

Not So Appealing?

The Challenges of Challenging Awards and Determinations before the Court

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1. When the disappointed losing party finishes reading an Arbitrator's Award or Expert's Determination their instinctive reaction may well be to ask their professional advisers about the prospects of challenging the result and re-opening the argument.
2. A desire to challenge is much more easily expressed than bringing any challenge however. In line with the basic rationale of alternative dispute resolution, the circumstances in which an aggrieved party is able to re-open matters in court are deliberately limited. The first point to note is that the rules are very different to those that apply when one is in the process of seeking to overturn a judgment of the court.
3. I intend today to focus on a selection of the recent cases that have been before the courts in 2018 and 2019 to illustrate just some of the relevant challenges faced by a party seeking to challenge an award or determination. Much of this case law emanates from the commercial courts. The relevant principles are the principles that will be carried over and applied in the property context.
4. There are 3 main challenge provisions in the Arbitration Act 1996. The first two are that a party to an arbitration may apply to the court to challenge an award:
 - a. on the grounds of serious irregularity affecting the tribunal, the proceedings or the award (section 68), or
 - b. (rarely, in a property context) on the grounds that the arbitral tribunal had no substantive jurisdiction (section 67).

The third is that it is possible to appeal against an award on a question of law (section 69). However, and in contrast to the first two bases for challenge, permission of the court is needed to appeal unless all parties to the proceedings agree.

5. As regards expert determination, the terms of the Arbitration Act 1996 are irrelevant. As a result, a party to a determination generally has no right to challenge it even if it is shown that the expert made an error of law or committed an irregularity causing a substantial injustice.

The only exceptions are:

- a. fraud;
- b. manifest error, if this route is open;
- c. if a party can establish that the expert has so far departed from his instructions that he has failed to carry out the instruction referred to him, such that the determination will not be binding; or
- d. if the expert has been negligent in carrying out the determination, such that the party who has suffered loss caused by that negligence may be able to recover damages from him.

The potential grounds for challenge in court are very strictly confined.

ARBITRATION

The touchstone: it is intended to be difficult to challenge awards

6. A key aspect of the Departmental Advisory Committee Report preceding the Arbitration Act 1996 was that the Act would provide much stricter controls on a party's ability to bring challenges. Paragraph 280 of the DAC report was as follows:

"Having chosen arbitration the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, Clause 68 is really designed as a long stop only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."

7. It is clear that the test of “substantial injustice” is intended to support the freestanding nature of the arbitral process rather than to encourage interference with it. In Lesotho Highlands Development Authority v Impregilo SpA [2006] 1 AC 221, Lord Steyn said that the Act brought about changes that were “radical”. It was drafted “to reduce drastically the extent of intervention of courts in the arbitral process”. The Act was intended to promote “one-stop adjudication”.
8. Most recently, HHJ Paul Matthews summarised the court’s approach as follows when considering an appeal from a rent review award in Merthyr (South Wales) Ltd v Cwmbargoed Estates Ltd [2019] EWHC 704 (Ch):

“47 ... because the parties have selected arbitration to resolve their dispute, it is not necessary that the arbitral tribunal produce a result which is as precisely correct in law as might be produced by resort to the litigation system, with its professional lawyer-judges, detailed legal procedural rules and its hierarchy of appeals. It is sufficient if the arbitral tribunal produce a result which (so far as concerns this case) is not “obviously wrong” on the face of the award. If it does, then it is final. This is the product of the policy adopted by Parliament in enacting both the 1979 and 1996 Arbitration Acts.

48. That arbitration is different from litigation in this respect is easily shown. For example, in Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd [2004] EWHC 996 (Ch), another case where leave was sought under section 69, Lloyd J said:

“25. ... It seems to me that the parties having chosen their experienced and learned arbitrator, they should be left with his decision and not have the opportunity of challenging it by way of an appeal to the court.”

But before we get to sections 68 & 69 is it an award at all?

9. When considering challenge, the first step is to consider whether the offending document is an award at all? Normally this will not be an issue, but there is no mechanism at all in the Arbitration Act 1996 for a challenge to a procedural order. A challenge can only be made to an award. As a result, a party may have to await the award itself before making a formal

challenge on the ground that the award has been made through the use of a defective procedure.

10. The decision of Cockerill J in ZCCM Investments Holdings Plc v Kanshanshi Holdings Ltd [2019] EWHC 1285 (Comm), emphasises that the distinction between a procedural order and an award can therefore be crucial when considering whether there can be any appeal at all. The Judge drew up some useful guidelines from previous authorities to assist in deciding whether a procedural order or an award has been made. She said:

- a. The court will give real weight to the question of substance and not merely form;
- b. Accordingly, one factor in favour of the conclusion that a decision is an Award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal *functus officio*, either entirely or in relation to that issue or claim;
- c. The nature of the issue with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award whereas a decision relating purely to procedural issues is more likely not to be an award;
- d. There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status;
- e. It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it;
- f. A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, and the level of detail in which the tribunal has expressed its reasoning.

11. She also identified a further factor which had not been stated expressly in earlier cases. She said:

- g.(i) a reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules; and
- (ii) the focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that

the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award.

