

Why Setting Aside an Award on Grounds of Serious Irregularity Should Not Ipso Facto Lead to the Removal of the Arbitral Tribunal

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In RJ v HB [2018] EWHC 2833 (Comm) ('RJ'), Andrew Baker J ('Baker J') found that the facts disclosed a serious irregularity under s68 of the English Arbitration Act 1996 ('the Act').^[fn]The author wishes to thank Ms Rachel Foxton, Mr Harry Francis Millerchip, and Ms Jenna Hare. The views in this article should not be taken as representative of any organisations I am affiliated to. All errors herein are my own.^[fn] Baker J also found that a finding of serious irregularity under s68 and the setting aside of the award did not *ipso facto* entail the removal of the arbitrator. Instead, an application would have to be brought under s24 of the Act to remove the arbitrator and have the matter heard before a fresh panel. This, *prima facie*, conflicts with Akenhead J's suggestion in Secretary of State for the Home Department v Raytheon [2015] EWHC 311 (TCC) ('Raytheon'), also discussed on this Blog here that the matter would *necessarily* be heard by a fresh panel if the award was set aside on grounds of serious irregularity.

Facts

HB and RJ were wealthy individuals. In 2013, HB sought to expand his banking interests and entered into a series of agreements with RJ, a potential investor, that RJ would provide US\$75m to enable HB to acquire a controlling interest in a bank. HB, upon doing so, would then merge that bank with another bank in which he already had a controlling interest. In return, RJ would gain the possibility of acquiring a minority interest of "25% less one share" in the merged banks, "subject to the obtaining of any necessary authorisations". HB was transferred the US\$75m, acquired the bank in question, and merged it as agreed. However, HB did not thereafter effect any share transfer to RJ, alleging that RJ was in breach of an obligation to obtain the necessary regulatory authorisation for doing so.

Proceedings and Judgment

The matter went to arbitration. The arbitrator found, *inter alia*, that RJ was in breach of a number of agreements with HB and that RJ was "the beneficial owner of the shares in [the bank] purchased with his...US\$75m" ('Award #3'). RJ's counterclaims against HB were rejected.

RJ then brought a claim in the High Court alleging that Award #3 was tainted with serious irregularity under s68 of the Act.

The serious irregularity RJ pointed to was that Award #3 was relief which had never been sought by HB and which was significantly different to anything that any of the parties had contended. Further, the arbitrator had decided on Award #3 without giving notice to the parties, depriving them of any opportunity to address such a case. Baker J agreed. The relief ordered was not something sought by either party and the parties had been denied a reasonable opportunity to address it. A serious irregularity was thus found on the facts.

Baker J then found setting aside more appropriate than remitting the decision back to the arbitrator because of the “nature of the serious irregularity, the...extent of its impact on the dispositive relief under the Award...and the degree to which the position has become complicated by the overlaying of reasoning (in the arbitrator’s Addenda)”.

The main point of interest in *RJ* then arises: Does the setting aside under s68 of the Act *necessarily* entail the removal of the existing arbitrator? Baker J unequivocally answered this in the negative, finding that an application under s24 of the Act was required to remove the arbitrator.

Comment

Baker J is correct to note in *RJ* that Akenhead J in *Raytheon* had conflated the finding of a serious irregularity with the removal of an arbitrator. Baker J held instead that the finding of a serious irregularity did not *ipso facto* necessitate the removal of the arbitrator. While Baker J did not fully explicate his reasoning, his approach to the nexus of s24 and s68 is preferable to Akenhead J’s in *Raytheon* for the reasons set out below:

First and most crucially, s24 of the Act outlines specific and narrow circumstances in which an arbitrator can be removed, and an s68 irregularity is not cited therein. Granted, one might construe such an irregularity as a circumstance giving rise to “justifiable doubts as to (the arbitrator’s) impartiality” (s24(1)(a)) or as evidence that the arbitrator has “failed properly to conduct the proceedings” (s24(1)(d)(i)), but that does not change the fact that an application under s24 must at least be brought in order for the arbitrator to be removed. That application would trigger s24(5) and the right of the arbitrator to be heard by the Court, and goes to show how *Raytheon’s* approach of moving *immediately* from the setting aside of a serious irregularity to the matter being heard by a different arbitrator has questionable statutory basis.

