Orascom TMT Investments S.À.R.L v. Veon Ltd

[2018] EWHC 985 (Comm)

Date: 11th May 2018

In a recently published Commercial Court judgment, which was initially delivered *ex tempore* in private, Mr Justice Andrew Baker considered a challenge, brought under section 68 of the Arbitration Act 1996 ("the Act"), to a final arbitral award made under the LCIA rules. The claim failed and was dismissed. However, the decision is of interest to arbitration practitioners for two main reasons. First, the Judge provided a helpful analysis of when section 68(2) of the Act will in principle be engaged. Second, the Judge indicated that the common practice for formulating and presenting challenges under sections 67 & 68 of the Act was inappropriate and should not be followed. The Judge also concluded by explaining why he decided that a copy of his decision should be published.

The decision is considered by **Ben Elkington QC, FCIArb**[1] and **Richard Liddell**[2] of 4 New Square.

BACKGROUND

The Claimant sought to challenge, under section 68 of the Act, a final arbitral award made under the Rules of the LCIA. Section 68(1) provides that a party to arbitral proceedings may apply to the court challenging an award on the grounds of "*serious irregularity affecting the tribunal, the proceedings or the award.*" Section 68(2) provides that "serious irregularity" means an irregularity of one or more specified kinds "*which has caused or will cause substantial*

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injustice to the applicant." One of those specified kinds of irregularity, set out in section 68(2)(d) is a "*failure by the tribunal to deal with all the issues that were put to it.*"

The claim was brought by Claim Form dated 23 October 2018, but the Court observed that the Claim Form did not clearly or helpfully define the issue said to have been put to the tribunal, but not dealt with by the tribunal, in their award. Rather, the Claim Form merely stated that the tribunal "…*failed to address a fundamental issue as to the impact of Italian law on the defendants' obligations under the contractual indemnity that was the subject of the parties' dispute*".

The award, and therefore the challenge, arose out of a share sale agreement entered into in April 2011, by which Orascom (the Claimant in this case and respondent in the arbitration) sold to Veon (the Defendant and claimant in the arbitration), the Wind Telecom Group. The share sale agreement was governed by New York law, but contained an arbitration agreement providing for arbitration in the event of dispute seated in London under the LCIA Rules.

The arbitration award ran to some 387 paragraphs across 183 pages. It was noted by the Court to be made by three very well-known and experienced New York arbitrators. The award concerned a claim made by Veon against Orascom for an indemnity in respect of financial loss Veon had suffered in settling claims arising in Italy as a result of three tax audits undertaken by the Italian tax authorities relating to Wind Group transactions. Veon was successful and Orascom's section 68 challenge related to only one of those tax audits.

WAS SECTION 68(2) OF THE ACT ENGAGED?

Sections 68 (1)-(2) of the Act provide as follows:

(1) A party to arbitral proceedings may…apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award…

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant….

…..(d) failure by the tribunal to deal with all the issues that were put to it

……

The first matter for the Court to determine was whether there was a "relevant issue", i.e. an issue which if put, and if not dealt with by the tribunal, would be capable in principle of engaging section 68(2) of the Act. The Court noted that a feature of the way in which section 68(2) was drafted was that the statute "*on the face of things, takes proof that the case falls within any one of the particular sub-paragraphs as proof, without more, that there has been an irregularity in the arbitral process*".[3] In other words, on the face of it, section 68(2)(d) provides that if a tribunal has failed to deal with an issue put to it, then such failure amounts (without more) to irregularity.

However, the Court made it clear that this was not the effect of section 68(2)(d). The meaning of "issue" in section 68(2)(d) must be informed by the drafting of the section. Not all "issues" in a case will fall within the meaning of "issue" in section 68(2)(d). Only some of them will do so. More specifically, an issue will only fall within section 68(2)(d) if a tribunal's failure to deal with that issue (assuming it was put to the tribunal) could properly be regarded as a procedural irregularity of the type which section 68(2) is targeting.

