Neutral Citation Number: [2018] EWHC 985 (Comm)

Case No: CL-2017-000653

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 22 March 2018

Before :

MR JUSTICE ANDREW BAKER

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Between :

ORASCOM TMT INVESTMENTS S.À R.L. **(formerly Weather Investments II S.à r.l.)**	**Claimant**
- and -	
VEON LTD **(formerly VimpelCom Ltd)**	**Defendant**

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David Foxton QC and Emily Wood (instructed by **Cleary Gottlieb Steen & Hamilton LLP**) for the **Claimant**
Charles Kimmins QC (instructed by **Simmons & Simmons LLP**) for the **Defendant**

Hearing dates: 22 March 2018

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APPROVED JUDGMENT

Mr Justice Andrew Baker :

Introduction

1. This is a claim brought by Claim Form dated 23 October 2017 challenging under section 68(2)(d) of the Arbitration Act 1996 a final award of arbitration under the Rules of the LCIA dated 30 September 2017. Section 68(2)(d) provides that, where a tribunal has failed "to deal with all the issues that were put to it", if that amounts in the particular case to a serious irregularity, the court may intervene. Serious irregularity, as defined by section 68(2), is an irregularity of one or more of the kinds set out in the section which the court considers has caused or will cause substantial injustice to the applicant.

2. The claim having been brought, squarely and solely under paragraph (d) of section 68(2), one could be forgiven for looking first to the Claim Form for a clear and succinct definition of the issue said to have been put to the arbitrators and said not to have been dealt with by them in the award. In fact, in this case the claim form is not so clear or helpful. It is said that the tribunal:

   "... failed to address a fundamental issue as to the impact of Italian law on the defendants' obligations under the contractual indemnity that was the subject of the parties' dispute."

3. As the court sees on many occasions, beyond that unhelpfully imprecise definition of the issue in respect of which the section 68 challenge was brought, the Claim Form in substance did no more than recite, by reference to the particular award in this case, the other statutory requirements.

4. It seems to me, although ultimately this claim will not turn on it, that that is not a satisfactory approach to challenges under section 68. Particularly under sub-paragraph (d), but also, for that matter, under the other sub-paragraphs, the function of the Claim Form in identifying the remedy claimed and the grounds on which the claim is made is not merely to identify that it is a claim under section 68(2), or which particular sub-paragraph is invoked, but is to stand as a sufficiently detailed and particularised statement of case to enable, in the first place, the defendant to the challenge, and then, ultimately, the judge dealing with the matter, to see precisely the nature of the challenge, the grounds upon which it is said to arise and, as a result, the particular questions that will need, or may need, to be dealt with at any hearing.

5. It is, with respect, insufficient in my judgment, although a common practice, merely to say in the Claim Form, beyond identifying the bare statutory essentials, that reference should be made to the supporting witness evidence. Witness statements served in support of a section 68 claim should contain evidence, not comment or argument. They are not the proper vehicle for setting out the analytical case to be advanced before the court; that should properly be done by way of statement of case. In circumstances where the procedure for section 68 challenges, as for that matter section 67 challenges, does not involve, unless specifically ordered in a particular case, an exchange of statements of case separate to the Claim Form, the Claim Form has to serve that purpose.

Background

6. The award in this case, and thus the challenge, arose ultimately out of a share sale agreement entered into in April 2011, by which the claimant, Orascom, which was the respondent in the arbitration, sold to the defendant, the claimant in the arbitration, VEON, the Wind Telecom Group. That was achieved by way of the sale and transfer of Orascom's shareholding in Wind Telecom SpA, an Italian entity, and, as a result, indirectly its ownership of Wind Telecom's various operating subsidiaries.

7. The share sale agreement was governed by New York law but contained an arbitration agreement providing for arbitration in the event of dispute seated in London under the LCIA Rules.

8. In due course, disputes arose as a result of VEON's claim that Orascom was obliged to indemnify it in respect of financial loss it had suffered in settling claims arising in Italy as a result of three separate tax audits carried out by the Italian tax authorities in 2013 relating to Wind Group transactions pre-dating the transfer of ownership.

