English court sets aside an award on the basis of serious irregularity, but confirms the doctrine has limited scope

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A recent decision of the English High Court (*F Ltd v M Ltd* [2009] EWHC 275 (TCC)) confirms that the Court may intervene and allow successful challenge of an arbitral award in order to protect parties against the unfair conduct of an arbitration. However, the case also demonstrates that the applicable test (i.e. a serious irregularity in the conduct of proceedings causing substantial injustice to a party) remains a high bar to establishing that an arbitral award should be set aside. The case is also unusual in that the dissenting opinion of a member of the arbitral tribunal provided the meat for challenge in this case – illustrating the risks attaching to a lack of unity amongst tribunal members.

The award provided £1,856,597.90 to the claimant and £1,101,871 to the defendant (the claimant accordingly recovering a net sum of £754,726.93 plus 40% of its costs). However, and as the Court acknowledged, rather unusually, one of the three members of the arbitral tribunal disagreed with the views of the majority on three points and so delivered a detailed dissenting opinion as part of the award. This dissension rendered the award vulnerable to challenge – the Court agreeing to uphold an element of the appeal relying on issues raised by the dissenting opinion.

The nature of the appeal required the Court to consider the tribunal members' approach to construction and their evaluation of the evidence, so allowing it to enquire as to the merits of the decision to a degree as well as the soundness of procedure. However, there does not seem to have been an unwarranted transgression on arbitral autonomy in this case – especially given the dissension amongst the tribunal.

The point on which the appeal succeeded was that there was no pleaded basis for finding that the claimant had admitted a certain sum to be due to the defendant. The arbitral tribunal had mistakenly assumed that the point had been raised in pleadings and not objected to by the claimant. The Court confirmed that, in circumstances where a point has been decided against a party without it ever having been heard on the issue, a serious irregularity will be established. The Court accordingly found that there had been an error by the majority in awarding the sum claimed to the defendant.

It is important to recognise that the combination of circumstances in *F Ltd v M Ltd* is unusual. As the Court acknowledged, it is necessary to demonstrate that any serious irregularity has caused substantial injustice to a party for any challenge to be successful. A finding on an issue on which no evidence had been submitted or pleading advanced, coupled with a clear dissenting statement from a member of the arbitral tribunal that he considered the finding to have no basis, clearly falls into this category. However, other cases on irregularity and the application of section 68 of the Arbitration Act 1996 demonstrate that a successful challenge on this basis is rare indeed. The House of Lords (in

Lesotho Highlands) confirmed that section 68 will be interpreted restrictively, Lord Steyn's judgment stating that it would not extend to situations where the tribunal used its powers incorrectly, or reached the 'wrong' decision, but only where it had acted *ultra vires* or failed to use a mandatory power.

Another recently decided case, *TAG Wealth Management v. West* [2008] EWHC 1466 (Comm) neatly illustrates the limitations on irregularity challenges. In that case, arbitration proceedings stretched out for almost six years before being struck out in February 2008 (only six months after pleadings in the case had been submitted) on the basis of inordinate and inexcusable delay (section 41(3) of the Arbitration Act 1996). In rejecting the claimant's challenge to the strike out decision on the basis of serious irregularity, the Court simply pointed out that the disclosure period had taken almost five years, that the delay was largely due to the claimant, and that the arbitrator's factual finding as to the cause of the delay 'cannot be challenged'. The Court added that neither a failure to particularise certain criticisms nor to misunderstand some of the documents constitute a serious irregularity. Finally the alleged improper behaviour of the arbitrator during the hearing (where he apparently commented that the claimant's solicitor, Ms Novakovic "must have obtained her surname upon marriage because she spoke English so well") did not cause substantial injustice to the claimant.

TAG confirms the general approach of the English courts to challenge on the basis of serious irregularity, and quotes previous authority in concluding that

"the authorities have been right to place a high hurdle in the way of a party seeking to set aside an award by reference to section 68… [it would] be a retrograde step to allow appeals on fact or law… to come in by the side door".

Jointly submitted with Alastair Cox