STEPHENSON HARWOOD

27 June 2023

CIF Weekly – issue 35

Radisson Hotels ApS Danmark v Hayat Otel Isletmeciligi Turizm Yatirim Ve Ticaret Anonim Sirketi – Commercial Court rules that public interest outweighs agreement to arbitrate confidentially, when publishing s.68 application judgment

On 12 May 2023, the Commercial Court handed down judgment in *Radisson Hotels ApS Danmark v Hayat Otel Isletmeciligi Turizm Yatirim Ve Ticaret Anonim Sirketi [2023] EWHC 1223 (Comm)* finding that the public interest in the publication of an unredacted judgment concerning an application under s.68 Arbitration Act 1996 outweighed the parties' agreement to arbitrate confidentially.

Facts and underlying proceedings

Hayat (an indirect subsidiary of Bilgili Holding AS, a Turkish holding company) commenced ICC arbitration proceedings in London against Radisson (an international hotel management group) in October 2018, relating to the management of a hotel in Turkey (the "**Arbitration**").

On 23 March 2021 the Tribunal issued a partial Award on liability and causation, finding Radisson liable for breach of contract (the "**Award**").

On or around 13 January 2022 Radisson identified documents evidencing that one of the arbitrators, appointed by Hayat, had engaged in *ex parte* communications with an individual engaged by Hayat in the Arbitration (including the exchange of two chains of internal Tribunal emails) (the "**Communications**"). On 27 January 2022 Radisson issued an arbitration claim form applying to set aside the Award, including under sections 68(2)(a) *("failure … to comply with section 33 (general duty of tribunal)") and (c) ("failure … to conduct the proceedings in accordance with the procedure agreed by the parties")* of the Arbitration Act 1996.

Hayat argued that Radisson was first informed of the Communications in September 2021, had deliberately delayed in investigating such allegations or issuing proceedings and accordingly had lost its right to appeal under s.68, pursuant to s.73 Arbitration Act 1996.

Dame Clare Moulder DBE held that Radisson had not acted "promptly" (as required by section 73 of the 1996 Act) when it first became aware of potential bias and therefore lost the right to challenge the Award. A full copy of the judgment, handed down on 21 April 2023, is available here[1] (the "**S.68 Judgment**").

Hearing to determine anonymity

By a separate hearing on 12 May 2023, Radisson made submissions that the S.68 Judgment should be anonymised, owing to: (a) the parties' agreement that all materials and information submitted in the Arbitration (with limited exceptions) were and would remain confidential; and (b) the terms of reference, which provided that any award in the Arbitration would not be published. Accordingly, Radisson submitted that: (1) the identities of the Claimant and Defendant; (2) any details identifying the Claimant and Defendant e.g., the names of representatives of either party; and (3) the Tribunal's identity, should be anonymised and redacted.

[1] LINK: Radisson Hotels APS Danmark v Hayat Otel Isletmeciligi Turizm Yatirim Ve Ticaret Anonim Sirketi [2023] EWHC 892 (Comm) (21 April 2023) (bailii.org)

Issue

The issue for the Court was whether the S.68 Judgment should be anonymised and redacted to preserve the confidentiality of the underlying arbitration.

The Commercial Court's decision

In relation to: (1) (the parties' identities); and (2) (the parties' representatives), the Court's answer was "no". Dame Clare Moulder DBE gave the following reasons:

1. Recent English Court of Appeal authority[2] confirmed that, when considering whether a judgment should be published with or without anonymisation, in each case, the Court's role was to weigh "*confidentiality and any detriment to the parties from publication against the public interest in publication, particularly where the judgment raises matters of some importance*."
2. Applying this test, no specific confidentiality had been identified which would amount to a specific detriment in the case. No details of the arbitration had been disclosed in the s.68 Judgment.
3. Further, Radisson's proposed redactions would make the S.68 Judgment difficult to follow, which was contrary to the public interest, insofar as judgment should be accessible and readily understood (*Manchester City*, applied). This applied to s.68 applications, since there was a public interest in understanding how the courts apply the law to maintain fairness in the conduct of arbitrations (whether or not the judgment in question raised matters of general importance or novelty).
4. Dame Moulder DBE also noted that: (a) Radisson had already recorded the fact of the arbitration and a broad description of its nature in its 2019 accounts; and (b) Hayat did not object to being identified in the S.68 Judgment.

As to (3) (the anonymity of the Tribunal), the Court held that the names of the arbitrators would be redacted, but gave the arbitrators 14 days to make an application as to whether or not their names should remain redacted, subject to which the judgment would be published in full.

Comment

The *Radisson* decision confirms the limitations of the scope of confidentiality in consensual arbitration proceedings once such proceedings are appealed before the Courts. It also confirms that the Courts will accord considerable weight to the public interest in understanding how the Courts determine applications relating to fairness in the conduct of arbitrations, when applying the balancing exercise identified above. Parties should therefore be aware of the risk of publicity that comes with a challenge of an arbitration award before the Courts.

As to the S.68 challenge itself, this serves as a reminder of the requirement in S.73 to act "promptly" when seeking to challenge an award before the Courts, as a delay (in this case it was only two weeks) might result in loss of that right.

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Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking here.

[2] *Manchester City Football Club Ltd v Football Association Premier League Ltd and others [2021] EWCA Civ 1110* at [42] per Flaux LJ.