

A slip capable of correction or an excess of powers? Court considers tribunal's powers to correct awards and scope of permissible challenges (OHL v Qatar Foundation)

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Arbitration analysis: Challenges were brought by a contractor (JV) under sections 67 and 68(2)(b) of the Arbitration Act 1996 (AA 1996) in respect of an addendum award (the Addendum) issued by an International Chamber of Commerce (ICC) tribunal. The Addendum was issued following an application by the employer to correct a fourth partial award. JV's challenges were dismissed and the judge gave helpful guidance as to the scope of AA 1996, ss 67 and 68 and the scope of a tribunal's power to correct and/or interpret its award. Written by Simon Lofthouse QC and Zulfikar Khayum, barristers, at Atkin Chambers, and counsel for Qatar Foundation.

Obrascon Huarte Lain SA (trading as OHL Internacional) v Qatar Foundation for Education, Science and Community Development [\[2020\] EWHC 1643 \(Comm\)](#)

What are the practical implications of this case?

This case confirms and makes clear that there is a clear delineation between possible challenges under [AA 1996, ss 67](#) and [68](#).

While [AA 1996, s 68\(2\)\(b\)](#) expressly relates to a serious irregularity challenge concerning 'the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67)', it was argued that a purported correction of an award which was outside a tribunal's powers meant that the tribunal had exceeded its substantive jurisdiction within the meaning of [AA 1996, s 67](#). If such an argument was successful it would mean the court would not need to consider whether an applicant had suffered 'substantial injustice' since this is not a necessary component of a challenge under [AA 1996, s 67](#) as it is under [AA 1996, s 68](#). The court rejected this argument, confirming the permissible limits of a [AA 1996, s 67](#) challenge as being one relating to challenges to substantive jurisdiction that is 'whether there was a reference to arbitration of the issue in accordance with the terms of the arbitration agreement, ie to identify what matters have been submitted to arbitration'. A challenge relating to whether a tribunal had the power to correct an award was therefore properly considered to be a challenge relating to whether a tribunal exceeded its powers under [AA 1996, s 68\(2\)\(b\)](#).

The case further reiterates the latitude to be afforded to arbitrators in correcting their award under what are colloquially referred to as 'slip rules'. In this case, the provision under consideration was Article 35 of ICC rules (Article 35) which permitted the tribunal to 'correct a clerical, computational or typographical error, or any errors of similar nature' and to seek an 'interpretation of an award'. The court noted that there may be reasonable room for disagreement as to whether certain mistakes or omissions constituted errors of a 'similar nature' to 'clerical, computational or typographical errors' and/or on whether there should be any 'interpretation' of the award. However, the tribunal was 'empowered to make decisions within a range' with that range being wider in cases of interpretation than correction. That itself derives from the powers of the tribunal which the parties

have themselves conferred which ‘import the power to make certain evaluative judgments’. The judge held that it would only be if the tribunal exceeded ‘what might by analogy be called the “margin of appreciation” accorded to the tribunal’ that an issue of excess of powers under [AA 1996, s 68\(2\)\(b\)](#) may arise.

Finally, the case confirms the importance of showing that ‘substantial injustice’ will be caused to any applicant seeking to challenge an award under [AA 1996, s 68](#). Where substantial injustice is absent, any such challenge will fail. In this case, where the tribunal had made clear they did not intend to deal with an issue and had not dealt with it, such that it remained to be heard and determined later, there could be no substantial injustice. The loss of an apparent windfall benefit was not substantial injustice. Indeed, there would be substantial injustice the other way if binding findings remained which were made by reason of mistake on issues which had not been determined and had not intended to be determined.

What was the background?

This case involved two challenges by a contractor (the JV) brought against an employer (QF) in respect of the Award in an ongoing ICC arbitration relating to disputes arising out of the construction of a hospital complex in Doha, Qatar. The proceedings were being heard in front of a tribunal consisting of Sir Stanley Burnton, Richard Fernyhough QC and Richard Wilmot-Smith QC.

