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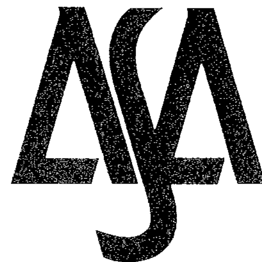

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D. Jurisprudence étrangère

I. ENGLAND & WALES: AN OVERVIEW OF A FEW RECENT CASES

In ***Bernuth Lines Ltd v High Seas Shipping Ltd*** [2005] EWHC 3020 (Comm) (21 December 2005),[1] the English High Court considered **whether arbitration proceedings could be validly commenced by e-mail** in the context of an application made under s.68 of the Arbitration Act 1996 (the 'Act').

Bernuth Lines chartered a vessel owned by High Seas Shipping from Florida to Nicaragua and back. Due to the size of the vessel's draft, she was unable to enter the designated port; her cargo had to be off-loaded onto another Bernuth vessel. The journey last longer than initially planned and a dispute arose regarding the parties' invoices.

High Seas first sent a revised invoice to Bernuth Agencies, Bernuth's agent in Florida, by post. Bernuth Agencies replied by sending claims invoices of a greater amount, by fax. High Seas ignored them and sent a second hire invoice, first through their own agent and then, six months later, through their Florida lawyers. These were apparently sent to specific individuals at Bernuth Agencies, by e-mail. The last correspondence required security 'in order to satisfy any London arbitration award in favour of High Seas'.

Just over a month later, High Seas's British lawyers sent a letter threatening arbitration proceedings under the London Maritime Arbitration Association ('LMAA') Small Claims Procedure. It was sent by e-mail to info@bernuth.com, the address which appeared on the Lloyds Maritime Directory and on Bernuth's website, next to the postal address, telephone and fax numbers of the company. The Claim Submission and letter to the LMAA was sent to the same e-mail address a month later, as was all the correspondence with the LMAA and the arbitrator that followed, including the final award, rendered less than two months later. However, the final award, awarding US$40,000 to High Seas, was also sent to Bernuth by post.

[1] The full text of the decision is available on www.bailii.org.

Bernuth brought an application to set aside the award under s.68 of the Act, arguing that 'the arbitration proceedings were not properly brought to the attention of Bernuth Lines such that there has been a serious irregularity affecting the proceedings which has caused or will cause them substantial injustice.' Bernuth argued, *inter alia*, that service by e-mail, in particular on a 'general information e-mail address' was not valid under the Act, or indeed under the LMAA Terms and that the Small Claims Procedure (which envisages service by e-mail) could not apply since Bernuth had a counterclaim bringing the total amount in dispute beyond the US$50,000 limit.

The court held that where the parties have not specifically agreed, **a notice under s.76 of the Act can be served 'by any effective means', which is 'purposely wide' and may include e-mail**, even if e-mail has not been recognised under the English Civil Procedure Rules ('CPR') as a valid means of service absent express agreement. The court made a distinction between, on the one hand, the CPR, which 'cater for litigants of all kinds from major corporations represented by the most accomplished firms of solicitors to individuals represented by more modest firms and those who are not represented at all' and, on the other hand, arbitrations 'usually conducted by businessmen represented by, or with ready access to, lawyers'.

However, the court also stressed that **not all service by e-mail would necessarily be considered an 'effective means of service'**:

> 'That is not to say that clicking on the 'send' icon automatically amounts to good service. The e-mail must, of course, be despatched to what is, in fact, the e-mail address of the intended recipient. It must not be rejected by the system. If the sender does not require confirmation of receipt he may not be able to show that receipt has occurred. There may be circumstances where, for instance, there are several e-mail addresses for a number of different divisions of the same company, possibly in different countries, where despatch to a particular e-mail address is not effective service.' (para. 29.)

In this instance, the e-mail address was valid; the situation was the result of an 'internal failing' and was in effect the same as the documents having been physically deposited at Bernuth's offices, but ignored by the staff. Bernuth could not hide behind such failing, which itself could not be

credibility explained by the fear of 'spam', given that the e-mails, in particular from the LMAA Arbitrator bore 'none of the hallmarks of 'spam''.

