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# English Courts Set Aside Award on Grounds of Serious Irregularity under Section 68 of the Arbitration Act 1996

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An often cited advantage of arbitration, as opposed to litigation, is the finality of the process. The grounds for time-consuming and costly challenges and appeals are limited.

Under the English 1996 Arbitration Act (the "Act"), parties can only challenge or appeal an arbitration award on three grounds: (i) a challenge on the grounds that the tribunal lacks substantive jurisdiction under Section 67, (ii) a challenge on the grounds of serious irregularity causing substantial injustice under Section 68, and (iii) an appeal on a point of law under Section 69. Only Sections 67 and 68 are mandatory provisions. There is a high evidentiary threshold to be met in order for the grounds under any of these sections to be met, and few and far between are those cases where the challenges have been found successful.

The recent Judgement of the Technology and Construction Court in *The Secretary of State for the Home Department v Raytheon Systems Limited* **[2015] EWHC 311 (TCC)** and **[2014] EWHC 4375 (TCC)** contains helpful guidance on the evidentiary tests which applicants will need to satisfy in order for a section 68 challenge to be successful.

Section 68 of the Act provides for challenges to an award on an exhaustive list of nine grounds of 'serious irregularity' affecting the tribunal, the proceedings or the award. Assuming one of nine grounds is met, the additional precondition to be satisfied in order for there to be a serious irregularity, is that the irregularity has caused or will cause 'substantial injustice' to the applicant.

'Serious irregularity' was a new term introduced by the Act, and was intended to deal with cases where "the Tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in section 68, that justice calls out for it to be corrected".[1] The threshold to meet this test is considered high, and Section 68 has been described as a 'long stop' to deal with 'extreme cases' where something 'went seriously wrong with the arbitral process'.[2]

There is good reason for this. The parties, by agreeing to submit the dispute to arbitration, have also consented

to the risks which accompany arbitration, including the extremely limited grounds for appeal.

**The Recent Case of The Secretary of State for the Home Department v Raytheon Systems Limited**

In two recent judgements handed down in *The Secretary of State for the Home Department v Raytheon Systems Limited*, Mr Justice Akenhead found that the tribunal which had been formed to hear the dispute between the parties had failed to consider two significant issues of liability and quantum in its award in favour of the respondent in the arbitration proceedings, Raytheon. The failure to address these issues was found to constitute a 'serious irregularity' under Section 68 of the Act, which had caused a substantial injustice to the applicant.

In a later judgement, Mr Justice Akenhead considered the appropriate relief to be granted in the circumstances of the case. After due consideration of the sparse case law on the matter, he concluded that the award should be set aside, and that the case be heard again by a new tribunal. Leave has been granted to the parties to appeal the judge's decision.

*Facts of the Case*

Raytheon Systems Limited (Raytheon), the defendant in the proceedings, was engaged by the Home Office to design, develop and deliver a new e-border technology system to reform border control. The value of the contract was a high nine-figure sum. In July 2010, the Home Office purported to terminate the contract. A dispute arose regarding the responsibility for termination, and the Home Office instituted arbitration proceedings, in which Raytheon subsequently alleged that the Home Office had wrongfully terminated the supply agreement.

In a Partial Final Award handed down on 4 August 2014 (and subsequently corrected on two occasions by way of memorandums), the tribunal found that the Home Office had unlawfully terminated the agreement between the parties, that it had repudiated the agreement, and that Raytheon had accepted that repudiation. The Tribunal awarded damages in excess of £126 million, and additional sums of approximately £60 million plus interest.

*High Court Challenge of the Award*

The Home Office brought proceedings in the Technology and Construction Court to have the Partial Award set aside and be declared to be of no effect. It relied on Section 68(2)(d) of the Act, on the grounds of 'serious irregularity' by reason of a 'failure by the tribunal to deal with all of the issues put to it'. In particular, the Home Office argued that the Tribunal had failed to deal with two issues of liability and three issues of quantum in relation to the £126 million awarded which had been put to it, which it argued were critical to the determination of the arbitration.

In a first hearing to determine whether a 'serious irregularity' had occurred under Section 68 of the Act, Mr Justice Akenhead carefully considered the case law and practice around Section 68. He noted that Section 68 reflects "the internationally accepted view that the court should be able to correct serious failures to comply with the "due process" of arbitral proceedings", quoting the judgement handed down in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43. He also reiterated that there was a 'high threshold' to be met to establish that a failure to address an issue constitutes a serious irregularity causing substantial injustice to the applicant. Mr Justice Akenhead added that courts should strive to uphold arbitration awards and should not approach awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults on awards with the objective of upsetting or frustrating the process of arbitration".[3]

However, looking more precisely at the case law relating to Section 68(2)(d), he noted that there would be a 'failure to deal with an issue where "the determination of that "issue" is essential to the decision reached in the award [...] An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes". He added that it did not matter if the issue was dealt with well, badly or indifferently, so long as it was dealt with. Significantly, he noted a failure by a tribunal to set out each step by which they reached their conclusion, or deal with each point made by a party was not the same as failing to deal with an issue.

