FENWICK ELLIOTT

The construction & energy law specialists

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International Quarterly

International Quarterly provides informative and practical information regarding legal and commercial developments in construction and energy sectors around the world.

Inside this issue:

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Welcome to Issue 39

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Welcome to our latest edition of *International Quarterly* which highlights issues important to international arbitration and projects.

In our 39th issue, we begin with a look at the latest update to the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration. James Cameron and Sam Cash review what has changed since the Guidelines were last updated in 2014.

We turn next to a recent decision out of the US Court of Appeals, with Rebecca Penney reviewing the latest ruling in the *Micula* case saga, which demonstrates both the pro-arbitration and pro-enforcement stance of the US Courts.

Ben Smith, Oliver Weisemann and Tajwinder Atwal then look closely at the English High Court's ruling to set aside a £70 million award after discovering that there was, in fact, no arbitration agreement, no arbitration had taken place, and the award itself had been fabricated.

Finally, Tajwinder Atwal looks a a recent UK Supreme Court judgment which found that the compensatory principle and principle of mitigation were both fundamental to the law of damages.

If there are any areas you would like us to feature in our next edition, please let me know.

Jeremy

News and Events

News

Fenwick Elliott is delighted to announce that on 1 April 2025, Karen Gidwani will succeed Simon Tolson as Fenwick Elliott's senior partner, with Simon continuing his extensive work for clients as a partner at the firm. Karen will take up the role following a 25-year career with the firm, having been a partner since 2006. The transition will follow Simon's two-plus decades as senior partner, during which time Fenwick Elliott has more than doubled in size, currently being active in nearly 50 jurisdictions. *Visit our website* to read more.

There is still time to reply to the King's College London **2024 Dispute Boards International Survey**. The aim is to provide a wide-ranging report, gathering insights from across the globe; affording a 'voice' to all participants in all building and engineering industries about the use and effectiveness of Dispute Boards. So your assistance would be greatly appreciated. Anyone whose practice involved Dispute Boards in the past six years is invited to answer the survey, *available here*.

Events

Partners Nicholas Gould and Claire King are featured speakers at the Informa Construction Law Summer School, taking place at Downing College, University of Cambridge, from 9-13 September. *Click here* for more information or to register to attend.

The Conflict Avoidance Coalition is hosting its inaugural **Conflict Avoidance Conference** in London on 2 October. This conference will provide practical strategies and insights into minimising conflict and managing disputes that arise on construction projects. For more information, please get in touch with Jeremy Glover or email capledge@rics.org.

Webinars

Fenwick Elliott hosts regular webinars that address key issues and topics affecting the construction industry. Our next webinar looks at NEC forecasting with Partner Claire King joined in discussion by Kort Egan of Gatehouse Chambers to examine what the NEC form actually provides for when providing quotations for compensation events prospectively, as well as taking a look at the safeguards within the form itself and case law which seek to keep one party from taking advantage of another. Please *click here* to register to attend.

If you would like to enquire about organising a webinar or event with some of our team of specialist lawyers, please contact Stacy Sinclair (ssinclair@fenwickelliott.com). We are always happy to tailor an event to suit your needs.

This publication

We aim to provide you with articles that are informative and useful to your daily role. We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover with any suggestions (jglover@fenwickelliott.com).

