International Arbitration Alert

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The English High Court Shuts Out "Inadequate Reasons" as a Basis to Set Aside an International Arbitration Award – 'Non-Intervention' approach of Courts in the Arbitration Process is Reinforced.

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Where London is the Seat those involved in international arbitration ought to know that challenges under Section 68 of the Arbitration Act 1996, (the "**Act**") require highly exceptional conditions. We say this because Section 68 imposes a high hurdle for applicants[1]; there will only be a serious irregularity if what has occurred is "far removed from what could reasonably be expected from the arbitral process"[2]; the importance of upholding arbitration awards has been repeatedly stressed[3]; and because the requirement of "substantial injustice" in Section 68 is *additional* to that of a serious irregularity such that both must be established[4]. A new case, *Islamic Republic of Pakistan & Anor v Broadsheet LLC*[5] has made the position in London even clearer and highlighted that, "The tribunal has to give reasons for the decisions on the essential issues but does not have to deal with each point made by a party in relation to those essential issues or refer to all the relevant evidence". It appears that the English Courts will not readily entertain "inadequate reasons" as a basis to set aside an Award. The finality of arbitration awards should not be under-estimated and parties with an especial interest in the reasoning, calculations or supporting information in an award ought to codify such special instructions in the procedural orders. As explained below, the position is not materially different in the other frequently used seats.

In *Islamic Republic of Pakistan & Anor v Broadsheet LLC* the defendant was appointed pursuant to an asset recovery agreement dated June 2000 (the "**ARA**"), to trace and locate assets taken from the State and other institutions and transfer them back to the State. Under the ARA in relation to assets recovered, the defendant was to receive 20% of the "amount available to be transferred." By a letter dated October 2003, the second claimant gave notice to rescind the ARA to the defendant and stated that the defendant had committed repudiatory breaches of contract. The defendant commenced arbitration proceedings against the claimants between 2009 and 2011. The tribunal awarded the defendant $21,589,460 plus interest as damages for the breach and repudiation of the ARA by the claimants. The majority of the claim, $19 million related to the defendant's loss of the chance claim in relation to the Sharif

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family, namely the value of the chance it lost to receive payment under the ARA in respect of recoveries made from Mr. Sharif and his family.

Pakistan challenged the award on the basis of Sections 68(2)(c) and 68(2)(h) of the Act alleging a "*serious irregularity*" in that there was a failure of the tribunal "*to conduct the proceedings in accordance with the procedure agreed by the parties*" and/or "*a failure to comply with the requirements as to the form of the award.*" At its core, Pakistan claimed that the tribunal had not given sufficient reasons "*to enable [Pakistan] to understand why the tribunal valued a particular loss off chance claim at USD 19 million and how the loss of chance discount had been applied.*" Mrs. Justice Moulder having reviewed the earlier case law and the tribunal's post Award ruling[6] decided:

> "… it is not open to the claimants to assert that there has been a failure to conduct the proceedings in accordance with the procedure agreed by the parties amounting to a "serious irregularity" by reason of a failure to provide a more detailed explanation on how the arbitrator reached his conclusions on the evidence in relation to the US$ 19 million: the award contains reasons for its conclusion on the issues and the parties have agreed that the tribunal should determine matters of fact. By requiring a further explanation of how aspects of the evidence were dealt with, the court would have to review the findings of fact and the evaluation of such evidence by the tribunal. On the authorities that is not a permissible approach and would be contrary to the limited role for the courts given by the Act. For these reasons, it is equally not open to the claimants to assert that there has been a failure to comply with the requirements as to the form of the award and thus a "serious irregularity" under section 68."

The position in London is aligned with other major arbitral seats: Paris, Geneva, Stockholm and New York. "*Insufficient reasons*" appear not to be a good ground for annulment/non-recognition of an arbitral award.

Paris

French courts have dismissed applications for annulment of awards based on an argument that arbitral tribunals had given improper or unfounded reasons. For example, although awards must give reasons, "*it is not for the cour d'appel, when seised of an application for annulment, to decide whether the reasons given by the arbitral tribunal are sound.*"[7]. The French courts, like London, look at the material existence of reasons, but do not review their content. Despite terms relating to international arbitration in the French Code of Civil Procedure (the "**FCCP**") such as Article 1502 (which confirms that French law does not require reasons for an arbitral award unless the parties have otherwise agreed that reasons must be provided) recent Court Decisions *may* be changing that position. The Paris Court of Appeal[8] held in November 2018 that:

> *the requirement to state reasons for judicial decisions is an element of right to due process; that it is necessarily included in the mission of the arbitrators, even if it does not appear in the arbitration rules to which the parties have submitted themselves.*

Geneva

Switzerland's Private International Law requires that an award shall be reasoned absent an agreement to the contrary. However, the Swiss Federal Tribunal[9] has rejected arguments that an un-reasoned award is against public policy "*since the requirement of reasoning is at the disposal of the parties, it cannot be considered as a right that cannot be waived and, consequently, cannot be declared of public policy.*" Similarly, the Swiss Federal Tribunal[10] has stressed that the right to be heard in adversarial proceedings does not require an international arbitral award to be reasoned. The Swiss Federal Tribunal**[11]** has clarified that the right to be heard is violated when an arbitral tribunal fails to consider allegations, arguments, evidence or offer of proof presented by the parties which are decisive for the decision to be rendered. In such cases, the right to be heard thus imposes a minimum duty on arbitrators to examine and deal with relevant and essential issues – which may leave open the possibility that an award could be challenged for insufficient reasons if the Swiss Federal Tribunal finds that the arbitrators have not dealt with an argument that appears decisive.

