

# International arbitration and technology disputes

**David McIlwaine**

Partner, Pinsent Masons LLP

**Stuart Davey**

Associate, Pinsent Masons LLP

# e-Borders and serious irregularity

Lexis®PSL Arbitration analysis

**Barry Fletcher**

Head of the Lexis®PSL Dispute Resolution Group

Lexis®PSL Arbitration

  
Pinsent Masons



# International arbitration and technology disputes

David McIlwaine, partner, and Stuart Davey, associate, at Pinsent Masons LLP, consider the growing appetite for international arbitration in the technology sector and discuss the decision of the High Court in *Secretary of State for the Home Department v Raytheon* (the e-Borders case), in which the firm acted for the successful claimant.

The use of international arbitration to resolve IT and technology disputes is growing. We have noted this in our practice and it is consistent with statistics released on behalf of arbitral institutions. For example, in recent years, telecommunications and information technology disputes typically amount to around 10% of all International Chamber of Commerce (ICC) filings (based on the ICC's published statistics between 2009 and 2014). They are therefore on a par with financial services disputes (approximately 10%) and a little less than energy disputes (approximately 10%–15%). Continuing the long term trend, construction-related disputes still lead from the front, constituting around 15%–20% of all filings.

This article considers why there has been an increase in international arbitration being chosen as the appropriate dispute resolution procedure for technology disputes. It also considers a key recent decision in the sector (the decision of the Technology and Construction Court (TCC) in the e-Borders case), and looks at likely future developments in this area.

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## Why the increase in technology-related international arbitration?

One of the biggest drivers for the use of arbitration in technology disputes is the increasingly international nature of technology-related transactions, whether this is because the customer operates across multiple jurisdictions, the suppliers involved are established or parented overseas, or the programme is being invested by foreign money etc. In addition, all the usual advantages of international arbitration apply to technology disputes. These are briefly revisited below.

### Speed and cost

Recent analysis shows that the speed and cost of resolving a dispute remain two of the key considerations when assessing which form of dispute resolution to select. The 2013 WIPO survey on dispute resolution for technology transactions carried out in March 2013 emphasised that parties estimated that litigation in their home jurisdiction cost about \$475,000 and in another jurisdiction cost approximately \$850,000, with litigation estimated to take about three and three and a half years respectively. Conversely, respondents to the survey estimated that arbitration took on average slightly more than one year and cost around \$400,000. As these views suggest, some parties continue to see arbitration as cheaper and quicker. In our experience, however—and particularly in a UK context—it is not clear that this is necessarily the case.

The speed of settling a dispute is a key consideration for a party to any commercial dispute, but particularly so for the technology sector. By its very nature, technology is fast moving.

What was once the future can rapidly become obsolete. Product development and innovation are integral to the very fabric of a technology company. Becoming embroiled in a long, drawn out dispute diverts attention, occupies management and distracts the operational teams. A forum—such as arbitration—which produces a certain result in a manner that is perceived to be quicker and cheaper will always be an attractive proposition. In arbitration, the parties typically have greater control over the timetable and the procedure that is followed than in traditional litigation. For example, the parties tend to have more flexibility to determine the extent of their disclosure or discovery exercises (which, in a major IT programme, can represent millions of documents). However, whether this makes the process quicker will depend on the nature of the case. In our experience complex technology disputes take time to progress through dispute resolution processes, whether that is in arbitration or litigation.

### Specialist expertise

Complex disputes also require expertise. As evidenced by the 2013 PwC and Queen Mary University of London School of International Arbitration survey results, traditionally, energy and construction disputes have disproportionately favoured arbitration compared to financial services, which has preferred litigation. Construction and energy firms benefit from the ability to appoint specialist arbitrators with expertise. The same attraction applies to tech disputes.

However, our experience has found that life is not always as straightforward as assuming that specialist expertise is easily available for arbitration. We have experienced difficulty in identifying and appointing international arbitrators with the right



level of expertise. Technology still remains a relatively niche sector with a limited pool of experts. Those that exist may not have availability or may be conflicted. Further, it is not common for institutions to make available publicly a list of arbitrators with set experience prior to a notice of dispute being issued.

Perhaps it is time for technology legal fora to identify lists of international arbitrators experienced in technology disputes, of differing nationalities? (Note: The efforts of the [Silicon Valley Arbitration and Mediation Center](#) are possibly the closest such effort, although the list appears to be by no means comprehensive, and the institution is not a key international dispute resolution centre.)

