

511-day extension granted to 28-day statutory time limit for bringing challenges to arbitral awards (Minister of Finance (Incorporated) v International Petroleum Investment Company)

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Arbitration analysis: In what he termed an ‘unusual and special case’ Mr Justice Baker in the Commercial Court granted the extension of time required by the claimants for bringing a serious irregularity arbitration claim under section 68(2) of the Arbitration Act 1996 (AA 1996), even though that meant allowing the challenge to be brought some 511 days late against a statutory requirement (absent the grant of an extension) to make such claims within 28 days. The court conceded that this was no doubt an exceptional length of extension to grant but described it as ‘an exceptional decision to meet the justice of an exceptional case’. Written by Colleen Hanley, barrister at Twenty Essex Chambers, London.

Minister of Finance (Incorporated) and another v International Petroleum Investment Co and another [\[2021\] EWHC 2949 \(Comm\)](#)

What are the practical implications of this case?

The time limit of 28 days from the date of any arbitral award (or the date the parties are notified of the result of any tribunal process of appeal or review) for challenging that same award, as fixed under [AA 1996, s 70\(3\)](#), is notoriously tight and is generally strictly enforced by the English courts.

This decision provides a relatively rare example of willingness on the part of the court to exercise an unusually high degree of flexibility and to grant a sizeable extension to an already expired time limit. Although the judge repeatedly stressed the unusual and exceptional nature of the case, undoubtedly this decision will provide fresh impetus and hope to those parties who may simply assume they are time barred under [AA 1996, s 70\(3\)](#) and thereby automatically locked out from challenging arbitral awards, whether final, interim or consent in nature.

The decision is to be welcomed for applying a common sense and practical approach to a statutory time limit which can often operate in an unduly harsh way. This is particularly so in circumstances when, for example, successful parties deliberately stall the payment of arbitral fees in order to delay the parties’ receipt of an award, thereby diminishing further the time window available to then challenge that same award. The exceptionally lengthy extension granted by the court in this case allowed the claimants to proceed with their serious irregularity challenge to a consent award (the Consent Award)—issued by a tribunal appointed under the London Court of International Arbitration Arbitration Rules, made pursuant to [AA 1996, s 68\(2\)\(g\)](#).

What was the background?

The background to the claim was highly political and internationally controversial. The claimants sought to argue that the settlement agreements given effect by the Consent Award (which the claimants sought to challenge long after the statutory time limit for doing so had passed) had been concluded by or at the behest of Mr Najib acting contrary to the claimants’ interests. Mr Najib was the former Prime Minister and Minister of Finance of Malaysia, whose alleged involvement in what was termed ‘kleptocracy on a massive scale’, provided the underlying background to the claim.

The claimants argued that the Consent Award had agreed grossly disadvantageous settlement terms outside any range of terms that an honest individual acting in the claimants’ interests might have agreed. This was done, it was said, in an attempt to conceal earlier fraudulent activity on Mr Najib’s part, and with the knowledge of the defendants.

During the arbitration, Mr Najib had remained Prime Minister and Minister of Finance of Malaysia and had been in effective control of the claimants. By reason of that control, it was said that the claimants were not able to advance a full or accurate defence. Such serious irregularity had caused and/or would cause substantial injustice to the claimants (and, as a consequence it was said, also to the Malaysian people) because it has resulted in the making of an award, purportedly by consent, to which in fact the parties had not consented. There was no jurisdiction on the part of the tribunal to issue the Consent Award because the consent itself was tainted and the tribunal could only act if there was consent on both sides.

The ultimate aim of the claimants' application was to have the court set aside the Consent Award, thereby reviving the arbitration as it stood immediately prior to it.

What did the court decide?

The central question at issue was whether time should be extended for the claimants' existing [AA 1996, s 68\(2\)\(g\)](#) claim which alleged the Consent Award had been obtained by fraud or in a way contrary to public policy.

The court confirmed that any extension of time application had to be decided by reference to the guidelines given by Mr Justice Colman in *Aoot Kalmneft v Glencore International AG* [2002] 1 All ER 76 (the *Kalmneft Factors*). The *Kalmneft Factors* provide a fair and reliable guide through the problem of whether justice demands that the required extension be granted.

The defendants argued that granting an exceptional extension of 511 days would severely undermine the 28-day statutory period and the finality of English arbitral awards, to the detriment of London's position as a leading centre for international arbitration. Baker J rejected this argument emphatically. The statutory scheme is for challenges to awards to be brought promptly wherever possible, but it is not absolute and provides for the possibility of extension. [AA 1996](#) does not include any strict upper bound upon the extensions that may be granted. The principles on which the grant of an extension will be considered are well established and the defendants provided no evidence that they had done any damage to London's relevant reputation. Rather it was far more likely to bring London into disrepute were a party to be allowed to connive in the dishonesty of the principal of its counter-party, harming the counter-party and the integrity of the system, and then thwart the counter-party, when it has been later freed from the control of the dishonest principal, from raising that with the court as guardian of that integrity. In the circumstances the judge had 'no real hesitation' in concluding overall that it would be unfair to the claimants, and an injustice, to deny them the opportunity of advancing their [AA 1996, s 68\(2\)\(g\)](#) claim, and that the extension of time they required in order to do so, very lengthy though it was, should be granted.

Case details:

- Court: Commercial Court, Queen's Bench Division, Business and Property Courts of England and Wales, High Court of Justice
- Judge: Mr Justice Andrew Baker
- Date of judgment: 04 November 2021

Colleen Hanley is a barrister at Twenty Essex Chambers, London. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysiscommissioning@lexisnexis.co.uk.

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