Stockholm

The Swedish Arbitration Act as amended on 1 March, 2019, does not require a Tribunal to provide reasons for the award. A failure to provide reasons will therefore not constitute a "procedural irregularity" for the purpose of Section 34(7) of the Swedish Arbitration Act. The Swedish Supreme Court in *Soyak International Construction & Investment Inc. v Hochtief AG*[12] stressed that when the parties have agreed to require a reasoned award (for example if the arbitration is governed by arbitral rules which require reasons), tribunals must comply in keeping with the expectations of the parties since reasons constitute "*a guardian of the rule of law.*" However, in the context of a challenge to the reasons provided, such considerations must be weighed against the interest of ensuring finality of awards. On balance, the Supreme Court held that only a total lack of reasons (or reasons so deficient that – in substance – they equate to a total lack of reasons) can constitute a procedural irregularity for the purpose of Section 34(7).

New York

Under the Federal Arbitration Act (FAA) arbitral awards do not need to be reasoned. *United Steelworkers of Am. V. Enter. Wheel & Car Corp*[13]. It is perhaps unsurprising that the lack of reasons in an award will not be a ground for non-recognition under the FAA unless the parties otherwise agreed that the award should be reasoned (for example through an agreement on the applicable arbitral rules or otherwise during the proceedings). Under the FAA even if the parties agreed that an award must contain reasons, an award will generally be recognized and enforced in spite of arguments that the reasoning of the tribunal was of poor quality / incorrect, incomplete or that the reasons provided are inconsistent with the dispositive portion of the award[14].

1 *Lesotho Highlands Development Authority v. Impregilo SpA & Ors* [2006] 1 AC 221 where Lord Steyn at paragraph 26 made clear:

> In the eighties and nineties there was persistent criticism about the excessive reach of these powers of intervention. The Departmental Advisory Committee on Arbitration Law ("The DAC") under the chairmanship of Lord Justice Saville (now Lord Saville of Newdigate) explained in its Report on the Arbitration Bill, at p 11, paras 21-22:

> ". . . there is no doubt that our law has been subject to international criticism that the courts intervene more than they should in the arbitral process, thereby tending to frustrate the choice the parties have made to use arbitration rather than litigation as the means for resolving their disputes.
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> Nowadays the courts are much less inclined to intervene in the arbitral process than used to be the case. The limitation on the right of appeal to the courts from awards brought into effect by the Arbitration Act 1979, and changing attitudes generally, have meant that the courts nowadays generally only intervene in order to support rather than displace the arbitral process. We are very much in favor of this modern approach . . ."
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> A major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process. [emphasis added].

2 *The Ojars Vacietis* [2012] 2 Lloyd's Rep 181 Field J at paragraph 30.

3 *Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 Bingham J (as he then was) stated (cited in The Ojars Vacietis at paragraph 34):

> "as a matter of general approach the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavoring to pick holes, inconsistencies and faults on awards with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it."

4 *Terna Bahrain Holding Co YJJ v Bin Kamel Al Shamzi* [2013] 1 Lloyds Rep 86.

5 [2019] WLR(D) 402.

6 In January 2019 the claimants made an application to the tribunal under Section 57 of the Act for certain corrections to the Award including the correction of the omission in relation to the application of the "loss of chance discount" in respect of the Sharif Family Other Assets. The tribunal made a ruling dated February 2019 in which it determined that there was no omission in relation to the "loss of chance discount."

7 Paris, 18 November 1982, Rev. Arb. 1983.197, note P. Level.

8 Paris, 20 November 2018, nos 16/10379 and 16/10381. To some extent, it appears that the Paris Cour d'Appel may be bringing the international arbitration regime more into line with French domestic arbitration which also explicitly requires a reasoned award (see Articles 1483 1°,1492 6° of the FCCP).

9 ATF 101 Ia 521 E.4, 12 December 1975; ATF 116 II 373 E. 7, 21 August 1990 and ATF 130 III 125 E.2.2, 9 December 2003.

10 ATF 128 III 234 E.4b, 1 February 2002.

11 ATF 133 III 235 E 5.2, 22 March 2007.

12 [2009] NJA 128.

13 363 US 598 (US S Ct 1960). Further, under the FAA an arbitral award may be vacated only upon a showing of (1) corruption, fraud, or undue means, (2) partiality of an arbitrator, (3) misconduct or misbehavior of an arbitrator, or (4) "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." The fact that an arbitrator "got it wrong" is not one of the enumerated bases for overturning an award.

14 *Leeward Constr. Co. Ltd. v. Am. Univ. of Antigua – Coll. of Med.*, 826 F.3d 634, 640 (2d Cir. 2016).