Neutral Citation Number: [2021] EWHC 1574 (Comm)

Case No: CL-2021-000094

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION,
CASE NO. 2019-05

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 08/06/2021

Before :

Mr Justice Butcher

- -

Between :

STA

Claimant

-and-

OFY

Defendant

- -

- -

Khawar Qureshi QC (instructed by **Volterra Fietta**) for the **Claimant**
Charles Kimmins QC and Mark Tushingham (instructed by **Three Crowns LLP**) for the **Defendant**

Hearing date: 25 May 2021

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APPROVED JUDGMENT

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THE HONOURABLE MR JUSTICE BUTCHER

Mr Justice Butcher:

1. This is an application by the Government of STA ('STA') under CPR r. 62(9) for an extension of time to bring a challenge under s. 68 Arbitration Act 1996 ('the Act') in respect of a Final Award dated 26 January 2021 ('the Final Award').

2. The Final Award was made by a Tribunal consisting of three arbitrators ('the Tribunal'). The arbitration was between STA and the Defendant ('OFY'), and had been conducted under the 2013 Arbitration Rules of the United Nations Commission on International Trade Law (the 'UNCITRAL Rules').

3. The dispute between the parties arose out of what OFY contended was the wrongful repudiation by STA in February 2018 of a contract, under which OFY was to provide a fast-track power generation solution, involving the relocation of two aeroderivative gas turbine power plants to STA (the 'Contract'). OFY's case was that, because of STA's repudiation, it was entitled to receive an 'Early Termination Payment' (as defined in the Contract). By the Final Award the Tribunal ordered STA to pay to OFY the full amount of the Early Termination Payment, namely US$134,348,661 plus interest and costs, and dismissed STA's counterclaim.

Procedural History

4. The procedural history of this application is of some importance. As I have said, the Final Award was dated 26 January 2021. The 28-day period prescribed by s. 70(3) of the Act would accordingly have expired on 22 February 2021.

5. On 19 February 2021 STA applied *ex parte* on paper for an extension of time until 19 April 2021 to bring a challenge. That has been called on this application 'the First Extension Application'.

6. The First Extension Application was made by STA's then solicitors, Omnia Strategy LLP ('Omnia'), and was supported by a witness statement of Kerris Anna Farren dated 19 February 2021. In that witness statement, Ms Farren gave the following evidence which is relevant to the present application:

   (1) She said that Omnia had been instructed on 18 February 2021;

   (2) She said that she was still reviewing documents, but given the recent instruction of Omnia, 'the Claimant will not be in a position to bring a challenge to the Award by 22 February 2021', and she had accordingly been instructed to make the present application;

   (3) She referred to the factors identified by Colman J in Kalmneft v Glencore International AG [2002] 1 Lloyd's Rep 128;

   (4) She gave reasons for seeking an extension of 56 days, which she identified as being: (a) that there had been delays in the instruction of Omnia due to

'the painstaking and bureaucratic decision-making process … [which] is a common feature of working with Government entities in [STA]', (b) the fact that there had been a recent general election in STA, and STA's Parliament was still vetting newly-appointed ministers, including the Attorney General, (c) that Covid-19 had contributed to the delay in instructing Omnia in particular because 'key members of the Office of the Attorney General contracted Covid-19, which [had] contributed to the disruption to the Office', the Office of the Attorney General was operating on a 'shift basis', and STA's civil service still relied heavily on paper documents, and (d) that in the arbitration STA had been represented by lawyers from the Office of the Attorney General and Ministry of Justice of STA as well as a local firm and further external lawyers had now had to be retained;

(5) She said that the delay in instruction had been unintentional and that STA had acted reasonably in seeking an extension as soon as Omnia was instructed;

(6) She said that she was unable to identify the grounds of the challenge which A might wish to bring, but said that STA 'feels strongly that there are good grounds to bring a challenge.'

