2020 REPORT OF THE COMMERCIAL COURT (ENGLAND & WALES) CONFIRMS THE DEFERENTIAL APPROACH TO ARBITRAL AWARDS CONTINUES

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UK Arbitration Alert

By: Louise Bond

The Commercial Court User Group has published the minutes of its meeting in November 2020 (the 2020 Minutes), including the usual update on the court's case statistics for the previous legal year (October 2019 - September 2020) with respect to the court's hearing of applications to challenge arbitral awards.

The Commercial Court regularly reports the statistics for arbitration applications under Sections 68 (serious irregularity causing substantial injustice) and 69 (appeal on a point of law) of the Arbitration Act 1996 (the Act). A review of the 2020 Minutes and the minutes from meetings in November 2019 and March 2018, show the following number of applications were made:

Court Year	**Section 68 of the Act (serious irregularity causing substantial injustice)**	**Section 69 of the Act (appeal on a point of law)**
2017-2018	71	87
2018-2019	19	39
2019-2020	16	22

Success rates are not consistently reported, but it is clear that they are low:

- In 2019/20, of the 16 challenges made under Section 68, only one was successful.
- In 2019/20, of the 22 determined applications under Section 69 for appeal on a point of law, permission was granted in only seven. No ultimate success rate was published.
- In 2018/19 none of the 39 applications under Section 69 were ultimately successful, and in 2017/18 only two of the 87 applications under Section 69 succeeded.

What is also clear is the year-on-year decrease in the number of Section 68 and Section 69 applications being brought before the Commercial Court, which might suggest an increasing acceptance among applicants of the low chances of success associated with such applications.

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THE COMMERCIAL COURT'S APPROACH

The courts of England & Wales have long adopted a deferential approach to arbitral awards. Non-intervention was a key founding principle of the Arbitration Act 1996, which provides that the court should not intervene except as provided by the limited rights of challenge recognised in the Act.

In 2013, the court highlighted three guiding principles that reinforce this deferential approach (*Bunge SA v Nibulon Trading BV* [2013] EWHC 3936 (Comm) at paragraph 35, referring to the Court of Appeal's judgment in *MRI Trading AG v Erdenet Mining Corporation LLC* [2013] 1 Lloyd's Rep 638):

> "As a matter of general approach, the courts strive to uphold arbitration awards.
> 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. Furthermore not only will the court not be astute to look for defects, but in cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid."

However, Walker J also recognised the limits of a deferential approach guided by these principles:

> "[T]hey are not intended to, and do not, enable the court to give an award a meaning which plainly was not intended by its authors."

RECENT CASES

Guided by these principles, in the court year 2019/20 there were two reported cases of successful challenges in the Commercial Court: one under Section 68 (*Xstrata Coal Queensland P Ltd v Benxi Iron & Steel* (Group) International Economic & Trading Co Ltd [2020] EWHC 324 (Comm)) and the other under Section 69 (*Alegrow SA v Yayla Argo Gida San ve Nak A.S* [2020] EWHC 1845 (Comm)). These cases are discussed below.

There have also been two further successful Section 68 applications (decided in November and December 2020), which fall outside of the scope of the court year statistics for 2019/20 but are nevertheless worth noting. These more recent cases are Doglemor Trade Limited and Others v Caledor Consulting Limited and Others [2020] EWHC 3342 (Comm) (discussed in our recent International Arbitration Alert) and Kazakhstan v World Wide Minerals Ltd [2020] EWHC 3068 (Comm).

Section 68: Xstrata Coal Queensland P Ltd v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd [2020]

In this London Court of International Arbitration (LCIA) award, one of the named claimants did not match the relevant party named in the contract in dispute. When the claimants sought to enforce the award in the People's Republic of China, the Shenyang Intermediate People's Court refused to recognise and enforce the award on the

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basis that the named claimant was not party to the contract or the arbitration clause, and therefore the award was without merit.

The claimants' application under Article 27 of the LCIA rules to have the arbitrator make an additional award, or correct the existing award, was denied, and so the claimants applied under Section 68 of the Arbitration Act.

The claimants argued that there was ambiguity or uncertainty as to the effect of the award (a recognised basis for a Section 68 application, see Section 68(2)(f) of the Act), causing substantial injustice to the claimants. Butcher J agreed that there was uncertainty or ambiguity, which manifested itself in the enforcement proceedings. Notwithstanding that English lawyers might agree as to its meaning and effect, Butcher J held that an award may be uncertain or ambiguous *"if it is capable of being misunderstood by an enforcing court. That the Award in this case was so capable is demonstrated by what occurred before the Shenyang cour*t." The substantial injustice caused to the claimants by this serious irregularity was clear from the refusal of the Shenyang court to enforce the award.

The award was remitted to the Tribunal for reconsideration. This challenge, brought by an award creditor, was unusual and clearly a long way from the more commonly encountered situation where the losing party challenges an award under Section 68.

Section 69: Alegrow SA v Yayla Argo Gida San ve Nak A.S [2020]

This application concerned an award granted against Alegrow by the Grain and Free Trade Association (GAFTA) Appeal Board (GAFTA being one of the few arbitral institutions that does not exclude the scope to bring a challenge under Section 69 under its rules).

Henshaw J acknowledged the three non-interventionist principles outlined above, and went on to emphasise that the sympathetic reading of arbitral awards enshrined in the first and second general principles will apply even more so to trade tribunal decisions, since "*one is not entitled to expect from trade arbitrators the accuracy of wording, or cogency of expression, which is required of a judge*" and "*trade tribunal decisions are generally to be accorded deference where the arbitrators' experience assists it in determining a question of law*."

Nevertheless, Henshaw J analysed the Appeal Board's decision and found that it must be based on two findings that were incorrect in law: first, that Yayla was contractually entitled to demand a shipment schedule from Alegrow on a certain date; and second, that Alegrow was in repudiatory breach of contract by failing to provide such a schedule by that date.

Henshaw J ruled that the award must be varied so as to conclude that Alegrow was not in repudiatory breach, but that Yayla renounced the contract by its notice of arbitration, and Alegrow's counterclaim was remitted to the tribunal for reconsideration.

CONCLUSION

The statistics recently published by the Commercial Court User Group demonstrate a continuing downward trend in the appetite to bring challenges against arbitral awards under Sections 68 and 69 of the Act.

The court's deferential approach to arbitral awards may be welcome to users of London-seated arbitrations. Many would consider it right that a high hurdle should have to be overcome before the court will intervene in an arbitral award, allowing legitimate arbitral processes to proceed to a certain conclusion largely unfettered, and respecting

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parties' choice of forum to resolve their disputes. It is for these reasons that the right to appeal on a point of law under Section 69 of the Act is excluded by many of the most widely used arbitral institutions.

However, parties who have a genuine basis for an appeal should take comfort from the successful cases in 2020, which suggest that the court will continue to intervene where necessary and appropriate.

KEY CONTACTS



LOUISE BOND
SENIOR ASSOCIATE

LONDON
+44.20.7360.6447
LOUISE.BOND@KLGATES.COM

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