SECTION 68 CHALLENGES: NO LOWER HURDLES FOR COVID-AFFECTED CASES

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Many of the legal repercussions of the Covid-19 pandemic are only now coming before the English courts. Parties are discovering that the unprecedented emergency situation of the pandemic did not necessarily lead to the application of a different set of legal rules. The decision in *Tenke Fungurume Mining v Katanga Contracting Services* is just one example, in which the claimant was unsuccessful in challenging the outcome of arbitration proceedings held during the pandemic.

BACKGROUND

Katanga Contracting Services S.A.S. ("KCS") commenced two ICC arbitrations, which were later consolidated, against Tenke Fungurume Mining S.A. ("TFM") in relation to contracts for the construction of tailing storage facilities and removal of scats in a mine in the Democratic Republic of the Congo. TFM submitted a counterclaim.

The merits hearing for the arbitration was scheduled to start on 1 March 2021 and TFM tried twice to adjourn the hearing due to the Covid-19 pandemic: first, on 25 January 2021, on the basis that the parties' mining experts had been prevented from visiting the site because of Covid-19 restrictions (and such visit would be relevant for its counterclaim); and second, on 4 February 2021, after TFM's leading counsel became ill with Covid-19.

The Tribunal rejected both requests for adjournment and the merits hearing took place between 1 and 8 March 2021. On 26 August 2021, the Tribunal issued the award, in which TFM was ordered to pay all sums claimed by KCS and the counterclaim was dismissed.

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On 23 September 2021, TFM challenged the award under section 68 of the Arbitration Act 1996 (the "Act") on the grounds of serious irregularity as the Tribunal:

- failed to adjourn the arbitration to allow a visit to the construction site by the experts;
- failed to adjourn the arbitration notwithstanding the illness of TFM's leading counsel;
- did not allow TFM to cross-examine KCS on its funding arrangement during the cost submissions stage; and

- caused substantial injustice to TFM by awarding compound interest at 9% with monthly rests.

DECISION

General principles regarding s.68 Challenges

Moulder J. stressed that "*Section 68 is designed as 'a longstop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in section 68, that justice calls out for it to be corrected*" (quoting from *RAV Bahamas Ltd and another v Therapy Beach Club Inc* [2021] UKPC 8).

> "To be successful in its challenge, it would need to establish that had the procedural irregularity not occurred, the outcome might well have been different."

For TFM to be successful in its challenge, it would need to establish that had the procedural irregularity not occurred, the outcome might well have been different, unless substantial injustice is obvious from the particular irregularity.

In addition, unless a tribunal has arrived at a decision which no reasonable tribunal could have made with respect to its general duties of fairness and impartiality (under s.33 of the Act), such decision cannot be characterised as a serious irregularity.

COVID-19 IMPLICATIONS

In respect of the site visit, TFM alleged that its position during the proceedings had always been that a site visit by the experts was necessary and fundamental for its counterclaim. However, a site visit had not been possible in advance of the merits hearing due to the Covid-19 pandemic restrictions and safety conditions. TFM argued that it was prevented from producing the evidence that it wanted because of the Tribunal refusing to adjourn the merits hearing and there was a real chance that the result of the counterclaim might have been different had the Tribunal not rejected the on-site visit by the experts.

However, Moulder J. concluded that TFM failed to show that a site visit might have made a difference to the outcome of the counterclaim, agreeing with the Tribunal's decision that, based on the testimony given by the experts during the merits hearing and the circumstances, a site visit was not necessary. Her view was that:

"[T]he *Tribunal exercised its discretion having regard to the evidence of the experts as to the utility of a site visit and weighed this evidence against the effect of an adjournment. There is no basis to conclude that this decision surmounted the high hurdle of a successful challenge under section 68 as being a conclusion which no reasonable arbitrator could have arrived at.*"

> "[T]he Tribunal exercised its discretion having regard to the evidence of the experts as to the utility of a site visit and weighed this evidence against the effect of an adjournment."

