

CHALLENGING AN ARBITRAL AWARD IN THE ENGLISH COURTS JUST GOT HARDER

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Legal Briefings - By **Vanessa Naish and Chris Parker**

The revised Commercial Court Guide moves to deter 'speculative' challenges, further boosting the UK's arbitration credentials

More evidence has emerged this month to bolster the English courts' already strong reputation for constructive engagement with arbitration in the shape of an updated version of the Commercial Court Guide.

The Courts & Tribunals Service had already in 2013 introduced provisions into Section O of the Guide to deter parties from "speculative" challenges of arbitral awards on the grounds of serious irregularity under section 68 (s68) of the Arbitration Act 1996 (the Act). Small additional changes were also made in 2017.

Picking up the theme on 3 February the updated version of the Guide includes substantial revisions to Section O to deter unfounded challenges to arbitral awards and confirms the court's powers to dismiss such claims and sanction abusive parties. Importantly, unlike the earlier changes, many of the amendments relate to challenges for lack of "substantive jurisdiction" under section 67 (s67) of the Act, one of the primary means to ask the courts to set aside an award.

The amendments include:

- clarification that a s68 challenge is only for cases with serious grounds for thinking irregularity has occurred that has or will cause substantial injustice.
- A new provision confirming a s67 challenge is only appropriate in cases with "serious grounds for a contention that the matters relied on do affect the substantive jurisdiction

of the tribunal... rather than being matters to be raised... under section 68 or 69 of the Act”.

- a requirement that a s67 challenge “must be supported by evidence of the facts said to give rise to the absence of substantive jurisdiction” and that this must be set out in the claim form.
- confirmation the court has power to dismiss any claim under sections 67 or 68 without a hearing and that it is astute to do so where the claim has “no real prospect of success”.
- the extension of the right for respondents to seek indemnity costs for s67 challenges as well as applications under s68 in circumstances where a claim is initially dismissed on the papers, the applicant requests a hearing and the hearing also results in dismissal.
- confirmation of the court’s powers under s70 of the Act to order a party challenging an award to provide security for costs or security for the award, and additional procedural steps that will apply where such security is sought. This includes the need for such applications to be dealt with “very promptly”, and that “any such application should be marked with a time estimate of 1 hour or less and listed to be heard on the first available Friday after issue”.
- a new provision setting out the process the court will adopt where part of an award is subject to challenge and a party applies to enforce the unchallenged elements of the award.
- some minor amendments addressing the formalities on certifying finality for enforcement abroad.

Arbitration matters make up 25% of the claims issued in the Commercial Court, reflecting London’s status as a leading centre for international arbitration. The majority of these are challenges to awards under s67-69 of the Act. These amendments to the Guide follow a consistent pattern adopted by the English courts of upholding the finality of arbitral awards and deterring the use of s67 and s68 for speculative challenges. The changes to Section O clearly set out the limited parameters of both provisions of the Act, highlighting the need for “serious” grounds for contending irregularity has occurred. The revisions spell out also that the issues raised in any s67 challenge must relate to jurisdiction and not be a s68 or s69 challenge in disguise.

The extension of indemnity costs to s67 challenges is further evidence of the court’s intention to give parties pause before seeking further remedies. Since indemnity costs were introduced for s68 challenges there has been a reduction in the number of related actions, although correlation does not prove causation. Since the number of s67 challenges is already relatively low (19 in the year 2019-20), it will be interesting to see whether there is a decline in the number of such challenges over the coming years.

These new provisions come in the 11th edition of the Guide, the operational bible for the Commercial Court (the supervisory court for international arbitrations), the Admiralty Court and the Financial List, collectively covering a large chunk of commercial matters before the English courts.

The new Guide covers a range of areas, including expanded use of electronic bundles and evidence being given remotely in the wake of pandemic-driven disruption as well as new guidance on disclosure and handling expert evidence of foreign law. The Guide also ushers in greater use of gender-neutral language and attempts to rebrand alternative dispute resolution as the more mainstream "NDR" (negotiated dispute resolution).

This article first appeared in our [Arbitration Notes blog](#). Click [here](#) for more analysis of the revised Commercial Court Guide.

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