Update: the IBA Rules on Conflicts of Interest in International Arbitration 2024

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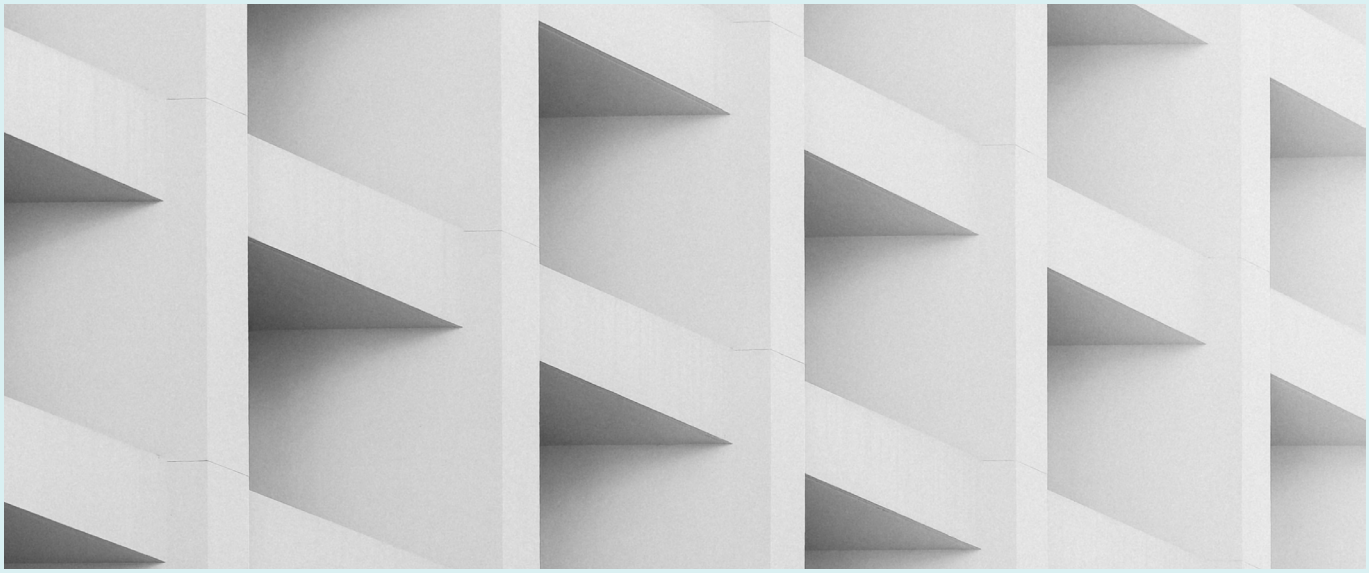
Now in its third decennial iteration, the International Bar Association ("**IBA**") has issued its updated Guidelines on Conflicts of Interest in International Arbitration (the "**Guidelines**").

The Guidelines are a "soft law" instrument which have been widely accepted as "best practice" since their first publication in 2004 and are, in our experience, ubiquitous in any application regarding a purported conflict of interest.

To identify whether (and how) the 2014 Guidelines should be updated, the IBA first conducted a survey of arbitration practitioners. This confirmed that an overhaul of the Guidelines was not necessary, but identified certain areas where the Guidelines could be updated, such as arbitrator disclosures, third-party funding, expert witnesses, States, non-lawyer arbitrators and social media. An IBA task force was then divided into teams to propose updates in respect of these areas and other possible issues. A draft of the updated Guidelines was then circulated for public consultation, including to all major arbitration institutions, with comments (in particular clear areas of consensus) taken into account in the final version.

The 2024 Guidelines contain relatively modest changes to the 2014 version, but that was probably driven by the 2014 Guidelines being so widely adopted and the "*if it ain't broke, don't fix it*" message the IBA received through its survey. There are, however, some important (and welcome) amendments and clarifications which are consistent with our view of what represents best practice.

The structure of the Guidelines is unchanged. Part I comprises seven "General Standards", accompanied by explanatory notes, and Part II contains the illustrative "Application Lists" in which the General Standards are applied to various circumstances across a "Non-Waivable Red List", "Waivable Red List", "Orange List" and "Green List". The General Standards continue to take precedence over the Application Lists (something the IBA has emphasised in its Foreword to the updated Guidelines).



So, what has changed?

1. General Standard 1 ("*General Principle*") now confirms that an arbitrator's obligation of impartiality and independence ends after the final award is rendered (and any corrections or interpretations issued). The obligation does not extend to the time period in which an award might be challenged before relevant courts or bodies.

2. General Standard 2 ("*Conflicts of Interest*") has been amended to clarify that, when deciding whether to decline an appointment (or refuse to continue to act), an arbitrator should bear in mind the objective standard: "*a conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances*". If, when applying the objective standard, "*justifiable doubts*" exist as to a possible conflict of interest, then the arbitrator should either: (i) decline the appointment (or refuse to continue to act), for example if the circumstances are those which appear on the Non-Waivable Red List; or (ii) make a disclosure, for example in circumstances described on the Waivable Red List. In our experience, this is consistent with the practice of arbitrators in any case, but the clarification is welcome.

3. General Standard 3 ("*Disclosure by the Arbitrator*") has been supplemented, mostly by 'raising' wording from the explanatory notes to the General Standard itself, to confirm that:

    a. When deciding whether a disclosure is necessary, and subject to a general requirement to make reasonable enquiries, the arbitrator is to assess "*all the facts and circumstances known to the arbitrator*" (i.e. it is a subjective standard).

    b. If the arbitrator would make a disclosure but is prevented from doing so by professional secrecy rules, or other rules of practice or professional conduct, then the arbitrator should decline the appointment (or resign).

    c. A failure to disclose certain facts or circumstances that might, from the parties' perspective, give rise to doubts as to arbitrator's impartiality or independence does not necessarily mean that a conflict exists or that the arbitrator should be disqualified.

