

Global Arbitration Review

# The Guide to Challenging and Enforcing Arbitration Awards

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General Editor  
J William Rowley QC

Editors  
Emmanuel Gaillard and Gordon E Kaiser

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## Publisher's Note

Global Arbitration Review is delighted to publish this new volume, *The Guide to Challenging and Enforcing Arbitration Awards*.

For those unfamiliar with Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and a series of more in-depth books and reviews, and also organise conferences and build work-flow tools. Visit us at [www.globalarbitrationreview.com](http://www.globalarbitrationreview.com).

As the unofficial journal of international arbitration, sometimes we spot gaps in the literature earlier than other publishers. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters has increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

*The Guide to Challenging and Enforcing Arbitration Awards* is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

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# Editor's Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

## Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – i.e., efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in approximately 160 countries. When enforcement against a sovereign state is at issue, the ICSID Convention of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 161.

## Awards used to be honoured

A decade ago, international corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

## Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

## Increasing press reports of awards under attack

During 2018, *Global Arbitration Review's* daily news reports contained literally hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement.

A sprinkling of last year's headlines on the subject are illustrative:

- 'Well known' arbitrator sees award set aside in London
- Gazprom challenges gas pricing award in Sweden
- ICC award set aside in Paris in Russia–Ukrainian dispute
- Yukos bankruptcy denied recognition in the Netherlands
- Award against Zimbabwe upheld after eight years
- Malaysia to challenge multibillion-dollar 1MBD settlement
- Uzbekistan escapes Swiss enforcement bid
- India wins leave to challenge award on home turf

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially

since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, last summer I raised the possibility of doing a book on the subject with David Samuels (*Global Arbitration Review's* publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project.

### **Editorial approach**

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said in a report 35 years ago:

*an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

### **Structure of the guide**

This guide is structured to include, in Part I, coverage of general matters that will always need to be considered by parties, wherever situated, when faced with the need to enforce or to challenge an award. In this first edition, the 13 chapters in Part I deal with subjects that include (1) initial strategic considerations in relation to prospective proceedings, (2) how best to achieve an enforceable award, (3) challenges generally, (4) a variety of specific types of challenges, (5) enforcement generally, (6) the enforcement of interim measures, (7) how to prevent asset stripping, (8) grounds to refuse enforcement, and (9) the special case of ICSID awards.

Part II of the book is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This first edition includes reports on 29 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 35 questions. All relate to essential, practical information on the local approach and requirements relating to challenging or seeking to enforce awards in each jurisdiction. Obviously, the answers to a common set of questions will provide readers

with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

Through this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

### **Quality control and future editions**

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors, colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach with chapters on China, Saudi Arabia, Turkey and Venezuela.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this first edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

April 2019

London

# Part I

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Issues relating to Challenging and  
Enforcing Arbitration Awards

# 6

## Due Process and Procedural Irregularities: Challenges

**Simon Sloane, Daniel Hayward and Rebecca McKee<sup>1</sup>**

### Introduction

One of the perceived advantages of international arbitration is the freedom a tribunal and parties have to determine the appropriate procedure of the arbitration in order to resolve the dispute in a timely and cost-effective manner, relatively unburdened by national rules of procedure. All a tribunal needs to do is ensure due process is followed.

Due process has been described by eminent practitioners as being both a precondition of arbitration<sup>2</sup> and the procedural cornerstone of the rule of law. 'It serves as the shield protecting fundamental procedural rights and was transposed into arbitration because arbitral tribunals issue binding decisions that determine parties' substantive rights.'<sup>3</sup> Such is the importance of due process in arbitration that its absence forms the basis for challenging an award under national arbitration statutes and for resisting enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

Unfortunately, it is becoming increasingly common for one or both opposing counsel to send a detailed plea to the tribunal prior to the award (and in some cases at or immediately following a hearing) reserving its client's rights in respect of an alleged procedural slight, in the hope of creating a platform to challenge the award or resist enforcement should their client be unsuccessful in the arbitration. Such an attempt to manipulate the way in which a tribunal runs the proceedings can give rise to a tribunal displaying 'due process paranoia',<sup>4</sup> resulting in extensive delays in the conduct of the arbitration and increased costs. This is

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1 Simon Sloane and Daniel Hayward are partners and Rebecca McKee is a senior associate at Fieldfisher LLP.