9. The arbitration award upheld VEON's claim in relation to each of the three tax audits and awarded in aggregate just under €140 million plus arbitration and legal costs, and made provision for interest. The section 68 challenge concerns, and concerns only, one of the three underlying tax audits. In relation to that tax audit, the loss suffered by VEON was, in round figures, €31 million, the claim against Orascom was, in round figures, for €25 million, the difference because under the indemnification provisions of the share sale agreement Orascom did not owe a full indemnity obligation but, rather,

a stated percentage of losses of this kind fell to be borne by VEON come what may.

10. The award runs to some 378 paragraphs across 173 pages, and is an award of three very well known and experienced New York arbitrators. Size is of course no guarantee of quality; however, it often indicates -- and my review of the award in this case bears this out -- a degree of care and thoroughness as to the detail in the case undertaken by arbitrators that in truth goes well beyond the English law requirements of the 1996 Act adequately to set out the reasons for their ultimate decision and award.

11. The arbitrators' consideration included a detailed review of the requirements of the contractual indemnification provisions interpreted in the light of underlying principles of New York law. That led them to conclude that the following was their appropriate 'sequence of inquiry', as they described it, for each of the indemnification claims:

"First, the Tribunal determines whether the claims fall within the scope of the indemnification obligation in the first place. If so, the Tribunal next examines whether in reaching the decision to settle each of the Italian tax claims, VimpelCom in good faith believed that it otherwise faced a cognizable risk of exposure with respect to such claims. This is a threshold requirement under New York law, and is not varied by any contractual provisions under the SSEA. Assuming subjective good faith, the Tribunal next examines whether VimpelCom complied with the applicable notice and participation provisions of the SSEA, and to the extent there is any doubt, whether any shortfalls in this regard demonstrably prejudiced OTMTI, in the sense that it exposed

OTMTI to loss that otherwise it would not have faced. In the absence of any such demonstrable prejudice, the inquiry remains as it would be under New York law where there is no dispute about notice, namely whether the decision to settle at all, or the terms of the resulting settlement, were objectively unreasonable. If not, then OTMTI's obligation to indemnify attaches, except to the extent that the "Losses" could reasonably have been obviated or significantly reduced by concrete steps that VimpelCom failed to take in mitigation. The obligation otherwise extends to all Losses effectively sustained by VimpelCom, and includes OTMTI's 72.65% share of such Losses, plus applicable interest."

The 'Issue'

12. As regards the tax audit in respect of which the section 68 challenge arises, the underlying tax claim giving rise to the audit was the booking and carrying forward by Wind Telecom of a €207 million write down of the value of a put option granted to a Wind Group subsidiary, Wind Telecommunicazione. The result of booking and carrying forward that write down as a tax deductible loss in the books of Wind Telecom was a tax saving of €57 million.

13. The essential premise of the tax audit conclusion that the €57 million tax saving had been improperly claimed was that the complex set of underlying transactions, including the put option, were a construct designed solely to translate a loss which would not have been tax deductible, arising on the collapse of the Wind Group's Greek operations, into a tax deductible loss. Thus, the audit conclusion was essentially that this was, in English law terminology, tax evasion not merely tax efficiency.

14. The potential liability under a challenge thus grounded to the Wind Telecom tax returns was €57 million in underpaid tax, plus penalties potentially at least doubling that sum. The loss ultimately incurred of only €31 million -- I use "only" in its context as a comparative measure against the potential liability -- arose when the potential tax liabilities arising out of the audit were the subject of a formal settlement concluded between VEON and/or Wind Telecom and the Italian tax authorities.

15. That settlement agreement articulated a rationale for the figure at which the tax authorities agreed to settle the potential audit liabilities, namely that there had been a failure to comply with transfer pricing rules under which the put option ought only to have been granted for an arms' length price. The arms' length price would then have represented a profit on which tax would have been payable. Had the transaction been structured in that way and had this been a sound, applicable theory of Italian tax law, the fault would then be in the failure to insist on that price and, as a result, to make the profit that would have generated a tax liability substantially lower than the €57 million tax saving in fact procured. (The subsequent €207 million loss would then have been legitimately a tax deductible loss.)