12. Applying those criteria to the facts before her, the Judge held that the tribunal had issued a procedural ruling and not an award in that case. It was simply a decision on the procedural question of whether a derivative action should be allowed. The parties had expected a ruling with reasons, and that is what they had received. The arbitration was not over and the tribunal was not functus. The challenge therefore failed to even get off the ground.

And always remember the need first to exhaust “any available arbitral process of appeal or review”

13. Section 70(2) provides that it is a condition precedent to any appeal under section 68 that the appellant has first exhausted “any available arbitral process of appeal or review”. A point emphasised in the drafting of section 68 itself. One such process is set out in section 57 of the Act. Section 57 is often referred to as “the slip rule”.

14. Section 57(3) provides:

“The tribunal may on its own initiative or on the application of a party

- (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
- (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.”

15. The drafting of section 57 covers 3 types of cases:

- a. A straightforward clerical mistake, like a typographical error;
- b. An error arising from an accidental slip or omission, like an arithmetical error;
- c. The clarification or removal of any ambiguity.

It is important to remember that this therefore includes the ability for a party to request the tribunal to make an award or an additional award on claims presented in the arbitration but not decided upon by the tribunal.

16. The consequences of failing to comply with section 70(2) are automatically fatal to any challenge. These are just some examples of cases which have fallen foul of this requirement in 2018-2019.
17. In Gracie v Rose [2019] EWHC 1176 (Ch), Judge Russen QC held that the applicant's section 68 challenges failed immediately on this ground. The arbitration award had been challenged on the basis that it was ambiguous and uncertain. As such, the applicant should have utilised the procedure under section 57 to seek that clarification or resolution and not issued under section 68. The Judge's judgment provides an excellent account of the role the section 57 process plays.
18. In X v Y [2018] EWHC 741 (Comm), an appeal was launched against an arbitration award on 4 various grounds of serious irregularity under section 68(2)(a) and (d). Bryan J dismissed the application on the basis that the Claimant had failed, as required by section 70(2), to seek relief from the Tribunal itself in accordance with the slip rule in section 57. Relying on the decision of Cooke J in Torch Offshore LLC v Coble Shipping Inc [2004] 2 Lloyd's Rep 446, Bryan J held that section 57(3)(a) could be used to obtain further reasons where none existed. X's claim was therefore automatically precluded by its failure to invoke section 57(3).
19. In ZCCM (cited above), Cockerill J said that an allegation that an issue had not been determined by the Arbitrator – set out as a ground for challenge under section 68(2)(d) – was an issue that could have been referred back to the Tribunal under section 57. It therefore again followed that a challenge under section 68(2)(d) could not succeed: it was automatically barred.
20. The specific nature of the error alleged is necessarily all-important, of course. No Curfew Ltd v Feiges Properties Ltd [2018] EWHC 744 (Ch), was a case where an arbitrator sought to correct his Award but the error did not fall within the scope of section 57, so leading to an allegation of serious irregularity. No Curfew was a rent review case, and the issues for the arbitrator were the split between the trading and ancillary parts of the premises and the applicable rates per square foot. The arbitrator considered the submissions of the parties' surveyors. He assessed the rent for the hostel and bar separately. The landlord's surveyor wrote to the arbitrator pointing out that he had used the wrong table from his evidence showing the split between the trading and ancillary areas on the ground floor. The arbitrator

then issued an amended award adjusting the figures, which resulted in an increase of the bar rent by 5,000. The amendments made by the arbitrator made it clear what the original error was, and what the correction was.

21. The Deputy High Court Judge held that the arbitrator had not had power to correct the award under s.57(3)(a). The authorities drew a distinction between errors affecting the expression of the tribunal's thought, which *could* be corrected, and errors in the tribunal's thought process which *could not*, Mutual Shipping Corp of New York v Bayshore Shipping Co of Monrovia (The Montan) [1985] 1 W.L.R. 625 considered and Gannet Shipping Ltd v Eastrade Commodities Inc [2002] 1 All E.R. (Comm) 297 applied. There had been no clerical mistake, error arising from an accidental slip or omission or any ambiguity in the award. There had been a single error by the arbitrator in misunderstanding the expert evidence. What followed were the consequences of that error. Because there had been no error in expressing the arbitrator's thoughts it was not capable of correction under s.57(3)(a).

Watch out for the strict statutory time limits and don't rely on the court's discretion to extend

22. The Arbitration Act 1996 adopts the principle of finality of awards. The time limits for an appeal to the court against an award – whether jurisdictional, procedural or substantive - are 28 days from the notification of the award: section 70(3). The court does have power to extend time, but the case law shows that even if there are only short delays an extension will be refused.
23. It is crucial that the applicable time limits are adhered to closely; the consequences of making a late application are severe. Both applications under section 57 and challenges under sections 67, 68 and 69 must be made “within 28 days of the date of the award”. Section 54(2) provides that “the date of the award” is the date upon which the arbitrator signs the award.
24. In the absence of agreement between the parties which operates to extend the time periods set out in section 57, any exercise of the initiative to correct (under 57(a)) and any application (under either 57(a) or (b)) must be taken or made within 28 days of the award. And, unless otherwise agreed by them, any correction made by the arbitrator on such an application and any additional award must be made within 56 days of the original award.