The court also considered (*obiter*) the effect of the LMAA Small Claims Procedure, which allows service of all documents by e-mail. It concluded that the Small Claims Procedure did apply to the service of the notice of arbitration (the 'claims submission') in this instance, even though High Seas knew of a likely counterclaim which would take the dispute outside the rules. In other words, **under the LMAA Terms, the amount of the claim was determinative of the procedure.**[2] Therefore, service would have been valid regardless of the provision of s.76 of the Act.

The fact that the arbitration had been validly commenced by e-mail meant that, despite the Claimant's counterclaims which could have arguably been set off against the amount awarded, the judge declined to set aside the award. Finally, the judge noted that the application should have been brought under s.67 – lack of jurisdiction – rather than s.68 of the Act

Whilst this is undeniably a good decision, in practice, it may not have any extensive application. First, under most institutional rules, arbitration proceedings can only be validly commenced by the Claimant's submission of a Request or Notice to the institution in the required number of (hence necessarily hard) copies. That is the case under the ICC Rules, the Swiss Rules and the LCIA Rules. Those rules do not expressly provide for the means of service on the Respondent, but having received sufficient hard copies for the Respondent and the arbitrator(s), it may be presumed that the institution is expected to deliver hard copies, rather than electronic copies by e-mail. The issue could therefore only arise, either where institutionalised rules provide that proceedings may be commenced in a different manner, for instance under the LMAA Terms (which refer back to the Act on this issue – hence in *Bernuth* the decision had some importance), or in *ad hoc* proceedings, with a seat in England.

Secondly, with respect to subsequent service, again, the most commonly used arbitration rules allow service by email, expressly or impliedly, so that the parties would be deemed to have 'agreed the manner of service' of

[2] This would not be the case with regard to the Expedited Procedure under the Swiss Rules since the relevant amount to determine the relevant procedure is clearly stated to be the aggregate of the claims, counterclaims and any set off defences (Art. 42).

documents, if not 'in pursuance of the arbitration agreement', at least 'for the purpose of the arbitral proceedings' (under s. 76(1) of the Act).[3]

Thirdly, in practice, it appears unlikely that an arbitration institution and/or arbitrators involved in large disputes would choose to communicate only by e-mail with the Respondent, in particular in a default situation. They may even be ill-advised to do so in light of Article V(1)(b) of New York Convention, which envisages the refusal of recognition and enforcement of the award where a party was 'not given proper notice of the arbitration proceedings'.

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In ***ABB AG V Hochtief Airport GmbH & Athens International Airport S.A.*** [2006] EWHC 388 (Comm) (8 March 2006),[4] the English High Court decided on another s.68 application, arising out an award rendered in LCIA arbitration proceedings, with London as the seat of the arbitration and Greek law as the applicable law.

The case was described by the arbitrators as a 'high profile case' and the facts as well as the arguments raised by the parties are rather complex. Essentially, the dispute arose out of the transfer of a minority (but decisive) shareholding in Athens International Airport ('AIA') by a German electrical company, ABB, to a third party, Horizon, part of a Greek group of companies ('Copelouzos'), with presumed close links with the Greek State. The validity of 2004 the share transfer agreement was challenged by Hochtief Airport ('HTA'), a German construction company and 40% shareholder in AIA, the other (55%) shareholder being the Greek State.

The arguments initially turned on the alleged existence of an oral shareholders agreement whereby HTA's consent was required and could be reasonably withheld prior to any share transfer, and whether in the circumstances, in 2004, it was withheld in good faith. In the course of the proceedings, and as a result of further disclosure of documents by ABB, the issues came to include the conduct of ABB in having previously (in 1999) entered into 'Three Agreements' with Copelouzos, on a confidential basis. Pursuant to these agreements, ABB's 5% shareholding would be held on bail

[3] The LCIA Rules, expressly provide for service by email (Art. 4.1 for service of documents by a party) and the ICC Rules refer to 'any other means of telecommunication that provides a record of the sending thereof' (Art. 3(2)). The situation may be somehow more ambiguous under Art. 2 of the Swiss Rules, which only refer to 'delivery', as do the UNCITRAL Rules.

