Can't we all just get along?

Khawar Qureshi QC highlights the key Arbitration Act 1996 decisions in 2011

IN BRIEF

- Almost all "serious irregularity" challenges failed.
- "Unconscious bias" rejected as a ground for QC arbitrator challenge.
- Court of Appeal restates the very high test for "point of law" appeal.
- Supreme Court rejects the claim that an arbitrator is an employed person.

More than 15 years have elapsed since the Arbitration Act 1996 (AA 1996) came into force, with the aim of supporting arbitration, and aligning the role of the English courts more clearly with this purpose. Some provisions of AA 1996 excite periodical calls for change to prevent "abuse" (such as s 68 (serious irregularity) or s 69 (appeals on points of law)). However, (and as we shall see with reference to recent cases), the English courts have continued to provide a robust response in the face of more "adventurous" attempts to deploy the AA 1996 to interfere with the arbitral process or prevent enforcement of an arbitral award.

In this article, we will examine nine cases arising under the AA 1996 in overview, most of which involved legal challenges to the arbitral process based upon s 33 (duty to act fairly), s 68 (serious irregularity) and s 69 (appeal on a point of law). We will also consider the role of the English courts in granting anti-suit injunctions in support of the choice of arbitration (as well as against arbitration, in support of the court process). It would not be possible to conduct a review of cases in 2011 without reference to *Jivraj v Hashwani* [2011] UKSC 40, [2012] 1 All ER 629, where the Supreme Court (to the relief of many and surprise of few) upheld the position that arbitrators should not be treated as "employed persons".

Section 68AA

As readers may be aware, there is no permission threshold for an application pursuant to s 68AA. Section 68AA applications can often develop into potentially lengthy hearings, where parties attempt to engage in a "re-run" of aspects of the hearing before the arbitral tribunal, in an effort (mostly doomed) to demonstrate the existence of a "serious irregularity" which caused "substantial injustice".

Nevertheless, s 68AA was "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"; see the DAC report quoted by Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2005] 3 All ER 789.

The cases referred to below illustrate how high the threshold of an "extreme case" is in practice.

In the case of *A v B* [2011] EWHC 2345 (Comm), [2011] All ER (D) 71 (Sep) Flaux J. rejected a challenge to remove a sole arbitrator (based upon s 24(1)(a) of AA 1996 "justifiable doubts as to impartiality"), and also (for the same reasons) dismissed a challenge to a partial award based upon s 68(1) of AA 1996 ("serious irregularity affecting the tribunal, the proceedings or the award").

A QC (Mr X) was appointed as a sole arbitrator on 12 May 2009 to determine a share sale and purchase agreement dispute, pursuant to the London Court of International Arbitration (LCIA) rules. Just before finalising a partial award, Mr X drew to the attention of the parties the fact that he had been instructed in 2004 on an unrelated matter (the Y litigation) by the law firm which was also representing the defendant in the matter before him. The Y litigation had apparently been settled in 2008 but revived in 2009, with the trial concluding on 8 December 2010. Mr X signed the partial award on 17 December 2010, which decided one critical issue in favour of the defendants.

A challenge by the claimants to the LCIA for removal of Mr X was rejected on 11 March 2011, and the matter came before the court.

The judge reviewed the authorities concerning the test for apparent bias, made observations as to the inevitability of QCs who practised in specialised areas being instructed by law firms to advise and represent clients in such matters, and thus the likelihood of such individuals sitting as arbitrators in these circumstances (because of their specialist expertise).

The judge held that the test for apparent bias was an objective one, and thus it was irrelevant that a foreign party "might, for example, regard as odd the way in which a member of the English Bar can be instructed in one case by a firm of solicitors while acting as arbitrator in another case where the same firm of solicitors was acting for one of the parties".

Furthermore, the test required the court to approach the matter from the perspective of the "fair-minded and informed observer", which meant considering all the facts, as well as assuming that such a person "is expected to be aware of the way in which the legal profession in this country operates in practice".

The claimant contended that Mr X must be taken to be tainted by "unconscious bias" (reflected it was said in the potential sub-conscious inclination to favour the law firm instructing him on the Y litigation), his failure to disclose his involvement in the Y litigation for more than a year (and just before he delivered the partial award) militating in favour of the challenge. The claimant referred to the International Bar Association's guidelines on conflict of interest in international

arbitration, and suggested that the circumstances should be treated as falling within the "waivable red list".