4. The only material change to General Standard 4 ("*Waiver by the Parties*") is that parties are now deemed to know facts or circumstances that could constitute a potential conflict of interest for an arbitrator that would be revealed by a reasonable enquiry at the outset or during proceedings. Accordingly, the parties will be deemed to have waived any potential conflict of interest if they do not raise an express objection within 30 days of such constructive knowledge. This does create an obligation on the parties (and their legal advisors) to "*do their homework*" at the outset, but is a welcome change in our view, and ought to reduce the scope for some of the cynical attacks on arbitrator independence/impartiality that parties sometimes deploy for tactical reasons during the course of proceedings.

5. There are no material changes to General Standard 5 ("*Scope*").

6. General Standard 6 ("*Relationships*") has been amended to confirm:

    a. That arbitrators may be employees of companies (and not just partners or employees of law firms), and, accordingly, "*bear the identity*" of the law firm or employer.

    b. The need to take into account the law firm or employer's organisational structure and mode of practice in determining whether a conflict of interest might arise. Structures through which separate law firms might co-operate and/or share profits might justify an arbitrator bearing the identity of such other law firms. This amendment, and the amendment noted above, continue to make the exercise of obtaining arbitrator appointments whilst working at a law firm difficult, and so the trend of legal practitioners needing to choose between working in private practice or as an arbitrator looks set to continue.

    c. That an entity or natural person over which a person has a controlling influence may be considered to bear the identity of such person (i.e. where a parent company is party to proceedings its subsidiary may be considered to bear the parent's identity, and similarly where a person is party to proceedings their closely held company may be considered to bear their identity).

    d. That third-party funders and insurers might have different levels of involvement (including influence over conduct of the proceedings), which may be relevant when considering whether such entities bear the identity of a party.

    e. The criteria of "*controlling influence*" and "*direct economic interest*" might not apply to States, and so matters involving States and State entities should be considered on a case-by-case basis, taking into account relationships between State entities and their relevance to the subject matter of the dispute. Arbitrators should err on the side of disclosure where States or State entities are involved. This is a welcome addition, as in our experience State influence can be pervasive, and can be a particularly sensitive point for private entities or investors.

7. General Standard 7 ("*Duty of the Parties and the Arbitrator*") has been amended to:

    a. Require parties to also disclose relationships between an arbitrator and (i) a person or

entity over which a party has a controlling influence, or (ii) any other person or entity the parties believe the arbitrator should take into consideration when making disclosures pursuant to General Standard 3.

b. Require parties, when disclosing relationships, to explain the relationship of the relevant persons and entities to the dispute. This is a welcome addition, as it ought to clarify where an actual conflict arises/ may arise, and where a party is merely seeking to play a tactical game.

c. Expand "disclosable" counsel to include those who advise on the arbitration (and not just those who appear for the parties in the arbitration). In practice, this obligation on the parties can be (and often is) created in the first procedural order, but it is a welcome addition to the Guidelines.

8. As regards the Application Lists:

a. The Red Lists (Non-Waivable and Waivable) are generally unchanged except to make them consistent with the updated General Standards (for example, recognising that an arbitrator might be employed by an entity other than a law firm).

b. The Orange List has been expanded, and provides welcome clarity on points that often arise in practice, so that a disclosure is now likely to be required where:

i. An arbitrator has been engaged by one of the parties or an affiliate to assist with (unrelated) mock-trials or hearing preparations on two or more occasions in the past three years. Where an arbitrator is engaged for the same purpose by the same counsel or law firm, the threshold is at least three occasions in the past three years.

ii. An arbitrator has been engaged as counsel (and not just arbitrator) in another arbitration on a related issue or matter involving one of the parties or an affiliate in the past three years.

iii. An arbitrator has been engaged as expert for one of the parties or an affiliate in an unrelated matter in the past three years. Where an arbitrator is engaged as an expert by the same counsel or law firm, the threshold is at least three occasions in the past three years.

iv. Two arbitrators have the same employer (and are not just lawyers in the same law firm).

v. Another lawyer in the arbitrator's law firm is an arbitrator on another dispute involving the same party or parties (or affiliates), on a related issue or matter.

vi. Two or more arbitrators, or an arbitrator and counsel for one of the parties, currently serve as co-arbitrators in another arbitration.

