

**ARBITRAL AWARD SET ASIDE FOR SERIOUS IRREGULARITY AND DISPUTE
REFERRED TO A FRESH TRIBUNAL**

Secretary of State for the Home Department v Raytheon Systems Ltd [2014] EWHC 4375
(TCC) and [2015] EWHC 311 (TCC)

Introduction

In judgments handed down on 19 December 2014 and 17 February 2015 in *Secretary of State for the Home Department* [2014] EWHC 4375 (TCC) (“the First Decision”) and [2015] EWHC 311 (TCC) (“the Second Decision”), the English Technology & Construction Court found that an arbitral process had suffered from serious irregularity because the tribunal had failed to deal with all the issues put before it. The irregularity was so serious that the appropriate course of action was to refer the dispute to a freshly constituted arbitral tribunal.

Background

In 2007, the Claimant Secretary of State engaged the Defendant defence company to develop a £750 million e-Borders technology system, which allowed for electronic checking of individuals passing through the borders of the United Kingdom against security watchlists, in order to reform UK border controls.

In July 2010, the Claimant terminated the contract on the grounds that the Defendant had missed key milestones with the consequence that the programme was running at least one year behind schedule. The Defendant commenced confidential arbitration proceedings seeking damages for wrongful termination. 16 months later, by a Partial Final Award (“the Award”) dated 4 August 2014, the Tribunal awarded the Defendant:

- (a) £49.98 million for damages;
- (b) £126 million for assets acquired by the Claimant during the contract;
- (c) £9.6 million for disputed contract change notices;
- (d) Interest;
- (e) Costs.

In September 2014, the Claimant challenged the Award for “serious irregularity” under Section 68 of the Arbitration Act 1996 because the Tribunal had failed to deal with key issues of liability and quantum that were put to it:

- (a) The Tribunal had not adequately addressed the fact that the Defendant had not complied with contractual notice provisions (which was a bar to its claim that it was not responsible for its failures to meet the agreed milestones);
- (b) The Tribunal had not included the Defendant’s defaults in its assessment of whether the termination of the contract was reasonable and proportionate;
- (c) The Tribunal had failed to consider whether the sum awarded in respect of the assets

acquired by the Claimant in the course of the contract should have been calculated by the contractually agreed method;

(d) The Tribunal had failed to consider whether compensation under that same head of loss should or should not exceed the amount that would have been recoverable had the contract been properly performed;

(e) The Tribunal had not considered issues of who was responsible for the incursion of costs in relation to the assets acquired by the Claimant during the contract, which was important because it affected the Defendant's argument that it was entitled to those costs.

The First Decision

By the First Decision, Akenhead J ("the Judge") held that there had been a serious irregularity by the Tribunal in failing to consider these issues which were highly important for the proper disposal of the dispute.

The Judge found:

(a) that the issues had been properly "put" to the Tribunal;

(b) had the Tribunal considered those issues then there was a 'real likelihood' that important findings in the Award would have to have been reconsidered, which might well have led to a different overall result;

(c) the failure to address those issues had therefore caused substantial injustice to the Claimant.

The Second Decision

By the Second Decision, the Judge held that the Award should be set aside in whole. Further, the Judge directed that the matter should be determined by a freshly constituted Tribunal.

The Judge considered that there were several factors in the case which required such a direction:

(a) The Claimant's complaints were "towards the more serious end of the spectrum of seriousness in terms of irregularity";

(b) The Tribunal had failed to consider a "very large amount of the evidence placed before it", notwithstanding its lengthy delay in finalising the Award;

(c) It would be "invidious and embarrassing" for the same Tribunal to re-determine the same issues that had been the subject of the Claimant's successful challenge;

(d) Were the issues to be reheard by the same Tribunal and the same overall conclusions reached, there would be a strong and reasonable objective belief that justice had not been done or had not been seen to be done;

(e) It was unlikely that the new arbitration before the new tribunal would be materially different from the original arbitration either in the pleadings or in terms of evidence adduced.

Concluding Remarks

The arbitrators in the original Tribunal were not named and the Judge expressly found that the Decisions were not intended to reflect on their general competence or integrity.

However, the *Raytheon* case demonstrates that the constitution of a Tribunal perhaps inadequately equipped to handle a complex dispute can have highly adverse consequences. Parties to arbitration should remember that decisions surrounding the appointment of arbitrators require serious consideration and are not to be taken lightly.

31 March 2015