

Serious Irregularity: The Enduring Power of *Egmatra*

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Introduction

This year of course the really big news is the ECJ decision in *West Tankers*; the Advocate General's opinion last year and the ECJ outcome last month. But with over 1000 cases to choose from, this year we had more latitude. However controversial that figure is (and it is hotly contested) it opens up more than just the cases decided in 2008. As a result, I think there is some merit in looking at the enduring power of *Egmatra*; how Tuckey J over ten years ago on 28 July 1998 in a very short judgment set the threshold test for section 68. Bearing in mind Stewart's strict instructions not to go into the facts of a case I confine myself to noting that *Egmatra* was a challenge from an LME award issued on the basis of documents only. The grounds of challenge under section 68 were that the tribunal refused to accept *Egmatra*'s expert evidence and a failure to properly deal with the CISG.

Section 68 aim and scope

Before I go any further I think it is worth just remembering what the original aim and intent of Section 68 actually was. It was an attempt to dampen the rising criticism of the overly interventionist approach of the English Courts under section 22 and 23 of the Arbitration Act 1950. Section 22(1) provided that:-

"In all cases of reference to arbitration the High Court or a judge thereof may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrator or umpire."

Section 23 provided:

(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside."

Section 68 went some way to silence the international criticism that the Courts of London intervened more than they should with the arbitral process. Serious irregularity requirement was "a new concept in English arbitration law."¹ It is

¹ *Lesotho Highlands Development Authority v Impregilo SpA & ors* [2005] UKHL 43 para 28

essentially a question of fairness of the process; a concept that can also vary in jurisdictions e.g. a document only arbitration is fair while perhaps not in the USA; service by email is not a violation of section 68 although not recognised at the time for litigation purposes.²

Section 68 has been compared to the general provisions in section 34 (1) para 6 of the Swedish Law³ although it does not contain a finite list. As pointed out by Dr Lew and his colleagues in their book on *Comparative International Commercial Arbitration* “The grounds laid down for challenging an award are often comparable with the grounds referred to in the New York Convention...”⁴ Although section 68 did not adopt the UNCITRAL Model Law Article 34 which essentially mirrors the New York Convention exceptions, the DAC Report did note that it was intended to reflect “the internationally accepted view that the court should be able to correct serious failure to comply with the ‘due process’ of arbitral proceedings *cf* Article 34 of the Model Law”⁵ The application of this provision is not itself without its tensions as evidenced by the long and detailed chapter on Recourse against the Award in *Arbitration in Germany: The Model Law Practice*.⁶

As pointed out by Poudret & Besson in their excellent book *Comparative Law of International Arbitration* “rather than adopt a general provision with respect to procedural violations, the English legislature has preferred to list under s.68 different types of irregularities concerning either the conduct of the procedure (s.68 (a) – (d)), the constitution of the tribunal (s.68(e)), or the award (s.68 (f)-(h)).”⁷ This approach is in contrast to the UNCITRAL Model Law (both the 1985 and UNCITRAL plus 2006). The list in section 68 is exhaustive and most importantly an application will only succeed if one of the irregularities is found to exist AND that it has caused or will cause a substantial injustice.

² See *Bernuth Lines Ltd v High Seas Shipping Ltd* [2005] EWHC 3020

³ Section 34(1) 6 provides that an award shall be “wholly or partially set aside upon motion of a party: ...6, if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.”

⁴ J Lew, L Mistelis and S Kröll, *Comparative International Commercial Arbitration* Chapter 25 para 25-4

⁵ DAC Report para 282. Section 68 and Article 34 UNCITRAL Model Law set out in full in the Annex. IN fact it has been noted that there “is probably little novel in section 68 in terms of principle when compared with the Model Law, but the terminology and codification are different” R Merkin and L Flannery, *Arbitration Act 1996* (Informa, 4th Edition, 2008) p.156

⁶ See Chapter VI, S Kröll and P Kraft, ‘Application for setting aside’ in K-H Böckstiegel, S Kröll and P Nacimiento (Eds) *Arbitration in Germany: The Model Law Practice* pps 436- 478 (Wolter Kluwer, 2007)

⁷ Poudret and Besson, *Comparative Law of International Arbitration* (2nd Ed, Sweet & Maxwell) p.747 para 808. See also *Lesotho Highlands Development Authority v Impregilo SpA & ors* [2005] UKHL 43 para 29 where Lord Steyn says “It will be observed that the list of irregularities under section 68 may be divided into those which affect the arbitral procedure, and those which affect the award. But nowhere in section 68 is there any hint that a failure by the tribunal to arrive at the “correct decision” could afford a ground for challenge under section 68.”

It is through this two tier test⁸ that the Act aimed to limit the scope of the provisions. This is made clear from the Departmental Advisory Committee on Arbitration Law (DAC Report) at paragraph 280 where provides:-

The court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this Clause. The test of “*substantial injustice*” is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. IN short, Clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.