2 J Lew et al., *Comparative International Arbitration* (1st edition, 2003), p. 674.

3 L Reed, 'Ab(use) of due process: sword vs shield', Freshfields Arbitration Lecture 31st, 26 October 2016.

4 *ibid.*



stopping some tribunals from attaining the objective of dispute resolution in a quick and cost-effective manner.

### **The legal basis for due process**

The parties' right to due process is set out in Article 18 of the UNCITRAL Model Law<sup>5</sup> (the Model Law), which deals with the equal treatment of parties. It states that 'the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case'. The purpose of Article 18 is to provide the framework for the fair and effective conduct of the arbitral proceedings and to ensure the mandatory nature of these requirements is consistently upheld by national courts, from which the parties cannot derogate.<sup>6</sup>

All well-recognised legal systems have a requirement that parties be treated equally and fairly; each party should be given a reasonable opportunity to present its case and deal with that of its opponent.<sup>7</sup> For example, if the parties agree to oral hearings for the presentation of evidence then the tribunal should hold such a hearing and the tribunal must ensure sufficient notice of the hearing is given to all the parties – *audi alteram partem*. But this right does not extend to the parties' prescribing procedural aspects of the hearing, such as the timing or length.

The Canadian courts have clarified that the purpose of Article 18 is to protect the party from egregious and injudicious conduct by an arbitral tribunal and is not intended to protect a party from its own failures and strategic choices.<sup>8</sup> This element has also been clarified by the Singapore courts, which have held that while the tribunal should not surprise the parties with their own ideas,<sup>9</sup> where a party should be on notice of legal issues a tribunal's determination on that issue does not constitute a breach of due process because of the party's failure to recognise it.

Included within this due process requirement is a party's right to have access to all statements, documents or other information supplied to the arbitral tribunal by one party. This right is expressly included in Article 24(3) of the Model Law.

The right to due process is also set out in Article V(1)b of the New York Convention, which states that recognition of the award may be refused where the party against whom the award is invoked proves that it 'was not given proper notice of the arbitration proceedings or was otherwise unable to present its case'.

Recently, there has been an attempt to narrow the due process language, not to diminish parties' rights, but to prevent abuse of more open language that might invite unreasonable procedural demands.<sup>10</sup> For example, while Article 15(1) of the 1976 UNCITRAL Rules stated that any parties should be afforded 'a full opportunity' to present their case 'at any stage

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5 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006).

6 2012 UNCITRAL Digest of Case Law on the Model Law on International Arbitration.

7 See, e.g., Arbitration Act 1996 of England and Wales, Section 33(1)(a); International Arbitration Act of Singapore (Cap 143A, 2012 Rev Ed), Section 22.

8 *Re Corporacion Transnacional de Inversiones S.A. de C.V. et al. v. STET Internacional S.p.A. et al.*, Ontario Superior Court of Justice, Canada, 22 September 1999.

9 *Soh Beng Tee & Co Ltd v. Fairmount Development Pte Ltd* [2007] SGCA 28, para. 44.

