Arbitral awards under the Arbitration act 1996: recent judgments and proposals for reform

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The arbitration process within the United Kingdom is subject to the provisions of the Arbitration Act 1996.[1] *AA 1996 provides a framework for the resolution of disputes through arbitration and attempts to limit the need for the parties to arbitral proceedings to seek intervention from the courts when settling disputes in the process outside the scope of the substantive issue. However, AA 1996 also allows for judicial intervention in certain circumstances, such as when a party seeks to challenge an arbitral award.*[2]

One of the most common grounds for challenging an arbitral award under AA 1996 is found under section 68 which allows a party to challenge an award on the grounds of serious irregularity and includes, amongst others, circumstances where the tribunal has exceeded its jurisdiction, there has been a serious procedural irregularity, or the award has been obtained by fraud or other illegal means.[3] Section 69 AA allows a party to appeal the award of the arbitral tribunal on a point of law. This is a more limited ground for challenge, as it only allows an appeal on a question of law that is of general public importance.[4]

AA 1996 also contains provisions for the enforcement of arbitral awards. Section 66 of the Act provides that an arbitral award may be enforced in the same way as a judgment of the court. This means that an award can be enforced through the courts, with the same powers of enforcement available to a successful party as if they had obtained a judgment in court.

It is clearly the case that the nature of some disputes means that a party may be seriously disadvantaged if required to wait for final determination of the substantive issue, even if this is precipitated by the arbitral process. Under section 44 AA 1996, the court is able to provide interim relief in support of arbitration proceedings. This includes measures such as injunctions or orders for the preservation of evidence.[5] This provision is important because it allows parties to obtain urgent relief from the courts to protect their interests pending the outcome of arbitration proceedings.

Overall, the Arbitration Act of 1996 has been successful in promoting the use of arbitration as a means of resolving disputes in the UK. It provides a clear framework for the resolution of disputes outside the courts and has significantly reduced the direct intervention of the courts in arbitration proceedings. However, the Act also recognizes the need for judicial intervention in certain circumstances,

[1] Hereinafter 'AA 1996'.
[2] See AA 1996, ss66 -71.
[3] AA 1996, s68(2).
[4] AA 1996, s96(3)(c)(ii).
[5] AA 1996, s44(2).

such as where an arbitral award is challenged under Sections 68 or 69 of the Act. It is these challenges to arbitral awards which necessarily still remain subject to the direct jurisdiction of the courts. This article will consider two judgments which specifically addressed these challenges and will conclude by considering the changes to AA 1996 currently being considered by the Law Commission in its Review of the Arbitration Act 1996.[6]

I. *EGF v HVF*[7]

The judgment *in EGF v HVF* offers a valuable clarification of the distinction between challenging an award on the grounds of an arbitrator's substantive jurisdiction and one based on significant procedural irregularities affecting the tribunal, drawing a distinction, therefore, between applications under sections 67 and 68 AA 1996, although, in practice, the factual nature of the claim meant that the distinction die not need to be drawn.

1.1. BACKGROUND

The Claimant made an application to invalidate an Interim Payment Order (IPO) issued by the Tribunal in accordance with Article 34 of the UNCITRAL Rules. The application was based on sections 67 (the tribunal's jurisdiction) and 68(2)(b) (the tribunal exceeding its powers otherwise than exceeding its jurisdiction) of AA 1996. Furthermore, the Claimant argued that the IPO was "tainted with serious procedural irregularity" due to the arbitrators' impartiality being questioned after allowing the introduction of two late witness statements without providing an opportunity for cross-examination by the parties. The primary concern in this context was that under Article 26 of the UNCITRAL Rules, any interim measure must be temporary in nature and this order was not temporary. Secondly, the court was asked to consider whether the fact that the IPO was made by way of an award of the tribunal rather than by procedural order meant that the award was invalid.

DECISION

The Court determined that the inclusion of the late witness statements did not indicate bias. Although the challenge to the arbitral powers under the Act was unsuccessful, the Court found that the Tribunal had exceeded its authority under Article 34 of the UNCITRAL Rules. Section 67 of the Act was not applicable since the application to invalidate the IPO did not contest the Tribunal's substantive jurisdiction. It was acknowledged that the Tribunal had been validly constituted based on a legitimate arbitration agreement. Instead, if a valid challenge were to be made regarding the Tribunal's authority to issue an IPO, the Court concluded that it would fall under Section 68 due to serious irregularity.

For a successful Section 68 challenge, it must be demonstrated that the serious irregularity resulted in potential or actual substantial injustice for the applicant. As the Claimant did not assert that the IPO had caused any substantial injustice, the criteria for a Section 68 challenge were not met. The Court expressed an obiter opinion that it would have upheld a Section 68(2)(b) challenge on the limited basis that the Tribunal had exceeded its authority under Article 34 of the UNCITRAL Rules ("*All awards shall be made in writing and shall be final and binding on the parties*") since an IPO is not considered final and therefore, a provisional *award* is not possible, the matter should be dealt with by a provision procedural order.

1.2. THE IMPACT OF THE DECISION

This ruling further exemplifies the rigorous standard for section 68 challenges in England. Despite the judge acknowledging that the Tribunal had exceeded its authority, the challenge was ultimately unsuccessful as it did not meet the requirement of demonstrating substantial injustice.

[6] Available at <www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/> (accessed 8th July 2023).
[7] *EGF v HVF* [2022] EWHC 2470 (Comm).

