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Pakistani Energy Sector Parties Challenge Arbitration Awards in the English High Court on the Grounds of 'Serious Irregularity'

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When a party is not content with an arbitration award, a challenge in the domestic courts often ensues. The High Court of England and Wales (the '**High Court**') often deals with this issue in challenges based on 'serious irregularity' in arbitration proceedings. How domestic courts approach challenges to arbitration awards is of increasing importance as foreign parties often decide to seat an arbitration in a jurisdiction that they believe will provide the greatest stability to governing the arbitration process. This article considers the reasons why parties often choose to seat their arbitration in a foreign jurisdiction, looking in particular at commercial contracts in Pakistan with an arbitration clause seating the dispute in London. We also briefly discuss the level of 'seriousness' required under the law for a section 68 application, and the consequences of making such applications before the High Court.

The Government of Pakistan through state-owned entities ('**SOEs**') is increasingly involved in high-value contractual disputes with other public sector companies. These contracts often have LCIA arbitration clauses, and over 84% of LCIA-administered arbitrations are seated in England. High Court's supervisory jurisdiction over the arbitral process means challenges to the arbitral awards often take place publicly (for example see here and here). The dated arbitration legal framework and a slow-moving judicial system have contributed to parties avoiding a Pakistan-based dispute resolution process and turning to London.

The Dispute

The High Court was recently faced with determining a challenge to an arbitral award under a contract to which both parties were based in Pakistan. How the English High Court approached this challenge will be of interest as it manages expectations for those considering challenging an award in the English courts. In *Quaid-e-Azam Thermal Power (Private) Ltd v Sui Northern Gas Pipelines Limited* [2024] EWHC 70 (Comm), a challenge was brought under Section 68 and Section 33 of the English Arbitration Act 1996 ('**the Act'**) before Dame Clare Moulder DBE. The underlying dispute concerned unpaid invoices under a Gas Supply Agreement ('**GSA**') entered into by the Parties in 2016 for the purchase of Regasified Liquefied Natural Gas ('**RLNG**') from Sui Northern Gas Pipelines ('**SNGPL**'). The LCIA arbitral award (the '**Award**') which was challenged involved

a withdrawal of PKR 3.3 billion escrow (approx. £8.5m) and PKR 9.23 billion (approx. £26m) invoices issued by SNGPL to Quaid-e-Azam Thermal Power ('**QATPL**'). The High Court dismissed the challenge to the Award by finding there was no 'serious irregularity' as pleaded by QAPTL.

Last year, in a separate case, SNGPL had unsuccessfully challenged under Section 68 an arbitral award in favour of National Power Parks Management Company (Pvt.) Ltd ('**NPPMCL**'). The dispute arose out of a GSA which was materially similar to the one that SNGPL had signed with QAPTL. This case will be discussed and distinguished further below.

The Parties

SNGPL is an entity listed on the Pakistan Stock Exchange and is 32% owned by the Federal Government. The High Court challenge emanated from the Award that was issued in favour of SNGPL in August 2022, by Chantal-Aimée Doerries, KC (the '**Tribunal**'), against QATPL, a public sector company. QATPL, owned by the Government of Punjab, operates a thermal power plant in northeast Punjab that relies on RLNG as its main fuel. Punjab is the most populated province and biggest consumer of electricity in Pakistan.

The Challenge

Section 68 of the Act grants parties the right to challenge an arbitral award on the grounds of 'serious irregularity', including the tribunal's failure to comply with its general duties under Section 33. In these Section 68 proceedings, the High Court was faced with a number of issues, but it primarily focussed on two key matters: (i) the latitude afforded to the Parties by the Tribunal to go beyond their written submissions to plead their case, and (ii) the extent to which a tribunal must address all issues raised by the Parties.

Five days before the final hearing, SNGPL submitted before the Tribunal further arguments. QAPTL argued that SNGPL's belated submissions were not only radically different, but were also inconsistent with its previously pleaded case of 'actual loss'. SNGPL pleaded, and the High Court agreed, that its claim was not for a breach of contract based on actual losses, but instead QATPL's failure to pay for gas under the 'Diversion of Gas and Take or Pay' clause. Under Section 3.6(a) of the GSA, if gas was not utilised by QAPTL, the gas would be diverted to other consumers; however, QAPTL would remain liable to pay the agreed price netted against the sum collected by any such diversion.

The challenge to the Award was brought on two grounds by QAPTL:

- Section 33: The Tribunal acted in breach of Section 33, by determining the claim on a basis that SNGPL had not pleaded and/or by determining it in a way that meant that QATPL did not have a reasonable opportunity to respond to SNGPL's case in the way in which that case was finally sought to be advanced; and
- Section 68: The Tribunal acted in breach of Section 68(2)(d), by failing to rule on a determinative issue that the parties had put before it.