The alternative—ie the court process—has similar risks. We are spoiled in the English jurisdiction by the TCC, where the judges are experienced in dealing with technology-related matters. However, this is a unique position not available in other jurisdictions, which increases the risk of being allocated a judge with little (or no) experience in this sector. More fundamentally, although the benefits of tech expertise may benefit the parties to a UK domestic dispute, it is likely that notions of neutrality (or lack of) may trump the benefits of such specialism from the perspective of a non-UK party.

### Confidentiality

The private nature of arbitration may also be particularly important for technology disputes. Trade secrets and technological know-how are crucial for many tech companies to gaining and retaining a competitive edge. However, confidentiality can be lost (at least in part) in any arbitration. Obvious examples would include during enforcement proceedings or challenges and appeals to set aside an award.

### Other reasons

Other important reasons for selecting international arbitration include the perceived neutrality of the tribunal, the fairness of the process, and crucially, the ability to enforce an award in most foreign jurisdictions, pursuant to the New York Convention.

## Use of standard contracts in the technology sector

### The Model Services Contract

In March 2014 the Crown Commercial Services, part of the UK government's Cabinet Office, issued a 'substantially revised set of model terms and conditions for major services contracts'. The new Model Services Contract is intended for procurements of IT and outsourcing services (including business process outsourcing) with a likely total contract value of £10m or more. It is used as the baseline for the majority of such government procurements in the UK.

Importantly for our purposes, the dispute resolution procedure in the Model Services Contract gives the government department (the Authority) the power to dictate the forum for final resolution of a dispute. If the supplier wishes to commence either court proceedings or arbitration it must serve written notice on the Authority of its intentions. The Authority may then opt to require the dispute to be referred to arbitration under the rules of the

London Court of International Arbitration. Alternatively, the Authority may instead opt to require the dispute to be subject to the jurisdiction of the courts of England and Wales. Thus, the UK government preserves the right of election. No equivalent right exists for the supplier.

### Why may the UK government prefer to arbitrate?

There are many reasons why a UK government entity may be more likely to opt for arbitration. These include those mentioned above, but there is also—given the costs typically involved—a political angle with such projects. Technology disputes are rarely black and white. The shade of grey will differ depending on the facts, but generally neither party will be blameless for the problems that have arisen in a programme which undoubtedly includes multiple obligations on both parties. The confidential nature of arbitration allows a government department to avoid adverse press coverage and other scrutiny. This may particularly be so in situations where senior civil servants are required to give evidence. That said, there has been some criticism that disputes concerning government contracts (and thereby involving public monies) should not be heard in private, but should be heard in court and be subject to public scrutiny.

### Use of NEC3

Another trend we have seen is the increased use of the NEC3 suite of contracts in construction and engineering projects. NEC3 is considered to be a more collaborative and co-operative contractual structure than other standard form contracts. It uses concepts of partnering.

The NEC3 contract suite contains not only the most common Engineering and Construction Contract, but also a Term Service Contract, a Framework Contract and a Professional Services Contract. NEC3 has been used on high profile projects such as Crossrail, Heathrow Terminal 2, the London 2012 Olympics in the UK, as well as energy, waste and civil projects in, among other jurisdictions, Hong Kong, New Zealand, South Africa and the Middle East. Although none of these are primarily technology projects, most contain large technology aspects, eg, IT, telecoms or system integration functions. Further, because NEC3 has been endorsed by the UK government and is recommended for use on public sector projects, it is highly likely that its public sector use will continue to increase.

The NEC3 suite of contracts is predicated on a two-tier approach to dispute resolution. In the first instance, a dispute is referred to and decided by an adjudicator. The decision of that adjudicator is final and binding unless and until either party notifies the other that it is dissatisfied and intends to refer the matter to the tribunal.

If such notice is given, the dispute is referred to a tribunal. The tribunal may reconsider the decision of the adjudicator but is not limited only to the information, evidence or arguments put to the adjudicator.

Whether the tribunal is arbitral rather than the courts should be specified in the contract. If the parties want a dispute to be resolved by arbitration then the contract should state this. We see that arbitration will commonly be included in such contracts.



