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Challenge to award rejected where tribunal exercised procedural power to prevent abuse of process

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Introduction

In *Union of India v Reliance Industries Limited and another*,[(1)] the High Court rejected an appeal of an arbitration award under section 69 of the Arbitration Act 1996 and a challenge under section 68 of the Act. The Court held that a tribunal seated in England may apply English law to determine whether a party is precluded from raising, in later proceedings, points that could have been made earlier, even if the governing law of the underlying agreement is that of another jurisdiction. Applying English law to the issue did not amount to either an error on a point of law or a serious irregularity causing substantial injustice.

Background

Section 69 – appeal on point of law

Section 69 of the Act allows the losing party in an English-seated arbitration to appeal to the High Court to review the award for substantive errors of law made by the tribunal. If the appeal is successful, the Court may remit the award to the tribunal, vary or set it aside. In practice, the courts only sparingly exercise the power conferred by section 69 – a power that frequently is excluded by parties in their arbitration agreement or in institutional arbitration rules.

Only questions of English law (and not of fact) may be appealed. An appeal can be initiated with the agreement of all parties or with leave of the court. The conditions for leave to be granted are set out in section 69(3):

- section 69(3)(a) – the question must substantially affect the rights of the parties;
- section 69(3)(b) – the question must be one that the tribunal was asked to determine;
- section 69(3)(c) – the tribunal's decision on the question that is the subject of the appeal must be either obviously wrong or, where the question is one of general public importance, at least open to serious doubt; and
- section 69(3)(d) – it must be just and proper for the court to determine the question.

Section 68 – challenging the award on grounds of serious irregularity

Section 68 of the 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 Act. The list includes:

- section 68(2)(a) – a failure by the tribunal to comply with section 33 (which concerns the general duty of the tribunal). Section 33 obliges a tribunal, among other things, to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting their case and dealing with that of their opponent;
- section 68(2)(d) – failure by the tribunal to deal with all the issues put to it; and
- section 68(2)(g) – among other things, the award being contrary to public policy.

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.

It is rare for section 68 challenges to succeed.

Res judicata

Under the principle in *Henderson v Henderson*,[(2)] a party is precluded from raising in subsequent proceedings matters that were not, but could and should have been, raised in earlier ones.

Facts

The underlying arbitration concerned two production sharing contracts (PSCs) governed by Indian law relating to offshore oil and gas fields in India. The PSCs were entered into in 1994 between, among others:

- the Union of India (ie, the government); and
- Reliance Industries Limited and BG Exploration and Production India Limited (together, Reliance/BG), the claimants in the arbitration.

Although governed by Indian law, the PSCs each contained an arbitration agreement that was governed by English law. The parties agreed to ad hoc arbitration seated in London and conducted in accordance with the 1976 United Nations Commission on International Trade Law Arbitration Rules.

The contracts gave rise to long-running arbitration proceedings dating from 2010. At the time of the judgment, the tribunal had issued

eight substantive partial awards. In an award dated 29 January 2021 (the award), the tribunal considered defences that had been advanced by the government, based on principles of Indian constitutional law. Reliance/BG submitted that those defences were beyond the tribunal's jurisdiction as they were barred by res judicata or abuse of process.

The tribunal accepted Reliance/BG's arguments on res judicata or abuse of process. Applying the principle in *Henderson v Henderson,* the tribunal concluded that it could not consider the government's threshold defences based on principles of Indian constitutional law, as they could have been raised at an earlier stage in proceedings but were not. The tribunal noted that parties to an arbitration were required to bring forward their entire case.

The government applied for permission to appeal the award under section 69 of the Act, with the Court asked to consider:

- whether the tribunal was correct to decide the specific questions of res judicata under English law because the seat of the arbitration was London; and
- if the answer to the foregoing was yes, whether the doctrine of res judicata was applicable to earlier phases in the same arbitration proceedings.

The government also brought a challenge based on section 68 of the Act alleging that:

- the tribunal had acted unfairly by shutting out defences not previously used while at the same time permitting reliance on documents that were not previously used in the same proceedings;
- the tribunal had failed to deal with issues of substantive Indian law; and
- the award was contrary to Indian public policy.

Decision

In his judgment dated 9 June 2022, Sir Ross Cranston, sitting as a judge of the High Court, dismissed the applications under each of sections 68 and 69.

Section 69 appeal

Was the tribunal correct to apply English law to the issue of res judicata/abuse of process because the seat of the arbitration was London?

