The recent Commercial Court decision in K & Others v P & Others provides a rare example of a party successfully challenging an arbitral award on grounds of serious irregularity. Here we look at how to challenge arbitral awards before the court, and how this challenge succeeded where the majority 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 only limited grounds on which arbitration awards can be challenged in 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)
- Appeal on a point of law (s.69 of the Act) (although parties can choose to exclude this right of appeal)

This case concerned a challenge on the basis of serious irregularity under s.68. Statistics published by the Commercial Court last year revealed that, of 122 such serious irregularity challenges brought between 2015 and 2017, only one was successful. 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 two things:

- First, that there is a **serious irregularity** falling within one (or more) of the 9 categories set out in s.68. 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.
- Second, that 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 (the preferred option), set the award aside or declare it to be of no effect.

**A successful s.68 challenge**

K and others v P and others concerned a final award rendered in an arbitration under the rules of the London Court of International Arbitration (LCIA). The dispute arose out of a share purchase agreement under which the buyers agreed to purchase the shares in two companies with property interests in Ukraine. The dispute centred on arguments about adjustment of the purchase price, and claims for breach of warranty under the share purchase agreement. In the arbitration award, the Tribunal favoured the Sellers on a number of points.

The Buyers challenged the arbitration award for serious irregularity, citing three of the legal grounds set out in s.68 of the act:

1. Tribunal failed to comply with its duty under s.33 of the Act (namely a duty to act fairly and impartially as between the parties, and to give each party a reasonable opportunity to put its case and to deal with its opponent’s case);
2. Tribunal failed to conduct proceedings in accordance with parties' agreement; and
3. Tribunal failed to deal with all the issues put to it.

The buyers cited a number of alleged failings by the tribunal which they said had the effect that
they were denied the opportunity properly to put their case. We review these below.

Allowing a late claim by sellers

- The Buyers argued that the tribunal had permitted the Sellers to assert a new claim at a late stage in the proceedings - it had not been pleaded in their written submissions, was raised for the first time in cross-examination and was unsupported by expert evidence, but the Sellers then relied on it in their closing submissions, and the Tribunal accepted it. The Buyers contended that, because the point first appeared only in cross-examination, they were unable to present their own factual evidence on it, and had insufficient opportunity to deal with this aspect of their opponent’s case.
- Giving his judgment in the Commercial Court, Cooke J noted that, while the Sellers' new claim appeared late on, the Buyers did not apply to exclude it at that stage, nor did they apply to adduce their own responsive evidence when the new point arose (though they did deal with the point in re-examination). Nor did the Buyers seek to exclude the point when it resurfaced in the Sellers' oral closing submissions - instead the Buyers engaged with the argument and explained why it should not be accepted on its merits. It was only in the closing written submissions that the Buyers sought to argue this point should not be allowed and that it had caused them prejudice. Accordingly, Cooke J considered that the Buyers "had been given every opportunity to grapple with the points raised, however late they first appeared", and that there was therefore no serious irregularity or substantial injustice. This particular challenge to the award failed.

Failure to deal with arguments/issues

- The Buyers asserted that the Tribunal had failed to deal with particular arguments they had raised.
- One of their arguments related to the financial treatment of certain assets. The court gave this challenge relatively short shrift - "although it may be said that the Tribunal did not specifically determine each and every argument put forward, it cannot, in my judgement, be said that it failed to deal with an issue in the sense of an essential matter which had to be determined in order for the Tribunal properly to reach its conclusion".
- Another of the Buyers’ arguments related to liability under the warranties and indemnities. The Court agreed with the Buyers that the Tribunal had failed to deal with this argument, and that the argument was of sufficient importance that it constituted an "issue" that needed to be determined within the meaning of s.68 of the Act. It considered this constituted a serious
irregularity which caused substantial injustice because, had it determined the issue, the Tribunal might have reached a different conclusion. It remitted the award to the Tribunal for determination of this issue.

Allowing new claim in closing submissions

- In the written closing submissions (exchanged 2 weeks after the final arbitral hearing), the Sellers advanced a new case as to the measure of loss for breach of a particular warranty - a point on which there had, until then, been common ground between the parties. As the Sellers' and Buyers' closing written submissions were exchanged simultaneously, the Buyers had no opportunity to address this new argument. The court agreed that the Tribunal failed to act fairly by denying the Buyers an opportunity to meet this new case. Had the Buyers been given that opportunity, the Tribunal may have come to a different conclusion, and so this was a serious irregularity causing substantial injustice. Again, the court remitted the award to the tribunal on this point.

Deciding an issue contrary to parties' agreement

- Finally, the Buyers argued that the Tribunal had decided a particular issue contrary to the agreed position between the parties, and without giving them notice of its intention, or the opportunity to deal with it.
- Again, the court agreed that this was a serious irregularity causing substantial injustice, and remitted this issue to the Tribunal for reconsideration.

Other issues

- **Waiver** - under s.73 of the Act, a party may lose the right to object to procedural unfairness if it continues to participate in arbitration proceedings without raising its objections. Cooke J considered whether the Buyers had waived their right to challenge by continuing to participate in the proceedings, but found that, in relation to the points where he had found in the Buyers' favour, they could not have known of the unfairness until they received the award, and so had not lost the right to object.
- **Delay** - the Tribunal did not issue the award until some two years after the final hearing (albeit this was partly due to the illness of one of the arbitrators). Cooke J described this delay as "inordinate and unacceptable", but the parties agreed that while delay on its own
may be a breach of the arbitrator's s.33 duty and therefore a serious irregularity, it did not automatically cause substantial injustice - one of the other grounds in s.68 would also have to be made out. Cooke J noted "the most that can ordinarily be said about such delay is that it can give rise to a suspicion that the Tribunal may have either forgotten what points were raised and required determination or that it, consciously or subconsciously, sought a shortcut in order to finalise a delayed award."

What can we take from this decision?

- While this case and others in recent years may suggest successful challenges are on the rise, parties to arbitration still face a high hurdle in challenging arbitral awards, and the courts will be slow to interfere in the arbitral process.
- Delay in producing an arbitral award is not, on its own, grounds for challenging the award - but it may well be an indicator that procedural unfairness lies beneath.
- Even where, as here, the court finds there has been serious irregularity causing substantial injustice, that may not be enough to undermine faith in the original arbitrator(s) - in this case the issues were remitted to the same Tribunal for (re)consideration.

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