War Series: Defining ‘War’ in Arbitration Awards and NATO Operations (Kosovo)

August 18, 2024

The arbitration award referenced in the UK Court of Appeal judgment [2002] EWCA 1878 delves deeply into the meaning of ‘war’ as interpreted by arbitration tribunals and its implications for contractual obligations. This award, rendered by a distinguished panel of arbitrators, underscores the nuanced approach that arbitration tribunals take in defining what constitutes a ‘war’ under commercial contracts, particularly in the context of **NATO operations**.

The arbitration at the heart of this judgment concerned the **New York Produce Exchange (NYPE) form of charter**, specifically the invocation of a **War Cancellation Clause** by charterers. The clause allowed for the cancellation of the charter in the event of the outbreak of war involving the nation under whose flag the vessel sailed. The dispute arose when Germany, as a member of NATO, participated in military operations in Kosovo and Yugoslavia in 1999. The charterers sought to cancel their obligations under the charter, claiming that Germany’s involvement in the conflict constituted ‘war’ as envisaged by the clause.

The core issue before the arbitration tribunal was whether the military operations in Kosovo, involving NATO and Germany, could be considered a ‘war’ within the meaning of the War Cancellation Clause. The tribunal’s majority found that the operations in Kosovo did not constitute ‘war’ as contemplated by the contract. This decision was based on a common-sense

interpretation of the term ‘war,’ which the majority arbitrators held should be understood as a conflict between nation-states, not merely military activities or hostilities that fall short of war. The tribunal majority reasoned that while the conflict in Kosovo was indeed intense and involved significant military engagement, it did not rise to the level of ‘war’ as defined by the contract.

This interpretation aligns with the approach taken by the courts in earlier cases, such as **KKKK v Belships Co (1939)**, where Branson J emphasized that the term ‘war’ must be construed based on the reasonable expectations of businesspersons, taking into account the nature of the conflict and the specific contractual context. The majority’s view was further supported by the distinction between ‘war’ and ‘warlike activities or hostilities short of war’ as explicitly drawn in the NYPE charter form.

The dissenting view by Sir Christopher Staughton, however, highlights the inherent ambiguity in the term ‘war’ and the potential for differing interpretations. Sir Christopher argued that a reasonable businessman would have considered the Kosovo conflict to be a ‘war,’ given the scale and intensity of the operations and Germany’s involvement. This dissent raises critical questions about the flexibility and adaptability of contractual terms in light of evolving international conflict scenarios.

The relationship between the judgment and the arbitration award is significant in that the Court of Appeal ultimately upheld the arbitration tribunal’s decision, despite recognizing the serious legal questions it raised. The court acknowledged that the arbitrators had applied a common-sense approach to the interpretation of the War Cancellation Clause, consistent with established legal principles. However, the court also noted the practical implications of the decision, particularly the emphasis on the timing of the cancellation notice, which played a crucial role in the outcome.

The broader implications of this award for **NATO operations today** are profound. The tribunal's decision reflects a conservative approach to defining 'war' in the context of contractual obligations, one that emphasizes the traditional understanding of war as a conflict between nation-states. This interpretation has significant consequences for parties to contracts involving NATO member states, as it suggests that not all military engagements, even those involving substantial force and participation by multiple nations, will be considered 'war' for the purposes of war cancellation clauses.

In the current geopolitical climate, where NATO operations are increasingly characterized by coalition-based engagements and multilateral military actions that may not involve formal declarations of war, the need for clarity in contractual language has never been more pressing. Parties drafting contracts that include war cancellation clauses must carefully consider the scope and definition of 'war,' ensuring that the terms are explicit and aligned with the parties' intentions.

The tribunal's decision in this case also underscores the importance of **timeliness in exercising cancellation rights**. The charterers' failure to provide timely notice of cancellation was ultimately fatal to their claim, highlighting the need for parties to act swiftly and decisively when invoking such clauses.

In conclusion, the arbitration award referenced in [2002] EWCA 1878 offers valuable insights into the interpretation of 'war' in commercial contracts, particularly in the context of NATO operations. The decision reflects a cautious approach, favoring a traditional understanding of war that may not always align with the realities of modern military engagements. For parties involved in contracts with NATO member states, the key takeaway is the importance of clear, precise language and the need for prompt action when invoking war-related contractual provisions. This award serves as a reminder that while the nature of conflict may evolve, the

principles of contract interpretation remain rooted in the reasonable expectations of the parties and the common-sense application of contractual terms.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/