7. By order dated 22 February 2021 Andrew Baker J made an order in these terms:

'1. Time for the Claimant to issue and serve any challenge to the Final Award under Section 67 and/or Section 68 of the Arbitration Act 1996 is extended to 8 March 2021.
2. The Claimant has permission to serve the Defendant with the Application, this Order, any application pursuant to paragraph 3 below, and any challenge issued pursuant to paragraph 1 above, by service upon Three Crowns LLP, 8-10 New Fetter Lane, London EC4A 1 AZ.
3. Any application for a further extension of time must be issued and served by 4.30 pm on 5 March 2021, and must be supported by evidence identifying in outline the nature of any challenge to the Final Award that the Claimant seeks additional time to prepare, as well as explaining why further time is required.
4. Costs reserved.
5. The Defendant has the right to apply to set aside, vary or discharge this Order under rules 23.10 provided such application is issued and served within 7 days of service of this Order on the Defendant.'

8. Andrew Baker J had thus not granted the extension sought by STA, and while granting a shorter extension, had also laid down a timescale for the filing of any application for a further extension.

9. No application was made for a further extension by 5 March 2021, and no challenge under s. 67 or s. 68 of the Act was issued by 8 March 2021.

10. On 1 April 2021 STA, by its new legal representatives, Volterra Fietta ('VF') issued a Claim Form, applying under s. 68 of the Act. The relief sought was the setting aside of the Final Award or its remission to the Tribunal. The application was stated to be made under s. 68(2)(c) and s. 68(2)(d). The basis of the challenge was said to be set out in the witness statement of Peter Flint dated 31 March 2021. In particular it was said that the challenge was based on two particular points:

    (a) First, that the Tribunal had failed, within s. 68(2)(c) to conduct the arbitration in accordance with the procedure agreed by the parties, in that the Tribunal had not been 'guided by the terms and conditions of the [Contract]'; and

    (b) Second, that the Tribunal had failed to deal with all the issues put to it, and in particular had failed to consider STA's arguments as to why mobilisation costs were not payable as a result of the non-satisfaction of Conditions Precedent and/or the non-occurrence of the Effective Date as defined in the Contract.

11. On 1 April 2021 STA also issued an Application Notice seeking an extension of time for the bringing of a challenge to the Final Award.

12. The witness statement of Peter Flint referred to in the Claim Form was made both in support of STA's s. 68 challenge, and also in support of its application for an extension of time. In relation to the latter, Mr Flint said:

    (1) That the new Attorney General of STA, who had previously been deputy Attorney General, had been sworn in on 5 March 2021;

    (2) VF had been formally instructed on 15 March 2021 and thereafter received some 10,000 pages of documents, and leading counsel had been instructed on 24 March 2021;

    (3) VF and leading counsel had become aware of Andrew Baker J's order on 25 March, and VF had then contacted Omnia, but Mr Flint said that he was not authorised to reveal any privileged matters;

    (4) A Notice of Change of Legal Representative had been served on 30 March 2021;

    (5) 'As has previously been addressed in the witness statement of [Ms] Farren', 'whilst delay has occurred in this case, the reasons have been provided above and previously…'

13. On 16 April 2021 OFY served responsive evidence and on 23 April 2021 STA served evidence in reply.

14. On 5 May 2021 Bryan J, having considered STA's application for an extension of time and relief from sanctions on paper, directed that it should be listed for an oral hearing with a one hour estimate, which should be expedited

as it related to an arbitration. The matter was accordingly heard by me on 25 May 2021.

Principles applicable to the application made

15. It was common ground between the parties that, in light of the fact that STA had not complied with Andrew Baker J's order, it needed to obtain relief from the implicit sanction involved in that order, and that that involved a consideration of the three matters identified in Denton v TH White Ltd [2014] 1 WLR 3926, namely (a) an assessment of whether the failure to comply with the rule, practice direction or court order was serious and significant, (b) the reasons why the default had occurred, and (c) an evaluation of all the circumstances of the case, so as to enable the court to deal justly with the application.

16. It was also common ground that STA's present application for an extension of time should be assessed by reference to what were referred to as the Kalmneft factors after the case which I have already mentioned. Both parties also referred to Terna Bahrain v Bin Kamil [2012] EWHC 3283 (Comm), [2013] 1 All ER 580. I consider that that case provides a helpful summary of the matters which require consideration on such an application. At paragraphs [27]-[31] Popplewell J said this:

> 27. The principles regarding extensions of time to challenge an arbitration award have been addressed in a number of recent authorities, most notably in ***Kalmneft v Glencore*** [2002] 1 Lloyd's Rep 128, ***Nagusina Naviera v Allied Maritime Inc.*** [2003] 2 CLC 1, ***L Brown & Sons Limited v Crosby Homes (Northwest) Limited*** [2008] BLR 366, ***Broda Agro Trading v Alfred C Toepfer International*** [2011] 1 Lloyd's Rep 243, and ***Nestor Maritime v Sea Anchor Shipping*** [2012] 2 Lloyd's Rep 144, from which I derive the following principles:
>
> (1) Section 70(3) of the Act requires challenges to an award under sections 67 and 68 to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act, and which is enshrined in section 1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the Act. Any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act.
> (2) The relevant factors are:
> (i) the length of the delay;
> (ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so;
> (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
> (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;

(v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration, or the costs incurred in respect of the arbitration, the determination of the application by the Court might now have;
(vi) the strength of the application;
(vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.
(3) Factors (i), (ii), and (iii) are the primary factors.

28. I add four observations of my own which are of relevance in the present case. First, the length of delay must be judged against the yardstick of the 28 days provided for in the Act. Therefore a delay measured even in days is significant; a delay measured in many weeks or in months is substantial.

29. Secondly, factor (ii) involves an investigation into the reasons for the delay. In seeking relief from the Court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. In the absence of such explanation, the Court will give little weight to counsel's arguments that the evidence discloses potential reasons for delay and that the applicant "would have assumed" this or "would have thought" that. It will not normally be legitimate, for example, for counsel to argue that an applicant was unaware of the time limit if he has not said so, expressly or by necessary implication, in his evidence. Moreover where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter.

30. Thirdly, factor (ii) is couched in terms of whether the party who has allowed the time to expire has acted reasonably. This encompasses the question whether the party has acted intentionally in making an informed choice to delay making the application. In Rule 3.9(1) of the Civil Procedure Rules, which sets out factors generally applicable to extensions of time resulting in a sanction, the question whether the failure to comply is intentional is identified as a separate factor from the question of whether there is a good explanation for the failure. This is because in cases of intentional non compliance with time limits, a public interest is engaged which is distinct from the private rights of the parties. There is a public interest in litigants before the English Court treating the Court's procedures as rules to be complied with, rather than deliberately ignored for perceived personal advantage.

31. Fourthly, the Court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. On an application for an extension of time, the Court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purposes of the Act. However if the Court can see on the material before it that the challenge involves an intrinsically weak case, it will count against the application for an extension, whilst an apparently strong case will assist the application. Unless the challenge can

> be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time. If it can readily be seen to be either strong or weak, that is a relevant factor; but it is not a primary factor, because the Court is only able to form a provisional view of the merits, a view which might not be confirmed by a full investigation of the challenge, with the benefit of the argument which would take place at the hearing of the application itself if an extension of time were granted.

17. I consider that STA's application for relief from sanctions will stand or fall with its application for an extension of time assessed by reference to the Kalmneft factors. In this analysis, however, it will be necessary to consider that issues of whether the applicant has acted reasonably will need to take into account the fact that the present is a second application, and that the first extension was not complied with.

The *Kalmneft* Factors

18. I accordingly turn to consider the Kalmneft factors.

Length of Delay

19. In relation to the length of the delay, the issue of the application for a second extension was 38 days after the 28-day period stipulated by the Act, and 27 days after the expiration of the deadline imposed by the order of Andrew Baker J. In circumstances where, as Popplewell J said at paragraph 28 of Terna Bahrain, the length of delay is to be judged against the yardstick of the 28 days provided for in the Act, and, in the present case, also against the yardstick of the length of the extension granted by Andrew Baker J, there is no doubt in my mind that the delay was significant and substantial.

20. While STA has suggested that the delay ought not to be regarded as significant in view of the length of the arbitration and the amount of money involved, I do not consider that either is germane to the present issue. The correct yardsticks are those I have referred to above. The length of the arbitration process should not have any significant bearing on the time within which an application should be made to the court after an award. The fact that a large sum is involved is not a reason why a longer period should be taken to make an application. On the contrary, the fact that a large sum is at stake may exacerbate the seriousness and significance of a failure to act promptly.

Did the applicant act reasonably?