Moreover, this decision offers valuable insights into the realm of interim remedies within arbitration, as well as the interplay between the governing Act and the procedural rules chosen by the parties. In this case, although the arbitrators possessed the power to grant provisional relief in the form of a provisional order, the granting of the same relief in the form of an award rendered the decision appealable, necessarily subject to the lack of substantial injustice.

II. *UNION OF INDIA v RELIANCE INDUSTRIES LIMITED AND OTHERS*[8]

2.1. BACKGROUND

Reliance Industries Limited ("Reliance") and BG Exploration and Production India Limited ("BG") were participants in two production sharing contracts ("PSCs") with the Indian Government, which pertained to gas fields located off the west coast of India. The PSCs were governed by Indian law, and their arbitration agreements were governed by English law, with London designated as the seat of arbitration. The arbitration proceedings between the parties concerning the PSCs had been ongoing for some years, and this case specifically involves the Government's application relating to the "Final Partial Award" issued in 2021 ("2021 Award").

The 2021 Award addressed the issue of the remaining costs owed to Reliance following a previous award in the case. The Government raised certain objections, including those based on Indian substantive law. However, the Tribunal determined that it could not consider these objections as they pertained to Reliance's earlier case, which had already been resolved in a 2018 award. According to the Tribunal, the Government should have raised these objections during the earlier proceedings. In arbitration, parties are expected to present their complete case, and unless there are exceptional circumstances, a party cannot revisit the same subject of arbitration that was omitted from its original case. Dissatisfied with this decision, the Government challenged it in court under sections 68 and 69 of AA 1996.

2.2. DECISION

The Government appealed under sections 68 and 69 AA 1996.

When dealing with the section 69 appeal, the Court extensively referenced Lord Sumption's analysis of the principle of *res judicata*, including the *Henderson v Henderson*[9] principle, finding that the, despite the substantive agreement being subject to Indian law, the appropriate law for any arbitral proceedings was English law and that, as such, the principle in *Henderson v Henderson,* which aims to prevent duplicate proceedings was relevant. This meant that the application under section 69(3)(c) AA 1996 must fail because the tribunals decision was not obviously wrong or open to serious doubt. No claim under section 69(3)(b) was possible because the tribunal was not asked to decide whether matters of *res judicata* should be dealt with subject to English or Indian law and, in any event, English law was the correct law where the seat of arbitration was in London.[10] Finally, there was no suggestion that the Government's rights had been substantially affected, meaning that section 69(3)(a) AA 1996 had no application.

When dealing with the section 68 AA 1996 issues, the court held that the impact of the *Henderson v Henderson* principle meant that the refusal to allow additional defences to be pleaded was not unfair under section 68(2)(a) AA 1996, the Government's case was effectively addressed, meaning that the appeal under section 68(2)(d) could not succeed, and that award was not contrary to public policy subject to section 68(2)(g) AA 1996.

[8] *Union of India v Reliance Industries Limited and others* [2022] EWHC 1645 (Comm).

[9] *Henderson v Henderson* [1843] 3 Hare 100.

[10] See *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46.

2.3. THE IMPACT OF THE DECISION

This decision showcases the pro-arbitration stance adopted by the English courts, particularly in the context of a complex and lengthy procedural history of the dispute. It underscores the application of the *Henderson v Henderson* principle by arbitral tribunals, mirroring the policy considerations seen in court proceedings. This principle prevents the abuse of process when a party attempts to introduce submissions in subsequent proceedings that could have been presented earlier. Additionally, the judgment serves as a practical reminder of the responsibility placed on parties and their legal representatives to ensure that the case is fully presented at the earliest opportunity.

III. THE LAW COMMISSION

The Law Commission of England and Wales published a report in 2021 proposing reforms to the Arbitration Act 1996. The report, entitled "Reforms to the Arbitration Act 1996: Commercial Arbitration"[11] , identified several areas where the Act could be modernized and improved.

One of the key proposals in the report was to allow parties to arbitration proceedings to appeal on a point of law to the courts, with the permission of the tribunal or the court. This proposal was aimed at improving the certainty and consistency of arbitration awards and bringing the law in line with international standards. The report also proposed changes to the way that arbitrators are appointed, with a view to making the process more transparent and reducing the risk of conflicts of interest. The Law Commission suggested that an independent body should be established to oversee the appointment of arbitrators, and that the process should be more closely aligned with international best practice. Other proposals in the report included improving the provisions for challenging arbitral awards, increasing the powers of the court to order interim measures in support of arbitration proceedings, and providing greater clarity on the law relating to the enforcement of arbitral awards.

The Law Commission's report on proposed reforms to AA 1996 was published in 2021[12] and the consultation period is ongoing. The Law Commission will be considering responses to the report and developing final recommendations for any reforms to be made to AA 1996 in due course.

It seems clear that the Law Commission considers the development of arbitration as a method of dispute resolution vital and that it is aware that as the process becomes more widely accepted within the context of commercial disputes the process and its legislative basis must evolve. The purpose of the consultation period is to obtain the views of parties involved in the arbitration process and therefore, it is the practical application of AA 1996 which is relevant. Although, even if adopted, the reforms may take some time to implement, the effect it seems is to cement arbitration within commercial law as a fundamental requirement within contracts of this nature.

[11] Available at <https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/> (accessed 8th July 2023)
[12] *Ibid.*