If it was found that a tribunal has not dealt with an issue in the case, an applicant would still need to demonstrate that this failure caused it 'substantial injustice', in order for the test under Section 68(2)(d) to be satisfied. Relying on *Vee Networks Limited v Econet Wireless International* [2005] 1 Lloyd's Rep 192, Mr Justice Akenhead noted that, in order to satisfy the 'substantial injustice' test, an applicant did not need to demonstrate that it would have succeeded on the issue which the tribunal failed to deal with, but it was only necessary for him to show that "(i) his position was "reasonably arguable"; and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award".

Having considered the law, Mr Justice Akenhead turned to consider the liability and quantum challenges made by the Home Office. He found that Liability Ground 2 had been made out, namely that the tribunal had failed to address the case made by the Home Office that all or substantially all of the delays in the performance of the agreement milestones were the actual fault or responsibility of Raytheon. Mr Justice Akenhead considered that the failure to address this issue was a 'substantial injustice' stating that "[t]he substantial injustice arises not simply from the fact that these issues were not clearly dealt with. They arise in the context that both parties spent a large amount of time, resources and indeed money in presenting their cases and evidence as to responsibility for the delays, disruption and inefficiencies".

Mr Justice Akenhead also found in favour of the Home Office in respect of Quantum Ground 3, namely that the Tribunal had not addressed the issue raised by the Home Office that Raytheon should not be permitted to recover sums on a global basis without any consideration of Raytheon's own actual or possible breaches of contract. He considered this to be a very important issue, not least because the consequences of the failure to deal with this issue affected the sum of damages awarded to Raytheon. He noted that "[i]t almost goes without saying that, necessarily, there has been a substantial injustice because the arbitrators have not addressed the key issues as to (a) whether or not there were problems which were the fault and responsibility of Z [Raytheon] and (b) if so, what impact that had on the cost recovery claim which formed the basis of the substantial award [...]". He went on to state that this failure to deal with the issues "cannot be classified as anything less than substantial injustice because the arbitrators have not applied their minds to the issue at all and any right minded party to arbitration would feel that justice has not been served".

*Appropriate Relief for a Failure to Deal with an Issue Put to the Tribunal*

In a second hearing, Mr Justice Akenhead considered what the appropriate relief under section 68(3) of the Act was for the tribunal's failure to deal with the issues mentioned above.

Section 68(3) of the Arbitration Act provides that, if there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may either (i) remit the award to the tribunal, in whole or in part, for reconsideration, (ii) set the award aside in whole or in part, or (iii) declare the award to be of no effect, in whole or in part. Section 68(3) provides that remission of the award to the tribunal for reconsideration should be the default option, and that the court "shall not exercise its power to set aside or to declare an award to be of

no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration".

Noting the sparse case law on Section 68(3), Mr Justice Akenhead stated that, in deciding whether to remit or set aside an award, the court needed to "consider all the circumstances and background facts relating to the dispute, the award, the arbitrators and the overall desirability of remission and setting aside, as well as the ramifications, both in terms of costs, time and justice, of doing either". He considered Merkin's Arbitration Law review of the pre-1996 authorities which indicated that quashing the award would be appropriate in the following circumstances where: (i) there has been a serious miscarriage of justice affecting evidence and the arbitrators cannot reasonably be expected to approach the matter afresh; (ii) one or both of the parties has justifiably lost confidence in the arbitrators in the light of the manner in which the arbitration has been conducted; (iii) the outcome of remission would require a full hearing or re-hearing; (iv) the remission would inevitably lead to the award being reversed; (v) the conduct of the arbitrator is such as to show that, questions of partiality aside, he is, through lack of talent, experience, or diligence, incapable of conducting the reference in a manner which the parties are entitled to expect; and /or (vii) the delay between the arbitration hearing and the outcome of the judicial proceedings is such that the parties and the arbitrators cannot reasonably be expected to remember what transpired in the original proceedings.

Mr Justice Akenhead, examining also the post-1996 authorities, determined that this was a case where the award should be set aside. In reaching this decision, he cited the following reasons:

(i) Both of the issues which he found had not be dealt with by the Tribunal under Section 68(2)(d) were "towards the more serious end of the spectrum of seriousness in terms of irregularity". He noted that the fact that the tribunal had taken some 16 months after final oral submissions to produce their award "might lead a fair minded and informed observer to wonder (rightly or wrongly) at least whether (subconsciously) the tribunal was seeking some sort of shortcut".

(ii) Citing the case of *Lovell Partnerships (Northern Ltd) v AW Construction plc* (1996) 81 BLR 83, he noted that it would be "invidious and embarrassing [for the tribunal] to be required to free [itself] of all previous ideas and to re-determine the same issues", and that even for a conscientious tribunal, re-determining issues could create "its own undesirable tensions and pressures".

