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MHA Advisory Ltd v Wynter [2025] EWHC 2497 (Comm) — When "Unable to Decide" Is Not an Invitation to Litigate

MHA Advisory Ltd v Wynter [2025] EWHC 2497 (Comm)

Date: 2 October 2025

Judge: Paul Mitchell KC (sitting as a Deputy High Court Judge)

Key Words:

Section 68, Serious Irregularity, Section 57, Correction, Clarification, Section 70(2), Jurisdictional Bar, Exhaustion of Remedies, Long Stop Protection, High Threshold Test, Procedural Gateway, Section 33, Fairness and Impartiality, Procedural Fairness, Failure to Deal with All Issues, Burden of Proof, Interpretation of Arbitral Reasoning, "Unable to Decide", Evidential Conflict, Restrictive Covenants, Restraint of Trade, Reasonableness Test, Two-Year Duration, Solicitation of Clients, Poaching Staff, LLP Members Agreement, Abusive Application, Available Recourse Not Exhausted, No Dereliction of Duty, No Failure to Decide, Arbitrator's Decision Upheld, Dismissal of Application, Clarification vs Appeal, Evidential Assessment, Mischaracterisation of Reasoning, Procedural Discipline, Clarification Before Challenge, Not a Second Bite at the Cherry, Judicial Restraint in Arbitral Matters, Error of Law vs Serious Irregularity, High Bar for Court Intervention

Summary

MHA Advisory Ltd applied to set aside a final arbitration award dated 31 May 2024 on grounds of serious irregularity under Section 68 [1]. It alleged that the Arbitrator failed to comply with Section 33 and/or to deal with all issues under Section 68(2)(a) and (d) [1], claiming he declined to decide the key evidential conflict on the reasonableness of a two-year restrictive covenant [1].

The High Court dismissed the application. MHA had failed to exhaust its available recourse under Section 57, which permits correction or clarification of an award. The Court held MHA could have sought clarification of the Arbitrator's conclusion on the two-year period. The Judge also rejected MHA's interpretation of "I am unable to decide," holding it meant the Arbitrator was unpersuaded by the Claimant's evidence, not that he refused to decide. The application was criticised as "abusive of the right to bring an application of last resort" [56(iv), 60–65].

Key Themes:

- ***Challenging Arbitral Awards:*** *Distinction between serious irregularity (Section 68) and appeal on law (Section 69) [2].*

- ***Serious Irregularity (Section 68):*** *High threshold for intervention, reserved for "extreme cases" [47, 48, 65].*
- ***Arbitrator's Duty (Section 33):*** *Tribunal's duty of fairness and procedural suitability [49–50].*
- ***Exhaustion of Remedies (Section 57 & 70(2)):*** *Mandatory use of arbitral remedies before applying to court [39–44, 60–62].*
- ***Restrictive Covenants:*** *Enforceability of two-year restrictions in LLP agreements [6–8, 11–20, 35–36].*
- ***Interpretation of Arbitral Reasoning:*** *Whether failure to accept evidence equals a dereliction of duty [52–57, 64].*

Background

The dispute arose between MHA Advisory Ltd (MHA), substituted for the original claimant MacIntyre Hudson LLP, and Mr Shiran Wynter, a former member of the LLP [4–5].

The Agreement and Covenants: On promotion to "Associate Partner" around 1 October 2020, Wynter signed a Members Agreement containing Clause 27 — restrictive covenants designed to protect client and staff relationships. The Covenants applied for two years after he left the LLP and included:

1. **Clause 27.1.1:** Restricting solicitation or interference with client relationships where Wynter had material dealings in the preceding two years.
2. **Clause 27.1.2:** Restricting him from acting for or providing competing services to clients or potential clients with whom he had material dealings.
3. **Clause 27.1.3:** Prohibiting solicitation or enticement of staff or members.

The Breach: After his departure on 31 July 2023, Wynter joined and helped build a competing firm, Haines Watts Audit EM Limited (HWAEM). It was **undisputed** that he solicited and dealt with clients and recruited staff from MHA. The issue was whether the two-year duration of the covenants was enforceable. If valid, Wynter was plainly in breach [6–8, 9–10].

Arbitration: Under Clause 30.1, the dispute was referred to arbitration, where the **core issue** was whether the two-year covenants constituted an unreasonable restraint of trade. The Claimant argued for enforceability based on the seniority of Wynter's position and the length of client relationships; Wynter argued they were excessive [11–14].

The Award: On 31 May 2024, Arbitrator Mr Michael Cover FCIArb found Wynter was sufficiently senior for the Covenants to apply in principle but concluded that **two years was "too long and not reasonable"** and dismissed MHA's claim [32–36].

The High Court Application: MHA challenged the Award under Section 68, focusing on paragraph 295, where the Arbitrator stated there was a "conflict on the evidence" and that he was "unable to decide" whether the two-year restrictions were reasonable. MHA characterised this as a failure to adjudicate [36, 45–46].

