The latest commercial contracts (2018)

3rd August 2018

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The latest commercial contracts (2018)

The law as stated during this webinar is up to date as of **27th July 2018**

Introduction

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- Interpretation of Contracts
- Challenge to Arbitration Awards

Interpretation of Contracts

"Judges are fond of speculating about the motives and practices of businessmen in drafting contracts. It is a luxurious occupation. The rules of admissibility protect them from the uncomfortable experience of being confronted by actual facts."

-Lord Sumption
Harris Society Annual Lecture, Keble College, Oxford, 8 May 2017

Traditional Approach

- **Prenn v Simmonds** [1971] 1 WLR 1381; **Reardon Smith Line Ltd v Hansen** [1976] 1 WLR 989
  - Surrounding circumstances assist in interpreting plausible meanings the parties must as 'reasonable men' have had in mind.
  - Court must put itself in the position in which the parties stood at the time it was made, with all the knowledge that they had at the time about the origin and purpose of the transaction and the circumstances in which it would fall to be performed.

Sea Change

- **Antaios Compania Naviera v Salen Rederierna AB** [1985] AC 191
  - Lord Diplock observed that if detailed semantic and syntactical analysis of words in a commercial contract was going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.
  - Language to be read in accordance with common sense, and not in a pedantic or literal way.

Contextual Approach

- **Investors Compensation Scheme v West Bromwich Building Society** [1998] 1 WLR 896
  - Lord Hoffman set out five 'common sense' principles for interpretation.
    - Objective intention of parties
    - Matrix of facts
    - Exclusions from matrix of fact
    - Purposive approach as opposed to a strictly literal approach.
    - Assignment of an appropriate meaning where the "natural and ordinary meaning" of a word results in an absurdity.

- **Chartbrook v Persimmon** [2009] 1AC 1101
  - There was no apparent error of drafting. But Lord Hoffmann reconstructed the commercial logic of the transaction.
  - The court held that absence of a sensible commercial justification for an interpretation will weigh heavily against its adoption.

Textualism v. Contextualism: Advance and Retreat

- **Rainy Sky v Kookmin Bank SA** [2011] 1 WLR 2900
  - In case of two possible constructions, the court was entitled to prefer the construction consistent with business common sense.
  - It is not necessary to conclude that an interpretation would produce an absurd or irrational result.

- **Arnold v Britton** [2016] AC 1619
  - Supreme Court cautioned against commercial common sense overriding the natural meaning of a provision.
  - It appeared to retreat from contextualism and raised the question of whether English law was moving towards a more literal approach to contractual interpretation, with considerations of commercial common sense assuming lesser importance.
  - There was no direct criticism of decisions in Rainy Sky and Investors Compensation Scheme.

Clarification: **Wood v. Capita Insurance Services Ltd** [2017] AC 1173

- The Supreme Court tackled the rules on contractual interpretation for the fifth time in eight years. It confirmed that textualism (*Arnold v Britton)* and contextualism (***Rainy Sky***), are not "conflicting paradigms".
- Both are tools for ascertaining the objective meaning of the language used by the parties. The extent to which the court will rely on each tool will vary depend on the circumstances.
- This is not a literalist exercise focused solely on a phrasing of the wording of the particular clause. The court will consider the contract as a whole and, depending on its nature, formality and quality of drafting, give more or less weight to elements of the wider context.
- As a general rule, greater emphasis is likely to be given to textual analysis in complex, detailed contracts drafted by experienced lawyers. Commercial context will often be more relevant where the agreement is more informal, or lacking in detail.

Practical Tips

- Avoid opaque and ambiguous clauses. Courts will not freely interpret badly drafted provisions in a party's favour when the meaning can be found in the language.
- Ensure that the contract is cohesive and works as a whole.
- Use recital provisions to explain the commercial and factual background. This is important if the agreement contains onerous or unusual provisions.
- Set out whether the contract is between sophisticated parties with access to legal advice at the time of drafting the agreement.

Challenge to arbitral awards

Challenges fall under three sections of the Arbitration Act 1996 – 67, 68 and 69. Strategising challenges are tricky and need to be given careful consideration. Successful challenges are rare.

Basics

- Challenges can only be brought from arbitration 'awards' and not 'orders'. An award is a ruling that has finality i.e. is one that is not of an interim character such as a procedural order.
- Most countries worldwide follow the UNCITRAL model law of 1996 and allow challenges if the award is contrary to public policy. England has, however, broken the grounds on which one may challenge arbitration awards into three categories

  Section 67 – Jurisdiction

  Section 68 – Serious irregularity during the conduct of arbitration

  Section 69 – Appeal on a point of law
- Bringing a successful challenge is difficult. Only 3 of over a 100 challenges under s68 were successful between 2015 - March 2018.
- Challenges must be brought in the court of the country where the arbitration was seated regardless of whether the governing law was that of another country.

Route I: Challenge to Jurisdiction (Section 67)

- Challenges under s67 can be against awards where the Tribunal has either accepted or rejected jurisdiction. A s67 challenge can also be brought against an award on merits on grounds that the tribunal lacked substantive jurisdiction.
- This constitutes a full rehearing i.e. not just a review of the tribunal's decision. [***GPF GP SARL v The Republic of Poland*** *[2018] EWHC 409 (Comm)*]
- A court can confirm, vary or set aside the award (in whole or in part).
- A jurisdictional challenge under s67 is not the same as one under s68(2)(b), which permits challenges on grounds that the tribunal has 'exceeded' its powers. [***Uttam Galva Steels Ltd v Gunvor Singapore PTE Ltd*** *[2018] EWHC 1098 (Comm)*]

Route II: Serious Irregularity (Section 68)

- The applicant must demonstrate a procedural unfairness in the conduct of proceedings or a defect in the award and prove that the irregularity has or will result in substantial injustice to the applicant.
- The court may remit the award to the tribunal for reconsideration, set aside the award or declare the award to be of no effect in whole or in part.
- The Act does not permit a challenge on factual findings
- Grounds are listed in s68(2) and constitute a failue to conduct proceedings in accordance with the procedure agreed, failure to deal with all issues put to the tribunal, uncertainty as to the effect of the award and on grounds that the award has been obtained by fraud or is contrary to public policy.
- There is no serious irregularity under s68(2)(A) on issues of construction. [***Reliance Industries Limited & Ors. v The Union of India*** *[2018] EWHC 822 (Comm)*]

Route III: Appeal on a point of law (Section 69)

- This is a challenge when there has been an error of law in the award.
- This section can be excluded by the consent of parties. This can be stated in the arbitration agreement or assumed when parties adopt institutional rules such as the ICC or LCIA rules that explicitly exclude rights of appeal. An agreement to dispense with reasons for the tribunal's award will be considered to be an agreement to exclude the court's jurisdiction under s69.
- If not excluded, the applicant must either obtain the agreement of all other parties or seek permission from the court.
- An applicant needs to satisfy the Court that here is a question o English law, determination of the question will affect the rights of one or more parties, the Tribunal was asked to determine the question of law, the ruling is obviously wrong or constitutes a question of general public importance, it is just an proper for the court to determine the question.

Other Relevant sections in the English Arbitration Act, 1996

- S24 deals with applications to remove an arbitrator. This is only exercised in exceptional circumstances. It requires proof that there has been or will be substantial injustice to one or more of the parties.
- S33 mandates the tribunal to act fairly and impartially, giving each party a reasonable opportunity of putting its case and dealing with that of the opponent.
- S73 disallows a complaint from being placed before the court unless it was first presented to the arbitrator(s).

THANK YOU

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