

Causation, Quantum and “Rolled-up claims”: English commercial court partially set aside investment award against Kazakhstan

On 23 November 2020, the English Commercial Court (the “**Court**”) upheld the Republic of Kazakhstan’s (“**Kazakhstan**”) challenge of an investment arbitral award made pursuant to section 68(2)(a) of the Arbitration Act 1996 (the “**Act**”). The tribunal had breached its duty under section 33 of the Act by awarding damages to World Wide Minerals Limited (“**WWM**”) and Paul A Carroll QC (together, the “**Defendants**”) on the basis of an argument that had not been advanced by WWM and which Kazakhstan did not have any fair opportunity to respond (the “**Challenge**”).^[1] The Defendants had put forward a “rolled up claim”^[2] (or a “global claim”)^[3] and sought damages based on the assumption that all its allegations would succeed but had not identified what losses were caused by each of the breaches alleged. Although the tribunal only found liability for certain conduct, the tribunal awarded damages without giving Kazakhstan the opportunity to address quantum in light of the findings on liability. Accordingly, the Court set aside part of the award relating to quantum and remitted all issues concerning causation and quantum to the tribunal.

The case is a rare example of a successful challenge of an award based on a serious irregularity pursuant to section 68 of the Act. The case also highlights that tribunals need to exercise caution when dealing with quantum if what is put forward by the parties does not fit with its decision on liability.

Background

The case arose out of a London-seated arbitration initiated pursuant to the bilateral investment treaty between Canada and the USSR in 1989 (the “**BIT**”). Kazakhstan had accepted WWM’s tender for the management and acquisition of uranium mining and processing facilities (“**TGK**”). WWM also entered into a management agreement with the relevant state entity of Kazakhstan which gave WWM an option to purchase TGK in the future. Subsequently, Kazakhstan terminated the management agreement and WWM commenced arbitration alleging breaches of the BIT and the management agreement. WWM alleged expropriation of its investment, including breaches arising out of Kazakhstan’s (i) failure to give it access to the production of the Southern Mines (the area believed to hold greatest potential); (ii) refusal to issue export licences; and (iii) failure to give timely notice to the Defendants of TGK’s bankruptcy. WWM also alleged that the failure to grant a licence for export of uranium and Kazakhstan’s failure to inform the Defendants of TGK’s bankruptcy proceedings violated the right to fair and equitable treatment under the BIT.

The tribunal rejected the expropriation claim, including because WWM had not secured access to the production of the Southern Mine. However, it upheld the two fair and equitable treatment claims, finding, inter alia, that Kazakhstan had acted unjustly and arbitrarily in relation to WWM’s export licence application.

Authors



Riccardo Loschi
Senior Associate
Zurich



Eleanor Scogings
Associate
Geneva

WWM proposed three different approaches to calculate the damages resulting from Kazakhstan's violations: damages calculated at the date of the award, at the date of the breach, or sunk costs. WWM did not, however, identify what losses were caused by each of the alleged breaches under any of the approaches. Kazakhstan asserted that if only some of the breaches were proven, the claim should fail as no alternative case had been advanced by WWM. WWM submitted at the hearing that if this were the case, the tribunal should render a partial award on liability and come back to the parties on damages.

The tribunal did not render a partial award, nor did it bifurcate the proceedings. It awarded WWM USD 13.7 million in sunk costs together with interest and legal expenses.

The Challenge

Kazakhstan's Challenge was made pursuant to section 68(2)(a) of the Act which allows an applicant to challenge an award on the ground of serious irregularity where it has caused or will cause substantial injustice to the applicant. Kazakhstan asserted that the tribunal had failed to comply with section 33 of the Act which provides that a tribunal is to "act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent".^[4] As to the relief sought, Kazakhstan requested the tribunal to set aside the paragraph/s of the award that violated section 68(2)(a) of the Act and, as a result, overturn the damages award.^[5]

Decision

Upholding the Challenge, the Court emphasised that WWM's case was to recover damages on one of the three above-mentioned bases on the assumption it would succeed on all its allegations. WWM had not advanced a claim for damages to be quantified on any basis (including the sunk cost basis) for any particular breach.