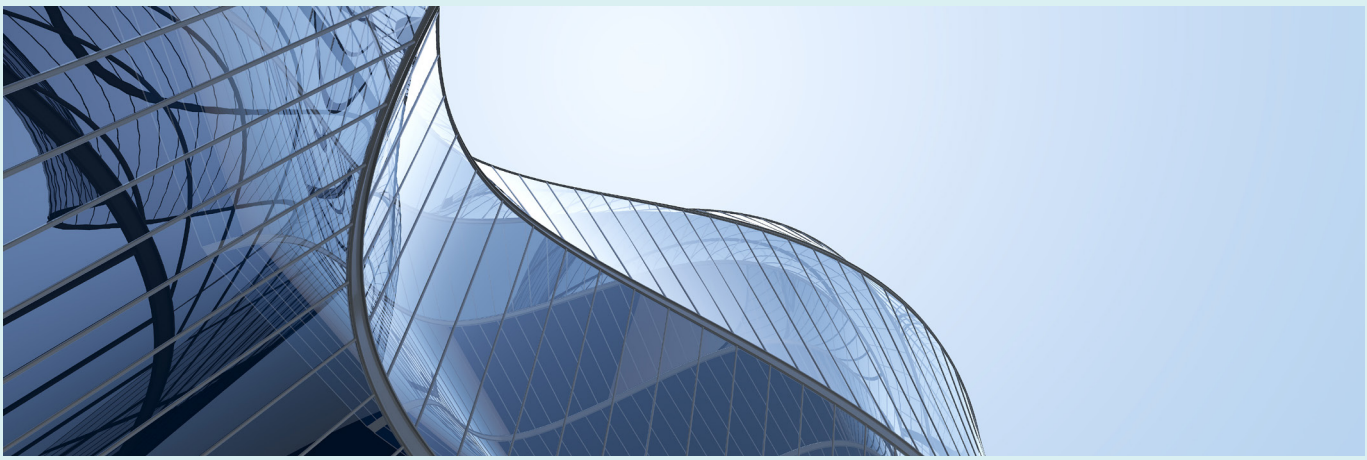
vii. An arbitrator is instructing an expert appearing in the arbitration in another matter where the arbitrator is acting as counsel.

viii. An arbitrator has publicly advocated a position on the case, including through social media such as LinkedIn.

ix. An arbitrator holds a decision-making position within the relevant arbitral institution or appointing authority and has participated in decisions regarding the arbitration.

c. The Green List is, like the Red Lists, also generally unchanged except to make them consistent with the updated General Standards, and to confirm that no disclosure is required where an arbitrator has previously heard testimony from an expert appearing in the arbitration.

In the latest iteration of the Guidelines, the IBA has avoided the all-too-common pitfall of change for the sake of change, but has provided welcome further clarity in the form of an evolution of the tried and tested principles that have made the Guidelines so widely adopted. In our view, this latest iteration of the Guidelines ought to be helpful to parties and arbitrators and is consistent with, and supportive of, best practice. ■



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US Court of Appeals upholds decision of the District Court to enforce Micula award against Romania

In May 2024, the US Court of Appeals for the District of Columbia upheld the decision of the District Court to deny Romania's motion to set aside judgments that enforced the Micula brothers' 2013 ICSID award against Romania. This is the latest chapter in the long-running saga of the Micula brothers' attempts to enforce the award in different jurisdictions and demonstrates both the pro-arbitration and pro-enforcement stance of the US Courts.

Background

This case has a rather long and complicated history, with the dispute now entering its 19th year. Proceedings have taken place all over the world in a number of different jurisdictions and forums.

The below is a summary of the events that have taken place to date:

- In 1993 (prior to its accession to the EU), Romania entered into an association agreement with the European Community ("**EC**") and its member states which required Romania to introduce state aid rules similar to the EC rules on state aid. The agreement also encouraged Romania to establish a legal framework to favour and protect investment and to conclude agreements for the promotion and protection of investment.
- In 1998, in the context of attempting to develop its regional policy, Romania set up a state aid scheme to attract investments in disadvantaged regions assuring tax breaks and exemptions or refunds of custom duties on raw materials. The scheme was to remain in place for 10 years from the date a region was officially designated as disadvantaged.
- During the early 2000s, in reliance on the incentives, the Micula brothers invested in large, highly integrated food production operations in one of the disadvantaged regions.
- In 2002, Romania and Sweden negotiated the Sweden-Romania Bilateral Investment Treaty (the "**BIT**") which provided for reciprocal protection of investments and included a provision for investor-State dispute resolution under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "**ICSID Convention**").
- However, as part of the process of accession to the EU and to align its incompatible state aid schemes with EU state aid rules, Romania abolished the scheme in 2005. Romania subsequently acceded to the EU in 2007.
- The Micula brothers commenced ICSID arbitration proceedings against Romania in 2005 under the BIT seeking compensation for Romania's premature abolishment of the scheme.
- In 2013, the ICSID tribunal found that the withdrawal of the incentives four years prior to their expiry constituted a breach of the "*fair and equitable treatment standard*" imposed by the BIT and ordered Romania to pay €178 million in compensation.
- Shortly after this, in 2014, the European Commission issued an injunction preventing Romania from paying the award whilst it conducted a state aid investigation. The injunction was granted the injunction and, in 2015, the Commission issued its decision that the payment of

compensation was equivalent to the compensation provided for by the abolished aid scheme and, therefore, also constituted illegal state aid (the "**EC Decision**").