QF sought corrections to make clear that the findings in the award relating to the JV’s claims for an extension of time and prolongation costs were subject to the determination of outstanding issues concerning compliance with contractual notification provisions. The Addendum made clear that the tribunal did not deal with the contractual notification issue and did not intend to do so and corrected the Award to reflect that this issue was to be determined and that any entitlement to extensions of time and prolongation were subject to resolution of that issue.

This was the second arbitral challenge before the High Court in relation to the underlying arbitral dispute.

The first challenge was heard and dismissed by Mrs Justice Carr (as she was then) in 2019 and concerned issues as to whether the arbitral tribunal had failed to comply with the general duty of the tribunal so as to amount to a serious irregularity (*Obrascon Huarte Lain SA (t/a OHL Internacional) and another v Qatar Foundation for Education, Science & Community Development* [\[2019\] EWHC 2539 \(Comm\)](#)). That judgment made reference to this further separate challenge to be heard in due course.

These challenges concerned a partial award which, while finding that QF validly terminated the contract of the JV, also made findings in relation to the JV’s claims for an extension of time and prolongation costs. In the award the tribunal declared the JV was entitled to certain extensions of time with recovery of prolongation costs.

Both parties subsequently made applications pursuant to Article 35 of the ICC rules to correct the award and/or for interpretation of the award. Part of QF’s application noted that the award did not address QF’s submissions as to the effect of notification provisions which required notifications of claims by the contractor for extensions of time and/or prolongation costs; QF sought corrections or an interpretation of the award to make clear that any findings were subject to determination of this issue at a later date.

Following the parties’ submissions, the tribunal issued an Addendum to the award and in respect of the relevant part of QF’s application stated:

‘...It is correct that the Tribunal did not in the Award address these issues, and it did not intend to do so. Whether there were any applicable contractual preconditions to the JV’s rights to extensions of time and prolongation costs and, if so, whether they were complied with are issues remaining to be determined by the Tribunal. It follows that those paragraphs do not correctly reflect the Tribunal’s decisions. Accordingly they should be amended as follows...’

The tribunal then proceeded to add the words ‘subject to compliance with any precontractual conditions’ before the tribunal’s findings in relation to the JV’s entitlements to extensions of time and prolongation costs.

The JV brought challenges to the Addendum and the changes it made to the award, under [AA 1996, ss 67](#) and [68\(2\)\(b\)](#), asserting that in making such changes the tribunal had exceeded its substantive jurisdiction and/or powers.

What did the court decide?

There were two challenges before the court under different sections of [AA 1996](#) and the judge dealt with them in turn. This was necessary because (i) the requirements for a successful challenge differed under each section (in particular, a [AA 1996, s 67](#) challenge did not require an applicant to show that ‘substantial injustice’ would be caused) and (ii) there was an issue as to whether [AA 1996, s 67](#) was applicable at all in such circumstances.

The AA 1996, s 67 challenge

[AA 1996, s 67](#) permits a challenge to an award on the basis of a lack of substantive jurisdiction by the tribunal.

The argument put forward by the JV was that having granted the JV apparently unqualified entitlements to extensions of time and prolongation costs, the tribunal was functus officio in that respect (insofar as such changes it sought to be made fell outside of Article 35 of the ICC Rules) such that the tribunal lacked the substantive jurisdiction to make the changes identified above to the award.

The judge accepted QF’s submission that [AA 1996, s 67](#) was inapplicable in such circumstances.

Considering the authorities relied on by QF, Mr Justice Butcher considered that [AA 1996, s 67](#) challenges related to whether matters had been submitted to arbitration in accordance with the arbitration agreement and that the authorities indicated this applied only to issues relating to the identification of matters submitted to arbitration. He also considered this was in accordance with the general principles in [AA 1996, s 1](#) (which sets out that the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense and that the parties should be free to agree how their disputes are resolved subject only to necessary safeguards with only limited intervention by the court). Further, the judge noted that under [AA 1996, s 57](#), provision is made for the tribunal to correct an award or make additional awards, unless the parties agree on other powers of the tribunal in this respect. As such a complaint about the exercise of [AA 1996, s 57](#) powers (or their agreed replacements) was an allegation of ‘the tribunal exceeding its powers’ within [AA 1996, s 68\(2\)\(b\)](#). The judge further considered (consistently with previous authority) that such an interpretation would not be unjust or uncommercial as the parties had agreed that the tribunal should have powers to correct an award and there was no good reason why a complaint that it has gone wrong in exercising that power should be subject to a different challenge regime than the exercise of other powers conferred on the tribunal as regards the progression of the arbitration.