25. The issue of the inter-relationship of these time limits was discussed in Gracie. In Daewoo Shipbuilding & Marine Engineering Co Ltd v Songo Offshore Equinox Ltd and Another [2018] EWHC 538 (Comm), Bryan J also addressed the vexed question of exactly when the 28 days permitted by section 70(3) of the Arbitration Act 1996 to appeal against an award began to run where there had been an application to the arbitrators to correct their award under section 57 of the 1996 Act. Bryan J accepted the correctness of the most recent authorities to the effect that time runs from the date of the award but will be extended to the date of the corrected award where the outcome of the application for correction is material to the decision as to whether there should be an appeal.
26. As regards any and all applications for an extension of time to bring a challenge, the test is a tough one. The court's power to extend time is contained in section 80(5) of the Act. No criteria are set out in the section, but these have been explored by the courts.
27. The key judgment is that of Colman J in AOOT Kalmneft v Glencore International AG [2002] 1 Lloyd's Rep 128, where the following criteria were set out:
1. The length of the delay;
 2. Whether, in permitting the time limit to expire and the subsequent delay to occur, the party was acting reasonably in all the circumstances;
 3. Whether the respondent to the application or the arbitrator caused or contributed to the delay;
 4. Whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
 5. Whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration or the costs incurred the determination of the application by the court might now have;
 6. The strength of the application; and
 7. Whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined."

28. X v Y [2018] (as cited above), is an example of a standard type of case where permission was refused for an extension of time under the court's general discretion in section 80(5). Applied to the facts there, Bryan J held that time should not be extended because:

- (i) A delay of 24 days was significant when judged against the 28 days permitted.
- (ii) No satisfactory explanation was given as to why the time limit was permitted to expire.
- (iii) Neither the tribunal nor respondent had any part to play in the delay.
- (iv) There was no prejudice to the respondent, but on the other hand proof of prejudice to the respondent was not a necessary requirement of a decision to refuse to extend time.
- (v) This did not arise because the awards were dispositive of the issues.
- (vi) The application was not a strong one.
- (vii) There was no unfairness in refusing an extension of time, given that the time allowed for applications was deliberately short and the delay was both significant and substantial.

29. In State A v Party B and Another [2019] EWHC 799 (Comm), Sir Michael Burton recently reviewed the decided cases on applications for extensions of time under section 80(5). By way of example, extensions of time for challenge were refused in: AOOT Kalmneft – 11 weeks; Nagusina Naviera v Allied Maritime Inc [2002] EWCA Civ 1147 – 3 months; L Brown & Sons Ltd v Crosby Homes (North West) Ltd [2008] BLR 366 – 66 days; Nestor Maritime SA v Sea Anchor Shipping Co Ltd [2012] 2 Lloyd's Rep 144 – 6 months; Terna Bahrain Holding Company WLL v Al Shamsi [2013] 1 Lloyd's rep 86 – 17 weeks; S v A [2016] 1 Lloyd's Rep 604 – 102 days; Squibb Group Ltd v Pole 2 Pole Scaffolding Ltd [2017] BLR 613 – 84 days; Telecom of Kosovo JSC v Dardafon.Net LLC [2017] EWHC 1326 (Comm) – 18 days; Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd [2018] 1 Lloyds 443 – 24 days.

The one exception was Chantiers de L'Atlantique SA v Gaztransport & Techingaz SAS [2011] EWHC 3383 (Comm) – 150 days, where fraud was alleged.

Is the challenge a section 68 case at all and does the complaint satisfy the necessary high standards?

30. Section 68 provides:

- “(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award....
- (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –
- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
 - (b) the tribunal exceeding its powers ...
 - (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
 - (d) failure by the tribunal to deal with all the issues that were put to it;
 - (e) ...
 - (f) Uncertainty or ambiguity as to the effect of the award;
 - (g) The award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
 - (h) Failure to comply with the requirements as to the form of the award; or
 - (i) Any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.”

31. Recourse to section 68 is *only* possible to ensure that due process is followed. It is only where an arbitrator or tribunal fails to comply with its general duties or exceeds its powers, grounds for challenge may therefore exist. The irregularity relied upon must be within the closed list of categories set out in paragraphs (a) to (i) above.

32. Remember, Lord Steyn said in Lesotho:

“nowhere in section 68 is there any hint that a failure by the tribunal to arrive at the correct decision could afford a ground for challenge”.

Section 68 does not allow a challenge based on errors in the assessment of evidence. Neither does it deal with errors of law.

33. There are 2 main questions to be addressed when considering the merits of a challenge to an award under section 68:
- a. Can it be shown that there is an irregularity of one or more of the kinds specified in section 68(2)?
 - b. Will it be possible to demonstrate that that irregularity has caused or will cause substantial injustice to the applicant?
34. Even when theoretically applicable, the test that will be applied is exacting. In Terna Bahrain Holding Company WLL v Al Shamsi [2012] EWHC 3283, the judge said that:
- “Relief under s.68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could reasonably be expected for the arbitral process, that justice calls out for it to be corrected.”

