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Right to challenge award waived where applicant continued arbitration without objection

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In *Radisson Hotels v Hayat Otel*,⁽¹⁾ the Commercial Court rejected a challenge to a partial award brought under section 68 of the Arbitration Act 1996 (the Act). Section 73 of the Act meant that the claimant was precluded from bringing a serious irregularity challenge, having failed to object during the arbitration once it became aware of the alleged irregularity.

Background

Section 68 of the Arbitration Act 1996 allows a party to apply to the courts to challenge an award made in England and Wales on the ground of serious irregularity that has caused or will cause substantial injustice to the applicant.

The exhaustive list of what is meant by "serious irregularity" is set out in section 68(2) of the Act and includes:

- section 68(2)(a), which pertains to failure by the tribunal to comply with section 33 of the Act; and
- section 68(2)(c), which pertains to failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties.

Section 33 sets out a tribunal's general duties, which include an obligation to act fairly and impartially between the parties.

Section 73 of the Act imposes restrictions on challenges to awards. It provides that a party that continues to take part in the proceedings without bringing its objection:

may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

The high threshold to establish a serious irregularity, together with the restrictions imposed by sections 73 and 70 (which imposes time limits for bringing challenges), means that only rarely will section 68 applications succeed.

Facts

Arbitration

In October 2018, Hayat commenced International Chamber of Commerce (ICC) arbitration proceedings against Radisson relating to the management of a hotel in Turkey. The three-person arbitral tribunal including a tribunal member who had been nominated by Hayat (tribunal member one).

During the proceedings, tribunal member one had been in contact with an expert consultant (the expert) who, at the time, was engaged by Hayat. These ex parte communications took place principally between March and May 2019 and included:

- tribunal member one forwarding two chains of internal tribunal emails to the expert (the March emails);
- the expert emailing a board member of Hayat's indirect parent company, copying tribunal member one (the April emails); and
- tribunal member one emailing the expert inter partes correspondence from Radisson to the tribunal (the May emails).

The recipients of the April emails also included the vice president of legal of Hayat's indirect parent company (the vice president).

On 23 March 2021, the tribunal issued a partial award on liability and causation (the partial award) in Hayat's favour.

Between September 2021 and January 2022, Radisson held meetings with both the vice president and the expert (who was introduced to Radisson by the vice president). During these meetings, Radisson was made aware that tribunal member one had engaged in ex parte communications with Hayat.

By no later than 13 January 2022, Radisson and its legal counsel had identified a USB drive containing evidence of the March emails. However, Radisson continued to participate in the arbitration, filing its rejoinder on quantum the following day.

Serious irregularity challenge

On 27 January 2022 Radisson commenced its section 68 serious irregularity challenge, seeking to have the partial award set aside (the section 68 application).

On 4 March 2022, Hayat disclosed the April and May emails to Radisson, upon which Radisson subsequently sought to rely. On 9 March 2022, tribunal member one resigned from the tribunal. Having initially relied on sections 68(2)(a), (c) and (g),⁽²⁾ on 28 March 2022 Radisson amended the section 68 application to withdraw the claim under section (g).



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In defending the section 68 application, Hayat submitted that, pursuant to section 73 of the Act, Radisson had waived its right to object. Hayat argued that, despite having knowledge of the March emails in September 2021, Radisson chose to continue with the arbitration proceedings, taking a "strategic decision to bank [the objection] for later use".⁽³⁾

Radisson contended that section 73 was not applicable because the partial award on liability and causation was a "final" award. The proceedings had been bifurcated and, therefore, the steps taken in the arbitration subsequently related to a separate phase of the dispute – quantum – which should not be treated as "the proceedings" for the purposes of section 73.

Radisson argued that, if section 73 was applicable, it had not waived its right to object to the alleged serious irregularity because Radisson did not know the grounds of its challenge until 25 January 2022, when native copies of the March emails were received.

Radisson also maintained that the April and May emails, which it only discovered through Hayat's disclosure in March 2022, amounted to a self-contained ground on which to challenge the partial award.