16. That brings me to the ‘issue’ said not to have been dealt with by the arbitrators in their award. With his characteristic analytical precision, Mr Foxton QC for Orascom recognised the shortcomings of the open-ended formulation in the Claim Form. He was to an extent criticised by Mr Kimmins QC for VEON as to whether his, that is to say Mr Foxton's, formulation of the issue has remained entirely consistent or has always been clear. But at all events as the

case was argued before me today, Mr Foxton was able to state in clear and precise terms the following issue(s):

i) Firstly and generally whether the settlement was unlawful under Italian law.

ii) Secondly and more particularly:

a) whether it was lawful of the Italian tax authorities not to pursue an otherwise valid assessment that there had been a tax abuse;

b) whether it was lawful for the authorities to settle upon the stated basis of a tax assessment derived from transfer pricing rules if those rules had no proper application to the facts; and

c) whether it was lawful for them to agree not to report to the criminal authorities in Italy what may have been a tax crime if the primary tax evasion theory had been well founded.

17. Before I turn to consider the various requirements of a section 68 challenge and whether they are satisfied by reference to that 'issue' and subparagraph (d) of section 68(2), it is salutary to explore a little the asserted relevance of the question of the legality or otherwise of the settlement in one or more of the senses just outlined.

18. On Orascom's part, without doubt their evidence included evidence of a distinguished Italian lawyer supporting the proposition that the settlement was contrary to Italian law in the respects I have identified. It was his view, going beyond matters simply of Italian law, that in the light of those

considerations of the lawfulness of the way in which the settlement was articulated, the proper conclusion was that the Italian tax authorities had, in reality, dropped or concluded to be meritless or very weak the primary tax evasion thesis. Thus, it was submitted to the arbitrators and submitted again to me, the Italian law evidence was relevant to the question whether the authorities would have pursued the tax evasion theory. Yet, it was said, this Italian law evidence finds no mention in the award. (Other matters of Italian law debated in evidence are considered specifically in the award.)

19. I should perhaps add that whilst the Italian law expert called by Orascom on the face of things strayed significantly beyond evidence as to the content of Italian law, his background was that of substantial direct experience of the operation of the Italian tax agency in question and thus his expertise was not purely as to the substantive content of Italian tax law.

20. Mr Foxton QC fairly acknowledged that he could not assert that any case had been advanced to the arbitrators to the effect that VEON, for its part, appreciated, or ought to have appreciated, by reference to the matters relied upon by Orascom's Italian law expert, that the Italian tax authorities saw the tax evasion thesis as meritless or abandoned. He submitted, and I shall return to this, that it was the clear implication of referring to and relying on that part of the evidence in the context of the mitigation issue identified by the tribunal that such a contention was being advanced. He submitted, in any event, that this Italian law evidence went to the objective reasonableness of the settlement, one of the other issues identified by the tribunal.

21. For his part, Mr Kimmins QC emphasised that there were findings in the award that could not now be challenged, and are not now challenged, that objectively the tax evasion charge had significant substance. That is to say, by reference to the underlying series of transactions and the available records, or paucity thereof, evidencing the original commercial justification for those transactions, if any, other than to generate a tax advantage, there were very real prospects of the tax evasion thesis being upheld if put to the test in the Italian courts. That was, moreover, the clear burden, the arbitrators found, of the external legal advice sought and obtained by VEON in relation to their possible liabilities.

22. The award also makes findings to the effect, this also having been challenged, that VEON's agreement to the settlement and payment of the €31 million liability accepted under it was all in good faith, in the light of its reasonable assessment, amongst other things based upon the external advice it had received, of the very real prospects of a much larger liability if the offered settlement was not accepted.

23. Mr Kimmins submitted that, against that background, the argument for Orascom so as to render the particular Italian law matters said not to have been dealt with in the award of any relevance at all, has to be that, despite all of the matters I have just identified, nonetheless the tribunal should have found that (i) the Italian tax authorities had abandoned the tax evasion theory, (ii) what is more VEON should have appreciated that and (iii) what is more again VEON should then have rejected €31 million as being a bad or excessive settlement amount to pay in all the circumstances.

24. Whilst this is not in evidence, so I will not found my judgment on it, I add that on instructions Mr Kimmins tells me that the gentleman at VEON who made the key recommendation to the supervisory board as to settlement based on legal advice received was a live witness who gave oral evidence at the arbitration hearing. It may well be therefore that the concession by Mr Foxton as to what was not expressly advanced by way of argument to the arbitrators goes beyond merely a failure to argue a point but may extend also to a failure to explore the substance of that point with an available witness.