## Learning lessons from the e-Borders case

One of the more interesting developments in the international arbitration arena in the past year or so was the judgment in the dispute related to the e-Borders IT system between Raytheon and the UK Home Office, where we acted for the Home Office. This article does not consider the judgment in detail but there has been significant commentary on it (an example of the private nature of the original arbitration being lost) (see for example [Lexis®PSL Arbitration's analysis: e-Borders award set aside and dispute to be reheard by new tribunal \(SoS for the Home Department v Raytheon\)](#) which is set out below). It is notable because it represents a rare successful challenge to an award under [section 68\(2\)\(d\)](#) of the Arbitration Act 1996 ([AA 1996](#)) (failure by the tribunal to deal with all the issues that were put to it, causing substantial injustice), leading to the award being set aside in its entirety, and the matter set to be re-determined by a fresh tribunal. It also involves a dispute with a government department, and using a standard form contract.

For an [AA 1996](#), s 68 challenge to succeed, the English court must be persuaded to intervene in an award made by a properly appointed tribunal in a consensual arbitration. The threshold for establishing grounds of challenge is rightly very high. Since the decision of Akenhead J in the TCC, there has been commentary as to whether:

- this will lead to an increase in challenges being brought in the English courts, and
- London should be perceived as a suitable forum for international arbitration

Our view is that the judgment may lead to some increase in challenge applications, but the courts will likely seek to ensure that the threshold of proof remains very high (in this regard see the finding of Cooke J in *Konkola v U & M Mining*: [Criticism as AA 1996, ss 67 and 68 challenges fail, but 'conditional' final awards approved \(Konkola v U & M Mining\)](#)). The courts will not wish to dilute the high hurdle of establishing that it should intervene, and each matter will be considered very carefully on its particular facts.

As for London, in our view, if anything, it should improve the perception of London as a sensible seat for international arbitration. The case illustrates the importance of ensuring international arbitration is a robust and considered process, and that if something does go awry with the procedures or the decision making process of award, the English court will be prepared to step

in (albeit in exceptional circumstances) to ensure that justice is achieved.

The e-Borders judgment may have a bearing on the speed and cost of arbitration. Akenhead J essentially found in the e-Borders judgment that, on the facts, 'there could be no easy short-cut' when considering technical matters. As such, an arbitration should not allow the tribunal to truncate the consideration process for dealing with the complex issues between the parties.

## The future

Technology is perhaps the epitome of a global industry. All sophisticated modern businesses rely on technology to function. There is a global market for the provision of IT services, and for the support of systems. Technology companies in turn rely upon international contracts for supply chain, distribution, installation, support and licensing.

As the world globalises and developing countries power economic growth, so the demand for technology increases. Africa is a great illustration of this. In recent years African representation in international arbitration generally has increased significantly. For example, in the past five years the number of ICC filings for Africa has continued to increase annually—both in terms of number of filings and number of countries represented. There may be a perceived notion (reasonable or not) that those foreign jurisdictions lack the maturity of our own or those closer to home (eg for cross border tech transactions in Africa). As the continent—particularly sub-Saharan Africa—continues to embrace technology we predict that the number of arbitrations related to technology will continue to grow.

Similarly, and despite recent high profile problems, and the e-Borders judgment, government IT programmes in the UK will be commissioned. Some will likely run into trouble. Given the use of standard forms which allow for—if not encourage—arbitration, we see the use of arbitration in technology disputes continuing to be the dispute resolution procedure of choice.

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

# e-Borders award set aside and dispute to be reheard by new tribunal (*SoS for the Home Department v Raytheon*)

In two judgments dated 19 December 2014 and 17 February 2015 (both made public on 17 February 2015), Mr Justice Akenhead upheld the Home Office's challenge to a partial final award made in arbitration proceedings arising out of the Home Office's termination of Raytheon's contract to design, develop and deliver the e-Borders system. In a pair of interesting decisions, the judge found that the tribunal's award was tainted by serious irregularity that had caused substantial injustice to the claimant, pursuant to sections 68(1) and 68(2)(d) of the Arbitration Act 1996 (AA 1996), with the consequences that the award would be set aside in its entirety and the matter reheard by an entirely new tribunal.

## Practical implications

Akenhead J's decision represents a rare, successful challenge to an arbitral award on grounds of serious irregularity, pursuant to AA 1996, s 68. Indeed, as the judge recognised in his second decision, there have been few cases, under the AA 1996, in which a successful application under AA 1996, s 68(2)(d) for failure to address issues has led to anything other than remission of the award to the original tribunal. That the court (a) found serious irregularity which had caused substantial injustice, (b) decided that the award should be set aside in total, and (c) that the matter should be reheard by an entirely new tribunal, puts Akenhead J's decision in an exceptional category of cases.