Legal Issues and Analysis

The Court addressed two main areas: the procedural bar under Sections 70(2)/57 and the substantive high threshold under Section 68 [39–44, 47–48, 60–65].

A. Recourse under Section 57 (Correction/Clarification)

MHA argued it had no recourse under Section 57, but Section 70(2) bars applications where that recourse exists [41, 43–44].

- **Ambiguity and Rationale:** An award lacking adequate reasoning is potentially ambiguous under Section 57(3)(a) [44].
- **Finding:** MHA could have asked the Arbitrator to clarify or "unpack" his conclusion on reasonableness [60–62].
- **Jurisdictional Conclusion:** Having failed to do so, MHA was barred from bringing its Section 68 application [62, 66].

B. Serious Irregularity under Section 68

Assuming the Section 57 hurdle was overcome, the Court considered two alleged irregularities:

1. **Failure to Comply with General Duty (S.68(2)(a) & S.33)**
    1. **Threshold:** Only extreme cases justify intervention [47, 50].
    2. **Interpretation Rejected:** "Unable to decide" meant the Arbitrator was unpersuaded, not refusing to decide [56(iii)–(iv)].
    3. **Conclusion:** The Arbitrator had considered all issues and complied with Section 33 [54].
2. **Failure to Deal with All Issues (S.68(2)(d))**
    1. **Scope:** Limited to essential issues not dealt with at all, not deficiencies of reasoning [51].
    2. **Finding:** All issues had been addressed; application dismissed [53–58, 64].

Conclusion

The application was dismissed [64].

- **Primary Reason:** Failure to exhaust Section 57 remedies, barring jurisdiction under Section 70(2) [62].
- **Secondary Reason:** On the merits, the Arbitrator had decided the issue; there was no serious irregularity [64–65].
  The Judge also labelled the application "abusive," far below the Section 68 threshold.

Key Takeaway:

A party must exhaust arbitral remedies, especially under Section 57, before turning to the court. Section 68 is for genuine procedural calamities, not evidential disappointments. Being unconvinced by evidence is not a dereliction of duty.

Parting Thoughts

Rushing to court under Section 68 without first using Section 57 is litigation hubris. MHA tried to turn "I am unable to decide" into a judicial scandal; the Court heard instead the sigh of an unimpressed arbitrator.

Section 70(2) is a gatekeeper, not a courtesy notice. MHA ignored it and was stopped cold. Even if it hadn't been, the sheer altitude of Section 68's test would have proved fatal. The "long stop" is not for re-arguing failed evidence.

Claiming serious irregularity because a tribunal didn't believe you is like accusing the referee of bias for blowing the whistle. The Court was unmoved.

In short:

- *Section 57 is not optional.*
- *Section 68 is not a safety net.*
- *Disagreement is not indecision.*

Section 68 is a legal howitzer; MHA arrived with a popgun. The Court, quite properly, sent them home.

#ConstructionLaw #Adjudication #DisputeResolution #LegalUpdate #CaseLaw #DDAlegal #Section68, #SeriousIrregularity, #Section57, #Clarification, #Section702, #JurisdictionalBar, #ExhaustionOfRemedies, #LongStopProtection, #HighThreshold, #ProceduralGateway, #Section33, #FairnessAndImpartiality, #ProceduralFairness, #FailureToDealWithAllIssues, #BurdenOfProof, #ArbitralReasoning, #UnableToDecide, #EvidentialConflict, #RestrictiveCovenants, #RestraintOfTrade, #ReasonablenessTest, #TwoYearRestriction, #ClientSolicitation, #StaffPoaching, #LLPMembersAgreement, #AbusiveApplication, #RecourseNotExhausted, #NoDerelictionOfDuty, #NoFailureToDecide, #Arbitration, #Dismissal, #ClarificationVsAppeal, #EvidentialAssessment, #Mischaracterisation, #ProceduralDiscipline, #JudicialRestraint, #ErrorOfLaw, #ArbitrationAct1996, #HighBarForIntervention

Authorities

Case Law:

1. Jurisdiction and Mandatory Recourse (Section 57 / Section 70)

***Al-Hadha Trading Co v Tradigrain SA* [2002] 2 Lloyd's Rep 512**

Established that if an award contains an inadequate rationale or incomplete reasons, it is likely to be ambiguous or require clarification, which falls within the ambit of Section 57(3)(a) of the Act.

***Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm)**

Affirms that Section 57(3)(a) can be used to request further reasons from the arbitrator or reasons where none exist. This supports the policy of the Act which enables the arbitral process to correct itself where possible without court intervention.

2. Defining Serious Irregularity and High Threshold (Section 68 — General Duty)

***Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm), [2013] 1 All ER (Comm) 580**

Distils the principles for intervention under Section 68(2)(a), emphasising that the applicant must show a breach of Section 33, which amounts to a serious irregularity causing substantial injustice. The test involves a high threshold; relief is only appropriate in extreme cases where the tribunal has gone "so wrong in its conduct" that justice calls out for correction.

***Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 (Comm), [2005] 2 All ER (Comm) 312**

Cites the DAC report on Clause 68, establishing that the test of "substantial injustice" is intended to support the arbitral process. Clause 68 is designed as a long stop, only available in extreme cases where the tribunal's conduct "simply cannot on any view be defended as an acceptable consequence"

of the choice to arbitrate.

3. Failure to Deal with Issues (Section 68(2)(d))

***World Trade Corp Ltd v C Czarnikow Sugar Ltd* [2004] EWHC 2332 (Comm), [2004] 2 All ER (Comm) 813**

Sets out propositions for applying Section 68(2)(d), defining it as covering issues where determination is essential to a decision. Crucially, deficiency of reasoning is the subject of Section 70(4), not Section 68(2)(d); therefore, Section 68(2)(d) is confined to essential issues, as distinct from the reasons for determining them.

***Weldon Plant Ltd v The Commission for New Towns* [2001] 1 All ER (Comm) 264**

The principle adopted is that Section 68(2)(d) is not a means for launching a detailed inquiry into the manner in which the tribunal considered issues; it is concerned with a failure where the tribunal has "not dealt at all" with a crucial issue resulting in substantial injustice.

***London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749 (TCC), [2007] 2 All ER (Comm) 694**

Adopted the summary of propositions extracted from the World Trade Corp judgment regarding the application of Section 68(2)(d).

4. Arbitrator's Decision as a Judicial Act (Section 69 vs Section 68)

***Re A (Children) (Care Proceedings: Burden of Proof)* [2008] EWCA Civ 1718; [2009] 4 WLR 117**

Cited as authority demonstrating that a decision to proceed in a certain way regarding the weight to be placed on evidence is a judicial decision. If the Arbitrator erred in law (e.g., burden of proof), the challenge lies under Section 69, not Section 68.

***Stephens v Cannon* [2005] EWCA Civ 222**

Cited as authority showing that a decision to proceed in a certain way regarding the weight to be placed on evidence is a judicial decision.

5. Restrictive Covenant Precedent (Factual Comparison)

***PricewaterhouseCoopers LLP v Carmichael* [2023] EWHC 824 (Comm)**

Cited in the Award as the "only exception" authority found regarding restrictions in LLPs. The Arbitrator used it for comparison regarding the duration of the restriction (15 months compared to the 2 years sought in the arbitration).

Legislation:

1. Jurisdictional Prerequisites and Mandatory Recourse

***Arbitration Act 1996* s.70(2)**

Establishes a mandatory procedural precondition for challenging an award in court. An application or appeal may not be brought if the applicant has not first exhausted (a) any available arbitral process of appeal or review and (b) any available recourse under Section 57. The Court applied this provision as

the decisive jurisdictional bar to MHA's Section 68 application.

Arbitration Act 1996 s.57

Provides for the correction of awards or the clarification/removal of ambiguity upon a party's application to the tribunal. The Court found that MHA wrongly claimed it had no recourse under this section and that it should have sought clarification of the arbitrator's reasoning regarding the two-year restriction. Failure to do so triggered the bar under Section 70(2).

2. Substantive Challenge — Serious Irregularity

Arbitration Act 1996 s.68

Governs challenges to arbitral awards on the ground of serious irregularity. The Court reiterated the high threshold for intervention: the provision operates as a "long stop" and applies only in "extreme cases" where the tribunal has gone so wrong that justice demands correction. MHA's challenge did not meet this standard.

3. Tribunal's Duties — Fairness and Procedural Conduct

Arbitration Act 1996 s.33

Imposes a general duty on the tribunal to act fairly and impartially, giving each party a reasonable opportunity to present its case, and to adopt procedures suitable for a fair resolution. MHA alleged breach of this duty, arguing that the arbitrator's statement "I am unable to decide" was a failure to adjudicate. The Court rejected this, holding the arbitrator had decided the issue and was unpersuaded by MHA's evidence.

4. Nature of the Challenge — Distinction Between Serious Irregularity and Appeal

Arbitration Act 1996 s.69

Provides for appeals on questions of law. The Court contrasted Section 69 with Section 68, emphasising that challenges based on alleged legal error — such as an error in applying the burden of proof — fall under Section 69, not Section 68. MHA's arguments improperly sought to recast an evidential defeat as a procedural failure.

Legal Texts & Commentary:

1. Defining Serious Irregularity and the "Long Stop" Protection of Section 68

Departmental Advisory Committee (DAC) Report on Arbitration Bill 1996

*Relied upon to explain the **purpose and scope of Section 68**. The Court referred to the DAC's statement that Section 68 is designed as a "long stop" mechanism, available only in **extreme cases** where the tribunal has gone so wrong that justice demands court intervention. This underpinned the Court's emphasis on the **high threshold** for serious irregularity and the restrictive approach to judicial intervention.*

Note:

*There are **no other legal texts or commentaries** cited in the judgment beyond the DAC Report.*

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