Applying that test, the Court concluded that the question or questions which the Claimant alleged the tribunal had failed to deal with did not amount to, or give rise to, an issue within the meaning of section 68(2)(d), i.e. an issue which was of sufficient significance that a failure by the tribunal to deal with it would engage section 68(2)(d). Thus the challenge failed *in limine*.

HOW SHOULD THE CHALLENGE UNDER S.68 BE PLEADED?

Although the claim did not ultimately turn on the Court's criticisms of the Claimant's pleaded case, the Court did consider that the manner in which the Claimant had approached the challenge under Section 68 was unsatisfactory. That was because the Claim Form (a) failed to provide a clear and succinct definition of the "issue" said to have been put to the arbitrators but not dealt with by them and (b) did no more in substance than recite, by reference to the particular award in this case, the other statutory requirements and refer to a witness statement which contained argument and comment.

Although noting that it had become common practice in section 68 (and section 67) challenges for the Claim Form to identify the bare statutory essentials and merely to refer

[3] Para 26.

to supporting witness evidence, the Court considered that this was insufficient. The Court gave the following guidance:

- The function of the Claim Form was to identify the remedy claimed and the grounds on which the claim was made and not merely to identify that it was a claim under section 68(2), or which particular sub-paragraph was invoked;

- The Claim Form should stand as a sufficiently detailed and particularised statement of case to enable both the defendant (to the challenge) and ultimately the judge dealing with the matter to see precisely the nature of the challenge, the grounds upon which it is said to arise and, as a result, the particular questions that would need, or may need, to be dealt with at any hearing;

- Witness statements served in support of a section 68 claim should contain evidence, not comment or argument and are not the proper vehicle for setting out the analytical case to be advanced before the Court; and

- In circumstances where the procedure for section 68 (and section 67) challenges do not involve, unless specifically ordered in a particular case, an exchange of statements of case separate to the Claim Form, the Claim Form must serve that purpose.

SHOULD THE JUDGMENT BE PUBLISHED?

The judgment was delivered *ex tempore* in private following the hearing, which was conducted in private in the normal way.

In deciding whether or not to approve his judgment for publication, the Judge considered the parties' submissions and the case of *Symbion Power LLC v Venco Imtiaz Construction Co* [2017] EWHC 348 (TCC), where the question of publication of a judgment concerning an arbitration award and whether it should be anonymised for confidentiality reasons was dealt with at [86]-[95].

In circumstances where the arbitration award was now in the public domain in New York and Malta (in the context of enforcement proceedings) and given the Judge considered

that (a) the Court's analysis of s.68(2) might be of interest to those engaged in arbitration seated in London and (b) the Court's observations as to procedure would be of general interest, Mr Justice Andrew Barker concluded that it was right for the judgment to be published.

COMMENTARY

This decision sounds two main warning bells. First, if a party is going to pursue a challenge under section 68(2)(d) of the Act, it is not enough for the challenger merely to establish that the Tribunal failed to consider a particular issue. The challenger must also establish that the issue was of a particular type, i.e. one which was sufficiently significant that a tribunal's failure to deal with it could properly be regarded as a procedural irregularity of the type targeted by section 68(2). Second, what has become common practice in challenges under sections 67 and 68 of the Act (namely providing an imprecise Claim Form which, in turn, refers to a more detailed and argumentative witness statement) is now clearly bad practice and a challenger who ignores the Court's guidance will do so at its peril.

The first issue is unlikely to come as a surprise to arbitration practitioners given the language of section 68 of the Act and the pre-existing case law. However, the practical guidance will serve as a useful wake up call to many practitioners who have become accustomed to setting out the case more fully in a witness statement as opposed to in a detailed Claim Form. That a witness statement should not contain commentary or argument is also a useful reminder to litigators, not just in section 67 and 68 challenges, but also more generally.

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