The court dismissed the possibility of "unconscious bias" being present in the circumstances, or otherwise providing a basis for challenge of an arbitrator—there was no evidence of "influence" crossing over from the Y litigation connection with the law firm and the arbitration. Accordingly, there was no obligation upon Mr X to disclose his involvement in the Y litigation at an earlier stage, and the s 68 challenge also failed.

In the case of *AK Kablo v Intamex* [2011] EWHC 2970 (Comm), [2011] All ER (D) 124 (Dec), Teare J dismissed a s 68AA based challenge to an award of the London Metal Exchange tribunal on the basis that the alleged serious irregularity, namely the finding without either party having advanced a case of an agreement on price issues, could not be established from a proper reading of the award "as a whole in a fair and reasonable way"—upon such a reading, the court found that the tribunal had not made such a finding.

In the case of *Chantiers v Gaztransport* [2011] EWHC 3383 (Comm), Flaux J rejected an application (made after an extension of time had been sought pursuant to s 80(5) of AA 1996), to set aside an arbitration award dated 3 February 2009 (the award) on the grounds that the award was obtained by fraud (s 68(2)(g) of AA 1996).

In the course of a very detailed judgment, reviewing oral evidence given by witnesses for both sides during the course of the hearing, the judge held that while certain test evidence (relating to safety features of the container tanks in liquefied natural gas vessels) was withheld and/or deliberately misrepresented to the claimant prior to the commencement of the arbitration, and while deliberately dishonest and misleading evidence was given on behalf of the defendant in those proceedings, even if the true position had been disclosed to the tribunal, it would have been unlikely to affect the decision of the tribunal.

The court thus concluded that it could not be demonstrated that the award had been obtained by fraud, or that the claimant had been caused substantial injustice. Significantly, the court also noted that the claimant should have raised issues as to non-disclosure of documents before the tribunal—it was too late to raise such points in the context of the application.

Challenge upheld

In the case of *Soeximex v Agrocorp* [2011] EWHC 2743 (Comm), Mrs Justice Gloster upheld a s 68AA challenge to a Grain and Feed Trade Association board of appeal (the board) award dated 6 December 2010 (the award). The award was in favour of the seller in the sum of $375,000, reflecting damages for the repudiatory breach of a contract to purchase Burmese rice.

The defendant had argued (and the board accepted) that US/EU sanctions potentially applied to the transaction. However (and wrongly) as the court found, the board failed to address two distinct questions before it, including the issue as to whether the step of opening a letter of credit in favour of the seller would violate US regulations (as this would constitute—according to unchallenged expert evidence before the board—"exporting financial services indirectly to Burma"). It was suggested to the court that the board had overlooked this discrete issue and concentrated instead on whether the seller was a "listed person" within the sanctions regime (which it was not). The court remitted the matter for re-consideration by the board.

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Section 69

In the case of *HMV UK v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708, [2011] All ER (D) 77 (Nov), the Court of Appeal refused permission to appeal from the decision of Warren J, who in turn had refused permission to challenge the award of a sole arbitrator pursuant to s 69 of AA 1996. The judge had granted permission to appeal his decision to the Court of Appeal. The challenge was mounted on the basis that the QC sole arbitrator (a landlord and tenant law specialist) had been "obviously wrong" as a matter of law in his interpretation of a rent review clause in a tenancy agreement of a shop in Reading, Berkshire.

The Court of Appeal rejected the challenge, holding that the interpretation of the rent review provision reached by the arbitrator did not "meet the test of being unarguable or making a false leap in logic or reaching a result for which there is no reasonable explanation". In dismissing the appeal, the court re-iterated the need for s 69 permission applications to be ordinarily dealt with on paper (for the first stage where the High Court judge has to decide whether to grant permission for the challenge to be made).

Anti-suit & anti-arbitration injunctions

In the case of *AES v UST* [2011] EWCA Civ 647, [2012] 1 All ER (Comm) 845, the Court of Appeal upheld the decision of the lower court to grant an anti-suit injunction in support of a contractual provision stipulating arbitration in London, in circumstances where no arbitration had been commenced or intended.

UST had become the owner of a hydroelectric concession in Kazakhstan, having acquired rights thereto from AES. The concession agreement was subject to Kazakh law, but disputes were referable to International Chamber of Commerce (ICC) arbitration in London, pursuant

to an arbitration agreement governed by English law (the arbitration agreement).

UST commenced court proceedings in Kazakhstan, seeking information relating to the concession assets. UST relied upon an earlier Kazakh Supreme Court ruling (the Kazakh decision) that the arbitration agreement was void as a matter of Kazakh public policy.