10 L Reed, 'Ab(use) of due process: sword vs shield', Freshfields Arbitration Lecture 31st, 26 October 2016.

of the proceedings', Article 17(1) of the UNCITRAL Rules as adopted in 2013 provide for 'a reasonable opportunity' to present one's case at 'an appropriate stage of the proceedings' (emphasis added).<sup>11</sup> The purpose of this transformation is to avoid mischief.<sup>12</sup>

### **Content and requirements of arbitral due process**

There are no definite international rules as to how and when due process should be observed in the arbitral process. Perhaps the most comprehensive summary on the rules of natural justice in the arbitration context, under a common law system, was enunciated by the New Zealand High Court<sup>13</sup> when it stated:

- a Arbitrators must observe the requirements of natural justice and treat each party equally.*
- b The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise.*
- c As a minimum, each party must be given a full opportunity to present its case.*
- d In the absence of express or implied provisions to the contrary, it will be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have an opportunity to be present throughout the hearing; and that each party be given a reasonable opportunity to present evidence and argument in support of its case, test its opponent's case . . . and rebut adverse evidence and argument.*
- e In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence extraneous to the hearing without giving the parties further notice and opportunity to respond.*
- f The last principle extends to [her or] his own opinions and ideas if these were not reasonably foreseeable as potential corollaries if those opinions and ideas that were expressly traversed during the hearing.*
- g On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other.*

Unsurprisingly, not all national laws recognise the parties' rights to an oral hearing and, in some civil law jurisdictions, the right to a hearing is limited to the right to make written submissions.<sup>14</sup>

If due process has been breached, a party may (1) seek redress before the court in the same jurisdiction as the seat of the arbitration to have the award remitted back to the tribunal for reconsideration, set aside, annulled, or (2) challenge the award at the enforcement stage in an appropriate jurisdiction. However, such challenges should and usually are treated with

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11 1976 UNCITRAL Arbitration Rules; 1976 UNCITRAL Arbitration Rules (as adopted in 2013).

12 L Reed, 'Ab(use) of due process: sword vs shield', Freshfields Arbitration Lecture 31st, 26 October 2016.

13 *Trustees of Rotoaira Forest Trust v. Attorney General* [1992] 2 NZLR 452 at 463.

14 See, e.g., Swiss law does not recognise a party having an automatic right to make oral submissions – Decision BGE 117 II 348.

great caution in the courts of almost all ‘pro-arbitration’ jurisdictions. As a result, a party will usually only succeed where ‘the most basic notion of morality and injustice’ is violated.<sup>15</sup>

### **Setting aside an award for breach of due process**

Article 34(2)(a) of the Model Law sets out four sets of circumstances<sup>16</sup> under which an application to set aside an award may be allowed, and all relate to a breach of due process where a party has proven it has not been treated equally and fairly.

Most jurisdictions contain similar provisions enabling a party to set aside an award or have it remitted back to the arbitration.

Australian federal laws recognise the right to set aside an award for procedural unfairness. In *Sino Dragon Trading v. Noble Resources*,<sup>17</sup> a party challenged the arbitrators alleging ‘justifiable doubts as to their impartiality or independence’ and applied to the Australian Federal Court for it to decide on the challenge under Article 13(3) of the UNCITRAL Model Law. The court refused to set aside an award against Sino Dragon on grounds of procedural unfairness because they were based on technical difficulties ensuing from its own decision to examine witnesses by videoconference via WeChat.

Singapore statute allows an award to be set aside on the ground that a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.<sup>18</sup> However, ‘arid, hollow, technical or procedural objections that do not prejudice any party should never be countenanced’. It is only where the breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, culminating in actual prejudice to the party, that the remedy of setting aside an award can or should be made available.<sup>19</sup>

In a recent award review, a committee of the International Centre for Settlement of Investment Disputes (ICSID) declined to annul an award on the grounds of an undeclared alleged conflict of interest in circumstances where the other tribunal members had determined the challenged arbitrator should not be disqualified. The committee decided it was not for it to undo the tribunal members’ decision unless it was so plainly unreasonable that no reasonable decision maker could have reached it.<sup>20</sup>

There have been some recent, helpful decisions in the English courts on the issue of due process and the standard required to set aside or remit an award under national laws.

In England and Wales, the mechanism to set aside or remit an award lies within the Arbitration Act 1996 (the 1996 Act). Section 68 provides a party with a right to challenge an award in circumstances where there has been a ‘serious irregularity’ that has caused or will cause an injustice to the applicant.

