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Serious Irregularity for Failure to Consider a Limitation Defence: Lessons from Djanogly v Djanogly

Ernest Leung (Wilberforce Chambers) · Friday, April 11th, 2025

On 17 January 2025, Mr. Justice Miles handed down judgment in *Djanogly v Djanogly* [2025] EWHC 61 (Ch), a case involving a long and bitter family dispute between a son, Saul Djanogly ("Son"), and a father, David Djanogly ("Father"). The dispute was referred by *ad hoc* agreement to the Golders Green Beth Din ("the Tribunal").

Background Facts

Prior to the appointment of the Tribunal, the dispute was heard by one of the judges of the Beth Din ("DL"), where the Father claimed for financial maintenance against the Son. The Father further alleged that in or around 1990, he had lent around £125,000 to the Son to enable him to undertake a business through a property development company called SAS Financial Services Limited ("SAS"). DL issued various informal rulings in 2014, known as Psak Din.

As the proceedings progressed, however, the claim morphed into one against the Son to account for the money he removed from SAS. The Father alleged that from 1985 onwards, the Son had assumed control of SAS and removed various funds from SAS. For this reason, the Father claimed that the Sin was accountable to him for these amounts.

On 2 August 2018, the Parties (excluding SAS, which had by then dissolved) entered into an *ad hoc* arbitration agreement appointing the Tribunal. The scope of the agreement extended to "the following claim and any related claim or counter-claim regarding: Compliance with Piskei Din issued by [DL] and related issues to be determined by this Beth Din."

Owing to the time which had lapsed since the alleged loans were advanced, throughout the proceedings the Son had repeatedly raised the defence of limitation. The Son also repeatedly requested an oral hearing to deal with these issues but the requests were refused.

On 5 August 2011, the Tribunal issued a final award and found that the Son was liable to the Father for an amount of £100,000.

The (Failed) s. 67 Challenge

The Son filed the present claim to set aside the award on the following bases:

- Under s. 67 of the English Arbitration Act 1996 ("1996 Act"): (i) the claim was against SAS and SAS was not a party to the arbitral agreement ("the Non Party Defence"); and (ii) the claim fell outside of the arbitral agreement ("the Out of Scope Defence"). Therefore, the Tribunal lacked substantive jurisdiction.
- Under s. 68 of the 1996 Act, the Son relied on the further argument that the Tribunal had failed to deal with the limitation defence raised in the proceedings (s. 68(2)(d) of the 1996 Act).

Mr. Justice Miles rejected both arguments under s. 67.

In relation to the Non Party Defence, he concluded that the fact that SAS was not a party to the dispute is immaterial. The claim as formulated was one against the Son and the Tribunal found that the Son was liable to the Father. Whilst the Tribunal only provided brief reasons as to why the Son was personally accountable to the Father for monies removed to SAS, a separate legal entity, this is neither here nor there as the Court is not asked to decide the merits of this point of law.

In relation to the Out of Scope Defence, Mr. Justice Miles applied the well-known doctrine in *Fiona Trust v Privalov* [2007] UKHL 40 (see, e.g., here) and held that on a purposeful interpretation of the arbitral agreement, the present claim did fall squarely within the scope of the agreement. Alternatively, the Son had failed to object to the Tribunal addressing the claims in its present shape such that he has lost his right to now challenge the award based on lack of substantive jurisdiction (s. 31(2) and 73 of the 1996 Act).

Applicable Non-National Law?

It is also worth noting that the Court had to decide another preliminary point before considering the limitation defence—can a non-national legal system, such as Jewish law, govern issues on limitation?

The starting point under s. 46 of the 1996 Act is that the parties are free to agree to determine the dispute "in accordance with such other considerations as are agreed by them." This means that the parties could agree for the Tribunal to determine the dispute on a system of legal principles which is not the law of a country. This is simply a reflection of the principle of party autonomy in arbitration.

Where the parties have not agreed on the applicable law or on the non-national legal system as "such other considerations," then s. 13 of the 1996 Act applies. This in turn triggers s. 1 of the Foreign Limitation Periods Act 1984 ("1984 Act") which applies the English limitation provisions, subject to it being disapplied by the law of another country in accordance with conflict of laws rules.

However, in *Halpern v Halpern* [2007] EWCA Civ 291, the Court decided that non-national legal principles cannot amount to the "law of another country" for the purposes of the Rome Convention. In *Djanogly*, Mr. Justice Miles extended this ruling to limitation issues; the same analysis also applies in relation to the 1984 Act such that Jewish law cannot disapply the operation of English limitation provisions.

The (Successful) Challenge Under s. 68

Having decided that the English limitation provisions do apply, Mr. Justice Miles then considered whether this serious irregularity did cause a substantial injustice to the Son.

The test, as correctly stated, is whether or not had the Tribunal adopted appropriate means, i.e., considered the limitation defence, they "might well have reached another conclusion favourable to the applicant" (*K v P* [2019] EWHC 589 (Comm)). Given it is seriously arguable that the claims against the Son are not maintenance claims and can be properly characterised as either claims in contract or tort, it is seriously arguable that the defence would have applied. It was also seriously arguable that the Father could not rely on provision of the Limitation Act to postpone the running of time.

On this basis, the challenge succeeded.

Analysis

This judgment is interesting for two reasons. First, it adds to the list of cases in which the English Court has been willing to set aside an arbitral award for grounds of serious irregularity as it last famously did in *Nigeria v P&ID* (*see* here).

The threshold is undoubtedly high and such instances are few and far between; indeed, the Commercial Court Report of 2022-2023 highlighted a decrease in the numbers of challenges to arbitration award under s. 67-69 of the 1996 Act. Out of the fourteen s. 68 challenges which were determined, seven were dismissed without a hearing; the rest all failed or were settled. Be that as it may, it appears that when it comes to important issues such as limitation, which would otherwise be fatal to a claim, the English Court appears willing to find such serious irregularity.

Second, the obiter comment by Mr. Justice Miles at the end of the judgment is interesting. He formed the view that had the Tribunal even addressed the point of limitation in the award, he would not have found a failure by the Tribunal to comply with its general duty under s. 33. This is so even where the Son was never given an opportunity to present his case on this orally. The comment is a reminder that the arbitral tribunal is the master of its own procedure and that challenges based on procedural rulings will rarely succeed (Russell on Arbitration, at [8-096]-[8-097]).

Whilst this may be correct, the limits of this proposition can be tested against the following hypothetical situation. If for instance, the tribunal were to decide the question on limitation in favour of the Defendants but merely gives an extremely superficial analysis of the issue, then the question arises as to whether or not the award is badly or unclearly reasoned (in which case, the Court will not intervene), or the award is unreasoned (in which case, the Court may intervene).

A useful illustration of the former can be found in a Hong Kong judgment in *AAB v BBA* [2024] HKCFI 699 (*see* here) where the Court found that the award though superficially reasoned, nonetheless provided reasons such that the application to set aside the arbitral award failed.

As to an unreasoned judgment, a useful illustration of the latter can be found in *Flannery v Halifax Estate* [2000] 1 WLR 377 where a judgment was successfully appealed (so the context is slightly different) on the basis that the judge simply stated: “I prefer the Expert Evidence that was given for the Defendants” without providing any other reasoning. It is clear that the facts here are stark and highly unusual. In any event, parties should bear in mind the fact that the Court could simply make an order under s. 70(4) of the 1996 Act for the Tribunal to amplify its reasons.

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