ALERT MEMORANDUM

The Annulment of a UK Award Does Not Entail Removal of the Members of the Arbitral Tribunal When the Proceedings Are Re-Opened

17 December 2018

A recent decision by the English High Court presents a rare exception to the low success rate for challenges to arbitral awards on the ground of "serious irregularity" under section 68 of the Arbitration Act 1996 (the "Act").

The judgment in *RJ and another v HB* [2018] EWHC 2833 (Comm) dated 26 October 2018 granted a section 68 challenge to an ICC arbitration award issued by "a very senior English QC, well known and highly regarded in the world of international commercial arbitration". The sole arbitrator's award was set aside on the ground that the arbitrator based his decision upon a novel point without giving the parties "notice" nor "a proper opportunity to consider and respond".[1] However, the court concluded that even where an award is set aside, that will not require removal of the arbitrator unless an application to remove the arbitrator is also successfully advanced.

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[1] *RJ and another v HB* [2018] EWHC 2833 (Comm), ¶ 27.

RJ and another v HB

RJ and HB entered into a series of agreements (the "Agreements") which ultimately provided for RJ to acquire a minority interest in a bank ("Bank 2") that HB had identified as an investment. For regulatory reasons, RJ (through L Ltd) agreed to pay US$75 million up front to HB for shares in Bank 1 (in which HB owned a controlling stake) and another business owned by HB. The transfer of those shares was deferred pending HB's obligation to procure the merger of Bank 1 and Bank 2, and the Agreements provided for RJ to then acquire 25% less 1 share of Bank 2 post-merger (the "Shares") for the equivalent of US$75 million. The Agreements also provided, inter alia, that in the event RJ failed to acquire the Shares, L Ltd would be entitled to recover the US$75 million purchase amount, plus interest after 31 December 2018.

The arbitration

HB procured the merger of the Banks, but RJ did not acquire the Shares. HB therefore commenced arbitration seeking specific performance (requiring RJ to accept delivery of the Shares) or damages in the alternative. It was undisputed between the parties that RJ had not taken ownership of the Shares. HB argued that RJ's failure to acquire the Shares constituted a breach of the Agreements, while RJ argued that it was not obligated to acquire the Shares and, accordingly, that L Ltd was entitled to recover the purchase price from HB.

The Award

In the final award dated 23 March 2017 (the "Award"),[2] the sole arbitrator found that RJ and L Ltd were in breach of the Agreements and declared that "[RJ] is the beneficial owner of the shares in [Bank 2] purchased with his or [L Ltd's] US$75 million". The sole arbitrator reasoned that the declaration of beneficial ownership would achieve the same result as ordering specific performance, but without requiring the arbitral tribunal to retain jurisdiction or police the parties' ongoing compliance with the Agreements.[3]

Section 68 Serious Irregularity

RJ and L Ltd brought a claim in the English High Court that the Award was affected by serious irregularity within section 68 of the Act.[4] The court may set aside an award under section 68 if it is shown that the award: (i) is affected by serious irregularity of a kind listed in section 68(2); and (ii) has caused or will cause substantial injustice to the applicant. Mr Justice Baker found that the Award was affected by serious irregularity within section 68(2)(a) (failure by the tribunal to comply with its duty to act fairly as between the parties pursuant to section 33 of the Act) and resulted in substantial injustice to RJ and L Ltd.

None of the parties had sought the declaratory relief granted in the Award, nor anything "materially similar".[5] Mr Justice Baker held that while arbitral tribunals are not restricted to choosing between options submitted by the parties, if they determine a dispute on a different basis, the duty of fairness under section 33 requires that the parties be given notice and a proper opportunity to address it. Baker J examined extracts from the hearing transcript and concluded that there was nothing in the evidence suggesting that the parties were fairly alerted even to the possibility that the sole arbitrator was contemplating the declaratory relief ultimately granted in the Award.

Baker J also held that the Award resulted in substantial injustice to RJ who did not have full regulatory approval to hold the Shares and would thus be exposed to a "real risk of financial penalties".[6] Baker J noted further that HB would also presumably have relied on the beneficial ownership to avoid repaying L Ltd the

[2] The Award was amended by an addendum dated 14 July 2017 and an addendum dated 29 September 2017, but as stated in the judgment "the Addenda do not solve the problem" (para. 18(i) of the judgment).

[3] Para. 41 of the judgment quoting paragraphs 225 to 248 of the Award.

