

International Arbitration Alert

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Doglemor Trade Limited v. Caledor Consulting Limited: Correction of Errors in Arbitral Awards

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Finality is often cited as an advantage of arbitration. But what happens if there is a clear error or irregularity in an award? Institutional rules and national arbitration laws typically provide a limited mechanism to address such issues. The recent decision of the English Commercial Court in *Doglemor Trade Ltd & Ors v. Caledor Consulting Ltd & Ors* [2020] EWHC 3342, handed down on December 4, 2020, is a rare and striking example of an arbitral award being successfully challenged under Section 68(2)(i) of the English Arbitration Act 1996 (the “Act”) for “irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal”.

This judgment represents an unusual intervention by the English Courts where an arbitral tribunal, having made a serious mistake in the calculation of damages in its award, declined to correct itself after the mistake became apparent.

Factual Background

The underlying dispute concerned a call option deed (“COD”) that conferred a right on the first defendant, Caledor, to acquire 30 percent of the shares in a company owned by Doglemor. The COD was governed by English law and contained a London Court of International Arbitration (“LCIA”) arbitration clause with a London seat.

In 2018, Caledor initiated arbitration proceedings against Doglemor seeking damages on the basis that the COD had been repudiated leading to its termination.

The repudiation was admitted by Doglemor in its defense submissions. Consequently, the sole issue which fell to be determined by the tribunal was the quantum of Caledor’s loss.

The Arbitral Award

The parties presented the tribunal with an agreed economic model (the “Agreed Model”) to assist it in determining the numerical effect of resolving the large number of disputed inputs into the discounted cash flow valuation, one of which was historic tax liabilities.

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When the tribunal came to calculate the total value of Caledor's loss, it wrongly applied the historic tax liabilities as a positive instead of a negative figure. That was contrary to the common ground between the parties and contrary to what the tribunal accepted it had intended to do.¹

The result was that damages were assessed at USD 58 million, instead of the USD 4 million it would have been had the historic tax liabilities been properly accounted for.

Application to Tribunal under Article 27(1) of the LCIA Rules

In January 2020, the Doglemor parties made an application to the tribunal under Article 27(1) of the LCIA Rules requesting that the tribunal correct its mistake.

Under Rule 27(1) of the LCIA Rules, a party may request that an arbitral tribunal correct "any error in computation, any clerical or typographical error, any ambiguity or any mistake of a similar nature" in an award.

In its response, the tribunal conceded that it had made such an error and acknowledged that the Agreed Model contained an express instruction in respect of the historic tax liabilities to "enter a negative value" which the tribunal had mistakenly overlooked.

Despite this concession however, the tribunal maintained that it was of the "clear view" that notwithstanding the error a correction was "not justified" because correcting the error without also revising other aspects of the valuation calculation would "result in a different award from that which the tribunal had intended to make and one which was unjust".²

In particular, the tribunal's position was that it had not only utilized the Agreed Model to assess loss, but rather had adopted an approach which involved "a more holistic and more subjective, evaluative exercise".³ On that basis, the tribunal maintained that its award of damages was reasonable and neither over-compensated nor under-compensated the Doglemor parties.

The Doglemor parties subsequently applied to the Commercial Court under Section 68(2)(i) of the Act to challenge the award.

Application to the Commercial Court under Section 68 of the Act

An arbitral award may be challenged under Section 68 of the Act if there has been "a serious irregularity affecting the tribunal, the proceedings or the award". The nature of the irregularity must fall within one of the specified categories set out at Section 68(2) and its effect must be such that the Court considers has caused or will cause substantial injustice to the applicant.

The Doglemor parties argued that the tribunal's error amounted to an admitted irregularity in the award within the meaning of Section 68(2)(i) which had caused substantial injustice as a result of the significant increase in damages awarded.

In his judgment, Sir Ross Cranston agreed with the Doglemor parties and held that the tribunal's error constituted a serious irregularity that had caused substantial injustice. The Court consequently ordered the award to be remitted to the tribunal for reconsideration.

In reaching its decision, the Court held that:

1. Section 68(2)(i) of the Act covers the type of admitted mistake that had arisen in this case. It was not an error of fact or law. The tribunal's mistake fell into a different category, being an error of implementation, by which the tribunal did not do what it had stated on the face of its award it had intended to do (subtracting rather than adding the tax liabilities).⁴
2. The tribunal's response to Doglemor's application under Article 27(1) of the LCIA Rules, although not part of the award, could be relied upon by Doglemor to establish the "admitted" irregularity in line with the wording of Section 68(2)(i) of the Act. The tribunal's response constituted admissible evidence as to both the mistake and its consequences for the award.⁵
3. The serious irregularity was one which under Section 68(2) of the Act had caused or would cause substantial injustice to Doglemor because there was an enforceable award that contained a computation error which had led to a significant increase in the amount of the award.⁶
4. If the tribunal had taken the opportunity to address the computation error, it might well have resulted in a significantly different award.⁷

Commentary

It is a rare occurrence for a tribunal to admit an error in its award and indeed rarer still for a tribunal to accept that it made an error but to decline to correct it. This case is an example of the recourse available to parties in such unusual circumstances and the willingness of the English court to intervene in support of the arbitral process.

¹ *Doglemor Trade Ltd & Ors v. Caledor Consulting Ltd & Ors* [2020] EWHC 3342, [2].

² *Ibid*, [41].

³ *Ibid*, [44].

⁴ *Ibid*, [60].

⁵ *Ibid*, [53].

⁶ *Ibid*, [62 to 66].

⁷ *Ibid*, [65].

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