Arbitration Developments – Application for Extension of Time to Commence Proceedings

Since the article in “Sea Venture” Vol. 17 entitled “English Law: Arbitration Developments” was published in March 1997, a number of attempts to gain further time have been made in the courts by parties who have missed time limits or have failed to comply strictly with contractual procedures for starting arbitration.

Before considering the approach taken by the courts, it is worth quoting in full s12(3) Arbitration Act 1996, which provides the only two grounds on which the court can extend time for commencing arbitration proceedings:

“The court shall make an order only if satisfied:

(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or

(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question”.

The underlying philosophy of the 1996 Act is one of promoting party autonomy at the expense of court intervention and s12(3) is a key example of this. The courts have taken a very strict approach to applications made under this section in the four main reported cases1. In only one case (the first decided case, which has since been distinguished by the courts in the later cases) did the courts allow an extension on the very unusual facts.

The most recently reported case is Harbour & General Works Ltd v Environment Agency2. The case concerns arbitration under a building contract but the principles of the decision are relevant to all s12(3) applications, irrespective of the subject matter. In refusing to grant the extension sought, the Court of Appeal gave very clear guidance to potential applicants of the way in which the Courts will exercise their powers under s12(3). In particular, Lord Justice Walker (who gave the leading judgement) explained that under s12(3) the Court could consider allowing an extension of time only in circumstances which the parties could not reasonably have contemplated as being those to which the time bar would apply. s12(3) did not allow the Court to interfere with a contractual bargain (which includes a contractual time bar) unless the circumstances were such that if they had been drawn to the attention of the parties at the time when they had agreed the provision, the parties would, at the very least, have contemplated that the time bar might not apply. Even then, if the Court could grant an extension under the above principles, it will only do so where it was just to do so.

In the “Harbour and General” case the applicants had failed to understand and, therefore, to follow the rather convoluted dispute resolution procedure in the contract. The Court decided that the applicants’ mistake, which was a failure to read the contractual provisions was well short of what was required for a successful s12(3) application. Unfortunately, missing a contractual deadline or failing to understand the provisions of a contract is not so uncommon as to be beyond the contemplation of the parties and so trigger the Courts’ powers under s12(3).

While each application will be decided on its facts, it is safe to assume that the courts will continue to adopt a very restrictive approach to applications for time extensions under s12(3). Ignorance or an unfortunate mistake is no excuse and a party who misses a contractual time limit will have no recourse to the Courts. This serves as a reminder to all users of London arbitration proceedings to pay particular attention to understanding and strictly observing time limits contained in contracts that they sign. It is far better to check these points at the outset before signature. Members who are in any doubt about such issues should contact the Club for guidance.

2 [2000] Lloyd’s Rep 60