The Court held that Kazakhstan had satisfied each element of section 68:

1. **Serious irregularity.** There were only two fair alternatives for the tribunal – it could have rejected WWM's damages claim, as Kazakhstan had submitted, or adopted the course of action suggested by WWM and issued an interim award with a quantum phase and submissions from both parties to follow.^[6] The tribunal breached section 33 of the Act by proceeding to assess damages without having published an award setting out its findings on the breaches and giving both parties the opportunity to adduce evidence and to advance submissions on what damages were recoverable for the breaches found proved. Kazakhstan was not given a fair opportunity to address damages and this amounted to a serious irregularity pursuant to section 68(2)(a) of the Act.
2. **Substantial injustice.** Kazakhstan was not required to show that the result would have been different had there been no irregularity. Rather, it was required to show that had it had an opportunity to address the issue, the tribunal might well have reached a different view and produced a different conclusion. The Court held that had Kazakhstan had the opportunity to address the issue of damages for breaches proved, it would have argued that WWM was to prove the loss caused by each proven breach and to determine the appropriate compensation.^[7] It was improbable that the same loss would have been caused by each of the breaches found proved. Further, it would have been necessary for WWM to prove the loss based on the tribunal's findings including that WWM did not have any rights to the Southern Mine and that Kazakhstan was entitled to terminate the

management agreement. The Court considered that had this been carried out, the tribunal might have reached a different conclusion particularly because the Defendants had emphasised the importance of the Southern Mine to the overall viability of its investment and that without access the whole project was loss making.

3. **Set Aside and Remission.** Section 68(3) of the Act permits a court to remit the award to the tribunal (in whole or part) for reconsideration; set the award aside (in whole or part) or declare the award to be of no effect (in whole or in part). Noting that the default position is to remit the award to the tribunal unless inappropriate to do so,^[8] the Court ordered that the relevant paragraphs of the award relating to quantum be set aside and held that the tribunal was to determine all issues related to causation and quantum.

Comment

This case illustrates a rare example of a challenge to an award succeeding based on serious irregularity. Citing *Terna Bahrain v Al Shamsi*,^[9] the Court reiterated that the test under section 68 involves a high threshold and the approach of the courts is not to “pick holes, inconsistencies and faults” in an award but rather to strive to uphold the award.^[10] On the facts of this case, however, the tribunal had not given Kazakhstan a fair opportunity to address quantum in light of its findings on liability thereby warranting this section of the award being set aside. The Court’s decision to remit the issues of causation and quantum to the tribunal is favourable and illustrates the pro-arbitration approach of the English courts and underlines that London is an arbitration friendly seat.

The case further highlights the importance of carefully formulating the causation and quantum aspects of a claim including if the tribunal does not find liability on every breach alleged. Tribunals also need to exercise caution when dealing with quantum if what is put forward by the parties does not fit with its decision on liability.

The case also serves as an example of the Court’s consideration of a “rolled up” or “global” claim. While the Court did not define explicitly what it meant by WWM’s “rolled up” or “global” claim, in other contexts such claims may arise where the claimant does not demonstrate clearly a direct link between the loss alleged and the specific events/breaches. The claimant therefore seeks compensation for the total amount of loss incurred and often argues that collectively the relevant events/breaches caused the loss. Interestingly, the Court applied this concept in the context of an investment arbitration where WWM qualified Kazakhstan’s breaches as “creeping violations” of, *inter alia*, the fair and equitable treatment obligation.^[11]

Lastly, the decision calls attention to the implications of submitting a “rolled up claim” in the absence of a bifurcated quantum phase. Counsel should consider carefully the potential advantages and disadvantages of bifurcating quantum on the facts of any given case. For example, while a bifurcated quantum phase would have worked well here (ironically, bifurcation of quantum was effectively what happened following the Challenge), this should be balanced against the possibility of increasing the duration, complexity and costs of the arbitration.

References

[1] *Republic of Kazakhstan v World Wide Minerals Limited and another* [2020] EWHC 3068 (Comm).

[2] [11].

[3] [43].

[4] Arbitration Act 1996, section 33(1)(a).

[5] [59].

[6] [48].

[7] [51].

[8] [58].

[9] *Terna Bahrain Holding Company WLL v Al Shamsi and others* [2012] EWHC 3283 (Comm).

[10] *Obrascon Huarte Lain SA v Qatar Foundation for Education, Science and Community Development* [2019] EWHC 2539 [44].

[11] [39 and 40].