# LLOYD'S LAW REPORTS

Editors:
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2006
Volume 2

informa
LONDON
2006

All editorial correspondence to: Lloyd's Law Reports,
Informa Law, Informa House, 30–32 Mortimer Street,
London W1W 7RE.



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Informa House
30–32 Mortimer Street
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ISSN 0024–5488
ISBN 978–1–84311–508–3

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Typeset by Interactive Sciences Ltd, Gloucester
Printed in Great Britain by MPG, Bodmin, Cornwall

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# LLOYD'S LAW REPORTS

Editors: Michael Daiches, Barrister
Professor Robert Merkin

PART 1 **ABB AG v Hochtief Airport GmbH** [2006] VOL 2

## QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

19, 20 January; 8 March 2006

ABB AG
v
(1) HOCHTIEF AIRPORT GMBH
(2) ATHENS INTERNATIONAL AIRPORT SA

[2006] EWHC 388 (Comm)

Before Mr Justice TOMLINSON

**Arbitration — Serious irregularity — Substantial injustice — Arbitrators finding that applicant guilty of bad faith in negotiations with respondent — Arbitrators concluding that respondent not itself guilty of bad faith in refusing to accept transfer of shares by applicant to third party — Whether conclusion tainted by serious irregularity — Whether Greek applicable law disregarded — Whether refusal to order disclosure of documents amounted to serious irregularity — Arbitration Act 1996, section 68.**

On 20 June 1991 the Greek state announced its intention to select a project leader to undertake and develop a new international airport at Athens. On 31 July 1995 an Airport Development Agreement (ADA) was signed and Articles of Association for a new body Athens International Airport SA (AIA), were agreed. The ADA included provisions to refer disputes to arbitration in London under LCIA Rules. The parties to the ADA were ABB, Hochtief, FASP (a joint venture between Hochtief and Flughafen) and Krantz, for the one part and, for the other, the Greek state. AIA SA was duly incorporated under Greek law and was given the rights for the "design, financing, construction, completion, commissioning, maintenance, operation, management and development of the new Athens international airport". ABB, Hochtief, FASP and Krantz built the new airport, with major engineering roles being taken by ABB and Hochtief.

Following the completion of the Airport, ABB sought to sell its 5 per cent share in AIA to Horizon, a company in the Copelouzos Group. On 11 November 2003 a notarial declaration was issued by Horizon by which it agreed to observe the terms of the ADA and to perform the obligations imposed by the Articles of AIA. The declaration complied with article 37.10.1 of the ADA, which provided that an incoming shareholder had to agree in writing to perform the obligations imposed by the articles. A Share Sale and Transfer Agreement was signed between ABB and Horizon on 24 May 2004.

The Greek state owned 55 per cent of the shares in AIA, and Hochtief thought it likely that Horizon would exercise its 5 per cent share to vote with the Greek state, giving it the 60 per cent required to decide various matters. On 27 January 2004 Hochtief submitted a request for arbitration to LCIA, seeking declarations that the transfer of ABB's shares in AIA to Horizon was null and void; and AIA's subsequent registration of that share transfer was null and void. Three arbitrators were appointed.

In its Statement of Case dated 6 May 2004, Hochtief argued that ABB, Hochtief, FASP and Krantz had entered into an oral agreement which prevented ABB from transferring its shares without Hochtief's consent, that the oral agreement amounted to a civil partnership under Greek law, and that the unilateral notarial declaration did not comply with article 37.10.1 of the ADA in that Hochtief's agreement was required but had not been obtained. ABB's c case was that the unilateral notarial declaration given by Horizon fully complied with the conditions set out in article 37.10.1 of the ADA so that there was no need for Hochtief to enter into a bilateral agreement with Horizon, and in any event there was no oral agreement or civil partnership. ABB argued in the alternative that if a bilateral agreement was required Greek law imposed a requirement on Hochtief to act in good faith, and Hochtief's refusal to enter into a bilateral agreement with Horizon was in bad faith.

At the hearing held on 8–9 December 2004 evidence was given to the arbitrators of earlier negotiations between ABB and another company in the Copelouzos group for the potential transfer of ABB's shares in AIA, which led to two option agreements and a bailment agreement dated 30 December 1999 (the three agreements). This gave rise to the suggestion that ABB had itself acted in bad faith. A second hearing was scheduled, and Hochtief requested production of documents relating to the three agreements. ABB objected, but the arbitrators ordered disclosure other than in respect of

documents which were privileged. ABB itself requested disclosure of documents showing that ABB had been willing to sell its shares to Hochtief in 1999 and 2003 but Hochtief had made only derisory offers. The arbitrators refused the order on the ground that ABB's bad faith was in issue and according to Greek law ABB would not be allowed to complain of a breach of good faith on the part of Hochtief.