In a 76 page judgment, the Court of Appeal held, inter-alia, that while in principle s 37(1) of the Senior Courts Act 1981 (SCA 1981) should not be used to provide the basis for an injunction to get round the limitations of s 44AA (which required arbitration proceedings to be imminent or already underway for the court to grant injunctive relief), the court could grant injunctive relief to protect and preserve the arbitration agreement.

The court further held that is was not bound, or otherwise required to have regard to the Kazakh decision.

In the case of *Excalibur v Texas and others* [2011] EWHC 1624 (Comm), [2012] 1 All ER (Comm) 933, Gloster J granted an injunction restraining the claimant from taking further steps in ICC arbitration proceedings in New York against three defendants (the defendants), pending determination by the Commercial Court in London of the question whether the defendants were bound by the arbitration provision in a commercial agreement.

The claimant sought to argue that the defendants were acting in breach of the terms collaboration agreement (which it was alleged they should be bound by albeit they were not signatories), pursuant to which it was entitled to receive monies. The claimant contended that it made introductions, which in turn enabled a production sharing contract to be entered into in Kurdistan. On 17 December 2010, the claimant commenced English Commercial Court and ICC arbitration proceedings against the defendants. An application made a few days later for a without notice freezing order was rejected. On 25 March 2011, the ICC secretariat notified the parties that the arbitration should proceed (notwithstanding the Commercial Court proceedings), on the basis that the tribunal should determine, inter-alia, whether there was a binding arbitration agreement.

The court rejected the claimant's attempts to downplay the Commercial Court proceedings and concluded that it could grant injunctive relief (applying s 37(1) of SCA 1981) directed to staying the ICC arbitration. The judge ruled that the question as to whether there was a binding arbitration agreement could and should most appropriately be considered by the court (as opposed to the tribunal). In doing so, the judge noted the exceptional circumstances of the case (not least the fact that the English Court and New York arbitration were simultaneously invoked by the claimant), and referred to the Supreme Court decision in *Dallah Trust v Pakistan* [2010] UKSC 46, [2011] 1 All ER 485 which confirmed the existence of such jurisdiction.

In the case of *Fulham Football Club v Sir David Richards and the Football Association Premier League Limited (FAPL)* [2011] EWCA Civ 855, [2012] 1 All ER 414, the Court of Appeal upheld the grant of injunctive relief (pursuant to s 9AA) against the claimant to stay its presentation of a winding up petition against the FA. The alleged "unfair prejudice" justifying the winding up petition was the involvement of Sir David Richards (the chairman of the FA) in helping Portsmouth secure a higher transfer fee from Tottenham for the player Peter Crouch.

Each of the 20 clubs in the Premier League holds a share in the Football Association Premier League (FAPL). In accordance with the FAPL's rules issued pursuant to its Memorandum of Association, Fulham made a complaint that Sir David had acted as an unauthorised agent. The board of the FAPL concluded that Sir David had played a legitimate role. Fulham alleged that Sir David had acted unfairly so as to prejudice its interests. The board notified Fulham that any further action in respect of its complaint needed to be pursued through arbitration, in accordance with its rules.

The Court of Appeal affirmed that there was no reason in principle or as a matter of public policy to prevent an allegation of unfair prejudice being made the subject matter of arbitration.

Arbitrators not "employed persons"

In the case of *Jivraj*, the Supreme Court unanimously reversed the decision of the Court of Appeal handed down on 22 June 2010, and confirmed that Steel J was correct in holding (in his decision on 26 June 2009) that an arbitrator is not employed "under a contract...personally to do any work" for the purposes of the Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660).

As such, the contractual requirement (agreed in 1981) for an arbitrator to be an Ismaili Muslim was not discriminatory, or (even if an arbitrator was an employed person), was otherwise justifiable as a genuine occupational requirement, in the context of a business dispute arising out of a joint venture agreement between two Ismaili Muslims.

Lord Clarke identified the specific features of the role of an arbitrator which led to the conclusion that he/she was not an employed person, including, inter-alia, the fact that "he is in no sense in a position of subordination to the parties".

In a separate speech, Lord Mance drew attention to the understanding in Germany as to the "entirely special character" of the "office" of arbitrator. Lord Mance identified the key point as being the fact that an arbitrator performs an "independent role, free from [the direction of another]".

Concluding observations

Around 3,000 arbitrations take place every year with their seat as London. The limited number of applications under the AA 1996 and the very high threshold which must be overcome for a challenge to succeed continue to send the strongest possible signal of court support for the arbitral process. NLJ

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