- The Micula brothers then appealed to the General Court of the European Union ("**GCEU**") in 2015 in an attempt to annul the EC Decision. They were successful; the GCEU issued its decision in June 2019 ruling in favour of the Miculas on the basis that all the relevant events leading to the award had predated Romania's accession to the EU and the Commission had no authority to retrospectively apply its powers to the events that took place before January 2007 (the "**GCEU Decision**"). The GCEU also decided that complying with the award would not constitute illegal state aid because the award only compensated the Miculas for Romania's pre-accession actions and, as such, could not constitute illegal state aid within the meaning of the EU regulations. The EC Decision was, therefore, annulled.

- It is also worth noting that, in 2014, the Micula brothers made an application to enforce the award in the UK. The outcome of this application was that a stay of enforcement was granted pending the outcome of the GCEU Decision. Ultimately, the stay was lifted by the Supreme Court in 2019 on the basis that the English Courts only have the power to stay execution of an ICSID award in limited circumstances, those being for procedural reasons (rather than substantive) and only in circumstances where no inconsistency arises with the ICSID Convention duty on national courts to recognise and enforce the award.

Enforcement in the US District Court

On 6 November 2017, the Micula brothers sought to enforce the award before the US District Court in Colombia. Unsurprisingly, the enforcement was opposed by both Romania and the Commission who made a number of objections:

- They relied on the earlier *Achmea*[1] judgment (which found the investment arbitration provisions of an intra-EU investment treaty were contrary to EC law), arguing that this had the effect of rendering the arbitration agreement in the BIT invalid and unenforceable and, therefore, the US District Court lacked jurisdiction under the US Foreign Sovereign Immunities Act 1976 (the "**FSIA**").

- They also relied on the "*act of state*" and the "*foreign sovereign compulsion*" doctrines of US law which prevents a US court from questioning the validity of public acts performed by a foreign sovereign state within its own borders and bars the review of actions carrying out the mandate of a foreign government.

- Finally, Romania argued that it had already paid the award in full through a series of tax setoffs and forced executions against various accounts held by Romania's Ministry of Finance.

The US District Court handed down its decision on 11 September 2019 entering judgment for US$330 million and rejecting all the objections:

- Based on the "*arbitration exception*" in the FSIA, Romania could not claim immunity from jurisdiction of the US Courts because it had consented to the underlying arbitration by entering into the BIT. Also, the ruling in *Achmea* was not applicable to these enforcement proceedings because the US District Court did not have to interpret or apply EU law to reach a decision.

- A former GCEU judge had provided a declaration which stated that the state aid investigation and EC Decision were no longer effective in light of the decision of the GCEU.

- The court disagreed that the award had been paid in full and noted that a significant portion of the award remained unsatisfied.

In January 2021, following an appeal from the Commission, the European Court of Justice (the "**ECJ**") reversed the 2015 GCEU decision which had annulled the original award against Romania. The ECJ decided that because the ICSID tribunal issued its award after Romania joined the EU in 2007, the EC could decide whether Romania's payment of the award would constitute unlawful state aid. The ECJ also issued a second ruling in September 2022 that the award could not be enforced in the courts of EU member states (the "**ECJ Decisions**").

Following on from the ECJ Decisions, Romania made an application under the Federal Rules of Civil Procedure ("**FRCP**") which govern civil procedure in the US District Courts to set aside the US judgment. It argued that the ECJ Decisions meant that the agreement to arbitrate in the BIT was void the moment that Romania entered the EU and, therefore, sought relief under FCRP 60(b) which enables a party to seek corrections or alterations to a judgment. The US District Court did not agree and held that the ECJ Decisions did not alter the US Court's prior finding on jurisdiction because they did not invalidate or nullify Romania's consent to arbitrate.

US Court of Appeals

Romania subsequently appealed to the US Court of Appeals (being the most recent decision handed down in May) arguing that:

- The ECJ Decisions should elicit a finding that the award against Romania is not enforceable.
- That the US District Court failed to take account of the conflict between Romania's EU obligations and the US District Court's enforcement of the award.