Lord Steyn said in Lesotho (as cited above):

"Plainly a high threshold must be satisfied. ... it must be established that the irregularity caused or will cause substantial injustice to the applicant. This is designed to eliminate technical and unmeritorious challenges . . ."

There can only be substantial injustice where it is seriously arguable that, but for the irregularity, the outcome might have been different.

35. Regardless of these strong words and repeated dire warnings, many would-be litigants nevertheless seek to utilise section 68 – particularly grounds (a) and (d) – to challenge awards simply on the basis that the Arbitrator has not dealt with each and every piece of the evidence put before them. Such challenges necessarily fail.
36. The recent judgment of Teare J in UMS Holding Ltd v Great Station Properties SA [2017] 2 Lloyd's Rep 421, provides a comprehensive review of the case law regarding misconceived challenges rooted in a party's unhappiness at the Arbitrator's treatment of their evidence. At paras. 28-35, he said:
- “Having considered these authorities my understanding of the law regarding allegations that an arbitral tribunal has overlooked evidence is as follows. A contention that the tribunal has ignored or failed to have regard to evidence relied

upon by one of the parties cannot be the subject matter of an allegation of a serious irregularity within section 68(2)(a) or (d), for several reasons.

First, the tribunal's duty is to decide the essential issues put to it for decision and to give its reasons for doing so. It does not have to deal in its reasons with each point made by a party in relation to those essential issues or refer to all the relevant evidence.

Second, the assessment and evaluation of such evidence is a matter exclusively for the tribunal. The court has no role in that regard.

Third, where a tribunal in its reasons has not referred to a piece of evidence which one party says is crucial the tribunal may have

- (j) considered it, but regarded it as not determinative,
- (ii) considered it, but assessed it as coming from an unreliable source,
- (iii) considered it, but misunderstood it or
- (iv) overlooked it.

There may be other possibilities. Were the court to seek to determine why the tribunal had not referred to certain evidence it would have to consider the entirety of the evidence which was before the tribunal and which was relevant to the decision under challenge. Such evidence would include not only documentary evidence but also the transcripts of factual and expert evidence. Such an enquiry (in addition to being lengthy, as it certainly would be in the present case) would be an impermissible exercise for the court to undertake because it is the tribunal, not the court, that assesses the evidence adduced by the parties.

Further, for the court to decide that the tribunal had overlooked certain evidence the court would have to conclude that the only inference to be drawn from the tribunal's failure to mention such evidence was that the tribunal had overlooked it. But the tribunal may have had a different view of the importance, relevance or reliability of the evidence from that of the court and so the required inference cannot be drawn.

Fourth, section 68 is concerned with due process. Section 68 is not concerned with whether the tribunal has made the "right" finding of fact, any more than it is concerned with whether the tribunal has made the "right" decision in law. The suggestion that it is a serious irregularity to fail to deal with certain evidence ignores that principle. By choosing to resolve disputes by arbitration the parties clothe the tribunal with jurisdiction to make a "wrong" finding of fact."

37. His Lordship emphasised the court’s well-established approach to reading and understanding arbitration awards in this regard. He stressed that when considering a challenge the court’s will seek to uphold the arbitrator if possible:

“It has long been established that “the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it.” (see Zermalt Holdings v Nu-Life Upholstery Repairs (1985) 2 Estates Gazette p.14 per Bingham J.)

38. As regards a potential challenge, it was argued in UMS that higher standards should be met by arbitrators when the tribunal chosen by the parties consisted of former Commercial Court judges and a distinguished lawyer, where considerable resources have been spent on the arbitration and where leading firms of solicitors and leading and junior counsel have been employed. Indeed, it was submitted that the parties were entitled “to expect a standard of award higher than that which is to be expected in a rent review arbitration of a corner shop conducted by a chartered surveyor (which was the type of arbitration in Zermalt)” [the cheek!]. This argument was dismissed. It was held that this basic rationale behind the Act falls to be applied uniformly.

39. It is notable that in UMS Teare J also expressed disapproval of the argument that a challenge could be brought under section 68 on the basis that certain conclusions were “manifestly illogical and cannot rationally be sustained”. Those challenges derived from the language used by Sales J. in Metropolitan Property Realizations Limited v Atmore Investments Limited [2008] EWHC 2925 (Ch). That was a rent review arbitration, where the arbitrator’s approach to assessing the revised rent assumed that a notional tenant would take a relevant notional lease at a rate which included a profit element for itself but his calculation did not in fact include any element of profit for the notional tenant. Sales J. concluded that the award was obviously flawed as a matter of the commercial logic which the arbitrator had himself decided should be applied. The award could not be regarded as a “rationally sustainable

resolution of, or dealing with, the basic issue which he had to determine”. This was therefore held to be a serious irregularity within section 68(2)(d): a failure to deal with an issue.

