that because its mandate had expired after the 30-day deadline provided in Article 27.1. MTC obtained an order extending the time under section 79 of the English Arbitration Act 1996. Lastly, Prince Hussam applied to set aside the section 79 order extending the deadline for corrections.

The Court dismissed the application of Prince Hussam and held that the Tribunal had the power to correct the Award within the meaning of article 27. The Court stated that "any English reader of the award, who is familiar with arbitration or the way that tribunals and judges express themselves in this country, would appreciate that the tribunal intended that the entitlement to which they referred meant that the defendant should pay that sum of money."[15] This decision illustrates the scope of Tribunal's power to correct arbitral awards under LCIA Rules 1998.

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[14] [2019] EWHC 3109 (Comm).

[15] Ibid, [4].

Jurisdiction of an Arbitral Tribunal Over a Dissolved Company

In *GA-Hyun Chung v Silver Dry Bulk Co Ltd*,[16] the English Court overturned an arbitral award under section 67 of the English Arbitration Act 1996 because the tribunal did not have jurisdiction over a dissolved company.

The arbitration arose out of the sale of a ship by Homer Hulbert Maritime Co Ltd (HH) to the defendant, Silver Dry Bulk Co. Ltd (SDBC). The agreement between HH and SDBC contained a London arbitration clause. SDBC filed a notice of arbitration in October 2014. However, HH did not respond. Subsequently, a sole arbitrator was appointed, who awarded damages to SDBC. HH's trustee challenged the award under section 67 due to HH being dissolved eight months before the notice of arbitration. Therefore, it was argued that the arbitration was a nullity. The Court had to consider two issues: whether the challenge fell within section 67 and whether HH had existed as a corporate entity in October 2014 under the law of the Marshall Islands.

Moulder J held that the challenge fell within the scope of section 67 since it relates to the substantive jurisdiction of the arbitral tribunal as defined in section 30 of the English Arbitration Act 1996. Section 30 is about the competence of tribunal to rule on its own jurisdiction, that is, as to whether the tribunal is properly constituted or not. If HH did cease to exist before the commencement of this arbitration, the arbitrator could not be validly appointed, and the tribunal was not properly constituted. The Court cited Lloyd LJ in *Baytur SA v Finagro Holdings SA*[17] and stated that there cannot be a valid arbitration when one of the two parties has ceased to exist.[18] The Court also held that HH had ceased to exist by October 2014 under the law of the Marshall Islands. Therefore, the arbitration was a nullity. The decision shows the importance of taking reasonable steps to check the legal status of a proposed respondent according to the applicable law before sending a notice of arbitration.

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[16] [2019] EWHC 1147 (Comm).

[17] [1992] 1 Lloyd's Rep 134.

[18] Ibid, 152.

Settlement Agreements

In *Sonact Group Limited v Premuda SPA*,[19] the Court considered whether an arbitration clause in a charterparty applied to a settlement agreement. This decision is another example of the pro-arbitration stance of the English Courts.

The Owner chartered its vessel, the Four Island, to the claimant. The Charterparty included an arbitration clause providing London as the seat of arbitration. Later, the Owner had a claim for demurrage, which was settled by an exchange of emails. Subsequently, the Charterer failed to pay the agreed amount in the settlement. As a result, the Owner's solicitors gave notice of arbitration. However, the Charterer contended the jurisdiction of the arbitral tribunal stating that the settlement agreement did not have an arbitration clause. Afterwards, the Charterer challenged the Arbitral Award under section 67 of the Arbitration Act 1996.

The Court took the commercial context into account and held that the wording of the arbitration clause was broad enough to include the settlement agreement, although the settlement agreement gave rise to a new legal relationship between the parties. Considering the facts of the case, the exchange of emails was described as an informal and routine arrangement to finalise the sums due under the charterparty. The Court stated that there is no choice of law clause in the settlement agreement either, but it is obvious that the parties intended that the choice of English law contained in the charterparty would continue to apply. Therefore, the arbitration clause was broad enough to include any disputes that arose under the charterparty.

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Error of Law

The decision of the High Court in *Eleni Shipping Limited v Transgrain Shipping B.V.*,[20] shows the high trash hold to challenge an award under section 69. The substantial dispute was about correct construction of two clauses in a time charter.

The Owners commenced arbitral proceedings against the sub-charterers for the loss caused during the vessel's hijack by pirates. The

[19] [2018] EWHC 3820 (Comm).

[20] [2019] EWHC 910 (Comm).

total claim was around US$5.6 million, including US$4.5 million unpaid hire. The Tribunal rejected the Owners' claim for hire for the hijacked period because of two additional typewritten clauses in the Charterparty excluding charterers from liability to pay during this period. Subsequently, the Owners appealed under section 69 of the Arbitration Act 1996 to challenge the award and contended the Tribunal's construction of these two clauses.

Clause 49 stated that "Should the vessel be captured or seized or detained or arrested by any authority or by any legal process during the currency of this Charter Party, the payment of hire shall be suspended for the actual time lost […]". After reweaving recent high authority on the principles applicable to the construction of commercial documents, Popplewell J held that clause 49 only covers the circumstances where an authority or legal process captures the vessel.

On the other hand, Clause 101 stated that "Charterers are allowed to transit Gulf of Aden any time, all extra war risk premium and/or kidnap and ransom as quoted by the vessel's Underwriters, if any, will be reimbursed by Charterers. […] In case vessel should be threatened/kidnapped by reason of piracy, payment of hire shall be suspended. […]" The Owners claimed that the vessel is off-hire only if the kidnap or threat of kidnap by piracy took place during transit of the Gulf of Aden. It was held that the expression "Gulf of Aden" is not capable of being given a meaning by way of any geographical definition in the context of a time charter of this kind. The purpose of such clause is to enable the Charterers to trade the vessel through the Suez Canal. Therefore, the Owners' appeal was dismissed because the appeal fails on clause 101.

Even though the Court did not overturn the award, it held that the Tribunal made an error of law. This is another case emphasising the role of the English Courts in Arbitration proceedings and its pro-arbitration stance.

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