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15 *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l’Industrie du Papier (RAKTA) and Bank of America (RAKTA)*, 508 F.2d 969 (1974).

16 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006), Article 34(2)(a)(i) to (iv).

17 *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd (No.2)* [2015] FCA 1046.

18 International Arbitration Act of Singapore (Cap 143A, 2012 Rev Ed), Article 24(b).

19 *Soh Beng Tee & Co Ltd v. Fairmount Development Pte Ltd* [2007] SGCA 28, para. 99.

20 A Ross, ‘Award against Argentina upheld despite committee’s qualms’, *Global Arbitration Review*, 18 December 2018; see also *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17.

Section 68(2) defines the term ‘serious irregularity’ by setting out an exhaustive list of situations that might cause such an injustice. On the other hand, the term ‘substantial injustice’ is not defined within the 1996 Act; it is a question of fact. These irregularities relate to failures in due process – failures made by the tribunal during the arbitral proceedings or in the course of rendering the award. They are set out as follows:

*68 Challenging the award: serious irregularity*

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);*
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);*
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;*
- (d) failure by the tribunal to deal with all the issues that were put to it;*
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;*
- (f) uncertainty or ambiguity as to the effect of the award;*
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;*
- (h) failure to comply with the requirements as to the form of the award; or*
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.*

If the English court finds that there has been a serious irregularity, as set out above, which has caused a party a substantial injustice, it can select the most appropriate remedy: (1) remit the award back to the tribunal for reconsideration, (2) set aside the award or (3) declare the award ineffective. Each remedy is available in whole or in part.

The opportunity for parties to bring due process failures to the attention of the English court is an important feature of the arbitral process, but the success rates are low, the threshold is high and the costs are potentially substantial. The 1996 Act was drafted to include a high threshold for the purpose of reducing the court’s intervention in the arbitral process.<sup>21</sup>

A common, serious irregularity cited in Section 68 applications is the tribunal’s failure to deal with all the issues put to it. In *Asset Management Corporation of Nigeria (AMCON) v. Qatar National Bank*,<sup>22</sup> there were multiple grounds on which the claimant challenged the award. First, AMCON claimed that the tribunal failed to apply relevant principles of Nigerian law, and second, it failed to deal with three of the claimant’s submissions. The court found that the claimant’s first complaint was not one that fell within the boundaries of Section 68, rather the complaint was that the tribunal applied one principle of Nigerian law instead of another. It found that the remainder of the claimant’s submissions that the tribunal failed to deal with an issue were unfounded. Conversely, the issues raised by the claimant were in fact dealt with by the tribunal. The court concluded that the application

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<sup>21</sup> *Terna Bahrain Holding co WLL v. Bin Kamel Al Shamzi & Others* [2013] 2 CLC 1, para. 85.

<sup>22</sup> *Asset Management Corporation of Nigeria (‘AMCON’) v. Qatar National Bank* [2018] EWHC 2218 (Comm).

had no prospect of success, and it was yet another example of ‘a dissatisfied party to an arbitration seeking to challenge an Award in circumstances where statute does not allow it’.

In *Midnight Marine Ltd v. Thomas Miller Specialty Underwriting Agency Ltd*,<sup>23</sup> the challenge was brought pursuant to Section 68(2)(b): the tribunal exceeded its powers. During the course of the arbitration, the respondent applied for a declaration that the claim was time-barred. The respondent argued that the claim should be dismissed pursuant to Section 41(3) of the 1996 Act, whereby the tribunal may dismiss a claim if it is satisfied that there has been ‘inordinate and inexcusable delay on the part of the claimant in pursuing his claim’ and the delay:

- (a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or
- (b) has caused, or is likely to cause, serious prejudice to the respondent . . . .