[4] References to section numbers are to the Arbitration Act 1996.

[5] Para. 24 of the judgment.

[6] Para. 35 of the judgment.

US$75 million, which could be materially higher than the value of the Shares.[7] The judgment also noted that awarding monetary damages would have had a materially different effect upon RJ than a declaration that he was deemed to be the beneficial owner of the Shares, and that there was "real room" for the argument that damages were an adequate remedy. It should be noted that the substantial injustice did not result from this outcome per se, but rather from the fact that this outcome was imposed without RJ and L Ltd being given a fair opportunity (or indeed, any opportunity) to address it.

Remedies for challenge – set aside and remission

Baker J also considered the question of what remedy is appropriate in the event that a challenge is successful. Under section 68, the court has the power to:

- remit a successfully challenged award to the tribunal (in whole or in part) for reconsideration;
- set the award aside (in whole or in part); or
- declare the award to be of no effect (in whole or in part).

A party therefore must consider which remedies to seek before the court when challenging an award.[8] As Baker J sets out in the judgment, the 'default' option under the Act is to remit the award to the arbitral tribunal for reconsideration under section 68(3) unless that would be "inappropriate". However, the preference of a section 68 applicant will generally be to have the award set aside rather than remitted to the tribunal for reconsideration.

The judgment includes as a helpful appendix a note jointly prepared by counsel for each side summarising whether remission or set aside was ordered in similar cases where a section 68 challenge has succeeded because arbitrators have determined disputes upon a novel point the section 68 applicant did not have a fair opportunity to address. In all 13 cases set out in this appendix, even where an order for set aside was made, matters were in any event remitted back to the original tribunal for reconsideration.

In *RJ and another v HB*, Baker J set aside the declaratory relief granted in the Award on the basis that it was "obviously a case for setting aside".[9] Baker J took into account the fact that the declaratory relief was intricately connected to the rest of the Award, which made it essential that the question of proper relief for HB must be examined afresh without the sole arbitrator being influenced by his consideration of the declaratory relief as a dispositive solution.

Does set aside lead to removal of the arbitrator?

Although RJ and L Ltd successfully argued that part of the award should be set aside rather than remitted to the tribunal for reconsideration, Baker J did not hold that the arbitrator should be removed. Baker J held that an order to set aside will not automatically involve the removal of the arbitrator and that a separate application for removal under section 24 of the Act would be required. This decision contradicts *Secretary of State for the Home Department v Raytheon Systems Ltd (No. 2)* [2015] EWHC 311 (TCC), where Justice Akenhead discusses removal of the tribunal as a natural corollary to the set aside judgment.

According to Baker J, the final question was whether, having been told that the finding should not have been made without giving notice to the parties of the novel point that the arbitrator was considering, there was "any real reason for supposing that [he would] now be unable to approach the question of relief afresh with an open mind (or, if this is any different, whether any reasonable, independent observer of the process would

[7] Para. 35 of the judgment.

[8] There is no difference of principle between the remedies of setting aside an award and declaring it to be of no effect (*Hussmann (Europe) Ltd v. Ahmed Pharaon* [2003] EWCA Civ 266, ¶ 81).

[9] Para. 57 of the judgment.

think he might suffer from that difficulty)".[10] Baker J also took into account the fact that there was no suggestion that the arbitrator should no longer be trusted.

This decision suggests that a party seeking to set aside an award and have it determined before a new arbitral tribunal may need to apply under both section 68 to have the award set aside and section 24 to have the tribunal removed. The party seeking removal of the arbitrator may also be required to explain why an experienced arbitrator cannot approach an issue that is remitted for reconsideration with an open mind. In practice, the decision puts up yet another hurdle before potential section 68 applicants. Even if a party is successful in having an award set aside, it cannot assume that the arbitrator will be removed.

Conclusion

RJ and another v HB is another example in a line of established authority that where an arbitrator decides a dispute on the basis of a novel point which the parties have not had a chance to address the consequent Award will be open to a challenge for serious irregularity. Thus, where an arbitrator has in mind a point that has not been addressed by the parties, it would be prudent for the arbitrator to seek submissions from the parties on that issue in order to minimize the risk of an award that addresses that issue being subject to challenge. In addition, the decision suggests that while the threshold for setting aside an award for serious irregularity remains high, removing the arbitrator on the basis of serious irregularity in the proceedings may require a separate application.

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[10] Para. 63 of the judgment.