21. In relation to whether STA acted reasonably in the circumstances in permitting the time limit to expire, it again appears to me to be plain that it did not. This is a case in which it was required to act promptly not only in accordance with the time period specified by the Act, but also in light of Andrew Baker J's order. STA has given no adequate explanation of the delay. Mr Flint's witness

evidence does little more, in this regard, than refer back to Ms Farren's witness statement. Looking at both, they do not provide the specificity which is required when seeking to explain a delay of the length and in the circumstances of the present.

22. One matter which is mentioned by Ms Farren is that there was a change in government, and that the Attorney General was not sworn in until 5 March. This process, however, plainly did not mean that STA was unable to act in the meantime. Omnia was instructed on 18 February and made the First Extension Application on the next day. Furthermore, counsel for STA at the arbitration had included Mr [X], as well as others in a team which appears still to be involved in the conduct of this application. It is not explained in the witness evidence how the process of vetting actually affected STA's ability to give instructions. In any event, Mr [X] was sworn in on 5 March 2021. There has been no explanation provided for why there was a delay after that.

23. As was said by Bryan J in Process and Industrial Developments v Federal Republic of Nigeria [2018] EWHC 3714 (Comm), at [56], in the present context of applications in respect of arbitrations the fact that a party is a foreign state is a matter of little significance. In that context, a foreign state is 'a litigant like any other litigant and … is expected to comply with the rules and provisions of the CPR and with any directions given by this court.' Furthermore, the fact that an entity – whether a government or otherwise – may have bureaucratic decision-making processes, does not justify delay. What was said by Bryan J in Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd [2018] EWHC 538 (Comm), [2019] 1 All ER (Comm) 161, at [83] appears to me to be germane here too:

> 'The fact that Korean corporations have very hierarchical management structures and take a considerable period of time in relation to important issues does not begin to justify delay. Indeed if there is such a structure that is all the more reason to put steps in train in good time before the deadline. That there is a short time limit is a well-known fact and is an important feature of arbitration under the Act. Many parties appearing in this Court in arbitration matters no doubt have hierarchical management structures and take time to make decisions. This is not a convincing reason to extend time generally, nor in the circumstances of this case, not least because it would substantially undermine the fundamental principle of speedy finality.'

24. The other matter which was referred to by Ms Farren, and which has been relied upon by Mr Qureshi QC is the impact of Covid-19. I consider, however, that Mr Kimmins QC was correct to say that the evidence as to the way in which Covid-19 is said to have affected STA is wholly inadequate to place any significant weight on this point. This court is now well used to evaluating contentions as to the effect of the pandemic on litigants and litigation. What is required, and is regularly provided, is a detailed explanation of the way in which the pandemic has affected particular people or particular processes. Such evidence is lacking here.

25. In relation to the issue of whether a party has acted reasonably in letting a time limit expire, Mr Qureshi QC submitted that the key question is whether that party has deliberately chosen not to comply with the relevant period, and that in the absence of such a deliberate decision the court would not, or would be unlikely, to consider that the party had not acted reasonably. While it is clearly correct that if there had been deliberate non-compliance that would count significantly against the grant of an extension, I do not accept Mr Qureshi QC's submission that the authorities indicate that in the absence of a deliberate decision the court will not or is unlikely to consider that a party has not acted reasonably. By way of example, Daewoo was not a case in which there was a deliberate choice not to comply with the relevant period - the applicant instead put forward a series of reasons why it contended that it had not been able to comply. Nevertheless it was found that the applicant had not acted reasonably and that this weighed against the grant of an extension (see paragraphs 79-89).

Did OFY or the Tribunal contribute to the delay?

26. As to the third factor, there is no suggestion in this case that OFY or the Tribunal caused or contributed to the delay.

Prejudice

27. There is no evidence of prejudice which would be suffered by OFY by reason of the delay, other than the prejudice entailed by delay in enforcing the Final Award, though that is itself a form of prejudice even if there can be an award of interest: Hulley Enterprises Ltd v The Russian Federation [2021] EWHC 894 (Comm) at paragraph 173. It is, however, well-established that the absence of prejudice to the respondent is not a necessary condition for the refusal of an extension: Daewoo at paragraph 90.

Continuation of Arbitration?

28. The Final Award disposed of all claims and counterclaims, and so the arbitration has not continued during the period of the delay.

The merits of the proposed challenge

29. As Popplewell J said in Terna Bahrain, on an application for an extension of time, the court will not normally conduct any substantial investigation of the merits of the challenge application. Nevertheless, if the court can readily see on the material before it that the challenge appears intrinsically weak, then that will be a factor, albeit not a primary factor, counting against an extension.