In an important decision, the US Court of Appeals rejected both of these arguments and, in doing so, held that once the US Courts have jurisdiction under FSIA's arbitration exception, US law implementing the ICSID Convention obliges the US Courts to enforce the award.

Conclusion

This decision is the latest chapter in the Micula brothers' extensive attempts to enforce their ICSID award against Romania which has involved proceedings across many different jurisdictions. The recent decision of the US Court of Appeals illustrates both the pro-arbitration and pro-enforcement stance of the US Courts, despite the apparent conflict with Romania's obligations to the EU. Both this and the decision of the Supreme Court in the UK is positive news for those looking to enforce ICSID awards in the UK and the US. ■

Footnote

[1] *Slowakische Republik v Achmea BV* [2018] C-284/16

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English High Court sets aside fabricated £70 million arbitration award

Introduction

In our previous article published in International Quarterly – Issue 37, we discussed the fascinating case wherein the English High Court (the "**Court**") set aside a multibillion-dollar arbitral award against the Republic of Nigeria in October 2023 on the basis that the award had been obtained by fraud.[1] The Court has now handed down a judgment on a similar case. On February 2024, in *Contax Partners Inc BVI* ("**Contax**") *v Kuwait Finance House (KFH-Kuwait) & Ors* (the "**Defendants**"), the Court set aside a multi-million pound Kuwaiti arbitration award (the "**Award**"), dated November 2022, and Kuwaiti judgment (the "**Kuwaiti Judgment**") after discovering that there was, in fact, no arbitration agreement, no arbitration had taken place, and the Award itself had been fabricated.

The facts

Contax is identified in its submissions as an "*Oil and Gas company, with offices in the Kingdom of Bahrain and operations in more than fifteen countries*". In the middle of 2023, Contax submitted an application on a without notice basis seeking to enforce the Award which was purportedly endorsed from the Kuwait Chamber of Commerce and Industry Commercial Arbitration Centre ("**KCAC**"). On 9 August 2023, the Court made an order granting leave to enforce the Award and entering judgment of the Award (the "**August Order**"), under s.66 of the Arbitration Act 1996 (the "**Act**").[2] The decision was subsequently served on the Defendants, and third-party debt orders were issued against various banks. The Defendants subsequently discovered that their accounts were frozen and only then discovered the existence of the proceedings. The Defendants then applied to set aside the August Order. In the hearing, which took place in February 2024, the Defendants argued that the Court should set aside the August Order on two grounds:[3]

1. Firstly, that the arbitration claim before the Court was commenced without authority and, therefore, liable to be struck out.

2. Secondly, the arbitration agreement and Award simply did not exist.

Language of the Award

Firstly, Mr Justice Butcher (the "**Judge**") considered the issue of whether the Award was genuine. The Judge found that there were very strong grounds for concluding that the Award itself was a fabrication. He agreed with the Defendants' position that large parts of the Award were taken from elsewhere. In doing so, he referred to five examples where the Award, which was in English, included substantial passages copied from the judgment of Picken J in *Manoukian v Société Générale de Banque au Liban SAL*,[4] with some minor modifications. In response to Contax's suggestion that this was a matter that could only be concluded with expert evidence, the Judge pointed out that the fabrication was obvious, referring in detail to the comparisons for the five examples he had identified.[5] He further went to state that, if the Award was genuine, "*it would mean that arbitration had played out in a way which was uncannily – one might fairly say miraculously – similar to what happened in front of Picken J*".[6]

No record of Kuwaiti arbitration proceedings

Secondly, the Judge found that there appeared to be no records of the arbitration proceedings. The solicitors representing the First and Second Defendants had exhibited a letter from the Secretariat General of the KCAC confirming that no cases had been brought in that forum against

any of the Defendants. They also exhibited a letter from the Kuwait Ministry of Justice, Court of First Instance, confirming that there was no record of any proceedings between the parties between 2000 and November 2023. In addition to this, they submitted a letter from the State of Kuwait Ministry of Justice, stating Contax has no legal disputes against Kuwait Finance House, the First Defendant.[7]

Procedural issues

Thirdly, the Judge addressed procedural issues with Contex's claim, most notably that the Award did not comply with basic requirements of Kuwaiti law, in particular Article 183 of the Civil Procedure Law, in that, contrary to this Article, the Award is in English rather than Arabic, does not contain a summary of the agreement to arbitrate, and is not signed by all of the arbitrators.[8] Correspondingly, the Kuwaiti Judgment should have also been in Arabic and not English.