The requirements of section 69(3)(c) were considered – namely, whether the tribunal's decision was obviously wrong or at least open to serious doubt. The government submitted that the doctrine of res judicata, including the rule in *Henderson v Henderson*, was one of substantive English law. On its case there was therefore an issue as to whether the rule could apply in an arbitration seated in England but in which the underlying contract was governed by the laws of another jurisdiction.[(3)]

In his judgment, Sir Ross Cranston referred extensively to the Supreme Court's decision in *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited*,[(4)] in which Lord Sumption stated that "the principle in *Henderson v Henderson* has always been thought to be directed against the abuse of process involved in seeking to raise in subsequent litigation points which could and should have been raised before". Lord Sumption added: "Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers."[(5)] As such, the *Henderson* rule was held to be a procedural power rather than a matter of substantive law and the tribunal's application of it in a London-seated arbitration had been correct.[(6)]

The government advanced the point that the rule in *Henderson* had a different application to arbitration than it did to court proceedings. Sir Ross Cranston found that the rule applied to the conduct of both arbitral and court proceedings and is encapsulated in section 33(1) of the Act, particularly section 33(1)(b), which sets out the duty of the tribunal to adopt procedures avoiding unnecessary delay or expense.[(7)] The government further submitted that the rule must be substantive if it can be used as a defence. The judge dismissed this argument, noting that a procedural power can be used as a defence, and Lord Sumption's characterisation of the *Henderson* rule in the *Virgin Atlantic* case[(8)] as a power that could be used generally (ie, in respect of claims, defences and arguments).[(9)]

In short, the tribunal's determination was not wrong or even open to serious doubt. There was, therefore, no need to address the issue of whether the question was of general public importance.[(10)]

Was the doctrine of res judicata applicable to earlier phases in the same arbitration proceedings?

The government submitted, correctly, that there was no binding precedent for the rule in *Henderson* to apply to all stages of the same arbitration proceedings. The judge held, however, that there was substantial judicial support for the rule to apply to all stages of the same proceedings, both to defences and claims, as well as in an arbitration and litigation.[(11)]

Section 69 requirements

The requirement in section 69(3)(b) – whether the tribunal was asked to determine the questions – was then considered. While it is true that a tribunal may be said to have been asked to determine a question of law even if the court struggles to identify precisely how it was put, or precisely what question the tribunal was asked to determine, in the present case it was difficult to see that the first question had been put to the tribunal. The government had neither suggested to the tribunal that it should apply Indian law in preference to English law on the matter nor was the second question put to the tribunal. The statutory requirement was, therefore, not satisfied.[(12)]

The requirement in section 69(3)(a) – whether a party's rights would be substantially affected – fell to be considered next. The government had to show that the choice of Indian law would, not might, have led to a different result. Even applying the lower threshold, there was no suggestion that the *Henderson v Henderson* principle in the Indian Code of Civil Procedure might lead to a different outcome to the position under English law. The statutory requirement was therefore not satisfied.[(13)]

Finally, the Court considered the requirement in section 69(3)(d) – whether it was just and proper for the Court to determine the question. Importantly, the tribunal had applied the *Henderson* principle as a matter of English law prior to the date of the award, on that earlier occasion in favour of the government. It was therefore not appropriate for the Court to determine the questions and allow the government to take an inconsistent approach to the one it had advanced previously in the arbitration.[(14)]

For the above reasons, the section 69 appeal was unsuccessful.

Section 68 challenge

In respect of section 68(2)(a) (ie, failure to comply with general duty), the government alleged unfairness in the tribunal's shutting out (through *Henderson*) of defences not previously run while permitting reliance on documents not used previously in the same proceedings.

The Court rejected the government's submissions. Shutting out the government's defences on the basis of *Henderson* did not constitute unfairness, even where the defendant was a state and relying upon provisions of its constitution.[(15)]

Similarly, the judge rejected the government's submissions as to section 68(2)(d), alleging the tribunal's alleged failure to deal with issues (being certain matters of Indian law). The tribunal had dealt with the relevant issues, albeit briefly.[(16)]

Finally, the judge rejected the government's submissions on section 68(2)(g), alleging that the award was contrary to Indian public policy. An appeal was held not to lie under section 68(2)(g) on the grounds that the tribunal had erred on points of Indian public policy, as this did not engage English public policy. To allow parties to use this subsection to attack the conclusions of arbitral tribunals on matters of foreign law under the auspices of public policy might open the floodgates to challenges.[(17)]

The section 68 appeal was therefore also unsuccessful.

Comment

The judgment is useful in clarifying the application of the rule in *Henderson v Henderson* to arbitral proceedings seated in England, even where the underlying agreement between the disputing parties is governed by the law of another jurisdiction.

Parties to arbitral proceedings seated in England should be aware of the procedural powers that a tribunal can exercise to prevent a party's abuse of process by advancing claims or defences that could and should have been brought earlier in the same or other proceedings. Where parties seek to advance new arguments at a late stage in the proceedings, they should be able to demonstrate that such new arguments arise from newly available information or a change of circumstances.

Users of arbitration in England will be reassured by another illustration of the English courts' reluctance to disturb findings of arbitral tribunals.

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Endnotes

(1) [2022] EWHC 1407 (Comm).

(2) (1843) 3 Hare 100, 67 ER 313.

(3) *Union of India*, paragraph 53.

(4) [2013] UKSC 46, [2014] AC 160.

(5) *Virgin Atlantic*, paragraphs 23-25.

(6) *Union of India*, paragraphs 54-59.

(7) Paragraph 61.

(8) *Virgin Atlantic*, paragraph 17.

(9) *Union of India*, paragraph 63.

(10) Paragraph 64.

(11) Paragraph 68.

(12) Paragraphs 71-73.

(13) Paragraphs 75-77.

(14) Paragraph 79.

(15) Paragraphs 90-91.

(16) Paragraph 94.

(17) Paragraph 95.