At the second hearing on 16 March 2005 Hochtief maintained its primary position that a bilateral agreement was required for the transfer to Horizon ad that it had not acted in bad faith when refusing its consent. However, if that was wrong, Hochtief argued that ABB had also acted in bad faith and was precluded from relying on Hochtief's bad faith. ABB's response was that the three agreements had not transferred the shares, and that this had happened only by the new agreement in May 2004. ABB also argued that it had not been required to disclose its earlier negotiations and that in any event there was no principle of Greek law which would allow Hochtief to act in bad faith simply because ABB had itself acted in bad faith.

The arbitrators in their award concluded that: (a) ABB was in breach of the ADA and of the general obligation of good faith in Greek law when making the three agreements; (b) there was a failure to comply with article 37.10.1 of the ADA; (c) the purported transfer of ABB's shares to Horizon was null and void; and (d) the transfer and registration of shares to Horizon could not be approved under article 37.10.2 of the ADA so that each of the purported registration and approval was null and void.

In the present proceedings ABB sought to challenge the award under section 68 of the Arbitration Act 1996 for serious irregularity in three respects: (i) Hochtief had not in terms contended that the purported transfer of shares in AIA to Horizon took place pursuant to the three agreements — by deciding the case on a basis not argued, the arbitrators had not given ABB a reasonable opportunity of dealing with the point; (ii) the arbitrators failed to decide or even to refer to the Greek law issue even though that had been critical to a finding that ABB could not be permitted to maintain that Hochtief had acted in bad faith in 2004 in refusing to accept Horizon's unilateral notarial declaration; and (iii) the arbitrators had found on the facts that ABB had acted in bad faith in 1999 by purporting to negotiate with Hochtief despite refusing ABB's request that Hochtief disclose documents which would have shown whether in truth Hochtief was ever prepared really to buy the shares and what was its financial limit if it had been.

————*Held*, by QBD (Comm Ct) (TOMLINSON J) that the application would be dismissed.

(1) The ambit of the jurisdiction under section 68 was restricted. It was not a ground for intervention that the court considered that it might have done things differently or expressed its conclusions on the essential issues at greater length. Furthermore it was particularly to be borne in mind in the context of international arbitrations that the arbitrators may not all have been brought up in the same legal tradition. In order to express the reasons for their award they had to find language with which each was comfortable (*see* para 67);

————*Zermalt Holdings v Nu-Life Upholstery Repairs* [1985] 2 EGLR 14, *Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd's Rep 83, *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd, The Pamphilos* [2002] 2 Lloyd's Rep 681, *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277, *Warborough Investments v Robinson* [2003] 2 EGLR 149, *Vee Networks v Econet Wireless International Ltd* [2005] 1 Lloyd's Rep 192, *Margulead Ltd v Exide Technologies* [2005] 1 Lloyd's Rep 324, *Lesotho Highlands Development Authority v Impregilo SpA* [2005] 2 Lloyd's Rep 310, applied; *Fidelity Management v Myriad International Holdings* [2005] 2 Lloyd's Rep 508, *World Trade Corporation v Czarnikow Sugar* [2005] 1 Lloyd's Rep 422, *Cameroon Airlines v Transnet* [2004] EWHC 1829 (Comm), *Profilati Italia v PaineWebber* [2001] 1 Lloyd's Rep 715, *The Petro Ranger* [2001] 2 Lloyd's Rep 348, *Egmatra v Marco Trading* [1999] 1 Lloyd's Rep 862, referred to.

(2) Although Hochtief did not in terms contend that the purported transfer of shares took place pursuant to the three agreements, a point which was taken was that the conclusion of the three agreements in 1999 constituted an act of bad faith on the part of ABB upon which HTA could rely in connection with ABB's argument that HTA was acting in bad faith in refusing to accept Horizon's unilateral declaration in 2003. The duty to act fairly did not require the tribunal to refer back to the parties its analysis of the material and the additional conclusion which it derived from the resolution of arguments as to the essential issues which were already squarely before it. ABB had had a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion. ABB had argued, unsuccessfully, that the shares were not transferred pursuant to the Three Agreements but pursuant to a completely new agreement which had the effect of rescinding the earlier collection of agreements. The arbitrators concluded that the transfer took place pursuant to the three agreements, which were prohibited by law when made (*see* paras 68 and 72).

