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High Court of England and Wales Allows Challenge of Arbitral Award for "Serious Irregularity" Where the Tribunal Admitted Its Mistake in Calculating Quantum

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In the recent case of *Doglemor Trade Ltd and others v Caledor Consulting Ltd and others*[1], the High Court of England and Wales considered a unique challenge to an arbitral award under section 68(2) of the English Arbitration Act 1996 (the "**EAA**"). That challenge arose out of a "serious irregularity" in which the tribunal admitted that it had erroneously calculated the quantum of its award, but then expressly refused to amend the award to correct that admitted mistake.

Section 68(2)(i) of the EAA, which empowers a party to arbitral proceedings to apply to the High Court to challenge an arbitral award on the grounds of an irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal, rarely attracts judicial scrutiny. *Doglemor Trade* appears to be the High Court's first consideration of the so-called 'second limb' of section 68(2)(i) (that is, irregularity *in the award* admitted by the tribunal). As such, the case offers welcome judicial guidance on the application of that provision to future arbitral awards. The decision is also notable for the Court's considerable restraint in remitting for the tribunal's re-consideration only those issues affected by the irregularity under section 68(2)(i) of the EEA. Consequently, the decision should offer comfort to arbitration users that an arbitral award is *prima facie* conclusive and that a single error should not permit an aggrieved party to re-open all of the issues that the tribunal has decided.

The Facts

Doglemor Trade arose out of a falling out between two businessmen: Alexander Bogatikov (the second claimant) and Mikhail Khabarov (the second defendant). Mr Khabarov was the majority owner of the first defendant, Caledor Consulting Ltd (together the "**Caledor Parties**").

Mr Bogatikov co-founded the Business Lines Group, a haulage and logistics business that wholly-owned the first claimant, Doglemor Trade Limited ("**Doglemor**"), which in turn owned 100% of the shares in the third claimant, DL Management Ltd ("DLM" and, together with Mr Bogatikov and Doglemor, the "**Doglemor Parties**").

Mr Khabarov joined the Business Lines Group as a senior manager in 2014. As part of this arrangement, it was agreed that Mr Khabarov would have an option to acquire an ownership stake in the business. This option was set out in a call option deed dated 27 February 2015 (the "**Call Option Deed"**). Pursuant to the Call Option Deed, the Caledor Parties were given an option to acquire 30% of the shares in DLM at a price of US$60 million. That option was exercisable over a

two-year period beginning at the end of February 2018. The Call Option Deed was governed by English law and contained a London Court of International Arbitration ("**LCIA**") arbitration clause with a London seat.

The relationship between Messrs Bogatikov and Khabarov broke down before the two-year option period ended. Mr Bogatikov began to negotiate with other potential investors, who he invited to join the Business Lines Group, and in August 2017, Mr Khabarov was excluded from the business.

Consequently, Mr Khabarov alleged that the Doglemor Parties had repudiated the Call Option Deed, and the Caledor Parties commenced arbitration seeking damages for the breach. In the arbitration, the Doglemor Parties conceded that they had repudiated the Call Option Deed, and therefore the only substantive issue to be decided was determining the quantum of the Caledor Parties' loss and damages.

The Arbitration

In the arbitration, the tribunal only addressed the proper valuation of the shares that were subject to the Call Option Deed (the "**Option Shares**"), which depended on the overall value of the Business Lines Group. The parties' respective positions varied considerably. The Caledor Parties alleged that the Business Lines Group was worth approximately US$599 million, which corresponded to a valuation of US$180 million for the Option Shares. In contrast, the Doglemor Parties alleged that the business was effectively worthless due to potential tax liabilities.