[4] The decision is also available in full on www.bailii.org.

for the Greek company and ultimately transferred to it by ABB, once feasible under the alienation provisions of the main shareholders agreement. ABB had apparently, at or about the same time, negotiated openly with HTA for the sale of its shareholding in AIA, without ever disclosing the device agreed or to be agreed with Copelouzos.

On the first issue, the Tribunal found that there was no effective oral agreement regarding the transfer of shares. However, on the second issue, the Tribunal found against ABB and concluded that: (a) the Three Agreements 'device' was in fact in breach of the main shareholders agreement in force at the time; (b) thus, in purporting to negotiate with HTA, back in 1999, at or about the same time as concluding such a deal with Copelouzos, ABB had acted in breach of the main shareholders agreement and implied duty to deal in good faith; and (c) it could be inferred from the facts (detailed in the award and reproduced in the court decision) that the actual share transfer agreement of 2004 was 'simply part and parcel of the device' to evade the alienation provision of the main shareholders agreement, negotiated in 1999 and implemented thereafter. It was thus equally in breach of that agreement. The transfer of shares to a Copezoulos company (as well as its registration) was therefore null and void.

ABB challenged the award under s.68, on the basis of 'serious irregularities affecting the proceedings and/or the award giving rise to substantial injustice in three respects':

(i) The tribunal had 'decided the case on a basis not argued and/or without giving to ABB a reasonable opportunity of dealing with the point' since HTA had not contended that the transfer of shares had taken place pursuant to the 1999 Three Agreements;

(ii) The tribunal had 'failed to decide or even to refer to the Greek law issue', being whether a finding of fact that ABB had acted in bad faith in 1999 prevented ABB from relying on HTA's own bad faith in withholding its consent to the 2004 share transfer agreement; and

(iii) ABB's position was that it had not acted in bad faith vis-à-vis HTA in 1999, but ended the negotiations because of HTA's own intransigence; yet, on two occasions the tribunal had declined ABB's request for documents showing whether HTA was ever prepared to buy ABB's shares in 1999 and, if it had been, its financial limit.

Before addressing each of the grounds, the High Court canvassed numerous authorities, including *Lesotho Highlands v Impregilo*. It reiterated that **the hurdle to be overcome in finding a 'substantial injustice' or 'serious irregularity' under s.68 was a high one, so that the section was designed to deal only with 'extreme cases'**:

> 'All of these authorities and judicial observations emphasise the restricted ambit of the jurisdiction under s.68. It is not a ground for intervention that the court considers that it might have done things differently or expressed its conclusions on the essential issues at greater length. Furthermore it is particularly to be borne in mind in the context of international arbitrations that the arbitrators may not all have been brought up in the same legal tradition. In order to express the reasons for their award they must find language with which each is comfortable.' (para. 67.)

In this instance, following to a thorough review of the parties' submissions, the transcript of the hearings and the award, the court rejected each of the three grounds relied upon by ABB. The last two grounds were addressed as *obiter dicta* only.

With regard to the first aspect of ABB's application, the court held:

> 'All the essential elements that might lead to [the tribunals'] conclusion were fairly in play or, to use a different expression, in the arena .... I do not consider that the duty to act fairly required the tribunal to refer back to the parties its analysis of the material and the additional conclusion which it derived from the resolution of arguments as to the essential issues which were already squarely before it. In my judgment ABB had had a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion. ... I can see no further argument which ABB could have deployed which would have been in substance different from the arguments already deployed.' (para 72.)

On the second ground, the 'Greek law issue', the court found that, whilst it was unfortunate that the tribunal's reasoning had been 'very compressed' on this issue, it was clear that the Tribunal had already formed an adverse view of ABB's conduct and rejected the opinion of ABB's legal expert.

Again, **what was important was 'that all these issues were fully ventilated in the arbitration.'** (para 76.)