The tribunal found in favour of the respondent; the claim was time-barred pursuant to Section 41(3). The claimant challenged the award claiming that the tribunal had exceeded its ‘jurisdiction’ in its dismissal. The court considered the claimant’s challenge to be ‘hopeless’ as it was obvious from the circumstances that if any party were to suffer a substantial injustice it would be the respondent if it was required to defend a claim when it was likely that a fair resolution was not possible because of the claimant’s conduct. As a result, the court found that it was unnecessary to consider the claimant’s challenge that the tribunal had exceeded its powers.

However, the London Commercial Court did allow a challenge to an award under Section 68(2)(b) in *Fleetwood Wanderers Limited (t/a Fleetwood Town Football Club) v. AFC Fylde Limited*, in which an arbitrator failed to notify the parties of written communications between himself and the Football Association and failed to give the parties the opportunity to make representations on the communications. The Court determined that the arbitrator had failed to comply with his duties under Section 33 of the 1996 Act to ‘act fairly and impartially . . . giving each party a reasonable opportunity of putting his case and dealing with that of his opponent’. Such a failure amounted to a serious irregularity that was capable of causing a substantial injustice. Had the parties been afforded the opportunity to make additional representations, it was possible that the arbitrator might have reached a different conclusion. The court remitted the award back to the arbitrator citing that the irregularity was a discrete part of the claim, and it would not be inappropriate to do so.<sup>24</sup>

On the rare occasion that an applicant succeeds in its Section 68 challenge, it faces further costs to effect the court’s remedy. In *The Secretary of State for the Home Department v. Raytheon Systems Limited*, the English court set aside an arbitral award for a serious irregularity. It held that the tribunal had failed to consider issues of liability and quantum and it would be inappropriate for the tribunal to attempt to redetermine the issues.<sup>25</sup> In

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23 *Midnight Marine Ltd v. Thomas Miller Specialty Underwriting Agency Ltd* [2018] EWHC 3431 (Comm).

24 *Fleetwood Wanderers Limited (t/a Fleetwood Town Football Club) v. AFC Fylde Limited* [2018] EWHC 3318 (Comm).

25 *The Secretary of State for the Home Department v. Raytheon Systems Limited* [2015] EWHC 311 (TCC) and [2014] EWHC 4375 (TCC).

those circumstances, while much of the factual and expert evidence might be salvaged, the arbitral process must be recommenced and a new tribunal appointed. The parties will have borne the costs of the original arbitration, while the tribunal will have been remunerated for delivering an ineffective decision. In *P v. D, X & Y*,<sup>26</sup> the court held that the tribunal's failure to deal with the issue of joint and several liabilities resulted in a substantial injustice against the claimant. The issue was remitted back to the tribunal for consideration. Once again, in such circumstances, the parties would normally be expected to pay the tribunal to revisit an issue that they failed to deal with properly first time around. This thankfully rare situation raises its own questions as to whether it is right for a tribunal to be compensated despite their errors or negligence.<sup>27</sup>

From the cases in England referenced above, the majority of which have been determined in the past 12 to 18 months, it is evident that parties do regularly allege 'serious irregularity' in respect of awards rendered by English seated tribunals. Although it is outside the scope of this chapter, the discussion as to whether courts and lawmakers should do more to tackle this practice in England and Wales is live and likely to continue.<sup>28</sup>

### **Challenging enforcement for breach of due process**

Article 36 of the Model Law allows for a challenge to enforcement of an award on the basis of a breach of due process where the party against whom enforcement is sought can prove one of the four grounds as set out in Article 34(2) of the Model Law. It follows that the same principles for setting aside an award for breach of due process under Article 34(2) also apply when a party seeks to challenge the enforcement of an award under Article 36.

However, typically it is the New York Convention that a party will turn to if it seeks to prevent enforcement of an award. Article V(1)b of the Convention states that recognition of the award may be refused if the party against whom the award is invoked proves that it 'was not given proper notice of the arbitration proceedings or was otherwise unable to present its case'.