Owing to the stark contrast between the parties' valuations, the tribunal asked them to produce an agreed valuation model to enable it *"to determine the numerical effect of resolving the many disputed points of quantum and assess the value"* of the Option Shares (the "**Agreed Model**"). The tribunal commented that the Agreed Model should not be a series of binary outcomes, but *"in as simple a vehicle as possible … set out the substance of the parties' respective positions and to enable us (if we are so minded) to select and apply alternative figures insofar as we consider that to be appropriate"*. Accordingly, notwithstanding the line-by-line methodology of the Agreed Model, the tribunal advised the parties that it would place more emphasis on the overall result of the Agreed Model's calculation than on each individual part.

The Mistake in the Tribunal's Award

In applying the Agreed Model, the tribunal noted that US$90 million of historic tax liabilities should be deducted from the Option Shares' value. However, the tribunal erroneously *added* this amount when calculating the loss. Consequently, instead of calculating the quantum of damages to be US$4 million, the tribunal issued a damages award of US$58 million.

Events following the award

On 23 January 2020, the Doglemor Parties made an application to the tribunal pursuant to Article 27(1) of the LCIA Rules, requesting that the tribunal correct its mistake. Under Article 27(1), a party may request an arbitral tribunal to correct *"any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature"* in an award. The tribunal may deal with such requests, whether it thinks them justified or not, in an addendum to the award.

In what it labelled as a "response" to the Doglemor Parties' Article 27(1) application (the "**Response**"), the tribunal conceded that it had made an *"error of computation"* in relation to the Agreed Model when it inputted the applicable tax liabilities. However, the tribunal went on to state that, notwithstanding the error, the award should not be corrected. The tribunal refused to correct the award under Article 27(1) because, it concluded, the Doglemor Parties were not asking for the tax liability figure to be corrected in the Agreed Model, but were instead seeking to correct the overall damages amount.

In its Response, the tribunal also observed that:

- whilst it had not intended to make the mistake, it had intended to attribute significant value to the Option Shares, and therefore a damages award of US$58 million was reasonable. The tribunal concluded that if it made the corrections that the Doglemor Parties sought, that would actually value the Option Shares too low and would not give sufficient effect to the tribunal's true intentions; and
- it had not intended to fix the damages mechanistically by reference to the Agreed Model. Instead, it intended to assess loss by way of a more holistic, and subjective, evaluative exercise, such that the calculations carried out using the Agreed Model would be subject to an *"overall sense check"*.

The tribunal concluded that correcting its computational mistake in isolation would undermine its core intention of reaching a determination of quantum that would be considered reasonable overall.

The Doglemor Parties disagreed with the Response, and subsequently challenged the award under section 68 of the EAA in the High Court.

The High Court's Decision

Under section 68(1) of the EAA, a party to arbitral proceedings may apply to the High Court to challenge an arbitral award on the grounds of *"serious irregularity affecting the tribunal, the proceedings or the award"*. Section 68(2) defines *"serious irregularity"* as *"an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant"*.

The Doglemor Parties argued that the tribunal's conduct in issuing the award and its subsequent Response contained three *"kinds"* of irregularity:

- under section 68(2)(a), a failure by the tribunal to comply with its general duties under section 33 of the 1996 Act;
- under section 68(2)(c), a failure by the tribunal to conduct proceedings in accordance with the procedure agreed by the parties; and
- under section 68(2)(i), an 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.

The case presented four issues to the High Court:

1. whether the Response amounted to an *"award"* for the purposes of section 68;
2. whether the tribunal's mistake amounted to a *"serious irregularity"* under sections 68(2)(a), 68(2)(c) and/or 68(2)(i);
3. whether the Doglemor Parties had suffered a *"substantial injustice"*; and
4. if there was a *"serious irregularity"* and the Doglemor Parties suffered a *"substantial injustice",* what issues should be remitted to the tribunal for re-consideration.

In relation to point (1), the Court observed that the tribunal's Response was not part of the arbitral award and had no legal status under Article 27(1) of the LCIA Rules or the EAA. The Response did not contain further reasons for the award, nor could it be binding on the parties or function to rewrite

the award. The Court explained, however, that this did not mean that the Response did not otherwise constitute admissible evidence to establish whether there was an "admitted" irregularity by the tribunal and, if so, the consequences of that irregularity.