In light of the above, the Judge found in favour of the Defendants, commenting that the matters put before him led him to conclude that there was no arbitration agreement or arbitration, and that the Award and the Kuwaiti Judgment were fabrications. Therefore, the Judge concluded that there was no triable issue in relation to Contex's claim and, for these reasons, set aside the August Order that entered judgment against the Defendants in terms of the purported Award.

Conclusion

Like *The Federal Republic of Nigeria v Process & Industrial Developments Limited* [2023] EWHC 2638 (Comm),[9] this case is a reminder that English High Courts will consider disclosure and supporting documents to witness statements with some care and act with due diligence to ensure that a judgment will not unintentionally cause lasting harm. In the Nigeria matter, the Nigerian people would have likely suffered catastrophic loss, as would the Defendants in this case.

The Judge did comment on the fact that there are a considerable number of serious questions left unaddressed following his judgment, for example, who was responsible for the fabrications and whether there was any criminal culpability. He suggested that these matters are likely to require further investigation. This is similar, in some ways, to the conclusion of the Nigeria case, which the Honourable Justice Knowles stated brought together a combination of examples of what some individuals will do for money. This evidently continues to be an issue.[10]

It is unlikely that this will be the last case concerning this kind of subject matter. Considering that generative artificial intelligence and technology generally are evolving faster than ever before, it will be interesting to see how the legal system will necessarily develop to address the challenge of ensuring the authenticity of documents put before the courts. This is particularly important where the Court has limited time to consider a matter, such as without notice applications. In this regard, the following comment of the Judge is particularly relevant:

> *"I recall considering this one with some care, in that I did not find it all very easy to understand. I gave, I would say in retrospect, undue allowance for difficulties apparently arising from documents being prepared by people who were not native English speakers and/or whose grasp of English procedure was not perfect. It did not, however, occur to me that any of the documents might be fabrications. I was not on the lookout for fraud, and did not suspect it. Understandably, at the time it did not occur to him that the documents may have been fabricated."*[11]

As the sophistication of means to produce fabrications and forgeries improves, it is likely that the kinds of fabrication a judge may need to grapple with in the future are rather less crude than those at issue in this case and may no longer be discernible by the human eye. It is, therefore, of paramount importance that judges are equipped to handle, by way of their own judgment as well as by technological means, whatever means of deception the future may bring their way.

Judgment: *Contax Partners Inc BVI v Kuwait Finance House (KFH-Kuwait) & Ors*[12] ■

Footnotes

[1] *https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/english-high-court-sets-aside-award-nigeria.*

[2] *https://www.legislation.gov.uk/ukpga/1996/23/section/66.*

[3] Paragraph 24 and 25 of the Judgment.

[4] [2022] EWHC 669 (QB).

[5] Paragraphs 40 to 44 of the Judgment.

[6] Paragraph 44 of the Judgment.

[7] Paragraph 16(1) of the Judgment.

[8] Paragraph 46 of the Judgment.

[9] *https://www.judiciary.uk/wp-content/uploads/2023/10/Nigeria-v-PID-judgment.pdf.*

[10] Paragraph 52 of the Judgment.

[11] Paragraph 9 of the Judgment.

[12] *https://www.bailii.org/ew/cases/EWHC/Comm/2024/436.html.*

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Mitigation, the compensatory principle and the law of damages: Sharp Corp Ltd v Viterra BV [2024] UKSC 14

Introduction

The Supreme Court handed down judgment in *Sharp Corp Ltd v Viterra BV* [2024] UKSC 14 and found that the compensatory principle and principle of mitigation were both, indeed, fundamental to the law of damages. In respect of Clause 25 of the Grain and Free Trade Association ("**GAFTA**") Contract No. 24 ("**GAFTA Default Clause**") this meant that where damages were awarded, they would be assessed by reference to "the market in which it would reasonable for the seller to sell the contract goods" at the date of default. The judgment also provides authoritative guidance on the limits within which the English Court can act on an appeal under section 69 of the Arbitration Act[1] (the "**Act**").

Facts

In January 2017, Viterra BV (the "**Sellers**") and Sharp Corporation Limited (the "Buyers") entered into two Cost & Freight free out ("**C&FFO**") Mundra terms. One contract was for the sale of lentils (the "**Lentils Contract**") and the other the sale of peas (the "**Peas Contract**", collectively, the "**Contracts**"). The Contracts were identical save as to commodity, quantity and price. It is important to note that both Contracts incorporated the GAFTA Default Clause.