The judge's second decision, which considered what course of action the court should take in accordance with AA 1996, s 68(3) in light of the judge's finding of serious irregularity, will be of particular interest to practitioners as there is little reported authority on the operation of this section of the Act. The factors that the court considered relevant to the question whether or not it is inappropriate to remit an award to the original tribunal are set out in detail below.

Towards the end of his second judgment, Akenhead J stated that his judgments were not 'intended to be a reflection on [the] general competence or integrity' of the unnamed arbitrators. It is unlikely that this high profile decision will have an adverse affect on the reputation of arbitral tribunals in general, but it is perhaps more likely that tribunals in comparable cases will seek to avoid some of the failings identified by the judge in this case.

*Note:* the judge commented on the volume of the documentation produced by the parties for the purposes of the application. Whilst recognising that the application's success or failure was very important to the parties and their desire to 'leave no actual or imagined stones unturned', Akenhead J stressed that there should be a 'great appreciation' of the need to limit the material for such applications and its defence to what is 'really and positively relevant', particularly when the application is being heard by a specialist court with experience of the type of contract at issue in this case.

## What was the background to the Home Office's application?

In 2007, the Home Office engaged Raytheon Systems Limited (Raytheon) to design, develop and deliver the e-Borders border control system (the Agreement). In 2010, the Home Office purportedly terminated the Agreement for cause following delay, disruption and inefficiency in the delivery of the project. A dispute arose between the parties regarding who was responsible for termination and the Home Office commenced arbitration proceedings against Raytheon.

The tribunal issued its award in August 2014 (16 months after the final hearings). In broad terms, the tribunal found that the Home Office had unlawfully repudiated the Agreement, which Raytheon then accepted. The tribunal awarded a significant sum in damages to Raytheon, which included approximately £126 million for what was referred to as Raytheon's 'claim A4—Transfer of Assets', ie sums in respect of assets transferred to the Home Office during the life of the Agreement but for which Raytheon had not yet been paid.

## What were the grounds of challenge to the award?

In September 2014, the Home Office applied to have the award set aside and declared to be of no effect pursuant to AA 1996, s 68(1) and AA 1996, s 68(2)(d) on the grounds of serious irregularity on the basis of a 'failure by the tribunal to deal with all the issues that were put to it', which caused substantial injustice to the Home Office.

Those issues, which affected both liability and quantum (in particular, the value of Raytheon's claim to the 'Transferred Assets'), were:

### Liability

- the legal consequences of the fact that Raytheon did not comply with provisions in the Agreement in order to be entitled to argue that it was not responsible for failures to achieve contractual milestones (Liability Ground 1)
- to assess the nature and seriousness of any defaults of Raytheon in determining whether it was objectively reasonable and proportionate for the Home Office to terminate the Agreement (Liability Ground 2)

### Quantum

- whether the sum awarded to Raytheon ought to have been calculated by the method agreed in the Agreement (Quantum Ground 1)
- whether the assessment of Raytheon's compensation should not to exceed the sum that would have been recoverable had the Agreement been performed according to its terms (Quantum Ground 2)

- that Raytheon should not be permitted to recover damages on a global basis without any consideration of whether or not it was responsible for those costs through failures in its own performance (Quantum Ground 3)

## How did the court decide the serious irregularity challenge?

In a judgment dated 19 December 2014, Akenhead J considered the Home Office's serious irregularity challenge (the December judgment). His second judgment, handed down on 17 February 2015 (and discussed further below), considered the consequences of that earlier decision (the February judgment). Both decisions were made publicly available on 17 February 2015.

In summary, and as detailed further below, the judge decided that the Home Office's application succeeded in respect of Liability Ground 2 and Quantum Ground 3 (see above). In the judge's view, those 'issues' had been put to the tribunal within the meaning of [AA 1996, s 68\(2\)\(d\)](#), but the tribunal failed to address them in its award. The judge went on to find that the tribunal's failure in this respect caused the Home Office substantial injustice.

*Note:* the judge provided a very useful summary of the law and practice on serious irregularity in general and [AA 1996, s 68\(2\)\(d\)](#) applications in particular. This summary is included at the end of this article as it will be of use to practitioners.

### The liability issues

In para [41] of the December judgment, Akenhead J stated that the tribunal found that it was unnecessary for it to consider or make findings in its award about who was responsible for the delay, disruption and inefficiency that occurred prior to termination of the Agreement in 2010. This was because the tribunal found that provisions in the Agreement (referred to in the judgment as Process Requirements) were conditions precedent and that the Home Office had not complied with or satisfied those conditions precedent during the process leading up to termination in 2010. One of those conditions precedent was that the Home Office should act in a reasonable and proportionate manner having regard to such matters as the gravity of the offence and the identity of the person committing it. The tribunal found (*inter alia*) that the Home Secretary, when making the final decision on termination, failed to address in any adequate fashion the question of whether and, if so, to what extent the Home Office had caused the contractual defaults on which the Home Secretary (and the Home Office) relied when deciding whether or not the Agreement should be terminated.