40. Teare J was sceptical Sale J’s analysis was correct. He warned that this decision has to be “treated with some care”. He reasoned that it is clear that:

- a. the mere fact that the arbitral tribunal has reached the wrong conclusion cannot constitute a serious irregularity within section 68.
- b. it is also clear that so long as an arbitrator deals with an issue it does not matter that he has done so “well, badly, or indifferently”: see The Secretary of State for the Home Department v Raytheon Systems Limited [2014] EWHC 4375 (TCC) at paragraph 33(vi) per Akenhead J.

He therefore considered that rather than illogicality providing a free-standing ground for striking down an award, it may instead indicate that there has been a failure to address an issue. This seemed to him the “... way in which the decision of Sales J. in Metropolitan Property Realizations Limited v Atmore Investments Limited should be understood.” The “glaring illogicality” identified by Sales J. indicated that the arbitrator in that case had not dealt with an issue which it was essential for him to determine.

41. X v Y [2018] EWHC 741 (Comm), is another example of a case where it was held that the essence of the allegations was an impermissible attack on the facts found and the legal reasoning in the award. The tribunal had not overlooked evidence or failed to resolve all issues put to it. If there was a failure to deal with an issue, that was said to be the result of X's presentation of the case, and that was not serious irregularity: Av B [2017] 2 Lloyd's Rep 1; New Age Alzarooni 2 Ltd v Range Energy Natural Resources Inc [2014] EWHC 4358 (Comm).

42. In Grindrod Shipping Pte Ltd v Hyundai Merchant Marine Co Ltd [2018] EWHC 1284 it was alleged the tribunal had acted unfairly and had failed to comply with its duty of giving each party a reasonable opportunity of putting its case contrary to section 33. The allegation was that the tribunal had rejected all of Hyundai’s arguments and had instead devised its own formulation of matters, so that the claim had been dismissed on grounds not put to the tribunal and which the applicant had not been given an opportunity to answer.

43. The challenge was rejected. Sir William Blair said that so long as the parties had been given the opportunity to deal with the “essential building blocks” in the tribunal’s conclusion, there was no need to refer back to the parties: ABB AG v Hochtief Airport [2006] 2 Lloyd’s Rep 1; Reliance Industries Ltd v The Union of India [2018] 1 Lloyd’s Rep 562. A party would usually have had a sufficient opportunity to meet the case if the essential building blocks were in play or in the arena in relation to an issue, even where the argument was not articulated in the way adopted by the Tribunal. Even if that was wrong, substantial injustice could not be shown because it was unlikely that the tribunal would have reached a different conclusion.
44. In contrast, Sir William Blair noted that arbitrators had to be particularly careful not to raise **new** points without giving the parties a chance to respond however – see Pacol Ltd v Joint Stock Company Rossakhar [2000] 1 Lloyd’s Rep 109. That may well provide a ground for challenge within section 68.
45. In A v B [2018] EWHC 3366 (TCC), the Court considered the application of section 68 to the exercise by the Tribunal of its discretion to exclude evidence. Mr X gave oral evidence, but although there was an objection by B that the evidence went beyond his witness statements the tribunal permitted the evidence to be adduced subject to a final ruling in its award on admissibility. In the Award, the tribunal ruled that his oral evidence was inadmissible. It was common ground that a refusal to admit evidence could constitute serious irregularity under section 68. However, the Deputy Judge noted that where the tribunal had a discretion, the court had to be aware of the “wide latitude” given to the tribunal as to how its powers were actually exercised. It was not enough that the tribunal had acted harshly, and the court could intervene only where the tribunal’s decision was “effectively outside the bounds of what can be characterised as an exercise of discretion at all”.
46. The Deputy Judge said:
- “the tribunal made a ruling that it was wholly entitled to make, having given both sides more than fair opportunities to address the issue of admissibility of / reliance upon Mr X’s oral evidence. It carried out a balancing exercise which ... was clearly well within the bounds of its wide discretion”.

Even if that was wrong, there was no substantial injustice. The court noted that there could be substantial injustice only where it was seriously arguable that, but for the irregularity, the outcome might have been different. That was not the case here.

Bias

47. Allegations of bias are necessarily fact specific. In two recent cases, the courts have considered Arbitrator's duties of continuing disclosure and have held them to be satisfied.
48. In Halliburton Co v Chubb Bermuda Insurance Ltd and Others [2018] EWCA Civ 817 the Court of Appeal upheld the first instance decision of Popplewell J in refusing to dismiss an arbitrator who had been appointed by solicitors for the some party in related proceedings. The effect of the decision is that there may well be a duty of disclosure if there are concerns about possible bias, but that a failure to disclose is not of itself an automatic ground for removal in the absence of other substantial factors.
49. Failure to disclose did mean that the arbitrator had not displayed the necessary "badge of impartiality" and that would inevitably colour the thinking of an objective observer. However, it could well be the case that a failure to disclose a circumstance was of no significance if, on further examination by the court that circumstance did not give rise to an inference of apparent bias. Something more was required. It was necessary to examine the circumstances as a whole, including the non-disclosure, to determine whether there was apparent bias.
50. The Court of Appeal held that overlapping appointments gave rise to a legitimate concern but not one amounting to apparent bias. It was to be expected that an arbitrator would decide a case solely on the material presented in the proceedings in question.
51. In Soletanche Bachy France SAS v Aqaba Container Terminal (Pvt) Co [2019] EWHC 362 (Comm), it was common ground based on the decision of the Court of Appeal in Halliburton Co v Chubb Bermuda Insurance Ltd [2018] 1 Lloyds Rep 638, that there was a continuing duty on the Arbitrator to disclose any additional links to a company B, mentioned in evidence. The claimant argued that during the course of the arbitration the arbitrator had contact with company B. Sir Michael Burton saw nothing in the allegation. Once it was disclosed by the arbitrator initially that he had been retained and instructed by B, nothing that