25. I turn then to the four requirements for the possibility of a valid challenge to this award under section 68(2)(d).

Step 1: Was There A Relevant Issue?

26. Was there here an issue, failure by the tribunal to deal with which, if put, would be capable in principle of engaging section 68(2)? I put that in that slightly cumbersome way because, as both counsel agreed, a feature of the drafting of section 68(2) is that the statute, on the face of things, takes proof that the case falls within any one of the particular sub-paragraphs as proof, without more, that there has been an irregularity in the arbitral process. That is not the end of the matter, because proof of an irregularity is insufficient. There must be a serious irregularity, that is to say one that has caused or will cause substantial injustice.

27. Whereas for all of the sub-paragraphs other than sub-paragraph (d), it is fair to say, without more, that satisfying them, as an ordinary and natural use of language, would seem to satisfy the notion that there has been an irregularity, on one view sub-paragraph (d) is rather different. On a perhaps simplistic

view, any proposition advanced by one party to an arbitration but disputed by the other party creates an issue. If for whatever reason it is not dealt with in the award, then on that view there will have been a failure by the tribunal to deal with an issue that was put to it. However, as both sides before me accept, and as is well reflected in the case law on section 68(2)(d), that does not feel right. That is because it does not feel right to say, no matter the circumstances, no matter the importance or significance of the point to the way in which the case has been advanced overall or is determined by the arbitrators, that failure to deal with something that was in issue before them is, without more, irregular. That means, in other words, that the notion of 'issue' for the purposes of section 68(2)(d) has to take colour from the very drafting point to which I have referred, namely that a failure to deal with such an issue, if put to the tribunal, has to be such as could properly be regarded as a procedural irregularity of the type which section 68(2) is targeting.

28. The case law has grappled manfully with what may therefore be a slightly protean concept. I was referred in particular to the decisions in *Petrochemical Industries v Dow Chemical* [2012] 2 Lloyd's Rep 691, *Secretary of State for the Home Department v Raytheon Systems Ltd* [2014] EWHC 4375 (TCC) and *A v B* [2017] 2 Lloyd's Rep 1. It will not be necessary for the purposes of this case to attempt to develop or improve upon the considerations of the point by, respectively, Andrew Smith J, Aikenhead J and Mr Butcher QC, as he was then, sitting as a High Court judge, in those three cases.

29. The first main issue in the arbitration relevant for present purposes was whether the settlement was concluded in good faith and objectively reasonably. The second main issue relevant for present purposes was whether, by entering into the settlement and accepting thereby a crystallised liability for €31 million, VEON and/or Wind Telecom had failed properly to mitigate.

30. I agree with Mr Foxton QC that it was an important and disputed element of Orascom's case, said by it to affect the proper answer to either or both of those main issues, that the Italian tax authorities had abandoned the tax evasion analysis. When I say there 'important', I should make clear, I mean only that it was an assertion upon which Orascom placed substantial reliance. Whether, ultimately, it was of any real importance for the decision of any of the issues before the tribunal is a different question.

31. As I have already indicated, there was no case advanced that VEON realised, or ought to have realised, that the Italian tax authorities had abandoned the tax evasion analysis, if indeed they had. At the same time, again as I have already mentioned and as Mr Kimmins emphasised, there are findings in the award as to the objective reality and substance of the tax evasion analysis and as to what VEON reasonably understood as to its prospective liabilities, having taken due advice.

32. In those circumstances, to my mind, the exploration undertaken by Orascom and that it wished the arbitrators to undertake, by reference to some of its Italian law evidence, as to the lawfulness of the settlement under Italian law, and as to whether that might indicate that the tax authorities had actually formed, at the least, serious doubts about its merits, could not possibly assist

Orascom in relation to mitigation. The fact that Orascom asserted that it went to mitigation was not, fairly to VEON or to the arbitrators, a substitute for advancing against VEON on the facts a case as to what it should reasonably have understood.

33. In my judgment also, there is no basis in the award, and the careful articulation by the arbitrators of the concept under New York law of the objective reasonableness of the settlement, for Mr Foxton's submission that it would be relevant to that question whether the Italian tax authorities had private doubts, irrespective of the degree to which those were, or ought to have been, evident to VEON.