The judge dismissed the Home Office's challenge on Liability Ground 1 (see paras [44]-[45] of the December judgment), but upheld the Home Office's challenge on Liability Ground 2. The judge found that the tribunal 'never grappled' with the Home Office's case that all or substantially all delay was the fault and responsibility of Raytheon. At para [42] of the December judgment, Akenhead J stated that there was no doubt that this issue was an issue in the arbitration which 'in the ordinary course of events and if it was necessary to do so, would have had to have been dealt with by the arbitrators'. The judge continued:

*'I do not have to say that it would be impossible for the tribunal to conclude in principle that, even if the total responsibility for all the delay was in fact that of [Raytheon] and not that of [the Home Office] or other agencies, there was still non-compliance. I have little doubt however that, if the tribunal had considered the issue in such terms, there is a real chance that it would have to reconsider some of its key findings. If it had done so, that might well have led to the need to consider the actual facts and the actual causes of responsibility for the delays which occurred and to a realisation that there could be no easy short-cut.'*

Accordingly, the judge concluded that the Home Office's challenge on Liability Ground 2 was established.

As for whether or not the tribunal's approach had caused the Home Office substantial injustice, Akenhead J was satisfied that the requirement was satisfied, either because the tribunal did not obviously consider in principle whether there could be or was compliance by the Home Office with the conditions precedent to termination in circumstances in which the entire responsibility for the contractual milestone delay was that of Raytheon and/ or whether the substantial responsibility for such delay was that of Raytheon. The judge continued that the substantial injustice lay not simply from the fact that these issues were not dealt with, but also because both parties had spent a large amount of time, resources and money presenting their cases on who was responsible for the delays, etc. The judge considered that the fact that these issues were not addressed, even in the context of evaluating whether or not the Home Office had complied with the conditions precedent to termination, might 'well lead an objective party or informed bystander to consider that the tribunal was simply seeking to avoid getting into the detail' (although the judge stressed that he was not suggesting that is what the tribunal did in this case).

### The quantum issues

The judge dismissed the Home Office's challenges on Quantum Grounds 1 and 2 (see paras [52]-[56] of the December judgment). The judge stated that the tribunal had adopted the 'pragmatic and practical' solution of approaching the evaluation of the Home Office's unjust enrichment in respect of the Transferred Assets on a 'cost' basis (ie the cost to Raytheon of producing the relevant assets less the sums paid—see para [55] of the December judgment).

However, the judge stated that once the tribunal had decided on this approach, it should have taken account of the extent to which those costs related to any delay, disruption and inefficiency which was the fault or responsibility of Raytheon. Having found that this issue was raised before the arbitrators, the judge concluded that they did not address it. The judge considered that this was a 'very important issue, not least because the consequences of the failure had been that some £126 million has been awarded to [Raytheon]'. Akenhead J concluded that this couldn't 'be classified as anything less than substantial injustice because the arbitrators have not applied their minds to the issue at all and any right minded party to arbitration would feel that justice had not been served'.

## What were the consequences of the court's finding of serious irregularity?

In a second judgment dated 17 February 2015, Akenhead J considered the consequences of his decision that the e-Borders award was tainted by serious irregularity that had caused the Home Office substantial injustice.

Pursuant to **AA 1996, s 68(3)**, when serious irregularity is found, the court has options. It may:

- remit the award to the tribunal (in whole or in part) for reconsideration, or
- set the award aside (in whole or in part), or
- declare the award to be of no effect (in whole or in part)

The court shall not adopt the second or third options above unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration (**AA 1996, s 68(3)**). Accordingly, and as the judge recognised in this case, remitting the award to the tribunal is the 'default' option unless it is inappropriate. The judge stated that there is no authority that suggests it will invariably be inappropriate to set aside the award when the serious irregularity concerns a tribunal's failure to deal with issues put to it.

