



COMMENTARY  
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## “Serious Irregularity” in Arbitration Award Triggers English Commercial Court Set-Aside

### IN SHORT

**The Situation:** A bank owner and an investor entered into an agreement in which the investor would provide the funds necessary for a merger of two banking entities in return for a minority interest in the acquired bank.

**The Issue:** Upon completion of the merger, the investor did not take the minority interest, presenting what the bank owner saw as a breach of contract. Arbitration followed, resulting in declaratory relief.

**Looking Ahead:** The English Commercial Court ruled that the declaratory relief ruling constituted a serious irregularity, shedding light on the circumstances under which the court will intervene in arbitral decisions.

On 26 October 2018, the English Commercial Court handed down its decision in *RJ, L Ltd v HB* [2018] EWHC 2833, setting aside parts of an arbitral award which were found to be affected by a serious irregularity, on the basis that those parts addressed matters outside the scope of the parties' submissions. Cases where awards are successfully set aside in the English courts are few and far between. This decision is significant because it shows that despite their pro-arbitration stance, English courts will examine the conduct of arbitral proceedings and intervene where there is a serious procedural irregularity.

### Summary of Facts

The dispute involves two individuals, HB, the owner of a bank (“Bank 1”) and RJ, an investor that agreed to provide US\$75 million through an investment vehicle, L Ltd, to enable HB to acquire a controlling interest in a separate bank (“Bank 2”). In return, RJ was to acquire a minority interest in Bank 2 upon completion of the merger. Due to regulatory limitations on the use of borrowing to fund the acquisition of Bank 2, the parties entered into a number of agreements pursuant to which HB would procure that Bank 2 acquire Bank 1 (so far as was lawful and upon obtaining necessary authorizations) and RJ would subsequently acquire a minority interest in Bank 2.

The agreements provided for different outcomes in case the final stage of the transaction could not be completed as expected. One possible outcome was an entitlement by L Ltd to be repaid US\$75 million plus interest. The circumstances in which that outcome would result formed part of the dispute between the parties.



The case is significant in highlighting the circumstances where the Courts will intervene to remedy procedural irregularities in arbitral awards.



In the course of the transaction, RJ provided the US\$75 million and the merger of Bank 1 and Bank 2 was completed, but RJ did not take the minority interest. HB commenced arbitration under the Rules of Arbitration of the International Chamber of Commerce seeking, amongst other things, specific performance and a declaration that RJ and L Ltd were not entitled to repayment of the principal sum on account of their breaches of contract. RJ and L Ltd counterclaimed, seeking the return of their US\$75 million investment and interest.

Disposing of the claims in the final award, the sole arbitrator declined to order specific performance on the basis that it was not an effective remedy in the circumstances of the case and, the tribunal reasoned, the same relief can be achieved by making declarations—specifically, by declaring that RJ was the beneficial owner of the shares in Bank 2—an order which the Tribunal proceeded to make.

### The English Commercial Court Decision

Upon receiving the award, RJ and L Ltd applied to the Commercial Court to have the declaratory relief set aside under s. 68 of the Arbitration Act 1996, on the basis of serious procedural irregularity. In the court's judgment, Baker J found that granting declaratory relief was a serious irregularity within the meaning of s. 68(2) of the Arbitration Act in circumstances where it was not raised by the parties or by the sole arbitrator in a manner sufficient to give the parties a reasonable opportunity to deal with it.

In reaching this finding, Baker J considered various exchanges between the parties and found that it was possible to read those exchanges "as a hint that something like what became [the award for declaratory relief] may have been starting to go through the Arbitrator's mind." However, the exchanges did not demonstrate that the parties had sufficient notice of the alternative means of disposal or a reasonable opportunity to address it. The court therefore set aside the award for declaratory relief.

The case is significant in highlighting the circumstances where the English Courts will intervene to remedy procedural irregularities in arbitral awards. Importantly, where a tribunal entertains or grants relief that is not sought by the parties and it does so without sufficient notice of its reasoning and without providing the parties a reasonable opportunity to address it, the award may be challenged or set aside for procedural irregularity under s. 68 of the Arbitration Act.

#### TWO KEY TAKEAWAYS

1. Cases where awards are successfully set aside in the English courts are few and far between.
2. However, where an award is based on findings or reasoning that the parties have not had a reasonable opportunity to address, there is a risk that it will be set aside for "procedural irregularity".



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