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COMMENTARY

English High Court Tackles Serious Irregularity in LCIA Arbitral Award

Challenges to arbitral awards on serious irregularity grounds are rarely pressed and very seldom succeed. The recent English[1] High Court judgment in *The Secretary of State for the Home Department v Raytheon Systems Limited*[2] ("First Judgment") is however one such occasion where a challenge, advanced under sections 68(1) and 68(2)(d) of the English Arbitration Act 1996 ("Act"), met with success. Consequent upon that ruling, and in a further judgment[3] ("Second Judgment"), the High Court set aside a London Court of International Arbitration ("LCIA") award of approximately £225 million.

Key Aspects

There are two components to these related judgments of most interest.

First is the serious irregularity grounds for challenging arbitral awards pursuant to Section 68 of the Act.[4] Section 68 lists various forms of serious irregularities which, individually or cumulatively, potentially provide for grounds of challenge. At first blush, the ambit of those grounds appears to be relatively wide. However, any party seeking to rely upon a Section 68 ground must demonstrate the further threshold ingredient that "substantial injustice" has been, or will be, caused by its occurrence. Although that ingredient was successfully demonstrated in the instant case, Mr Justice Akenhead nonetheless affirmed that the bar is set very high[5] and that curial relief will be exercised only where, among other matters, the tribunal has gone so wrong in the conduct of the arbitration that "justice calls for it to be corrected".

Second is the issue of what the appropriate relief ought to be where serious irregularity (causing substantial injustice) is properly established[6]—specifically, whether the award should be remitted or set aside and the factors weighing for and against each. In this regard, His Lordship's judgment provides some very useful, and relatively rare, guidance on this issue.

Arbitration Background

In 2007, the Secretary of State for the Home Department ("Home Office") engaged US defence company Raytheon Systems Limited ("Raytheon") to design, develop and deliver a £750 million electronic border control system. However, under a new Government, the Home Office purported to terminate Raytheon's contract in 2010, citing, among other matters, the significant delays suffered to the milestone deliverables.

Raytheon denied that the termination was lawful and, on that basis, pressed substantial damages claims against the Home Office. A London seated LCIA arbitration was commenced by the Home Office, and a tribunal was constituted comprising UK and US wing arbitrators and a Canadian chair.

A 42-day substantive hearing on liability and quantum took place, with oral evidence of fact and opinion drawn from a total of 58 witnesses, following which the tribunal rendered its Partial Final Award in August 2014 ("Award"). In agreeing that the contract had been unlawfully terminated, the tribunal directed the Home Office to pay Raytheon damages of approximately £225 million including costs and interest.

The Challenge

Invoking Section 68 of the Act, the Home Office applied to the High Court (Technology and Construction Court) for the Award to be set aside and declared to be of no effect on grounds of serious irregularity having occurred.[7] The Home Office contested that there existed a serious irregularity affecting the tribunal, the proceedings or the Award arising from a "failure by the tribunal to deal with all the issues that were put to it"[8]—specifically, the tribunal's omission to deal with various matters essential to the Home Office's case on both liability and quantum.[9]

Upon hearing the challenge, Akenhead J handed down two judgments.

First Judgment–Serious Irregularity?

Of the various serious irregularity grounds advanced by the Home Office, Akenhead J determined that the tribunal had failed to address two essential matters that had been put to it.

Questions Concerning Liability. The tribunal had not assessed whether entire or substantial responsibility for the delay (including associated disruption and inefficiencies) rested with Raytheon. In His Lordship's view, there was "little doubt however that, if the tribunal had considered the issue in such terms, there is a real chance that it would have to reconsider some of its key findings".[10] Stemming from that failure, Akenhead J was satisfied that substantial injustice had been established, not only as relates to the delay issue having not been addressed, but also in light of the large amount of time, resources and cost spent by the parties in presenting their respective cases and evidence on the issue before the tribunal.

Questions Concerning Quantum. Resultant of the tribunal's omission to deal with liability on the delay issue, the Home Office could credibly contend that it should not have been on the hook for the attendant costs awarded against it.[11] Substantial injustice had occurred because had the tribunal dealt with liability, those costs may have been excised from the overall quantum equation.

Accordingly, the Home Office's challenge was upheld.

Second Judgment–Appropriate Relief?

Having therefore concluded that serious irregularity was fully made out, it fell upon Akenhead J to determine what the appropriate relief ought to be—specifically, whether the Award (in whole or part) should be remitted, set aside or declared to be of no effect.

On analysis of the Act's Section 68(3) wording, among other observations, His Lordship stated that where serious irregularity had been found to have occurred[12]:

- Plainly, remission is the "default" option, and the Court cannot set aside unless it would be "inappropriate" to remit.
- The burden of establishing that it would be inappropriate to remit must be on the party seeking relief other than remission, and what must be established is that where proven serious irregularity exists, it would be inappropriate to remit to the existing arbitral tribunal.
- There is no authority which suggests that it will invariably be inappropriate to set aside the Award where Section 68(2)(d) is the relevant serious irregularity ground.
- There is little or no difference in practice between the setting aside and declaration of no effect remedies.
- In deciding whether to remit or set aside, it is incumbent upon the court 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 including all attendant costs, time and justice ramifications.

- There is no previous authority which substantially mirrors the facts of the instant case, and there are relatively few reported decisions on Section 68(2)(d) of the Act.