happened afterwards during the arbitration amounted to a material change, and in particular there was no need for the Arbitrator to disclose he had met the client. The ultimate question was whether objectively there was apparent (including unconscious) bias. The judge saw no possibility that an objective observer could have concluded that there had been any risk at any time of a lack of impartiality.

Undisclosed Evidence

52. One of the clearest grounds for challenge and one of the easiest ways in which an arbitrator can fail to hold a fair hearing, in breach of section 33 of the Arbitration Act 1996 and leading to serious irregularity under section 68, is for the arbitrator to take into account evidence upon which one or both parties have not had the chance to comment. Although this should be well-known, there was a further successful challenge on this basis recently.
53. In Fleetwood Wanderers Ltd v AFC Fylde Ltd [2018] EWHC 3318 (Comm) HHJ Halliwell remitted on award on the ground that the arbitrator had taken evidence from a third source without informing the parties, and had relied upon that evidence to reach his award. In the dispute between the two football clubs, the arbitrator had committed a serious irregularity by making enquiries and eliciting information from the FA about a matter which proved determinative in his award without notifying the parties about those enquiries and giving them an opportunity to make representations.
54. The irregularity had given rise to substantial injustice. The test was whether a different outcome might have resulted. In the present case the parties would have made representations, and it was realistically possible that information could have been adduced to persuade the arbitrator that the FA had considered and rejected the matter at hand and decided not to do so. The judge's clear view was that there was an arguable case that the arbitrator had as a matter of law reached the wrong conclusion. Remission was the appropriate remedy because:
- a. the default position under section 68(3) was remission unless that remedy was inappropriate;
 - b. the irregularity related to a discrete aspect of the claim, so that question could be resolved without reopening the rest of the case;
 - c. the irregularity could be dealt with by the parties being permitted to make representations; and

- d. there was no allegation of actual or apparent bias, it was merely the case that the arbitrator wished to reach the correct conclusion.

Natural Justice

55. P (A Company Incorporated in Country A) v D (A Company Incorporated in Country B) and Others [2019] EWHC 1277 (Comm) is one of the comparatively rare cases where a challenge under section 68 based on the ground of breach of the rules of natural justice has been upheld. The errors made by the tribunal were: reliance on the lack of credibility of a key witness when there had been no cross-examination of that witness on the point; and reliance on a matter not raised by the defendant.
56. The court held that the award was tainted on the basis of two settled principles of law:
 - a. First, where there was a challenge to a witness on a core issue as to credibility, it ought to be put in cross-examination to that witness, failing which lack of credibility could not be relied upon. If the evidence of a key witness was to be disbelieved, he was to be given a fair opportunity to deal with the allegation.
 - b. Secondly, the tribunal could not base its decision against a party on a case not argued by the other.
57. Sir Michael Burton was satisfied that there was substantial injustice. While it was not for the court to speculate what the result would have been if principles of fairness had been applied, it was possible that there might have been a different outcome. Where there has been an irregularity of procedure, he said that it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. The award was therefore be remitted.

Removal of the Arbitrator?

58. Remission is the default remedy if a ground is established under section 68. However, the judgment of Andrew Baker J in RJ and Another v HB [2018] EWHC 2833 (Comm) discusses two important consequences of a finding by a court that there has been serious irregularity by the arbitrator contrary to section 68:
 - a. what is the appropriate remedy; and

- b. is there jurisdiction for the arbitrator to be removed in the absence of an application for removal under section 24 of the 1996 Act?

59. In the appeal, it was agreed that there would be serious irregularity if the arbitrator had decided a dispute on a basis significantly different to anything raised by or with the parties, if the parties had no reasonable opportunity to present their cases on the point and if there was substantial injustice. Andrew Baker J held on the facts that the arbitrator had given an award based on beneficial ownership even though the argument had not been "in play" on either side. There had also been substantial injustice. RJ had been declared to be the beneficial owner of a minority stake in the Bank, but he did not wish to own it, given that regulatory approval would be required for the exercise of voting rights and that he was exposed to financial penalties. Andrew Baker J regarded the present case as one where setting aside was appropriate. The nature of the serious irregularity had a major impact on the disposition.
60. As to removal of the Arbitrator, the initial question was one of jurisdiction. Andrew Baker J referred to Secretary of State for the Home Department v Raytheon Systems Ltd (No 2) [2015] 1 Lloyd's Rep 493 as the only case where such a power had been exercised. However, the Judge himself preferred the view that it was first necessary to make a concurrent application under section 24, which sets out the specific grounds and the procedure for removal the removal of an arbitrator: see Brake v Patley Wood Farm LLP [2014] EWHC 1439 (Ch) and Norbrook Laboratories Ltd v Tank [2006] 2 Lloyd's Rep 485.
61. In the present case there had been no concurrent section 24 application. Had there been a section 24 application it would have been necessary to make the arbitrator a party to the proceedings under CPR 62.6(1). The failure to join the arbitrator meant that it was inappropriate to consider a section 24 application at that hearing.
62. In any event, Andrew Baker J held that even a clear case for setting aside did not alone create any basis for removing the arbitrator:
- "In common with the many cases in which awards have been set aside, but there has been no suggestion the arbitrators should no longer be trusted, in this case the arbitrator has done nothing to warrant such concern on the part of the court or the parties."

