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Serious irregularity challenge to LCIA award dismissed by Commercial Court (Orascom TMT Investments v VEON)

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Arbitration analysis: Matthew Bradley of 4 New Square analyses the decision of Mr Justice Andrew Baker in the Commercial Court to dismiss a serious irregularity challenge to a London Court of International Arbitration (LCIA) tribunal's award for failure to deal with all the issues that were put to it, pursuant to section 68(2)(d) of the Arbitration Act 1996 (AA 1996). The court's essential finding was that there was no relevant issue capable in principle of engaging AA 1996, s 68(2)(d), such that the challenge failed for that reason alone. In the course of giving judgment, the court made some trenchant observations as to the proper pleading of arbitration Claim Forms, and as to the proper distinction to be drawn between pleadings and witness statements in challenges under AA 1996, s 68 (and s 67).

Orascom TMT Investments Sarl v Veon Ltd [2018] EWHC 985 (Comm)

What are the practical implications of this judgment?

First and foremost, the judgment deprecates a common practice in the presentation of challenges brought under AA 1996, ss 67 and 68, namely (i) the provision in the Claim Form of a vague description of the challenge to be brought and a recitation of the relevant subsections of the AA 1996, twinned with (ii) witness statements containing the expansion of the analytical case to be advanced. The message is clear:

- witness statements are to be used to convey evidence, not comment or argument
- since challenges under AA 1996, ss 67 and 68 do not usually involve the exchange of statements of case separate to the Claim Form, the challenge should be fully particularised in the body of the Claim Form

The judgment serves as reminder that, to demonstrate a 'serious irregularity' for a AA 1996, s 68 challenge, proof of an irregularity, without more, will not suffice. It is paramount that the irregularity should reach the threshold of being 'serious' (para [26]).

Thereafter, the key point to take from the judgment is that, for an 'issue' to be capable of engaging AA 1996, s 68, it will not suffice to show that there was a proposition on which the parties locked horns at the hearing. The 'issue' must have been one of sufficient stature that, if left unaddressed, it could lead to the existence of a 'serious irregularity' (para [27]).

What was the background to the decision?

The dispute arose out of a share sale agreement, under which Orascom sold VEON its shareholding in an Italian telecom group. The agreement was governed by New York law but provided for arbitration in London under the LCIA Rules.

VEON brought a claim against Orascom for losses sustained as a result of settling claims with the Italian tax authorities, arising out of three tax audits undertaken in relation to transactions which took place during Orascom's ownership of the telecom group.

By an award running to 173 pages (and held to demonstrate a degree of care and thoroughness going well beyond the requirements of the AA 1996), three New York arbitrators found in favour of VEON, and awarded it just under €140m, plus costs and interest.

Orascom sought to challenge the decision reached regarding one of the three tax audits, in respect of which VEON was successful to the tune of €25m. The challenge was founded on the AA 1996, s 68(2)(d) to the effect that a '*failure by the tribunal to deal with all the issues that were put to it'* is capable of constituting a *'serious irregularity'* justifying the court's intervention.

Orascom's pleaded case in this regard was that the tribunal: *'…failed to address a fundamental issue as to the impact of Italian law on the defendants' obligations under the contractual indemnity that was the subject of the parties' dispute.'* That pleading was criticised for its imprecision, but Orascom in any event made clear at the hearing that the nub of its complaint was that (i) an "issue" before the arbitral tribunal was Orascom's assertion that the settlement reached by VEON with the Italian tax authorities was unlawful under Italian law and that (ii) the arbitral tribunal had failed to address that issue.

What did the court decide?

The foundation stone of the court's decision was that, on a proper analysis, the question of whether the settlement reached was lawful as a question of Italian law was never a relevant issue. In the course of reaching that decision Mr Justice Andrew Baker opined in terms capable of broad application, as follows:

> *'On a perhaps simplistic view, any proposition advanced by one party to an arbitration but disputed by the other party creates an issue. If for whatever reason it is not dealt with in the award, then on that view there will have been a failure by the tribunal to deal with an issue that was put to it. However, as both sides before me accept, and as is well reflected in the case law on section 68(2)(d), that does not feel right. That is because it does not feel right to say, no matter the circumstances, no matter the importance or significance of the point to the way in which the case has been advanced overall or is determined by the arbitrators, that failure to deal with something that was in issue before them is, without more, irregular. That means, in other words, that the notion of 'issue' for the purposes of section 68(2)(d) has to take colour from the very drafting point to which I have referred, namely that a failure to deal with such an issue, if put to the tribunal, has to be such as could properly be regarded as a procedural irregularity of the type which section 68(2) is targeting.'*

The intricate reasons as to why the lawfulness of the settlement was not a relevant issue are of less wide interest. In short, Orascom contended that it was a matter which was important to two important issues within the case, namely (i) whether the settlement had been concluded in good faith and objectively reasonably, and (ii) whether, by entering into the settlement concerned, VEON had failed properly to mitigate.

The court gave these arguments short shrift and found that, on a proper analysis, the lawfulness of the settlement was irrelevant to determination of both issues. On that basis, no issue capable of engaging AA 1996, s 68 was established.

The court made further findings that, in any event, the issue had been dealt with sufficiently in the tribunal's award (by way of a footnote) and that, on any analysis, even if the issue was a relevant one which had not been dealt with, such a failure was incapable of causing Orascom substantial injustice.

Case details

- Court: High Court, Business and Property Courts of England and Wales, Queen's Bench Division, Commercial Court
- Judge: Mr Justice Andrew Baker
- Date of judgment: 22 March 2018, but only recently published