The judge set out an approach for the court when assessing which course of action to adopt pursuant to **AA 1996, s 68(3)**, namely:

*'What the Court needs to do in deciding whether to remit or set aside is to consider all the circumstances and background facts relating to the dispute, the award, the arbitrators and the overall desirability of remission and setting aside, as well as the ramifications, both in terms of costs, time and justice, of doing either. A review of "appropriateness" encompasses a pragmatic consideration of all the circumstances and relevant facts to determine what it is best to do but it necessarily covers the interests of justice as between the parties.'*

Having stated that there was no previous authority substantially mirroring the facts of this case and in light of the few reported decisions on **AA 1996, s 68(2)(d)**, the judge referred, with apparent approval, to Professor Merkin's commentary in his work *Arbitration Law* (Service Issue No 68, 12 August 2014) at para 20.33, as well as several relevant authorities (including some employment tribunal cases) (see para [5]-[12] of the February judgment: *Bremer, Pacol, Ascot, Lovell, James Moore, Sinclair Roche, Boardman and Imtech*). Nevertheless, the judge stated that it was inappropriate to decide the case on the 'basis of case statistics', and focused instead on the statutory test, ie was it inappropriate to remit the matter to the tribunal?

The judge considered that this was a case in which remitting the matter to the tribunal would not be appropriate, and that the award should be set aside in total and a new tribunal rehear the matter. The following factors influenced the judge's decision (inter alia):

- the breaches of **AA 1996, s 68(2)(d)** were 'towards the more serious end of the spectrum'. The judge continued that was 'not for the Court to speculate why the tribunal felt that it did not need to address the issues concerned. However, the fact that

the tribunal took some 16 months after final oral submissions to produce their award might lead a fair minded and informed observer to wonder (rightly or wrongly) at least whether (sub-consciously) the tribunal was seeking some sort of shortcut'

- it would be 'invidious and embarrassing' (Mance J in *Lovell*) for the tribunal to rehear the matter. The judge recognised that it was not possible to predict what the tribunal may do if the matter was remitted to them. However, the judge was concerned that if, albeit conscientiously and competently, the tribunal in effect reached exactly the same conclusions as before, that might well lead to a strong belief objectively that justice had not been or not been seen to have been done'
- the judge did not consider it likely that there would be any significant re-drawing of the issues in the arbitration if the matter was reheard. The judge recognised that much of the arbitration would need to be reopened 'given the scope of the issues not addressed', but warned against the reopening of issues that had been lost without obviously good reason to do so
- Akenhead J anticipated that much of the factual and expert evidence adduced in the original arbitration would be redeployed, and could be rationalised to reflect concessions made by witnesses in cross examination. He also considered that little if any further disclosure would be required
- the extra cost of arbitrating before a new tribunal compared to remitting the matter to the current tribunal would be 'relatively insubstantial' in this high value dispute
- the judge doubted that the tribunal would have any significant recall of the evidence 'having probably not considered in any detail the evidence relating to the delays on the project and the responsibility for such delays for two years or more (to date)'

### What guidance can be derived from the court's decision?

The following guidance on when it may be inappropriate to remit an award to a tribunal may be discerned from the decision:

- where, following a finding of serious irregularity, the court forms the view that a reasonable person would no longer have confidence in the arbitrators' ability to come to a fair and balanced conclusion on the issues if remitted, that view may well support a conclusion that it would not be appropriate to remit
- the court needs to consider whether there is a real risk, judged objectively, that even a competent and respectable tribunal, whose acts or omissions have been held to amount to serious irregularity causing substantial injustice may sub-consciously be tempted to achieve the same result as before

