

High Court considers summary dismissal of serious irregularity challenges to arbitral awards

31 January 2019 | Contributed by [Clifford Chance](#)

Background

Facts

Decision

Comment

In *Midnight Marine Limited v Thomas Miller Specialty Underwriting Agency Limited*,⁽¹⁾ the High Court examined the process for the summary dismissal of a challenge to an arbitral award on the grounds of serious irregularity. Mr Justice Males held that the purpose of oral hearings on summary dismissal is to determine only whether there is a real prospect of the challenge succeeding. Going beyond that would frustrate the objective of the summary dismissal mechanism.

Background

Section 68 of the Arbitration Act 1996 allows a party to arbitral proceedings to apply to court challenging an award on the ground of serious irregularity affecting the tribunal, the proceedings or the award, which has caused or will cause substantial injustice to the applicant. What constitutes 'serious irregularity' is set out in Section 68(2) and includes where the tribunal has exceeded its powers.

Paragraph O8.5 of the Commercial Court Guide relates to Section 68 challenges and allows the court to dismiss a challenge without a hearing if it considers that the claim has "no real prospect of success". Where the court makes an order dismissing an application without a hearing, the applicant has a right to apply to court to set aside the order and to seek directions for a hearing of the application.

Facts

Arbitration

The arbitration in *Midnight Marine* arose out of the loss of cargo being carried on a barge owned by the claimants (the insured). The insured had settled a claim brought by the cargo owners. Prior to that settlement, the defendant – insurance underwriters – had informed the insured that they did not accept liability under the insured's policy.

The insured commenced proceedings against the underwriters in the Canadian courts. The underwriters commenced arbitration proceedings against the insured, pursuant to an arbitration clause in the insurance policy and nominated an arbitrator, but it was agreed that the insured did not need do so until after the Canadian court had ruled on a stay application by the underwriters. In the arbitration, the underwriters sought a declaration of no liability under the policy. The Canadian court stayed its proceedings in October 2010 but no further steps were taken in the arbitration until seven years later, when the insured (the arbitration respondent) finally appointed an arbitrator.

In the arbitration, the underwriters submitted that the insured's claim for an indemnity should be dismissed:

- First, on the basis that the claim was time-barred (being outside the six-year statutory period).

AUTHORS

[Marie Berard](#)



[Benjamin Barrat](#)



The tribunal agreed that the claim was time-barred. The notice of arbitration had not stopped time running because the only matter referred to arbitration was the underwriters' claim for a declaration of non-liability and no arbitration had been commenced in respect of the insured's claim.

- Second, the underwriters relied on Section 41(3) of the Arbitration Act which permits the tribunal to dismiss a claim as a result of inordinate and inexcusable delay on the part of claimants in pursuing their claim. Section 41(3) provides that a tribunal may dismiss a claim where such delay gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or where such delay has caused, or is likely to cause, serious prejudice to the respondent. In the present case, the tribunal held that it would be appropriate to treat the insured as the claimant or counterclaimant for the purpose of Section 41(3), although it was a respondent in the arbitration.

The tribunal issued an award in favour of the underwriters (the arbitration claimant).

Challenge to the award

The insured issued proceedings in the High Court, challenging the award pursuant to Sections 68 and 69 of the act.

Section 68

The insured contended that the tribunal had exceeded its powers by dismissing the challenge pursuant to Section 41(3). They argued that this section applied only to the claimant in the arbitration (not to themselves as arbitration respondents).

Section 69

The insured sought permission to appeal on a point of law. The insured contended that the majority of the tribunal was wrong in concluding that the underwriters' notice of arbitration was insufficient to refer the insured's claim for an indemnity to arbitration.

Mr Justice Butcher rejected both applications on the papers, accepting that the insured's Section 68 challenge should be dismissed without a hearing in accordance with Paragraph O8.5 of the Commercial Court Guide. The insured appealed this decision.