Akenhead J proceeded to consider various cases[13] where the underlying facts led to a conclusion that setting aside was the appropriate relief. The cases highlighted potentially material factors such as where a serious miscarriage of justice affecting evidence had occurred and the arbitrators could not reasonably be expected to be able to approach the matter afresh, where confidence in the arbitrators was lost, where remission would require a full re-hearing or where remission would inevitably lead to the award being reversed.

Concluding that the Award in this instance ought to be set aside in whole for re-hearing by a fresh arbitral tribunal, His Lordship reasoned[14] a number of determinative factors, including:

- The grounds advanced by the Home Office under Section 68(2)(d) of the Act were towards the more serious end of the spectrum of seriousness in terms of irregularity. That the tribunal took some 16 months after final oral submissions to produce the Award "might lead a fair minded and informed observer to wonder (rightly or wrongly) at least whether (sub-consciously) the tribunal was seeking some sort of shortcut".
- It would be "invidious and embarrassing [for the tribunal] to be required to try to free [itself] of all previous ideas and to re-determine the same issues", and such exercise could well create undesirable tension and pressure.
- If the tribunal were to again reach exactly the same conclusions, albeit conscientiously and competently, that "might well lead to a strong belief objectively that justice had not been or not been seen to have been done".
- Any significant re-drawing of the issues in the arbitration appears improbable. Much of the factual and expert evidence adduced before the existing tribunal would be re-deployed before the fresh tribunal.

Observations

Some important points arise from this case.

First, it timely reminds all arbitrators that, regardless of seniority or experience, it is incumbent upon them to exercise abundant caution by ensuring that awards squarely address all essential matters put by the parties. Any such failure not only runs the risk of attracting curial scrutiny but also has the potential to indelibly stain professional reputations (however unmerited).

Second, despite the success enjoyed by the Home Office in the instant case, it very much remains the position that any party invoking a Section 68 challenge will be required to surmount a high evidentiary bar—in particular, to meet the requirement that a party must properly establish that substantial injustice has been or will be caused.

Third, Mr Justice Akenhead's thorough analysis and reasoning adds considerably to an otherwise slim corpus of authority on Section 68 serious irregularity challenges. Whilst not setting a new watermark on the law and practice relating to remission or setting aside of arbitral awards, His Lordship's instructive judgments will nonetheless provide useful guidance to any parties contemplating similar challenges.

Of striking interest, in setting aside the Award for the proceedings to be re-heard afresh, His Lordship stated[15]:

> …I would anticipate that, on many of the individual issues on which each party lost, the losing party would not seek to re-argue them; the sanction will be costs so that, if a party which lost on a given factual or legal issue before the current tribunal argues it again and loses it before the new tribunal, it should not be surprised when it faces an indemnity cost sanction, whatever the overall result….

At one level, His Lordship's portent comments carry merit by reminding the parties of their duty to conduct the arbitration fairly, efficiently and expeditiously. Whether a court can reach so far as to augur cost sanctions in relation to what will be, strictly speaking, a *de novo* arbitral proceeding, however, is slightly more controversial.

Finally, His Lordship granted the parties leave to appeal on both judgments. Should any appeal(s) ensue, we will provide a further case update.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Damian Watkin
Dubai
+971.4.709.8410
dwatkin@jonesday.com

Hamish Lal
London
+44.20.7039.5184
hlal@jonesday.com

Michael W. Bühler
Paris
+33.1.56.59.38.54
mbuehler@jonesday.com

Sheila Shadmand
Dubai
+971.4.709.8408
slshadmand@jonesday.com

Lee Coffey
London
+44.20.7039.5120
lcoffey@jonesday.com

Matthew J. Skinner
Singapore
+65.6233.5502
mskinner@jonesday.com

Phillip Georgiou
Hong Kong
+852.3189.7312
pgeorgiou@jonesday.com

Steven L. Smith
San Francisco
+1.415.875.5725
stevensmith@jonesday.com

Jean-Pierre N. Harb
Paris
+33.1.56.59.46.35
jpharb@jonesday.com

Baiju S. Vasani
London / Washington
+44.20.7039.5121
+1 202.879.3888
bvasani@jonesday.com

Pierre Heitzmann
Dubai / Paris
+971.4.709.8484
+33.1.56.59.46.26
pheitzmann@jonesday.com

Endnotes

1 All references to England also include Wales, as they together constitute a single jurisdiction.

2 [2014] EWHC 4375 (TCC).

3 *The Secretary of State for the Home Department v Raytheon Systems Limited* [2015] EWHC 311 (TCC).

4 The subject of His Lordship's First Judgment.

5 *See* in particular the useful summary provided at paragraph 33 of His Lordship's First Judgment.

6 The subject of His Lordship's Second Judgment.

7 Per section 68(1) of the Act.

8 Per section 68(2)(d) of the Act.

9 Being an alleged failure to address two questions on liability and three questions on quantum. Specifics of those matters are summarised at paragraphs 34 to 39 of His Lordship's First Judgment.

10 At paragraph 48 of His Lordship's First Judgment.

11 Amounting to some £126 million.

12 *See* paragraphs 3 to 5 of His Lordship's Second Judgment.

13 A summary analysis of which is contained at paragraphs 5 to 12 of His Lordship's Second Judgment.

14 *See* paragraph 23 of His Lordship's Second Judgment.

15 At paragraph 23 of His Lordship's Second Judgment.