The court added that ABB's **attack was 'in substance a criticism of the adequacy of the reasons rather than an assertion of an irregularity such as is contemplated by s.68.'** The question of substantial injustice therefore did not arise. In any event, there could be none since 'the points which each side were taking were fully canvassed in evidence and argument. ABB was not deprived of the opportunity fairly to deal with the point. The tribunal did not fail to deal with an issue that was put to it.' (para 80.)

On the third and last ground for challenge – whether the tribunal had failed to act fairly and impartially in dealing with ABB's document production request under the IBA rules on the taking of evidence, the court intimated that **it would normally be desirable to require both parties to disclose their position during negotiations in order to determine their respective good or bad faith.** However, in this instance, the tribunal had already concluded, on the basis of 'overwhelming evidence', including ABB's attempt to circumvent the alienation provisions of the main shareholders agreement, that ABB had acted in bad faith. Hence, even if the documents had shown what ABB argued they would, **the conclusion would have been the same. Therefore, the tribunal could not be said to have acted unfairly, nor was there any scope for substantial injustice.**

With regard to the overall approach to s. 68 applications, the High Court decision is to be applauded. The court, in no uncertain terms, insisted on the fact that it was 'operating in territory in which judicial restraint and sensitivity is required.' (para 1) and that **it was 'not for this court to tell an international commercial tribunal how to set out its award or the reasons therefore.'** (para 80.)

The court also concluded its thirty-page judgment by **warning against the high number of challenges under ss. 67 and 68 of the Act, which are 'immensely time-consuming and therefore costly'**. However, international arbitrators may be interested to note the court's (hardly concealed) disapproval of the 'compressed' nature of the tribunal's reasoning in the award, which in its view may have encouraged the Claimant's application:

> 'Whilst the court will never dictate to arbitrators how their conclusions should be expressed, it must be obvious that the giving of clearly expressed reasons responsive to the issues as they were

> debated before the arbitrators will reduce the scope for the making of unmeritorious challenges as this ultimately has proved to be. It will be of little comfort to ABB but it may be instructive to know that at the end of my pre-reading in this case I was fairly certain that I would have no alternative but to remit or to set aside the award, notwithstanding the court's general approach to strive to uphold arbitration awards. I have had to strive a little harder than I might reasonably have expected. Reasons which were a little less compressed at the essential points might have been more transparent as to their meaning and might even have dissuaded the unsuccessful party from challenging the award or, at any rate, from mounting so wide-ranging a challenge.' (para. 87.)

There is certainly some force in these remarks, in particular when, unlike s.69 appeals on questions of law which allows a review of the merits of the award, applications brought under s.67 - lack of jurisdiction - and s.68 - serious irregularity- are the Model Law clauses (the equivalent to Art. 190 of the Swiss PIL Act) and cannot, in England, be excluded by the parties (unlike in Switzerland, see note below on the *Sukuman* case).

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In ***Kershaw Mechanical Ltd v Kendrick Construction Limited*** [2006] EWHC 727 (2 March 2006),[5] the High Court heard **an appeal on a question of law arising out of a domestic award** under Section 69 (2)(a), i.e. **where the parties had expressly agreed that such appeals could be brought.**

The dispute related to the effect of the variation of a contract for the construction of a hospital extension in England. The parties had expressly agreed that questions of law could be submitted to the courts for determination under s.69 and Kershaw submitted four questions relating to the proper interpretation of the variation.

Before considering each of the questions, the court embarked on a review of the key English authorities in order to determine 'the correct approach of the court to an appeal under section 69(2)(a) of the 1996 Act', including two issues of particular interest: 'Is there a philosophy of non-intervention, which should influence the court hearing an appeal under

[5] The decision is also available on www.bailii.org.

section 69(2)(a)?' and 'How should the court identify any questions of law arising out of the award?'