Second, *Raytheon’s* approach requiring the removal of an arbitrator leads to unnecessary expense. This expense takes not only the form of costs incurred by re-hearing before a new tribunal (as acknowledged even in *Raytheon* at [23(d)]), but also the reputational damage the removed arbitrator may unjustifiably suffer. It is telling that *Raytheon* at [24] specifically notes that “these judgments are not meant to be a reflection on (the arbitrators’) general competence or integrity”. On this view, having the matter re-heard before a different arbitrator would merely incur unnecessary costs.

Third, *Raytheon’s* reasoning is generally out-of-sync with the corpus of caselaw on the matter. In *none* of the thirteen cases cited at the appendix to *RJ* was a new arbitrator appointed, even where the earlier award was set aside. *Norbrook Laboratories v Tank* [2006] EWHC 1055 (Comm) (*‘Norbrook’*), not listed in the appendix, stands as an exception to this, but there was a separate s24 application in that case which was not present in *Raytheon* or *RJ*.

On the other hand, there is judicial recognition of the “invidious” position arbitrators may be placed in if tasked to re-hear proceedings. In *Lovell Partnerships v AW Construction* [1996] 81 BLR 83 (*‘Lovell’*), Mance J (as he then was) pointed to the “undesirable tensions and pressures” that might arise if arbitrators were so tasked. Burton J also admonished in *Sinclair Roche v Heard* [2004] IRLR 763 against “a very real and very human desire to attempt to reach the same result, if only on the basis of

the natural wish to say 'I told you so'". But going even further, there is a real risk of an arbitrator being influenced by s24 removal proceedings against him, especially if he still has issues left to determine (or if certain issues are remitted to him for consideration after s68 is triggered).

Further, it might be argued that the expense of a re-hearing before a fresh panel is a cost worth bearing so that justice is 'seen to be done'. Mance J in observed in *Lovell* that: "If...the tribunal...reached exactly the same conclusions as before, that might well lead to a strong belief objectively that justice had not been or (been seen to be done)". The removal of arbitrators following a serious irregularity being found would ameliorate these problems. Further, the extent of cost-saving from having the same tribunal re-hear the matter is questionable given the potentially long lapse for appeals and further arguments between a s68 finding and the matter actually being re-heard.

On balance though, while there are normative arguments in favour of *Raytheon* which merit consideration, the position of the law is clear post-*RJ*. The structure of the Act and the narrow s68 categories mean that a serious irregularity does not ipso facto require the removal of an arbitrator.

Conclusion

RJ has clarified the nexus between s68 and s24. In practical terms, practitioners looking to rely on s24 to remove an arbitrator whose conduct/award has disclosed a s68 serious irregularity should be explicit that they are doing so. They should also bear in mind the s24(2) requirement that recourse to the arbitral institution has been exhausted before seeking removal. It should also be noted that since s24 proceedings may take some time, an arbitrator against whom removal proceedings have been brought may still be tasked, potentially in response to a s68 finding, to decide on certain issues. Parties considering the removal of an arbitrator would thus be prudent to consider what matters remain outstanding before deciding to bring s24 proceedings.

At the same time, in relation to s68 serious irregularities, arbitrators need to be cognizant of how they communicate with parties. Clear indications as to relief remain key, and parties should be made aware of the possible options the arbitrator is entertaining. Formulating agreed lists of issues, as envisaged in the ICC Rules in the form of 'terms of reference', may be another way to ensure that focus is maintained on key issues and serious irregularities avoided.

In closing, serious irregularities by their nature are likely to not crop up too often in practice. However, when they do, it is important that the law governing what happens next is clear and sensible. *RJ* provides that clarity.