

September 23 2021

# Serious irregularity challenge to arbitral award upheld

Clifford Chance | Arbitration & ADR - United Kingdom



MARIE BERARD



TOM DYER

## › Introduction

## › Background

## › Facts

## › Decision

## › Comment

### Introduction

In *PBO v DONPRO*,<sup>(1)</sup> the High Court upheld the claimant's challenges to an arbitral award made under section 68 of the Arbitration Act 1996, determining that the arbitration tribunal had:

- failed to provide the parties with an opportunity to address the issues on which it had based its decision before issuing an award; and
- wrongly rejected the claimant's application to amend its statement of case.

The High Court allowed the claimant's amendments to its statement of case and remitted the arbitral award back to the tribunal for reconsideration.

### Background

Section 68 of the Arbitration Act allows a party to apply to the courts to challenge an award on the ground of serious irregularity. An exhaustive list of what is meant by "serious irregularity" is set out in section 68(2) of the Arbitration Act; the list includes a failure by the arbitral tribunal to comply with section 33 (which concerns the general duty of the tribunal). Section 33 obliges a tribunal, among other things, to give each party a reasonable opportunity to put forward their case and deal with that of their opponent. Whether that opportunity is afforded to a party is a question of fact and degree. In addition, section 33 requires the tribunal to adopt procedures suitable to the circumstances and to avoid unnecessary delay and expense.

A successful applicant under a section 68 application must demonstrate:

- a serious irregularity falling within one of the categories under section 68(2); and
- that the irregularity has caused or will cause substantial injustice to the applicant.

In practice, as counsel for the defendants in this case described, it is in "rare and extreme" circumstances that a section 68 challenge will succeed.

### Facts

The original dispute between the parties arose out of a series of agreements for the sale and purchase of cocoa beans, entered into between PBO and DONPRO in 2017. DONPRO assigned the outstanding debts in relation to three of these contracts to the second defendant (2DON).

Each of the contracts was governed by English law and incorporated the Federation of Cocoa Commerce contract rules for cocoa beans (the FCC contract rules). The FCC contract rules require any contractual dispute to be settled by arbitration in accordance with the FCC arbitration and appeal rules (the FCC arbitration rules), which allow parties to appeal an initial arbitral award before a separate board of appeal in "new proceedings in which fresh submissions and evidence may be submitted".

In this case, arbitration proceedings were commenced by DONPRO and 2DON against PBO. In response, PBO counterclaimed (after a successful application to join CODON to the proceedings) that 11 contracts entered into between PBO and CODON in 2018 (the relationship between CODON and the other defendants was not explained) had essentially been replacement contracts entered into in place of the three outstanding DONPRO contracts, and that the losses suffered by each party under the claim and the counterclaim should be compared and the difference awarded to the party showing the greater loss.

In 2019 the first-instance tribunal found against PBO, ordering PBO to make payments to DONPRO and 2DON, and dismissed PBO's counterclaim against CODON. PBO appealed the decision. Pursuant to the FCC arbitration rules, the appeal was heard in fresh proceedings before a new tribunal (the appeal tribunal). In the appeal proceedings, PBO:

- identified and claimed further losses relating to its purchase of jute bags for the delivery of cocoa, which were ultimately not required as CODON did not make the cocoa deliveries; and
- applied to amend its statement of case (after changing legal advisors in the middle of the appeal proceedings) to include additional grounds of appeal.

In its award, the appeal tribunal:

- upheld the original award;
- refused PBO's application to amend its statement of case; and
- refused to consider PBO's claim relating to jute bags, on the ground that it did not have jurisdiction.

PBO subsequently brought three challenges under section 68 and two challenges under section 67 of the Arbitration Act to the High Court. In its first two section 68 challenges, PBO claimed that the appeal tribunal had departed from the case as it had been presented by the parties without warning, in such a way that PBO had not been afforded a reasonable opportunity (if any) of putting forward its case. PBO claimed that these circumstances had been brought about by the appeal tribunal's decision that:

- the 11 contracts with CODON had been cancelled because PBO had displayed an intention not to perform them within the meaning of rule 19.5 of the FCC contract rules; and
- it did not have jurisdiction to deal with PBO's additional claim relating to the jute bag losses, despite the fact that there had been no submissions on either of these points from the parties.

The third section 68 challenge concerned the appeal tribunal's refusal to allow PBO to amend its statement of case.

#### **Decision**

In his judgment dated 16 June 2021, Justice Bryan upheld all of the section 68 challenges and remitted the arbitral award back to the appeal tribunal for reconsideration. The courts of England and Wales, as a matter of public policy, seek to uphold arbitration awards and avoid unnecessary costs; in circumstances where there had been no challenge to the appeal tribunal's impartiality, it was not appropriate for the award to be set aside and the matter heard by an entirely new tribunal. On the basis that the proceedings had been reopened and the award was now subject to redetermination, the parties accepted that it was no longer necessary for the court to consider the two section 67 challenges.