For example, in the United States, in *Iran Aircraft Industries v. Avco Corporation*,<sup>29</sup> the Iran-United States Claims Tribunal at The Hague issued an award against Avco for lack of proof of damages, having told the company in a pre-hearing conference that it need not produce the thousands of invoices underlying its claim. Subsequently, the US Second Circuit Court of Appeals refused enforcement of the award on the basis that Avco had been denied the opportunity to present its claim. The Second Circuit Court of Appeals concluded that, although 'unwittingly', the tribunal had nevertheless misled the appellee and denied the opportunity to present its claims in a 'meaningful manner' as requested under the New York Convention.

However, in *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*,<sup>30</sup> the English court approved enforcement of an award despite a similar due process objection. In this case, the state said it had been unable to present its case in an ICSID Additional Facility proceeding

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26 *P v. D, X & Y* [2017] EWHC 3273 (Comm).

27 R-J Temmink, 'Who should pay for serious irregularities in international arbitration?', *Lexology*, 15 May 2018.

28 See, e.g., K Noussia, 'Arbitration Act – Time for Reform?', *Journal of Business Law*, Issue 2, 2019.

29 *Iran Aircraft Industries v. Avco Corporation*, 980 F.2d 141 [1992].

30 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm).

because the division of hearing time was unequal, even though it had itself requested a condensed hearing and chosen not to cross-examine the claimant's witnesses.

In the case of *Malicorp Ltd v. Egypt*, the English court refused to enforce an award on two grounds: (1) the award had been set aside by the Cairo Court of Appeal and (2) the award had granted remedies on a basis that were neither pleaded nor argued. The claimant contended that the Cairo Court of Appeal decision to set aside the award was wrong and its judges were guilty of pro-government bias. The English court refused the claimant's argument as it had no 'positive and cogent evidence' to support its claim. In respect of the second ground, the tribunal had granted damages to the claimant under Article 142 of the Egyptian Civil Code in circumstances where it sought compensation for a breach of contract only. The court concluded that 'the award of damages . . . must have been a complete surprise to Egypt'. The tribunal failed to ensure that Egypt was warned of these matters, which constituted a 'serious breach of natural justice'.<sup>31</sup>

### **Due process paranoia – an unfortunate trend**

When addressing procedural issues, tribunals often pander to a party's procedural request out of fear that its award might be challenged due to a breach of the party's due process rights. Often, such pandering will result in prolonged proceedings that are not in a party's interests, raise costs and negatively affect the attractiveness of international arbitration as a dispute resolution mechanism.

In most cases the boundary between due process breaches and simple procedural complaints are clear. Except in extreme circumstances, most procedural disagreements, such as extensions of time and determinations on the scope of disclosure, are not serious threats to fundamental fairness and equality. However, procedural lapses by a tribunal, such as a refusal to hold a hearing when requested to do so, the failure to give notice of a hearing, not dealing with proven witness tampering and intimidation, or the tribunal making biased statements, can all be instances of serious breaches of due process.

Tribunals should take comfort from the fact that very few awards are successfully set aside or challenged for procedural complaints. A robust rejection of 'due process paranoia' by arbitral tribunals would greatly enhance international arbitration's reputation at a time when delay and high costs are having the opposite effect.

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<sup>31</sup> *Malicorp Ltd v. Egypt* [2015] EWHC 361 (Comm).

# Appendix 1

## About the Authors

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Simon Sloane, a partner in Fieldfisher's dispute resolution team, has more than 25 years' experience of international arbitration, having arbitrated under all the major institutional rules, including ICC, LCIA, SCC, ICSID, SIAC, BANI, HKIAC, CIETAC, THAC, KLRCA, AAA and ARIAS. He has particular expertise in high-value disputes in the energy, construction, insurance and hotels and leisure sectors. Currently, he leads a number of significant investment treaty arbitrations relating to the CIS region and the Energy Charter Treaty. Simon is a Fellow of the Chartered Institute of Arbitrators.

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Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

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