(3) Although the reasoning in the award was confused and compressed, it was plain both from its award and the transcript of proceedings that the tribunal formed an extremely adverse view of ABB's conduct. It considered that ABB had acted in bad faith towards its contractual partner and had attempted to conceal what it was doing. It was also plain that each member of the tribunal formed an adverse view of the evidence as to Greek law given on behalf of ABB. Accordingly the attack the award was in substance a criticism of the adequacy of the reasons rather than an assertion of an irregularity such as was contemplated by section 68. The points which each side were taking were fully canvassed in evidence and argument. The tribunal did not fail to deal with an issue that was put to it. The issue was whether Hochtief was in breach of its duty of good faith in refusing to accept Horizon's unilateral declaration. The tribunal dealt with that submission by rejecting it. The reasoning set out in support thereof might have been unsatisfactory but that was not of itself a serious irregularity. It was inconceivable to suggest that the arbitrators did not apply Greek law in coming to their conclusion and had exceeded their powers under

section 68(2)(b): there were references to Greek law in the award and it was plain that the arbitrators fully understood that they were applying the provisions of Greek law to the relevant parts of the dispute (*see* paras 76 and 80).

(4) Whether the arbitrators were wise to reject ABB's request for disclosure was not for the court to decide. The tribunal's rejection of ABB's disclosure request made it clear that the tribunal was already approaching the question of bad faith on the basis that what really mattered was ABB's attempt to circumvent the alienation provisions in the ADA. The arbitrators had express power under the IBA Rules to exclude from production any document on the ground of lack of sufficient relevance or materiality. They could be said to have acted unfairly in dealing with ABB's request as they did. Further, there was simply no scope for an allegation of substantial injustice. The arbitrators plainly concluded on the basis of overwhelming evidence that ABB conducted itself towards HTA in a number of respects which amounted to bad faith. The foundation for that finding was ABB's negotiation and conclusion of the three agreements as a device to circumvent the alienation provisions in the ADA. Had ABB proved that in the negotiations in December 1999 and/or January 2003 HTA were unwilling to pay a fair market price for ABB's shares that would have had no effect whatsoever upon either the arbitrators' conclusion as to ABB's bad faith or as to the outcome of the dispute as a whole. (*see* paras 84 and 85).

————*Per* Tomlinson J: Challenges to awards under sections 67 and 68 of the Act now appear to exceed in number applications for leave to appeal under section 69. A challenge under section 67 or section 68 can be mounted as of right without leave. Those who resort to and practise in international commercial arbitration are rightly jealous of the autonomy of the process, and the case law which has developed in this field demonstrates that the court will respect that autonomy. Challenges such as this are immensely time-consuming and therefore costly . . . Whilst the court will never dictate to arbitrators how their conclusions should be expressed, it must be obvious that the giving of clearly expressed reasons responsive to the issues as they were debated before the arbitrators will reduce the scope for the making of unmeritorious challenges (*see* para 87).

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The following cases were referred to in the judgment:

*Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The Pamphilos)* [2002] 2 Lloyd's Rep 681;

*Cameroon Airlines v Transnet* [2004] EWHC 1829 (Comm);

*Egmatra v Marco Trading* [1999] 1 Lloyd's Rep 862;

*Fidelity Management v Myriad International Holdings* [2005] 2 All ER (Comm) 312;

*Hussman (Europe) Ltd v Al Ameen Development and Trade Co* [2000] 2 Lloyd's Rep 83;

*Lesotho Highlands Development Authority v Impregilo SpA* (HL) [2005] 3 WLR 129;

*Margulead Ltd v Exide Technologies* [2004] 2 All ER (Comm) 727;

*Profilati Italia v PaineWebber* [2001] 1 All ER (Comm) 1065;

*The Petro Ranger* [2001] 2 Lloyd's Rep 348;

*Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm);

*Warborough Investments v Robinson* (CA) [2003] 2 EGLR 149;

*World Trade Corporation Ltd v Czarnikow Sugar Ltd* [2004] 2 All ER (Comm) 813.

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This was an application by ABB to set aside an arbitration award dated 19 July 2005 on the ground of serious irregularity, under section 68 of the Arbitration Act 1996.

David Waksman QC, instructed by CMS Cameron McKenna LLP, for the claimant; Christopher Style, Solicitor-Advocate of Linklaters for the first defendant; the second defendant did not appear and was not represented.

The further facts are stated in the judgment of Tomlinson J.

Wednesday, 8 March 2006

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## JUDGMENT

**Mr Justice TOMLINSON:**

*Introduction*

1. The court has before it a challenge to an award made by three professional lawyer arbitrators sitting as a tribunal to resolve an international commercial dispute. The arbitrators described the dispute as "a very high profile case . . . which will have considerable impact not only on the business of Hochtief and ABB, but will also no doubt have a very considerable impact in Greece". The arbitration was conducted according to the rules of the London Court of International Arbitration, hereinafter the "LCIA rules", which in article 26.9 include an irrevocable waiver of the right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made. The seat of the arbitration was London. The matters referred to arbitration were, so far as now relevant, governed by Greek law. By direction of the tribunal the International Bar Association (hereinafter "IBA")