Decision

Males dismissed the Section 68 application. He noted that Section 82(1) of the Arbitration Act defines the term 'claimant' as including counterclaimant ("unless the context otherwise requires, includes a counterclaimant, and related expressions shall be construed accordingly"). The judge did not accept that there had been an irregularity that had caused or would cause substantial injustice to the insured. Either the insured's claim had not been referred to arbitration – in which case it was time-barred – or it had, but the insured was guilty of inordinate and inexcusable delay in pursuing it. The tribunal was within its powers to dismiss the claim on that basis.⁽²⁾

Males also dismissed the Section 69 application. That application could not succeed if the claim was going to be dismissed anyway for inordinate and inexcusable delay.⁽³⁾

Oral hearings for summary dismissal of Section 68 challenge

Males urged caution against the use of the summary dismissal oral hearing as a full hearing of the Section 68 application. That, the judge stated, would mean that "the objective of weeding out hopeless applications at an early stage by a prompt and economical procedure will have been frustrated", and that if a full oral application were to become the standard procedure "the availability of a procedure for dismissal on paper would achieve nothing". Males criticised the costs of the summary dismissal application as high relative to the amount originally in dispute (the application costs of £150,000 amounted to almost half of the amount in dispute of C\$625,000).⁽⁴⁾

The court stated that the question to be asked at the oral hearing was whether there was a "real prospect of success such that the case should be allowed to go forward to a full hearing of the section 68 application". The judge made the following suggestions as to the Paragraph O8.5 oral hearing procedure:

- hearings should be short (typically no more than 30 minutes in length);
- hearings should, where possible, be listed before the judge who has dismissed the application;
- there should be no need for further written submissions, except for the applicant to explain succinctly what is said to be wrong with the judge's reasons for dismissal; and
- respondents should not attend the hearing or, at any rate, should not recover their costs if they do.

Such hearings would, the judge suggested, be similar to the oral renewal of applications for permission to apply for judicial review after a refusal on paper. The judge noted that the procedure to be adopted merits further consideration by the court.⁽⁵⁾

A consistent approach?

Earlier in 2018, the High Court provided somewhat different guidance on hearings of Section 68 summary dismissal applications. In *Asset Management Corporation of Nigeria v Qatar National Bank*,⁽⁶⁾ a Section 68 challenge was dismissed on the papers. The decision was appealed, further submissions were filed and an oral hearing was held.

While the court dismissed the Section 68 challenge, it stated that "where a hearing is sought by [a] party, it would usually be granted by the court unless the underlying application was seen as something akin to vexatious". The judge suggested that holding an oral hearing would allow the parties' positions to be advanced and tested in a manner not always so readily achieved on paper. However, the judge did state that there was no reason why the court should not exercise its powers for summary dismissal on paper, noting that the court "has tended to do so more and more in light of the unmeritorious applications that are made under Section 68".⁽⁷⁾

Comment

A party whose Section 68 challenge has been dismissed on the papers retains the right to apply for an oral hearing on the court's decision.

The use of such oral hearings is likely to be the subject of further judicial consideration. The guidance provided in *Midnight Marine* is helpful in distinguishing the summary dismissal process from full Section 68 proceedings. It will be interesting to see whether the courts will follow Males's proposals with a view to limiting the procedural complexity and costs of summary dismissal applications. Males was clearly mindful of the ever-increasing costs associated with arbitration challenges – and mindful of retaining the attraction of London as an international arbitration centre. As he candidly commented, "While commercial parties are free to spend their money as they wish, it cannot be in the interests of London arbitration generally for costs on that scale to be incurred for a hearing of this nature. There is after all such a thing as killing the golden goose."

The approach taken by Males is consistent with the English court's support for the independence of the arbitral process and lack of appetite for reopening a tribunal's decisions other than in limited circumstances.

For further information on this topic please contact [Marie Berard](mailto:marie.berard@cliffordchance.com) or [Benjamin Barrat](mailto:benjamin.barrat@cliffordchance.com) at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com or benjamin.barrat@cliffordchance.com). The Clifford Chance website can be accessed at www.cliffordchance.com.

Endnotes

(1) [2018] EWHC 3431 (Comm).

(2) *Ibid*, 30.

(3) *Ibid*, 34, 17.

(4) *Ibid*, 38, 42, 4.

(5) *Ibid*, 38-39.

(6) [2018] EWHC 2218 (Comm).

(7) Ibid, 38, 41.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).