In April 2017, the Sellers nominated the vessel RB Leah (the "**Vessel**") for both Contracts. In May 2017, the lentils and peas ("**Goods**") were loaded on board the Vessel in Vancouver. As per the Contracts, the Buyers did not make payment for the Goods within five days prior to the Vessel's arrival at Mundra. This meant that under the non-payment provisions of the Contracts, the Sellers retained the Goods and had the right to resell them.

By June 2017, the Goods were cleared at customs and remained at the discharge port. The Buyers refused the authorities to release the Goods to the Sellers and, in November 2017, the Sellers declared the Buyers in default under both Contracts, claiming damages of their intended exercise of the right to resale.

Late in the year, the government of India imposed an import tariff on yellow peas of 50% with immediate effect and, subsequently, imposed a tariff of 30.9% on lentils with immediate effect. As a result, the Goods had significantly increased in value in the domestic market. On 2 February 2018, by way of contract, the Sellers re-sold the Goods.

GAFTA Board of Appeal

The Sellers declared the Buyers in default and commenced arbitration seeking damages. The GAFTA Board of Appeal found that while the date of the Seller's declaration of default was in November 2017, it was impossible to re-sell the Goods until they were able to obtain possession of the Goods on 2 February 2018; thus, the GAFTA Appeal Board accordingly found that 2 February 2018 was the date of default.

Commercial Court Decision

The Buyers appealed against the GAFTA Board of Appeal's decision and, in Commercial Court, the appeal was rejected by Justice Cockerill. It was held that the Buyers had not shown that the GAFTA Appeal Board had erred in law, which was the basis for dismissing the appeal.

Court of Appeal Decision

However, the Court of Appeal[2] overturned Justice Cockerill's

Footnotes

[1] *https://www.legislation.gov.uk/ukpga/1996/23/section/69.*

[2] On Appeal from [2023] EWCA Civ 7.

[3] Paragraph 84 of the Judgment – "*The compensatory principle aims to put the injured party in the same position as if the breach of duty had not occurred. In relation to contractual damages this means that the injured party is "so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.*"

[4] Paragraph 85 of the Judgment – "*The principle of mitigation requires the injured party to take all reasonable steps to avoid the consequences of a wrong. This means that (i) there is no recovery for loss which should reasonably have been avoided; (ii) there is recovery for loss incurred in taking reasonable mitigating steps, even if that increases the loss and (iii) if the loss is successfully reduced by the taking of reasonable mitigating steps then the party in breach is entitled to the benefit of that - there is no recovery for avoided loss.*"

[5] Paragraph 83 of the Judgment.

[6] [2015] UKSC 43.

[7] [2007] UKHL 12.

decision. Lord Justice Popplewell concluded that the damages payable under the Default Clause were to be assessed on the basis of a notional substitute contract for the Goods on the same terms as the parties' Contract, save as to price, at the date of default. It held instead that damages should have been assessed on the basis of the terms ex warehouse Mundra, in instalments, with risk having passed on shipment. This is because the parties had varied the contracts to be on ex warehouse Mundra terms.

Supreme Court Decision

The Sellers appealed against the Court of Appeal's decision on the grounds that it had exceeded its jurisdiction under section 69 of the Act, in finding that the contract had been varied.

The Buyers cross-appealed on the basis whether damages should have been awarded on an "*as is, where is*" basis, being the estimated ex warehouse Mundra value of the Goods.

The Supreme Court held that the Court of Appeal had exceeded its jurisdiction under the Act, in relation to errors of fact and no power to make its own findings of fact.

In respect of damages, the Supreme Court reversed the GAFTA Board of Appeal and the Lower Courts basis on which they had assessed the damages. Instead, it held that that two fundamental principles of the law of damages are the compensatory principle[3] and principle of mitigation[4] of damage.[5] Both principles are reflected in the GAFTA Default Clause. Applying both principles meant that the GAFTA Appeal Board should have considered "*the market in which it would reasonable for the seller to sell the contract goods*" at the date of default.

The Sellers were left with the Goods which had landed in Mundra, whereby the value had increased significantly because of the imposition of the customs tariffs. Therefore, it was held that the answer to the question of law is that the value of Goods under paragraph (c) of the Default Clause falls to be measured by reference to a notional sale of the Goods in bulk ex warehouse Mundra on 2 February 2018.

Conclusion

The Supreme Court's decision clarifies that damages are to be assessed on a compensatory principle and principle of mitigation. This approach clearly departs from the earlier decision in *Bunge SA v Nidera*[6] and *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)*,[7] whereby both decisions focused heavily on the compensatory principle. ■

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