

COURT SETS ASIDE ARBITRAL AWARD FOR SERIOUS IRREGULARITY

By Gordon Bell and Christopher Richards

The recent Commercial Court decision in *(1) RJ (2) L Ltd v HB* provides a rare example of a party successfully challenging an arbitral award on grounds of serious irregularity. It also considered whether the English court has the power to remove an arbitrator where it makes a finding of serious irregularity. We look at how to challenge arbitral awards before the court, and how this challenge succeeded where many fail.

Challenging arbitral awards

One of the basic principles of the (English) *Arbitration Act 1996* (the Act) is that the court should only intervene in arbitration in limited circumstances.

In accordance with this non-interventionist principle, the Act provides limited grounds on which arbitration awards can be challenged before the court. In short, they are:

- Challenge on grounds that the tribunal lacked substantive jurisdiction (s.67 of the Act);
- Challenge on grounds of serious irregularity (s.68 of the Act); and
- Appeal on a point of law (s.69 of the Act) (unless the parties have excluded the right of appeal).

Not only are the grounds of challenge limited, but successful challenges for serious irregularity are very rare. Statistics published by the Commercial Court earlier this year revealed that, of 122 serious irregularity challenges brought between 2015 and 2017, only one was successful. 2018 has however seen the number of successful s.68 challenges creep up.

So what is serious irregularity, and what does a party have to show to succeed in challenging an award on this ground?

Serious irregularity

Under s.68 of the Act, a party can challenge an arbitral award on grounds of serious irregularity affecting the tribunal, the proceedings or the

award. The applicant must demonstrate that:

- The serious irregularity falls within one of the prescribed types in the Act. These include failure by the tribunal to comply with its duties or deal with all the issues put to it, the tribunal or any arbitral institution exceeding its powers, or the award being obtained by fraud; and
- The serious irregularity has caused, or will cause, **substantial injustice** to the applicant - in short that the irregularity affected the outcome of the proceedings.

If the court is satisfied that there has been a serious irregularity causing substantial injustice, then it can either remit the award to the tribunal for reconsideration or, if that is not appropriate, set the award aside or declare it to be of no effect.

A successful s.68 challenge

RJ & L Ltd v HB concerned a final award rendered by a sole arbitrator in ICC proceedings concerning an investment in the banking sector.



In the arbitration, the claimant (HB) had sought a declaration that the defendant (RJ) was bound by deed to accept delivery of shares from HB (and for specific performance thereof), alternatively for damages for breach of the deed. HB's position was therefore that RJ had not taken the shareholding as intended, and had "wrongfully set his face against doing so".

RJ did not dispute that it had failed to take the shareholding; indeed it no longer wanted to. Its position though was that its failure to complete the transaction did not involve any breach of contract, and it denied that specific performance should be given.

The parties were therefore in agreement that RJ had no ownership interest in the shares.

In the award however, the arbitrator found that RJ was the beneficial owner of the shares.

RJ challenged the award under s.68 on the basis that the arbitrator granted relief that HB had never sought and which was significantly different to anything any of the parties argued for; further that the arbitrator had done so without any notice to the parties, thus depriving them of the opportunity to address any such case.

On the following points, Mr Justice Andrew Baker decided:

- **Serious irregularity** - "arbitrators are not restricted to choosing between whatever rival contentions are developed by the parties; but if they are to contemplate determining a dispute on some rival basis, fairness dictates, and so the arbitrators' general duty of fairness under s.33 of the Act requires, that the parties be given notice and a proper opportunity to consider and respond to the new point." The arbitrator had decided the dispute in a way which had not been brought by HB, suggested by RJ, or raised by the arbitrator with the parties, and nothing in the proceedings put the parties on notice that the arbitrator was thinking of deciding the dispute in this way. Baker J was satisfied there was therefore a procedural irregularity.
- **Substantial injustice**- the effect of the award was that RJ was declared beneficially to own a shareholding he did not want, for which



he did not have a regulatory approval, and his ownership of which exposed him to a real risk of financial penalties imposed by the regulator. Baker J had no doubt it was a substantial injustice for RJ to be put in that position without having had an opportunity to address the possibility before the arbitrator.

- **What to do with the award?** -The default option in cases of irregularity is to remit the decision to the arbitrator, but Baker J considered it was essential in this case that those parts of the award affected by the arbitrator's reasoning be set aside to be considered afresh.

- **Can the court remove an arbitrator for serious irregularity?** On the facts of this case, the question of removal did not arise - the arbitrator was "a very senior English QC, well known and highly regarded in the world of international commercial arbitration, who was jointly nominated by the parties", and whose honesty and integrity was not impugned. Baker J had no doubt that the arbitrator would take on board this judgment and that he would be able to "approach the question

of relief afresh with an open mind".

• In passing, however, Baker J corrected what he described as "the misapprehension" (shared by the parties and judge in *The Secretary of State for the Home Department v Raytheon Systems Limited [2015] EWHC 311 (TCC)*) "that setting aside rather than remitting an award involved without more, or required, replacing the tribunal". Baker J considered that s.68 alone does not empower the court to remove an arbitrator, that power being reserved to s.24 of the Act, and if a party sought such relief it would need to make a s.24 claim, joining the arbitrator as a party.

Limited intervention

While this case and others in the last year may suggest successful challenges are on the rise, parties to arbitration still face a high hurdle to establishing serious irregularity causing substantial injustice, and the courts will be slow to interfere in the arbitral process. It is noteworthy too that, even though the court was in no doubt as to irregularity and injustice in this case, it still had faith in the arbitrator's professional ability to consider the issue afresh with the court's supervisory guidance - a sign that intervention in the arbitral process may be minimised (at least in some instances) even where there is a successful challenge.

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