In respect of leading counsel's illness, TFM alleged that his participation in the merits hearing was vital to TFM as he had been involved in advising and representing TFM in the proceedings from the very outset. The Tribunal refused to adjourn the merits hearing on this basis and TFM did not have enough time to find a suitable replacement. TFM believed that if its leading counsel had attended the hearing the outcome of some of the legal issues raised by TFM might have been different.

Moulder J. concluded that TFM had not shown that the Tribunal's decision to reject the adjournment of the hearing due to counsel's illness was a decision which no reasonable tribunal could have reached and that the Tribunal had gone so wrong in its conduct of the arbitration that justice called out for it to be corrected.

"The delay caused by adjourning the merits hearing was not in line with the parties' agreement to conduct the arbitration as expeditiously as possible."

The Tribunal had considered all the circumstances before deciding not to adjourn the hearing and concluded that: (i) from 26 January 2021 TFM knew that leading counsel could not attend the hearing and could have found a replacement; and in any event (ii) TFM was assisted in the proceedings by a highly-qualified legal team from a reputed international law firm; further (iii) the delay caused by adjourning the merits hearing was not in line with the parties' agreement to conduct the arbitration as expeditiously as possible.

In this regard, Moulder J. noted that the *"duty of the Tribunal is to adopt procedures suitable to the circumstances of the case avoiding unnecessary delay or expense so as to provide a fair means for the resolution of the matters to be determined. As stated in Kalmneft, 'the court's powers to interfere with an arbitrator's discretionary decision … should not be engaged unless it is clear that he has failed to have regard to the relevant facts and to his duty under section 33'."*

OTHER GROUNDS FOR CHALLENGE (NOT RELATED TO COVID-19)

TFM further challenged the award on the grounds that the Tribunal failed to give TFM a reasonable opportunity to meet KCS's costs case by refusing to let TFM cross-examine KCS in relation to KCS's funding arrangement and compound interest claim.

"'the court's powers... should not be engaged unless it is clear that he has failed to have regard to the relevant facts and to his duty under section 33'."

KCS revealed during the cost submissions stage for the first time that it had obtained a shareholder loan which it described as a 'litigation funding agreement'. TFM requested to cross-examine KCS on the funding arrangement, but the Tribunal refused (TFM was only permitted documentary disclosure in relation to the loan).

Moulder J. dismissed TFM's arguments, concluding that TFM did not show that the refusal to allow cross examination was a decision which no arbitrator could reasonably have reached in the circumstances of the case. The Tribunal was entitled to refuse cross examination having regard to the stage of the proceedings and the document disclosure granted in relation to the funding agreement.

In relation to the Tribunal's decision to award compound interest, Moulder J. clarified that, under section 49(3) of the Act, the Tribunal had "*the power to award interest is at such rates and with such rests as the tribunal considers meets the justice of the case.*" In the present case, the Tribunal was able to form a view as to the rates of interest and cost of borrowing from the evidence. Therefore, as the decision not to allow cross examination was a procedural matter within the discretion of the Tribunal and TFM did not establish that cross examination might have led to a different outcome on the award of compound interest, TFM's challenge was rejected.

CONCLUSION

"The Tribunal was able to form a view as to the rates of interest and cost of borrowing from the evidence."

Despite restrictions being lifted around the world, the Covid-19 pandemic continues to give rise to new disputes and impact arbitral proceedings. The Commercial Court reiterates here the high threshold imposed by the English courts to grant s.68 applications. It further demonstrates that it will take more than mere hinderances from Covid-19 to establish a successful ground for challenge.

The extent of the pandemic impact will vary from case to case, so this decision serves as guidance for parties pursuing a s.68 challenge based on Covid-19 implications of the necessity to establish that a serious irregularity has occurred and that such irregularity has caused a substantial injustice.

Finally, parties who are involved in ongoing proceedings should act swiftly to mitigate any issues caused by Covid-19 that might harm their case and not simply rely on suspension/adjournment applications to the Tribunal.

KEY CONTACTS

REBECCA WILLIAMS
PARTNER • LONDON

T: +44 203 036 9805

rwilliams@wfw.com