(iii) Mr Justice Akenhead considered that it was unlikely that a new arbitration would lead to a significant re-drawing of the issues in the arbitration. He added that he would expect that "on many of the individual issues on which each party lost, the losing party would not seek to re-argue them", failing which he anticipated that the party having previously lost on an individual issue in the first arbitration, and electing to run the same argument again in the new arbitration, would face cost sanctions.

(iv) He added that, in the new arbitration, he expected that much of the factual and expert evidence would be redeployed.

(v) Mr Justice Akenhead also expressed doubt that the current tribunal, having likely not considered in detail the evidence on the delays to the disputed project, would have any significant recollection of the evidence. He commented on the delays between the date evidence was given in the first arbitration and this hearing, and further added that these delays would likely extend to 4 years if an appeal was pursued.

Costs in the application were awarded to the Home Office, at a discount. Mr Justice Akenhead did not address

the question of costs in the first arbitration, whose award had now been set aside.

**Comment**

This recent decision adds to the slim body of authorities on challenges to awards under Section 68(2)(d) of the Act. It provides useful guidance to applicants seeking to challenge arbitration awards under Section 68(2)(d) on the evidentiary tests which need to be satisfied.

*Should Agreeing a List of Issues Become the Norm in Arbitration?*

This judgement serves as a reminder to all arbitrators, regardless of their experience and seniority, of the importance of ensuring that their awards consider and address all issues in a case, even if only in passing. The gravity of the failure to address key issues in the case was emphasised on multiple occasions by Mr Justice Akenhead. However, there remains a fine distinction to be drawn between addressing all essential issues in the case, and dealing with every disputed point raised by the parties. This distinction has been emphasised in previous authorities, but where a large number of disputes facts and issues are raised in a case, it may not always be clear which are considered 'essential' and likely to lead to a 'substantial injustice' if not addressed.

In these circumstances, arbitrators may choose to avoid such potential pitfalls, by requiring the parties to agree in advance the list of issues which must be determined in the arbitration. This is already envisaged in certain institutional rules, such as those of the ICC, to assist tribunals in navigating these distinctions. The ICC Rules require a tribunal to draw up Terms of Reference in the case which, unless the tribunal considers it inappropriate, should include a list of issues to be determined. Because the parties are required to sign such Terms of Reference, it necessarily renders it more difficult for them to bring later challenges under Section 68(2)(d) of the Act unless the issue addressed was already included in the agreed list of issues. Such list would also facilitate the tribunal's own process of preparing the award.

*Are Cost Sanctions Appropriate in New Arbitrations, Where an Initial Award has been Set Aside?*

Another point of particular interest was Mr Justice Akenhead's suggestion that parties should anticipate cost sanctions against them where a party who lost on a given factual or legal issue before the current tribunal seeks to argue it again and loses it before a new tribunal. This comment reminds parties of their responsibility in ensuring the arbitration proceeds efficiently and expeditiously, and has economic merit.

This implication of potential cost sanctions, however pragmatic in terms of economic and procedural merit, is slightly controversial as this runs counter to the legal position that when an award has been set aside it no longer has legal effect in the seat of arbitration. Accordingly, parties should retain the discretion of raising the same, or new, legal arguments in the new arbitration, on the basis that the new tribunal may well reach different conclusions than the first tribunal which heard the case. Mr Justice Akenhead noted this conundrum in his judgement, observing that, whilst he was conscious that in setting aside the whole award for re-hearing by a different tribunal, a number of findings in the first arbitration may be re-opened before a new tribunal, he anticipated that "it will be a foolhardy party who, without obviously good reason, seeks to do so".

*Where an Award is Set Aside, What Happens to the Costs in the First Arbitration?*

Another interesting question which this judgement raises concerns the overall costs awarded in the first arbitration. The award in the first arbitration having now been set aside, the cost orders which were made in the original award no longer have legal effect. The parties will need to incur further legal and other costs in

subjecting the dispute to arbitration again.

What remains unclear, and was not addressed in this judgement, is whether the parties will be able to seek their costs in the first arbitration proceedings in a second arbitration on the same facts and legal issues. This will likely depend on whether the wording of the arbitration clause of the supply contract between Raytheon and the Home Office is broad enough to grant the new tribunal jurisdiction to determine such costs. To avoid any doubt as to whether a new tribunal would have such jurisdiction, the parties could have raised the issue in the court proceedings. Having not done so, they can alternatively now seek to agree that this issue will fall within the jurisdiction of a new tribunal.

Even if it were within the jurisdiction of a new tribunal to determine whether the parties could recover their costs in the first arbitration whose judgement was set aside, it will necessarily be a complex process for the new tribunal to assess those costs, having not procedurally overseen the first arbitration.

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1. *Petroships Pte Ltd of Singapore v Petec Trading and Investment Corporation of Vietnam and Others (the Petro Ranger)* (2001) 2 Lloyd's Rep 348. ↩
2. *Fidelity Management SA v Myriad International Holdings BV* (2005) EWCH 1193 (Comm). ↩
3. Quoted the judgement in *Fidelity Management v Myriad International* case (2005) 2 Lloyd's Rep 508. ↩

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