Challenging arbitral awards for breach of procurement laws

What happens where there is a dispute about whether a contract containing an arbitration clause is alleged to have been agreed in breach of procurement laws? The orthodox analysis is that the tribunal should decide the consequences, if any, for the parties to the arbitration clause, because the arbitration clause is separable and maintains its efficacy even if the contract is impugned.[1]

But it can be tempting for a losing party to challenge the decision at enforcement stage.

In this article we look at two decisions in the shipping arena where such challenges have been made. The first is a very recent decision from Mauritius. We then compare it with a more orthodox decision of the Commercial Court in 2018.

State Trading Corporation v Betamax Ltd 2019 SCJ 154

On 31 May 2019 the Supreme Court of Mauritius handed down judgment on a challenge to an award brought by the State Trading Corporation against a company called Betamax Ltd.[2] Mauritius has arbitration law based upon the UNCITRAL Model Law on International Commercial Arbitration (the "Amended Model Law").

STC was a trading arm of the Ministry responsible for Industry, Commerce and Shipping within the Mauritian Government. In November 2009 it entered into a contract of affreightment with Betamax for the transport of all Mauritian oil imports from India for a period of 15 years. The contract was operated for over 5 years until, in January 2015, the Government of Mauritius, by cabinet decision, terminated any further operation of the contract. The reason cited was that it considered there to have been serious breaches of the Public Procurement Act 2006 during tender, although it does not appear that any allegation of fraud or bribery was made. In May 2015 Betamax initiated arbitration proceedings culminating in the issue of an arbitration award, in its favour, in June 2017.

It was STC's position that the contract was illegal and unenforceable because it was entered into in breach of applicable procurement principles. Betamax denied that the Public Procurement Act applied owing to the nature of the contract. The arbitrator agreed with Betamax's position and ruled that the contract of affreightment was effective and enforceable.

[1] See for example: Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration and s.7 of the Arbitration Act 1996.

[2] Not, apparently, anything to do with the video tapes older readers might remember.

STC applied to set aside the arbitral award. The Supreme Court of Mauritius disagreed with the arbitrator's interpretation of the Public Procurement Act 2006 and held that the contract had been entered into in breach of that Act. It followed, the Court said, that the award should be set aside.

We are not qualified to express any view on the merits of the position under the relevant procurement laws. However, viewed from an international perspective the decision seems surprising under the Amended Model Law.

- Mauritius recognises two systems of arbitration; domestic and international. The independence of an arbitration agreement was recognised by the Supreme Court of Mauritius in the domestic sphere in Pieter Both Property Development Ltd v Chemin Grenier Industries (2013) SCJ 279.

- In this case, however, the Mauritius International Arbitration Act 2008 (the "MIAA") was applicable, section 20 of which enacts Article 16 of the Amended Model Law echoing its familiar terminology: *"An arbitration clause which forms part of a contract shall be treated for the purposes of subsection (1) as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause*."

Although the judgment was fully reasoned, it is not clear that the Supreme Court of Mauritius necessarily focused on the orthodox principle that it was for the arbitral panel, and not the court, to determine whether the underlying contract was void for illegality. Arbitration agreements should be set aside only where there are specific grounds to impeach the agreement to arbitrate. Parasitical challenges to the underlying agreement are insufficient for these purposes. The Supreme Court's focused upon standards of integrity, free and open competition and protection from fraudulent and corrupt practices (all perfectly valid public policy considerations) were not directed at the agreement to arbitrate.

ESSA v CMSA [2018] EWHC 224 (Comm); [2018] 1 Lloyd's Rep. 399

Similar issues arose in ESSA v CMSA, a case which came before the Commercial Court in 2018. The dispute arose in relation to a shipbuilding contract concluded between ESSA, a salt mining company (51% of which was owned by the Mexican Federal Government) and the defendant, CMSA. By a contract entered into in July 2014, CMSA had agreed to design, construct and sell a salt barge to ESSA. The contract incorporated an arbitration agreement subject to English law. In May 2015 the contract was terminated by CMSA following ESSA's failure to pay an installment due under the contract. Arbitration proceedings were initiated by CMSA in August 2015. In October 2016 – subsequent to the final hearing on the case's merits, but prior to the issuing of the arbitral award - a law relating to the procurement of public sector services was enacted by the Mexican Congress. As a consequence of this, in November 2016 a division within ESSA passed a resolution decreeing that the tender process under which CMSA had been awarded the contract, was a nullity. A very belated challenge to the arbitrator's

jurisdiction was made in December 2016, which the arbitrator refused to admit for consideration owing to delay. An award was issued by the arbitrator in favour of CMSA in April 2017.

ESSA sought a declaration from the High Court, under s 67 of Arbitration Act 1996, that the contract – including the arbitration agreement – had no effect. ESSA accepted that the contract was binding at the outset, but argued that it had become invalid retrospectively.

Its position was – correctly – dismissed. Given that ESSA had not argued that it lacked capacity, there was no basis upon which it could (or did) argue that the contract was not valid when initially concluded. Accordingly, given that English and Mexican law both treat arbitration clauses as separate agreements capable of surviving the termination or rescission of a main contract it mattered not what had subsequently taken place; the arbitrator had jurisdiction to consider the dispute referred to him and there was no basis upon which the Court could, or should, interfere with his decision.

The approach taken by the Court was uncontentious; in this jurisdiction (as with many others) separability has been fully recognised since the Court of Appeal's decision in Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] 1 Lloyds Rep 455, and is firmly embedded following the House of Lords' decision in Fiona Trust & Holding Corp v Privalov [2008] 1 Lloyds Rep 254 and s. 7 of the Arbitration Act 1996.

The principle is sound: the effect, if any, of breaches of procurement laws to the efficacy of a relevant contract containing an arbitration clause, should generally be considered by a tribunal.

Indeed, *Redfern & Hunter on the Law and Practice of International Commercial Arbitration* (6th ed 2015) goes rather further: it is said[3] that a general principle applies in the context of international arbitration that a state entity cannot rely on its own domestic law to argue that it did not have a capacity to enter into an arbitration agreement thereby rendering it invalid. It is doubtful whether that is established under English law.

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[3] At paragraphs 2.39 - 2.41 and, in particular, footnote 9