When considering challenge, it is always salutary to consider that the likely outcome of a successful challenge is remission to the original arbitrator for reconsideration.

The Limits of Section 69

63. The Section provides that:

- “(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. ...
- (2) An appeal shall not be brought under this section except –
 - (a) with the agreement of all the other parties to the proceedings; or
 - (b) with the leave of the court. ...
- (3) Leave to appeal shall be given only if the court is satisfied –
 - (a) that the determination of the question will substantially affect the rights of one or more of the parties,
 - (b) that the question is one which the tribunal was asked to determine,
 - (c) that, on the basis of the findings of fact in the award –
 - (i) the decision of the tribunal on the question is obviously wrong, or
 - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
 - (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.”

64. Challenges under section 69 must involve questions of law. There are very many cases authorities where the courts have criticised parties for seeking to bring appeals under section 69 on issues of fact or evidence. In this jurisdiction it is not legitimate to attempt to dress up an appeal on facts as a question of law as to whether the evidence was sufficient to justify the findings: see Demco Investments & Commercial SA v SE Banken Forsakring [2005] 2 Lloyd's Rep 650, [35]-[45]; Surefire Systems Ltd v Guardian ECL Ltd [2005] EWHC 1860 (TCC), [21].

65. The test under section 69 is best summed up in HMV UK Limited v Propinvest Friar Limited Partnership [2011] EWCA Civ 1708, where Arden LJ said that:

“It is not enough... simply to show that there is an arguable error on a point of law. Nor is it enough that the judge to whom the application for leave is made might himself or herself have come to a different answer.”

Arden LJ added:

“It seems to me that the kind of situation envisaged is one where the judge looks at the award and thinks “Something must have gone seriously wrong; that just cannot be right””.

The error must be “obviously wrong”.

Obviously wrong?

66. This is a high hurdle. It is clear that this is a higher standard than, say, the test for the test for giving permission to appeal in ordinary litigation, where a real (ie not unreal or illusory) prospect of success is enough: see CPR rule 52.6. So judges may take different views about the construction of a clause without any being “obviously wrong”.

67. In Merthyr (South Wales) Ltd v Cwmbargoed [2019] (as cited above), the dispute was between landlord and tenant over the calculation of an additional rent under a mining lease. A chartered surveyor (B), with experience in dealing with minerals and mineral extraction, was appointed. There was a dispute as to the true interpretation of the lease.

68. HHJ Paul Matthews summed up the position as follows:

“The instant case was not one where the award could be demonstrated to be obviously wrong, or even just wrong, by reference to its own terms, even when the lease was read alongside it. In order to show that the award was “obviously wrong”, the claimant had instead thought it necessary to embark on a minute textual analysis of the lease, coupled with a forensic examination of the factual matrix, which had been based on evidence from witnesses which the court had not seen or heard, with a view to demonstrating a conclusion which, it was then submitted, would be a commercial nonsense. That was not what s.69 was for. The parties had chosen to arbitrate their dispute before a professional arbitrator experienced in the particular business sector concerned and there was no reason why they should not be left with his decision. The 1996 Act had been founded on a philosophy which differed in important respects from

that of the CPR. Even if the claimant had managed to show that there was room for another view of the lease's provisions than that contained in the award, it was very far from demonstrating that the award was on its face "obviously wrong".

69. The Judge added:

"The authorities make plain that the obvious error must normally be demonstrable on the face of the award itself. It is not intended that the parties should adduce copious evidence of the "factual matrix", and advance complex written arguments to show how this or that unforeseen consequence will follow if the undesired construction adopted by the arbitrator is allowed to stand. This is not a construction summons, nor indeed any kind of ordinary litigation, where it may be enough to obtain permission to appeal to show that the contrary interpretation is at least properly arguable, ie has a real prospect of success. It is an arbitration award, the product of a free choice by the parties to arbitrate rather than litigate. It is intended to be final except in rare cases. One of these is where the award is "obviously wrong" in law from looking at the face of the award."

70. The claimant sought to rely on the fact that the arbitrator was not a lawyer to support the view that the decision on the point of construction was "obviously wrong". The Judge rejected this argument:

"The parties were entitled to agree to arbitrate rather than litigate if they wished, and to select anybody, qualified lawyer or not, to carry on the arbitration. The arbitrator appointed is a qualified surveyor with experience of dealing with minerals and mineral extraction, which is exactly the subject matter of this lease, and at the heart of the dispute between the parties. There is simply no reason to suppose that he has misconstrued the lease merely because he is not a lawyer.

