



COMMERCIAL DISPUTES **KNOW-HOW GUIDES**

APPLICATIONS TO CHALLENGE ARBITRATION AWARDS

Arbitration is intended to be final and binding but that does not prevent aggrieved parties from applying to the English High Court to challenge the arbitration award, although only in certain limited circumstances. Whilst arbitration is a private process, there is some opportunity given by the Arbitration Act 1996 for the parties to seek intervention of the courts.

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INTRODUCTION

This note sets out an overview of each means of challenge and some common procedural pitfalls to avoid when making a challenge, including time limits and loss of the right to object. If the arbitral proceedings were issued in England then the challenges open to applicants under the Arbitration Act 1996 ("the Act") are those relating to (1) the tribunal's substantive jurisdiction, (2) allegations of serious irregularity by the tribunal, and (3) an appeal on a point of law. Whilst the parties do not have the right to 'contract out' of (1) and (2), they do have the right to agree to opt out of (3).

Unless the court has agreed to extend the time limit, challenges under the respective sections of the Act (67, 68 and 69) must ordinarily be brought within 28 days of the date of the arbitration tribunal's award.

If a party fails to object promptly to the tribunal's lack of jurisdiction, the improper conduct of the proceedings or any other irregularity, it will lose the right to bring a challenge later unless it can show that it did not know of the ground for the objection and could not with reasonable diligence have discovered it.

CHALLENGE TO THE TRIBUNAL'S SUBSTANTIVE JURISDICTION (SECTION 67 OF THE ACT)

Section 67 allows for an award to be challenged on the grounds that it was made without jurisdiction. Challenges can be made on the basis of:

- The existence or validity of the arbitration agreement.
- The constitution of the tribunal.
- The scope of the arbitration agreement.

The application will be dealt with at a hearing which will often hear live witness evidence. The court may confirm the award, vary it or set it aside (in whole or in part). If the award challenged is a preliminary award on jurisdiction, the tribunal may continue with the arbitration proceedings and make a further award while the challenge to its jurisdiction is pending.

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CHALLENGE ON THE GROUND OF SERIOUS IRREGULARITY AFFECTING THE TRIBUNAL, THE PROCEEDINGS OR THE AWARD (SECTION 68 OF THE ACT)

An award can be challenged under section 68 if there has been a serious irregularity that has caused or will cause substantial injustice. The irregularity may relate to the tribunal, the proceedings or the award.

Section 68 is designed to remedy procedural failings and not to correct errors of fact, law or jurisdiction. An exhaustive list of the types of irregularity that can be challenged is set out in section 68(2) of the Act and include:

- Failure by the tribunal to comply with its general duties, such as the duty to give each party a reasonable opportunity to put its case.
- The tribunal exceeding its power.
- Failure by the tribunal to deal with all the issues that were put to it.
- The award being obtained by fraud or in a manner contrary to public policy.

The threshold for fraud is high but interestingly a statement made recklessly may give rise to a finding of fraud under s 62(8)(g).

The requirement to show that the irregularity has caused or will cause substantial injustice is designed to eliminate unmeritorious claims. If, for example, the tribunal failed to give the applicant an opportunity to respond to a point in its opponent's case, but the tribunal rejected the point in its award, the applicant would not have suffered

substantial injustice. The court will not second-guess the outcome of the arbitration when determining whether there has been substantial injustice.

If the challenge succeeds, the award may (in whole or in part) be remitted to the tribunal, set aside or declared to be of no effect.

APPEAL ON A POINT OF LAW (SECTION 69 OF THE ACT)

An award can be challenged under section 68 if there The parties can agree to contract out of the right to appeal on a point of law under section 69, either in the arbitration agreement or through their choice of the rules governing the arbitration (this appeal route is waived under the ICC Arbitration Rules 2017 and 2021 and LCIA Arbitration Rules 2020).

Importantly, the appeal is strictly limited to errors on English law, so factual findings, procedural errors or mistakes on foreign law, are not errors that can be appealed under section 69.

An appeal will only be granted if all of the following requirements are met:

- Determination of the question will substantially affect the rights of one or more of the parties.
- The question of law is one which the tribunal was asked to determine. So, the court will not consider hypothetical questions of law or points of law which were not argued before the tribunal.
- The decision of the tribunal is obviously wrong, or the question is one of general public importance and the tribunal's decision is open to serious doubt.
- Despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

This is part of a series of practical know-how guides for those involved in commercial disputes whether the dispute has led to litigation or not. They provide basic information on a wide range of disputes topics but are not a substitute for specific legal advice. For further guidance on the topic please contact David Vaughan at david.vaughan@collyerbristow.com or on +44 (0) 7808 870 142 or contact any member of the commercial disputes team.



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