Serious Irregularity

The leading authority on Section 68 challenges is *RAV Bahamas Ltd and another v Therapy Beach Club Inc [2021] UKPC 8*, which prescribes that intervention should be limited to 'extreme' cases and that the test of serious irregularity imposes a 'high threshold'. To support its challenge, QATPL primarily relied on two precedents: *The Vimeira* [1984] 2 Lloyd's Rep 66 and *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277. Both cases emphasised the importance of the parties' pleaded position in an arbitration, so as to enable arbitrators to perform their essential function of resolving the issues raised by the parties.

After a careful review of the submissions before the Tribunal, the High Court held that QATPL was not deprived of an opportunity to respond to SNGPL's case. Instead, QATPL misunderstood the case that it had to meet and hence failed to respond accordingly. The High Court further held that SNGPL did not depart from its pleaded case in the belated submissions filed five days before the final hearing. In reaching this decision, the High Court upheld the approach in *Terna Bahrain Holding Company WLL v Al Shamsi* [2013] 1 All E.R. (Comm) 580, where it was held:

> "There is… an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of s 33 or a serious irregularity."

Failure by the Tribunal to Address Issues Raised by the Parties

For the second ground of the challenge, relying on *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC), the High Court dismissed the objection on the basis that the award did sufficiently address the issues raised by QATPL and that there was no prejudice caused to QATPL.

Comment

This case is significant in emphasising the court's reluctance to set aside an award under Section 68 unless the high threshold of seriousness is met. The English courts take a contextual approach to any challenge and will review submissions and proceedings in their entirety in determining whether there is a serious irregularity.

The courts appear to have given significant flexibility in allowing parties to improve their case without a finding that new issues have been raised outside the scope of the pleadings. As such, litigating parties are expected to anticipate ancillary issues and address these, and cannot rely on their failure to address an issue as a ground to challenge the award if the other party raises issues which broadly fall within its pleaded case.

For example, in another case against NPPMCL, SNGPL was of the view it had "won an identical award from the LCIA" in the arbitration proceedings against QATPL on the same issue as in *SNGPL v NPPMCL*. What was in fact identical between the two disputes was the broiler-plate Section 3.6 of the GSA "Diversion of Gas and Take or Pay" for Monthly Take-or-Pay Quantity of gas. It transpired before the High Court that the issues raised in the arbitration against NPPMCL, although related to Section 3.6 of the GSA, were factually radically different to the issues in the QAPTL case.

In *QATPL v SNGPL*, the High Court underscored the extreme nature of irregularity that would meet the threshold in Section 68. Parties need to think through the case being pleaded even where near identical contracts exist. These two cases demonstrate that the issue will be fact specific and it is critically important for parties to ensure that the Arbitral Tribunal approaches the issues correctly as the prospects of challenging the award for irregularities will always be extremely difficult.

Conclusion

England is a popular jurisdiction for seating arbitrations. Pakistani parties, in particular, often favour London as the seat of arbitration. There are a number of reasons for this. First, the legal system in England and Wales is considered reliable and efficient. Second, the backlog of cases in Pakistani courts make Pakistan as the seat of arbitration unattractive. Third, the arbitration law in Pakistan is outdated and Pakistani courts are generally considered to provide limited or delayed relief to parties who are unhappy with the arbitration process. Having said that, it is understood that the Pakistani arbitration regime is expected to undergo a radical change, with the promulgation of the new Arbitration Act.

The discussion above and comparison of the two different Section 68 proceedings involving the same party (SNGPL), near identical GSAs and similar facts, demonstrate a few notable conclusions:

- The high threshold of "seriousness" before the English High Court for a challenge under S. 68.
- An identical or similar GSA does not mean it will be dealt in an identical manner by the Tribunal. A careful and thorough appreciation of the factual and legal matrix of each dispute and subsequent arbitral award is needed before approaching the courts.

These are important considerations for contracting parties negotiating the seat of arbitration in any contract. It is not unusual, as in the cases discussed above, where even in a contract where both parties are in Pakistan, the parties choose London as the seat of arbitration. When arbitration awards are then challenged in the English courts this has the, perhaps unintended, consequence of bringing the dispute to the public domain as the cases are reported. The dispute is then also internationalised and brings a level of scrutiny that perhaps neither party to the dispute would like and which defeats one of the key advantages of arbitration: privacy.

In this context, it becomes very important for parties and those who practise in this field based outside England to have a firm understanding of how the English courts approach challenges to awards before seeking a publicly available challenge to the Award.

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