***Egmatra* message**

In *Egmatra* it was this section of the DAC that was so cleverly brought to the attention of Mr Justice Tuckey (as he then was) by a young Toby Landau. Tuckey J noted that the section 68 was no “soft option” to a failed application for leave to appeal. Substantial injustice had to be demonstrated. He was unmoved by the assertion of Egmatra that the expert evidence would have shown the tribunal that the aluminium blocks delivered under the contract were not primary but secondary ones. Although Tuckey J did not consider whether in fact there was a serious irregularity he confined himself to answering the second question on substantial injustice and dismissed it in short.

This judgment has been relied on in many cases since; the Court of Appeal in *Checkpoint Ltd v Strathclyde Pension Fund* (2003) [2003] EWCA Civ 84 The well known and much lauded decision in *Lesotho Highlands* where as Audley Sheppard

⁸ The same test is applied under section 24 relating to the power of the court to remove an arbitrator although this strict application was not applied in *ASM Shipping Ltd of India v In contracts*, one of the first judgments under section 68 arose out of a challenge to an award rendered under the Rules of the Refined Sugar Associations in *Rustal Trading Ltd (applicant) v Gill & Duffus SA (respondent)* (1999) QBD (Comm) (Moore-Bick J) 13/10/99 2000) 1 Lloyd's Rep 14. The court was not persuaded that the arbitrator lacked impartiality due to his prior contact with one of the parties in a different dispute but as most arbitrators were active traders. “I am confident that most traders take a fairly robust view of such matters and would not regard them as being of any significance when considering an arbitrator’s ability to act impartially.” Para 20 IN any event, the applicant had lost the right to challenge under section 73(1) in that case having continued to take part in the arbitration without objecting.

accurately pointed out: “The House of Lords has endorsed the policy of limited review of awards”⁹ and more recently just last September 2008 in *O’Donoghue v Enterprise Inn plc*. Here similar grounds as *Egmatra* were used by the claimant to try to set aside the award. O’Donoghue sought to challenge the arbitrators award on rent review issued on a documents only on the basis that there was no oral hearing and that he was not given the opportunity to cross examine the respondent’s expert witness, Mr Owens. Judge John Behrens dismissed the application reaffirming that to be successful under section 68 there must be an irregularity under section 68(2) and “Furthermore, it has to be such that it will cause or has caused substantial injustice to the applicant.”¹⁰ In the section on substantial injustice he refers to the DAC and *Egmatra*¹¹ reaffirming the high threshold to be satisfied.

Over the years since the Arbitration Act entered into force producing the 1000 odd decision under its provision there have been awards which have been set aside but it is rare and an onerous burden of proof for an applicant. Significantly many of the cases where a serious irregularity has been upheld relate to rent review cases most recently the judgment last November in *Metropolitan Property Realizations Ltd v Atmore Investments Ltd* [2008] EWHC 2925 (Ch) where the court held that the award on rent review “was clear, but it was founded upon an error of reasoning.” Successful challenges are not exclusively rent reviews for example the *Van der Giessen-de-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV* [2008] EWHC 2904 (Comm) which related to a contract for engineering works to a passenger vessel for Brittany Ferries the court concluded that failure by the tribunal to deal with essential issues raised by the claimant amounted a serious irregularity that caused substantial injustice. But these cases do not seem to fall in to the exception rather than the rule.

Conclusion

In my view, *Egmatra* has endured the test of time as it correctly applied the two tier test in section 68. A test that balances the interests of fairness against finality. In considering its terms, the judgment of *Egmatra* did not go beyond what the Act provided and what the drafters clearly intended as made clear in the DAC Report. In fact, it is as a direct result of the citation from the DAC Report in *Egmatra* that has ensured its lasting appeal. As a result, it is in keeping with the ethos of the Act and rightly has been endorsed repeatedly as a result of this temperance.

⁹ A Sheppard, England & Wales in JW Rowley (ed) *Arbitration World: Jurisdictional Comparisons* p.75 referring to *Lesotho Highlands*

¹⁰ *O’Donoghue v Enterprise Inn plc* [2008] EWHC 2273, para 42

¹¹ *Ibid* para 52 where he cites Coulson J in *Sinclair v Woods of Winchester* [2005] EWHC 1631 para 23

The aim of the mandatory provisions of section 68 was to reduce unmeritorious challenges. This does not in any way seem to deter further reliance on section 68 and I for one look forward to many more cases on how this provision peculiar to the English Arbitration Act 1996 will be applied.

Annex

Section 68 Arbitration Act 1996

Challenging the award: serious irregularity

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failure to comply with the requirements as to the form of the award; or
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

- (a) remit the award to the tribunal, in whole or in part, for reconsideration,
- (b) set the award aside in whole or in part, or
- (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

Article 34 UNCITRAL Model Law

Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.