In determining whether the appeal tribunal had failed to comply with section 33 (and thus whether there had been a serious irregularity in the appeal proceedings), Bryan referred approvingly to the summary of the relevant legal principles in *Grindrod Shipping Pte Ltd v Hyundai Merchant Marine Co Ltd*.<sup>(2)</sup> The following principle was of particular relevance to the first two challenges set out below:

[7] *There will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with.*

#### **Tribunal's decision on FCC contract rule 19.5**

Rule 19.5 of the FCC contract rules allows a party to cancel the contract if a party to the contract "displays an intention not to perform or an inability to perform". The appeal tribunal found that CODON was entitled to (and had) cancelled the 11 contracts with PBO because PBO had displayed an intention not to perform them. However, Bryan found that this point was not in issue in the proceedings as "PBO did not know that it was facing an argument relying on Rule 19.5" and it "was not provided with a fair opportunity to address Rule 19.5". It was incumbent on the tribunal to warn the parties that it wished to be addressed on this point. Realistically, the "essential building blocks" of the appeal tribunal's decision were matters that the parties had not put in issue before the tribunal and on which the tribunal had not asked to be addressed. This amounted to a serious irregularity.

As to whether the serious irregularity caused or would cause substantial injustice, Bryan noted that while he was "not concerned with the merits" of PBO's arguments on the rule 19.5 point, he was satisfied that they may have "resulted in the [appeal tribunal] reaching a different conclusion and produced a significantly different outcome". He gave little time to the submission that PBO would not have made those arguments in the appeal proceedings if the tribunal had indicated that it was interested in hearing from the parties on rule 19.5, finding that "the inevitable consequence is that such matters would have been aired".

#### **Tribunal's decision regarding jute bag losses**

Bryan noted that while this matter concerned jurisdiction (for which the Arbitration Act offers a separate challenge avenue in section 67), he was "satisfied that it is open to argue that the manner in which [this] decision was reached was in breach of section 33". Bryan found that jurisdiction had not been an issue that had been raised by the parties and that the appeal tribunal's failure to provide the parties with an opportunity to address the point amounted to a serious irregularity. As to whether this serious irregularity caused (or would cause) substantial injustice to PBO, Bryan held that PBO's arguments on jurisdiction had "substance" and may have "resulted in the [appeal tribunal] reaching a different conclusion and produced a significantly different outcome".

#### **Tribunal's refusal to permit amended statement of case**

PBO argued that by refusing its application to amend its statement of case, the tribunal had failed to comply with its general duty under section 33 of the Arbitration Act, causing substantial injustice. This was a procedural decision rather than a final award; as Bryan acknowledged, "it is rare for a case management decision to have the quality and effect" to amount to a serious irregularity under section 68 of the Arbitration Act. However, there is a wide range of case management decisions. In his judgment, Bryan distinguished "discrete matters" (eg, costs and timetabling) from matters that may be "determinative of the arbitration itself" and in which the tribunal's duties under section 33 of the Arbitration Act are consequently in "sharp focus". The latter matters are the more likely candidates for a section 68 challenge (in contrast to general case management decisions, which the judge characterised as "highly unlikely" to merit a section 68 challenge).

Bryan found that in its reasons for refusing PBO's application to amend its statement of case, the appeal tribunal had made no attempt to:

- identify the amendments themselves;
- address the applicable principles in relation to whether amendments should be allowed;
- consider the potential prejudice to PBO in not allowing the amendment to the statement of case; or
- consider the likely delay to the parties in allowing the amendment.

In doing so, the appeal tribunal had reached a decision that no reasonable tribunal would have reached. Having reached that decision, it was not appropriate to remit PBO's application for amendment to the appeal tribunal. Instead, Bryan effectively granted the application himself, holding that the defences that PBO had sought to add into its statement of claim were now live before the appeal tribunal.

#### **Comment**

Parties must be given an opportunity to address the essential building blocks of a tribunal's decision, and it is incumbent on an arbitral tribunal to solicit submissions from the parties on any points that it considers central to the issues in dispute, including any doubts that it may have regarding its jurisdiction to decide any of the parties' claims.

This judgment underlines the need for tribunals to carefully consider the merits of procedural applications, and to provide appropriately

reasoned decisions. Not all case management decisions are alike: those that amount to a fork in the road which could realistically lead to a significantly different outcome in the arbitration, such as applications to make substantive amendments to a party's pleadings, may be susceptible to a section 68 challenge.

*For further information on this topic please contact [Marie Berard](#) or [Tom Dyer](#) at Clifford Chance LLP by telephone (+44 20 7006 1000) or email ([marie.berard@cliffordchance.com](mailto:marie.berard@cliffordchance.com) or [tom.dyer@cliffordchance.com](mailto:tom.dyer@cliffordchance.com)). The Clifford Chance website can be accessed at [www.cliffordchance.com](http://www.cliffordchance.com).*

#### **Endnotes**

(1) [2021] EWHC 1951 (Comm).

(2) [2018] 2 Lloyd's Rep 121.

Rikesh Gandhi, trainee solicitor, assisted in the preparation of this article.