In relation to point (2), the Court concluded that the tribunal's admitted mistake fell under section 68(2)(i) of the EAA and amounted to an irregularity in the tribunal's award. The mistake was not an error of fact or law, but fell into a different category of mistake: an error of "implementation," by which the tribunal had failed to carry out its stated intention on the face of the award (*i.e.*, by adding the potential tax liabilities when calculating damages rather than subtracting them). The Court also noted that "*the important, and limiting*" qualification of section 68(2)(i) was that the tribunal itself must admit the mistake, and it is not for the court to identify one. Accordingly, the tribunal acts as *"gatekeeper"*, which prevents the court from undermining the arbitral process. In view of the Court's decision on section 68(2)(i), there was no need to address the applicability of sections 68(2)(a) or (2)(c).

In relation to point (3), the Court concluded that the serious irregularity was one that had caused, or would cause, substantial injustice to the Doglemor Parties because: (i) there was an enforceable award against the Doglemor Parties that contained a computational mistake, and (ii) the tribunal, while noting that it had intended to award substantial damages, may have produced a different award had it in fact noticed its error at the time it originally calculated the Caledor Parties' damages in the award.

In relation to point (4), the Doglemor Parties argued that only the computational error should be remitted to the tribunal because this was the admitted mistake. The Caledor Parties, however, sought wider remission. They argued that the tribunal, in its Response, had stated that its approach to the calculation of damages was iterative and, accordingly, they argued that the scope of the remission should be sufficiently wide to enable the tribunal to make the adjustments it considered necessary to reflect the impact of the error. To do otherwise, the Caledor Parties argued, would force the tribunal to find damages in the amount of US$4 million, which the tribunal had made clear in its Response would not reflect its intention and would therefore be unjust.

The Court, relying on a Privy Council judgment,[2] observed that an arbitration award was *prima facie* conclusive and the courts have limited powers of intervention. Because the tribunal conclusively decided several issues, it was not open to the Court to remit those issues to the tribunal, particularly because it was clear that the tribunal had carefully considered the parties' arguments. Therefore, the Court remitted only those issues to the tribunal that the computational mistake potentially affected to reach an assessment of quantum in respect of the Option Shares accordingly. The Court confirmed that it was remitting the award so that the tribunal could re-calculate a figure for the Caledor Parties' loss.

Comment

In the first judicial guidance on the application of the second limb of section 68(2)(i) of the EAA, the High Court made it clear that to engage this second limb a court need not find any irregularity in the due process of the arbitral tribunal. Instead, all that is required is that the tribunal itself must recognise and admit the mistake (rather than a court identify it). However, because it is rare for a tribunal to expressly recognise such mistakes, challenges under the second limb of section 68(2)(i) may well remain uncommon.

Whilst this case demonstrates the courts' willingness to scrutinise the arbitral process where necessary, it is also confirmation that an arbitration award is *prima facie* conclusive. A practical lesson that arbitration users might take from this relates to the potential perils of complex valuation models in calculating quantum, and the way in which such models might be used by a tribunal. Those models should always be established so as to minimise the possibility of errors and maximise

the parties' and the tribunal's comprehension and use of the models and their underlying bases: in this case the tribunal stated that it had used the model iteratively, and not mechanistically, to reach a decision. However, in spite of this iterative approach, the High Court did not permit the tribunal to re-consider the entire quantum calculation as contended for by the Caledor Parties. Accordingly, it is crucial for all parties to understand and agree the basis on which the model will be used to calculate quantum, as the courts will not readily re-open the entire quantification exercise.

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[1] [2020] EWHC 3342 (Comm).

[2] Sans Souci Ltd v VRL Services Ltd [2012] UKPC 6.

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