As to the first point, the High Court expressly pointed out that any 'philosophy' or 'ethos' of 'non intervention' of the courts under the Arbitration Act, as expressed in *Lesotho Highlands v. Impreglio*, should not deter the courts to address appeals on a question of law under s. 69(2)(a), precisely because the parties have in such a case agreed to the appeal. Such cases are 'at the other end of the spectrum' by comparison to s. 68 applications (serious irregularity, for which no agreement or leave is required), even where such deal in fact with error of law (disguised as an 'excess in powers under s. 68), as was the case in *Lesotho Highlands*.

In addressing the second question, the court usefully reviewed several key authorities including two leading cases, *The 'Chrysalis'* and *The 'Baleares'*,[6] and stressed the need for the courts 'to be constantly vigilant **to ensure that attempts to question or qualify the arbitrators' findings of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged.**' (para. 61, citing Lord Justice Steyn in *The 'Baleares'*.)

On the merits, the case certainly illustrates the difficulty for the courts to distinguish questions of law arising out of the arbitral award from questions of facts, in particular when it comes to the interpretation of complex contractual provisions, and the inevitable inferences drawn by the arbitrator from certain facts. However, the courts' ultimate refusal to review three of the four questions submitted by the Claimant, its reformulation of the remaining question so as to limit its ambit, and it refusal to remit the award for reconsideration, demonstrate an overall restraint in interfering with the arbitrator's findings.

The decision is of interest as it contains a comprehensive review of certain key underlying principles regarding s.69 appeals, even if the two questions mentioned above were examined in the context of the parties' agreement to submit to the state courts questions of law arising out of the award.

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[6] The 'Chrysalis' [1983] 1 Lloyd's Rep. 503, by Mustill LJ and The 'Baleares' [1993] 1 Lloyd's Rep. 215, by Steyn LJ.

Sukuman Ltd v The Commonwealth Secretariat [2006] EWHC 304 (Comm) (27 February 2006),[7] illustrates the English courts' willingness to **uphold agreements to exclude s.69 appeals on a question of law**.

The challenged award was rendered by the Arbitral Tribunal of the Commonwealth Secretariat ('ComSec'). On of the functions of ComSec is to arrange for aid supply to Commonwealth countries and, in this case, it had entered into a contract with Sukuman's predecessor, AMS, for the creation of a website for the Government of Namibia. A dispute had arisen upon completion of the website regarding its ownership. The contract, like all ComSec contracts contained an arbitration clause whereby all disputes were to be referred to the Arbitral Tribunal of ComSec. London was the seat of the arbitration. An award was rendered in favour of ComSec and Sukuman filed an application for leave to appeal under s.69.

The issue before the High Court was whether the settlement of disputes by arbitration 'in accordance with the Statute of the Arbitral Tribunal of [ComSec]' was sufficient to exclude s.69 appeals where the exclusion clause in the Statute provided:

> 'The judgment of the Tribunal shall be final and binding on the parties and shall not be subject to appeal. This provision shall constitute an 'exclusion agreement' within the meaning of the laws of any country requiring arbitration or as those provisions may be amended or replaced.'

The Claimant submitted that:

(i) 'the exclusion of the right of appeal is such a draconian measure when, as here, imposed by the standard arbitration system relied on by a public authority, such as ComSec, that before there can be reasonable notice by ComSec to an opposite contracting party such as AMS there must be an express reference to that exclusion on the face of the agreement to arbitrate'; and, alternatively

(ii) such express reference in the arbitration agreement 'must be necessary in order to comply with the requirements of Article 6 of the European Convention on Human Rights.' (para. 11.)

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[7] The decision is also available on www.bailii.org.uk.

On the first ground, the judge applied existing case law and upheld the exclusion:

> 'The exclusion of the supervisory jurisdiction of the courts under section 69(1) of the 1996 Act is a provision which, unlike an exclusion of liability clause, does not go to the substantive rights of the parties but only to the ancillary dispute resolution machinery under the statute. Given that the consensual exclusion of the right of appeal represents a means of enhancing party autonomy and the achievement of finality, both of them policy foundations of the 1996 Act, it is hard to see why the test of what is reasonable notice of an exclusion agreement should present a particularly high threshold and, in particular, one which would be higher than that required under the 1978 [sic] Act.' In these circumstances, I conclude that ... **the provisions of section 69(1) do permit the incorporation of exclusion agreements by reference without spelling them out in the body of the arbitration clause.**' (paras. 20 & 21.)