Decision

Dame Clare Moulder DBE, sitting as a judge of the High Court, dismissed the section 68 application, holding that section 73 of the Act precluded Radisson from raising its objection to the alleged serious irregularity.

Applicability of section 73 to partial award

The judge rejected Radisson's argument that section 73 was inapplicable where a partial award has been issued. Section 73 seeks to prevent parties from continuing to take part in "proceedings" without raising a ground for challenge but later seeking to rely on the same ground. In this context, "proceedings" must be construed as continuing until all aspects of the arbitration have been resolved and it did not matter that a partial award had been issued. Allowing the alternative interpretation would mean that a party could carry on into the next phase of an arbitration and later raise an objection to "derail the proceedings if and when he chose to deploy the objection".⁽⁴⁾

Knowledge of grounds for objection

Radisson had waived its right to challenge the partial award when it continued to participate in the arbitration proceedings after it had become aware of the alleged serious irregularity and failed to raise an objection.

The judge endorsed the findings of Moore-Bick J in *Rustal Trading Ltd v Gill & Duffus SA*,⁽⁵⁾ that:

- section 73 is designed to ensure that a party who believes they have grounds for objecting on the basis of serious irregularity should raise that objection as soon as they are aware of it; and
- if the respondent can show that the applicant took part, or continued to take part, in the proceedings without objection, the burden passes to the applicant to show that they did not know, and could not with "reasonable diligence" have discovered, those grounds at the time.

On the first point, the Court found that Radisson had known by 13 January 2022 that it had grounds for a serious irregularity objection, having identified the March emails by that point. Despite being aware of the grounds for objection, Radisson continued to participate in the proceedings, filing the quantum rejoinder on 14 January 2022 and the following week engaging with the ICC on unrelated procedural issues. In applying section 73, a key issue for the court to consider was when the applicant believed it had grounds for making an objection, rather than when it had cogent evidence to bring a challenge.

On the second point, the judge considered whether, if she was wrong that Radisson had waived its right to object, Radisson had discharged the burden of proving that in any event it could not with "reasonable diligence" have discovered the grounds for the objection. The judge noted that Radisson was first informed of the ex parte correspondence in September 2021. The judge held that, with reasonable diligence, Radisson could have discovered the grounds for an objection at the time it continued to take part in the proceedings in January 2022 (eg, by seeking further information or evidence from the vice president and the expert).

The judge also dismissed Radisson's submission that the April and May emails, which were disclosed to it only in March 2022, amounted to a self-contained ground on which to challenge the partial award. The judge cited the decision of Knowles J in *Province of Balochistan v Tethyan Copper Company Pty Ltd*,⁽⁶⁾ that it would be wrong to be prescriptive or try to lay down precise limits for the meaning of a "ground of objection". Instead, a "ground of objection" should be examined broadly and the fact that new additional evidence was put forward does not mean that there was a new ground.

In *Radisson*, the judge considered that the grounds of objection advanced were of arbitrator bias and a lack of disclosure and, as such, the April and May emails did not give rise to a new and distinct ground.

Comment

The judge's pragmatic interpretation of section 73 emphasises that serious irregularity objections should be raised in a timely manner. Parties should not continue to participate in any part of arbitration proceedings – including a bifurcated phase – without raising an alleged serious irregularity of which they are aware and later wish to rely upon. Failure to promptly raise any objections on the grounds of serious irregularity – whether for strategic reasons or otherwise – may prove fatal to a subsequent challenge under section 68. The decision also demonstrates that the Court will be unsympathetic to attempts to construe narrowly a "ground of objection" for the purposes of section 73.

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

Helga Awa, trainee solicitor, assisted in the preparation of this article.

Endnotes

(1) *Radisson Hotels APS Denmark v Hayat Otel İşletmeciliği Turizm Yatırım Ve Ticaret Anonim Şirketi* [2023] EWHC 892 (Comm).

(2) Section 62(a)(g) provides a ground of serious irregularity where the award is obtained by fraud or the award or the way in which it was procured is contrary to public policy.

(3) *Radisson v Hayat*, at [26].

(4) *Radisson v Hayat*, at [34].

(5) [2000] CLC. 231.

(6) [2021] EWHC 1884 (Comm).