47. Moreover, because the parties have selected arbitration to resolve their dispute, it is not necessary that the arbitral tribunal produce a result which is as precisely correct in law as might be produced by resort to the litigation system ... It is sufficient if the arbitral tribunal produce a result which (so far as concerns this case) is not "obviously wrong" on the face of the award. If it does, then it is final. This is the product of the policy adopted by Parliament in enacting both the 1979 and 1996 Arbitration Acts."

71. Perhaps unsurprisingly, it is rare for challenges by way of appeal to succeed.

EXPERT DETERMINATION

72. If it is difficult to challenge an arbitration award that is nothing to the limited rights that exist to challenge an expert determination, absent fraud or, possibly, negligence.

73. Expert determination clauses usually provide that the determination may be overturned if there is a “manifest error”. The term “manifest” has been interpreted strictly so there is limited scope for a challenge on this basis. In Walton Homes Ltd v Staffordshire CC [2013] EWHC 2554 (Ch), the subject matter was an overage clause in an agreement for the sale of land. There was a dispute between buyer and seller about the amount of “additional consideration” payable. The matter was referred to an expert surveyor. The contract provided that the surveyor’s decision would be final and binding, except in the case of “manifest error”. The housebuilder sought to set aside the determination on the basis that the interpretation of the clause was manifestly erroneous.

74. The Judge noted that:

“manifest is a word which gives a very limited window of opportunity to challenge. The examples given in the various authorities ... show that it is something like an arithmetical error, or a reference to a non existent building and the like”.

75. There is nothing to stop parties agreeing an expert's decision is to be binding on them on all matters. For many contracting parties, having disputes determined in this way has the advantage of obtaining a speedy decision in the interests of certainty and finality. There is, however, a difference between circumstances where an expert has answered the right question, but in the wrong way, and where s/he has answered the wrong question altogether. As explained in Nikko Hotels (UK) Ltd v MEPC Plc [1991] 2 EGLR 103 at 108:

“If he has answered the right question in the wrong way, his decision will be binding. If he has answered the wrong question, his decision will be a nullity.”

76. The recent decision of the Court of Session in Scotland provides a good example of a case where the terms of the parties’ contract mean that the decision of the expert is to be binding on them and incapable of challenge. Cine-UK Ltd v Union Square Developments Ltd [2019]

CSOH 3 concerned the rent review provisions in the lease of a multiplex cinema in a shopping centre in Aberdeen. In accordance with the rent review clause, the dispute was referred to an independent surveyor for determination. The lease defined “independent surveyor” as a surveyor engaged to act as an expert, whose decision would be “final and binding on the parties hereto both on fact and law”. It read:

Clause 1.23: a “single chartered surveyor experienced in assessing rental levels of property similar to the Property in city centre locations in the United Kingdom... who shall act as an expert,... and whose decision shall be final and binding on the parties hereto both on fact and law, and such chartered surveyor, who shall be entitled to seek professional advice on matters of law and other issues if he thinks fit, shall have the power to refer any matter to the Court in accordance with the Administration of Justice (Scotland) Act 1972”.

77. Both parties accepted that it is possible for contracting parties to confer exclusive jurisdiction upon an expert to resolve disputes of both fact and law, precluding the court’s jurisdiction to review the expert’s decision. Whether they have done so is a matter of contractual interpretation. The pursuer argued that each of the rent review assumptions and disregards were contractual directions that the expert was required to follow. The tenant submitted that the surveyor had interpreted the disregards incorrectly, which constituted an error of law and meant they had answered the wrong question. The court rejected this argument. The expert was required to determine the open market rent as at the review date in accordance with the rent review provisions. Provided the expert addressed that question, their decision was final even if the interpretation of the rent review clause was incorrect in law (which the Judge did not consider the expert’s view was here, in any event).

78. On the true interpretation of the Lease the parties had intended the decision of the independent surveyor to be final and binding. The rationale and the underlying provisions conferring finality on decisions of experts, as recognised by the case law, was accepted. Lady Wolffe noted that the parties’ intention for the finality of the surveyor’s determination was reinforced by two features present in the Lease:

1. Firstly, there was no requirement for the independent surveyor to provide reasons for his or her determination. One important function of a provision requiring the independent surveyor to provide reasons for their decision is to



enable parties to consider whether there has been an error of law in that decision. If the court has no jurisdiction to review the decision, an explanation should be unnecessary. Any argument for the surveyor to give reasons falls away if parties agree, as they had in this case, that the decision is final and cannot be appealed.

2. Secondly, the terms in which certain disputes should be determined by an independent surveyor were not defined or limited so as to allow for a legal challenge. In other words, if the parties had wanted to retain the ability to challenge a determination based on an error of law in certain sorts of disputes, they could have distinguished those forms of disputes from others in which the determination was to be final and binding. No such distinction was made and, accordingly, the surveyor's decision was final and binding in this instance.

79. This decision demonstrates that it is always important to examine the terms of the expert determination clause very carefully. There may well be no room for challenge at all.

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