- the costs of remission compared with the costs of a new tribunal looking at the case in the context of the overall amounts in issue will be a factor for the court to consider
- the passage of time may also be a factor for the court to consider. If a sufficiently long time has passed since the evidence was heard, it may not matter, in relative terms, whether the tribunal is a new one because the old one would in any event have to spend considerable time, effort and cost in researching the evidence again
- the relative importance or seriousness of the irregularities was also identified as a relevant factor. Akenhead J stated that the more serious the irregularity, the more likely it is that setting aside may be the appropriate remedy. In his view, there are ‘shades of serious irregularity’
- whether justice can not only be done but can be seen to be done. This is slight variation on the first point of guidance above. Akenhead J stated that a ‘primary question must be whether the Court or either party, judging and judged objectively, is satisfied that [the] arbitrator can be trusted to and to be seen to deliver justice for the parties if the matter is remitted to him or her’
- the fact that the serious irregularity in question does not go to every issue in the case or it goes only to a number of issues does not and should not mean that it is never appropriate to set aside the award
- ‘Section 68 reflects “the internationally accepted view that the Court should be able to correct serious failures to comply with the “due process” of arbitral proceedings: cf art 34 of the Model Law.” (see *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, Paragraph 27); relief under Section 68 will be appropriate only where the tribunal has gone so wrong in the conduct of the arbitration that “justice calls out for it to be corrected.” (ibid).’
- ‘The test will not be applied by reference to what would have happened if the matter had been litigated (see *ABB v Hochtief Airport* [2006] 2 Lloyd’s Rep 1, paragraph 18).’
- ‘The serious irregularity requirement sets a “high threshold” and the requirement that the serious irregularity has caused or will cause substantial injustice to the applicant is designed to eliminate technical and unmeritorious challenges (*Lesotho*, paragraph 28).’
- ‘The focus of the enquiry under Section 68 is due process and not the correctness of the Tribunal’s decision (*Sonatrach v Statoil Natural Gas* [2014] 2 Lloyd’s Rep 252 paragraph 11).’
- ‘Section 68 should not be used to circumvent the prohibition or limitations on appeals on law or of appeals on points of fact (see, for example, *Magdalena Oldendorff* [2008] 1 Lloyd’s Rep 7, Paragraph 38, and *Sonatrach* Paragraph 45).’
- ‘Whilst arbitrators should deal at least concisely with all essential issues (*Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 Toulson J at 284D), courts should strive to uphold arbitration awards (*Zermalt Holdings SA v and Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at page 15, Bingham J quoted with approval in 2005 in the *Fidelity* case [2005] 2 Lloyds Rep 508 paragraph 2) and should not approach awards “with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults on awards with the objective of upsetting or frustrating the process of arbitration”.’
- ‘In relation to the requirement for substantial injustice to have arisen, this is to eliminate technical and unmeritorious challenges (*Lesotho*, paragraph 28). It is inherently likely that substantial injustice would have occurred if the tribunal has failed to deal with essential issues (*Ascot*, 284H-285A).’
- ‘For the purposes of meeting the “substantial injustice” test, an applicant need not show that it would have succeeded on the issue with which the tribunal failed to deal or that the tribunal would have reached a conclusion favourable to him; it necessary only for him to show that (i) his position was “reasonably arguable”, and (ii) had the tribunal found in his favour, the tribunal might well have reached a different conclusion in its award (*Vee Networks Limited v Econet Wireless International* [2005] 1 Lloyd’s Rep 192, paragraph 40).’
- ‘The substantial injustice requirement will not be met in the event that, even if the applicant had succeeded on the issue with which the tribunal failed to deal, the Court is satisfied that the result of the arbitration would have been the same by reason of other of the tribunal’s findings not the subject of the challenge.’

## Will there be any appeal?

The judge granted the parties permission to appeal both judgments. Given the parties, the profile of the dispute and the sums at stake, as well as the more novel points of law considered in Akenhead J’s February judgment, it is perhaps likely that this matter will be heard by the Court of Appeal.

## What order for costs was made?

The judge proposed to order that Raytheon pay 80% of the Home Offices costs of the proceedings (the application), to be assessed on the standard basis. An interim payment of costs to the Home Office of £146,000 was ordered.

## Court and judgment details

The application was heard by Akenhead J in the TCC on 8 and 9 December 2015. A further hearing was held on 16 January 2015 to consider the consequences of the judge’s decision that the award should be set aside. The judgments were handed down on 16 December 2014 and 17 February 2015, and both were made public on 17 February 2015.

## Akenhead J’s summary of the law and practice on serious irregularity

The judge provided a helpful summary of the law and practice in relation to serious irregularity challenges and [AA 1996, s 68\(2\)\(d\)](#) applications in particular, which is worth setting out here:

And, in respect of AA 1996, s 68(2)(d) applications:

- ‘There must be a “failure by the tribunal to deal” with all of the “issues” that were “put” to it.’
- ‘There is a distinction to be drawn between “issues” on the one hand and “arguments”, “points”, “lines of reasoning” or “steps” in an argument, although it can be difficult to decide quite where the line demarcating issues from arguments falls. However, the authorities demonstrate a consistent concern that this question is approached so as to maintain a “high threshold” that has been said to be required for establishing a serious irregularity (*Petrochemical Industries v Dow* [2012] 2 Lloyd’s Rep 691 paragraph 15; *Primera v Jiangsu* [2014] 1 Lloyd’s Rep 255 paragraph 7).’
- ‘While there is no expressed statutory requirement that the Section 68(2)(d) issue must be “essential”, “key” or “crucial”, a matter will constitute an “issue” where the whole of the applicant’s claim could have depended upon how it was resolved, such that “fairness demanded” that the question be dealt with (*Petrochemical Industries* at paragraph 21).’
- ‘However, there will be a failure to deal with an “issue” where the determination of that “issue” is essential to the decision reached in the award (*World Trade Corporation v C Czarnikow Sugar Ltd* [2005] 1 Lloyd’s Rep 422 at paragraph 16). An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided which is critical to the result and there has not been a decision on all the issues necessary to resolve the dispute or disputes (*Weldon Plan Ltd v The Commission for the New Towns* [2000] BLR 496 at paragraph 21).’
- ‘The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the Section 68(2) application (*Primera* at paragraphs 12 and 17).’
- ‘If the tribunal has dealt with the issue in any way, Section 68(2)(d) is inapplicable and that is the end of the enquiry (*Primera* at paragraphs 40-1); it does not matter for the purposes of Section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.’
- ‘It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length (*Latvian Shipping v Russian People’s Insurance Co* [2012] 2 Lloyd’s Rep 181, paragraph 30).’
- ‘A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue (*Fidelity Management v Myriad International* [2005] 2 Lloyd’s Rep 508, paragraph 10, *World Trade Corporation*, paragraph 19). A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it (*Hussman v Al Ameen* [2000] 2 Lloyds Rep 83).’
- ‘There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences (*World Trade Corporation* at paragraph 45). The fact that the reasoning is wrong does not as such ground a complaint under Section 68(2)(d) (*Petro Ranger* [2001] 2 Lloyd’s Rep 348, *Atkins v Sec of State for Transport* [2013] EWHC 139 (TCC), paragraph 24).’
- ‘A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an “issue”. It can “deal with” an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise (*Petrochemical Industries* at paragraph 27. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues (*Buyuk Camlica Shipping Trading & Industry Co Inc v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm), paragraph 30).’
- ‘It is up to the tribunal how to structure an award and how to address the essential issues; if the issue does not arise because of the route the tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will not be engaged. However, if the issue does arise by virtue of the route the Tribunal has followed for the purposes of arriving at its conclusion, Section 68(2)(d) will be engaged.’
- ‘Whether there has been a failure by the tribunal to deal with an essential issue involves a matter of a fair, commercial and commonsense reading (as opposed to a hypercritical or excessively syntactical reading) of the award in question in the factual context of what was argued or put to the tribunal by the parties (and where appropriate the evidence) (*Ascot Commodities v Olam* [2002] CLC 277 and *Atkins*, paragraph 36). The Court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard.’

**David McIlwaine**

David is a Partner specialising in dispute resolution and renegotiation in the IT, outsourcing and communications sectors.

David has acted on numerous large scale and technically complex IT projects on behalf of both suppliers and users. He assists clients to re-assess the project and to take remedial action by way of termination, re-negotiation or otherwise. David has led the re-negotiation of substantial IT contracts, resulting in the implementations being salvaged. David has considerable experience in both High Court litigation (particularly the Technology and Construction Court) and International Arbitration. David represented the Home Office in the successful challenge to set aside the arbitration award in *Secretary of State for the Home Department v Raytheon*, described in this article.

David is assistant editor of Pinsent Masons Computer Law Reports and has written numerous commentaries on recent case law relevant to the I&T industry.

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**Stuart Davey**

Stuart is an Associate in the Pinsent Masons TMT Disputes team. Stuart has significant experience in arbitration proceedings and is currently acting for an IT supplier in relation to a high profile, high value dispute with a UK government body. He has been involved in a lengthy multi-week arbitration hearing involving over 100 witnesses of fact and numerous expert witnesses of various technical disciplines. Stuart has advised various IT suppliers and outsourcing in relation to services and sourcing contracts, and assisted with resolution of troubled contracts

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**Barry Fletcher**

Barry specialises in international arbitration and commercial litigation. He trained and practised at Jones Day before joining Pinsent Masons. At LexisNexis, Barry is Head of the Lexis®PSL Dispute Resolution Group.

In practice, Barry's work included general commercial, aviation and technology arbitrations pursuant to a range of international arbitral rules and involving UK and international clients. He also has a background in general commercial, civil fraud and IT litigation, including experience before the High Court. While in private practice, Barry worked with a broad range of clients from both the private and public sectors.

In addition to his work for Lexis®PSL, Barry contributes to the LexisNexis Dispute Resolution Blog and New Law Journal on litigation and arbitration matters.



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