Butcher J also recognised that if the position was otherwise ‘it would open the door to nice arguments in court as to whether the tribunal’s decision to correct an award were or were not within its powers, and depending on the court’s answer to that question, to the setting aside of corrections or amendments without regard to any questions of whether they had caused substantial injustice’. As discussed further below, there were difficulties with showing any substantial injustice had occurred in this case such that a challenge under [AA 1996, s 67](#) would have had significant advantages for JV if it was considered such a challenge was available and the requirement to show substantial injustice could be side-stepped.

The AA 1996, s 68 challenge

Two issues arose under this aspect of the challenge—was there an excess of the tribunal’s powers at all and if so, had it caused or would it cause substantial injustice?

No excess of power

The judge noted that the parties had conferred powers on the tribunal which import the power to make certain evaluative judgments and that the power to correct errors of a ‘similar nature’ to ‘clerical, computational or typographical errors’ imported a degree of latitude as to what errors may be corrected. Butcher J stated that in such a case and in determining if there should be any and, if any, what ‘interpretation’ of the award, a tribunal is empowered to make decisions within a range and that any court should respect ‘what might by analogy be called the “margin of appreciation” accorded to the tribunal’.

In this case the judge considered the correction not as ‘clerical, computational or typographical errors’ but considered they could reasonably be regarded as the correction of errors ‘of a similar nature’ (per the wording of Article 35 of ICC Rules). This was in circumstances where it was clear that the tribunal had not given consideration to the notification arguments and the text of the award therefore did not reflect the tribunal’s original intention. It appears in this regard the judge considered it of relevance that the tribunal’s stated intention was before the court in the form of the Addendum.

The judge went on to state that he found it ‘even more difficult to say that the Tribunal was not entitled to interpret the Fourth Partial Award by the changes made in the Addendum’.

Whether by way of correction or interpretation, the judge therefore held that the tribunal was empowered to alter the text of the Award in the way that it did and so there was no excess of power.

No substantial injustice

The judge described QF’s submission that there would in any event be no substantial injustice as required by [AA 1996, s 68](#) as a ‘complete answer’ to the [AA 1996, s 68](#) complaint in any event.

This was because the Addendum made clear that the tribunal had not addressed the notification issues (and it had been accepted by the JV that the Award did not expressly address either party’s submissions on notices) such that the effect of the changes made to the Award was that such issues would be heard and determined at a later date.

While it was suggested by the JV that substantial injustice was caused by the unqualified declarations as to extensions of time being placed ‘in jeopardy’, the judge reiterated the principle that in considering whether there is substantial injustice, ‘the Court does not simply compare the position of the applicant before and after the conduct of the arbitrators of which complaint is made’.

The judge considered there was no substantial injustice to the JV in these issues being considered on their merits by an impartial tribunal as opposed to being passed over by reason of a mistake.

Indeed, the judge noted that there would have been a substantial injustice *to QF* if the Award had not been changed and binding findings remained which were made by reason of mistake on issues which had not been determined and had not been intended to be determined. It was also noted that in such circumstances there could have been a successful application by QF pursuant to [AA 1996, s 68\(2\)\(d\)](#) by reason of a failure to deal with all issues put to the tribunal.

The JV's applications were therefore dismissed.

Case details

- Court: Commercial Court, Queen's Bench Division, Business and Property Courts of England and Wales, High Court of Justice
- Judge: Butcher J
- Date of judgment: 24 June 2020

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