Unsurprisingly, the court also rejected the alternative ground based on the European Convention on Human Rights, noting that many countries, including Sweden and the U.S. (to which one could obviously add Switzerland) did not allow any appeal of the merits of arbitral awards, without there being any infringement of Art. 6 of the Convention. He concluded:

> 'It follows, in my judgment, that parties who, by entering into an arbitration agreement, contract into the restricted supervisory regime of Section 69 of the 1996 Act, are not by agreeing to such restrictions acting inconsistently with the human rights of the opposite party, regardless of whether one of them is a public authority. Although they are to have a very restricted right of appeal, that is not impermissible under the Convention. Equally, **if they mutually agree to go down the route of entirely excluding a right of appeal, they are also acting entirely consistently with Article 6 in the sense that they have preferred the facility offered by section 69(1) of finality and privacy to the prospect of subsequent supervisory court proceedings** and, having so agreed, they cannot be permitted to rely on Article 6 and complain that there was anything unlawful in one party, whether or not a public authority, inviting agreement to the exclusion of a restricted right of appeal.' (para 26.)

The High Court's decision must be correct on both grounds. Although not mentioned, the English courts had in fact already decided, under the 1996 Arbitration Act, that an agreement to arbitrate under the 1988 ICC Rules (Art. 24 of which contained a provision as to the finality of the award and the waiver of the right ' to any form of appeal') sufficed to constitute agreement to exclude s.69 appeals.[8] The same would *a fortiori* be true of arbitration under the 1998 ICC Rules, which refer to a waiver of 'any form of recourse' (Art. 28.6) and under the LCIA Rules, which are even more explicit.[9]

In Switzerland, where there is no equivalent to the s.69 right of appeal, the issue of exclusion agreements may nonetheless arise regarding challenges under Art. 190 of the PIL Act, the equivalent of the right to challenge on issues of substantive jurisdiction and serious irregularity under ss. 67 and 68 of the Act. Unsurprisingly, the test is more stringent. Under Art. 192 of the PIL Act, the only way in which parties which have no real link with Switzerland can - partially or totally – waive their right is by an express declaration to that effect. Their agreement to arbitrate pursuant to arbitration rules will not suffice. What will constitute an express agreement reflecting the common intention of the parties will be a question of interpretation in each case, and may well include language originally designed to exclude appeals on a question of law under s.69 of the English Arbitration Act.[10]

Domitille Baizeau

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8 *Sanghi Polyesters Ltd (India) v The International Investor KCFC (Kuwait)* [2000] 1 Lloyd's Rep. 480.

9 Art. 26.9 of the LCIA Rules provides that 'all awards shall be final and binding on the parties' and 'the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made'. The position with regard to Art. 32.2 of the UNCITRAL Rules and Art. 32.2 of the Swiss Rules is more uncertain since it simply refer to the award being final and binding, but not to any right of review, recourse or appeal being waived.

10 It is commonly agreed amongst commentators that an express and specific reference in the agreement to the one arbitration rule providing for a waiver would suffice – *e.g.*, Art. 28.6 of the ICC Rules or Art. 26.9 of the LCIA Rules. On the other hand, a reference to Art. 32.2 of the Swiss Rules or the UNCITRAL Rules would in all likelihood not suffice. See 'Waiving the right to challenge an arbitral award rendered in Switzerland: caveats and drafting considerations for foreign parties' [2005] Int. A.L.R. Issue 3, 69. See also for first *e.g.* complete Art. 192 exclusion agreement: Swiss Supreme Court decision ATF 131 III 173, published in French and English in ASA Bull. 3/2005, p. 496 and note F. Perret, p. 520; and for first *e.g.* of partial Art. 192 exclusion agreement: *Republique du Liban v. Y. et Z.*, 10 Nov. 2005, 4P.98/2005 published in in ASA Bulletin 1/2006, p. 92.