30. The present is, in my judgment, one of the relatively infrequently encountered cases in which the court can see on the present application that the grounds of the proposed challenge are intrinsically weak.

31. As I have said, two grounds have been advanced in the Claim Form. The first is the contention that the Tribunal failed to be 'guided by the terms and

conditions of the [Contract]', and that this constituted a failure by the Tribunal to conduct the proceedings in accordance with the procedure agreed between the parties within s. 68(2)(c) of the Act. The basis for this contention is that it is said that it was a condition precedent under the Contract that STA should allocate a site; that while a failure on the part of STA to allocate a site might give rise to a right on the part of OFY to terminate, it did not allow OFY to allocate an alternative site; and that no finding of a waiver by or estoppel against STA was open to the Tribunal because of the terms of Clause 28(c), 28(a) and 28(f)(xvii) of the Contract.

32. In my view, this is a clear case of an attempt to present alleged errors of law as errors of procedure, by means of the contention that the findings of the Tribunal did not accord with the terms of the agreement. The parties agreed, by Clause 28(f)(xvii) that the decision of the arbitrators should be final and binding and that 'neither Party shall seek recourse to a law court or other authorities to appeal for revisions of such decision'. Yet on STA's reasoning almost any question of law or construction of the agreement would constitute a failure of the Tribunal to abide by the procedure agreed between the parties, on the basis that it did not give effect to the terms of the Contract. Section 68 of the Act is concerned with 'due process', and not with whether the tribunal has made the 'right' decision: UMS Holding Ltd v Great Station Properties [2017] EWHC 2398 (Comm), [28], Islamic Republic of Pakistan v Broadsheet llc [2019] EWHC 1832 (Comm), [40(i)]. STA's complaint here is not one which is concerned with due process, but, if anything, is a complaint about an alleged error as to the application of the provisions of the contract in the determination of the substantive dispute on the merits.

33. STA's second complaint, as set out in the Claim Form, is that the Tribunal failed to deal with all the issues which were put to it. Specifically, STA wishes to contend that the Tribunal failed to consider its argument that OFY was not entitled to claim mobilisation costs because STA had not allocated a site (and hence the Effective Date had not occurred) and had not complied with all the terms, obligations and deliverables for which it was responsible under the Contract.

34. In my judgment it is clear that the Tribunal did deal with this issue at paragraphs 463-4 and 522 of the Final Award. STA's complaint is, on analysis, that the Tribunal's reasons for its rejection of STA's argument are inadequate. It is a type of complaint which cannot be brought under s. 68(2)(d): see the cases assembled in Merkin, *Arbitration Law* para. 20.30.17 and UMS Holding at [28], [133-134]. Furthermore, if STA considered that the Final Award omitted reasons or was unclear or ambiguous, it should have made an application to the Tribunal under Article 37 of the UNCITRAL Rules and/or pursuant to s. 57 of the Act, which it did not. Until such recourse is exhausted, under s. 70(2) of the Act, an application may not be brought under s. 68.

35. Perhaps conscious of the difficulties of reliance solely on s. 68(2)(d), in his oral submissions Mr Qureshi QC also submitted, as I understood it, that insofar as the Tribunal's decision in relation to mobilization costs depended on

a finding of an estoppel, this was impermissible, because of the terms of clause 28(a)(i) and (c) of the Contract. This was, in effect, another argument that there was an irregularity within s. 68(2)(c). In my judgment it was intrinsically weak for the same reasons as the other argument based on s. 68(2)(c) which I have already considered.

Unfairness

36. The final 'factor' is whether, in the broadest sense, it would be unfair to STA for it to be denied the opportunity of having its application determined. In my judgment, it would not. STA has already been given an extension of time in which to bring a challenge under s. 68 or to request a further extension. STA is solely responsible for having failed to avail itself of the usual period or that extension. This follows on from delays to the arbitration itself for which, as it appears, STA was solely responsible; why it has happened is not properly explained; and the application sought to be made appears intrinsically weak.

Conclusion

37. For these reasons, and in particular because of the length and circumstances of the delay and the absence of an adequate explanation for it, I dismiss STA's application to extend time and refuse its application for relief against sanction.