34. In those circumstances, it seems to me that the question whether the Italian tax authorities had in fact privately abandoned, or concluded to be meritless or weak, the tax evasion analysis was not an issue that fairness demanded the arbitrators deal with expressly or separately, let alone, underneath that question, did they require, as a matter of fairness, to deal specifically or separately with the evidence as to Italian law forming one aspect (even if it may have been a major aspect) of the evidence upon which Orascom relied to support the conclusion for which it contended, namely that the tax authorities had so abandoned or evaluated the tax evasion analysis.

35. None of that, in short, cried out in my judgment to be given express, separate consideration. Thus, to my mind, the question or questions, as finally framed by Mr Foxton QC as the basis upon which the court is asked to intervene under section 68, do not amount to, or give rise to, an issue failure to deal with

which, if put, would engage section 68(2)(d). This claim therefore fails *in limine*.

Step 2: Was The Issue Put?

36. I need say no more about this step than that were I wrong at Step 1, so that the question, or questions, as now formulated by Mr Foxton, should properly be regarded as section 68(2)(d) issues, then so far as they went, they clearly were put before the arbitrators by Orascom.

Step 3: Was The Issue Dealt With In The Award?

37. A question whether an issue capable of engaging section 68(2)(d) has been dealt with, and any related question of what may be sufficient to say that the issue has been dealt with, in my judgment must take colour from how it is said to matter. That is to say how, as the issue was put to the arbitrators, it is said to matter to the analysis of the claim or defence, as the case may be.

38. Here, as I have explained, the asserted relevance was as to whether the Italian tax authorities had abandoned, or were minded to treat as meritless or weak, the tax evasion analysis. The award dealt squarely with that question, finding against Orascom on it. In the detailed reasoning of the arbitrators in relation to that aspect of the case, they said, amongst other things, as follows:

"VimpelCom argues that the question of exposure from a transfer pricing claim was purely academic, because the transfer pricing theory was merely a convenient means to an end - a tool that provided the Italian Tax Authorities with flexibility to conclude a settlement at a lower figure than they could have offered under the anti-abuse theory that the Authorities otherwise were

determined to pursue."; and "The Tribunal accepts, first, that this was VimpelCom's contemporaneous understanding of the Italian Tax Authority's position: it is reflected in management's 25 July 2013 memorandum to the Supervisory Board, which recounted that "[i]f the offer is not accepted, the ITA asserts that it will proceed with issuing the audit report and attempting to collect the €57 million it claims is owned [*sic*.], plus additional penalties and interest. The ITA has also stated that it will forward its audit to the Italian criminal prosecutor ...". The reference to €57 million in back taxes, and to possible criminal prosecution, clearly denotes a threat by the Authorities to proceed on the anti-abuse theory, not on the transfer pricing theory. There is no evidence suggesting that the Authorities had not made such a threat, or that it was an entirely empty threat, because in reality, the Authorities already had "abandoned" any interest in an anti-abuse claim, which is what OTMTI contends."

39. Against that final sentence, the arbitrators attached a footnote 191 providing references to the principal paragraphs of Orascom's defence, rejoinder and post-hearing brief, by which, before the arbitrators, the case by reference to the evidence of Italian law that the authorities had abandoned the tax evasion theory was advanced. Those are the same principal paragraphs relied upon before me to persuade the court at step 2 that the issue, as Mr Foxton would have it defined, was sufficiently put to the arbitrators to be capable of engaging section 68(2)(d).

40. In my judgment, on its own terms, and all the more so when read with the associated footnote 191, what I have just quoted is, or includes, a clear finding

that the arbitrators were unpersuaded that anything put before them by way of evidence pointed towards an abandonment of the tax evasion theory by the tax authorities. If without the footnote there might have been doubt whether that had included the Italian law evidence and the associated unlawfulness theory propounded by Orascom, the footnote resolves that doubt against Orascom.

41. So, whilst it is true that the arbitrators did not go on and deal separately with or make a specific finding as to whether, under Italian law, the settlement was in some sense unlawful, the 'issue', even as Mr Foxton QC would define it, has been sufficiently dealt with by the award, in my judgment. Whatever the arbitrators made of the detail of that evidence, they found it did not suggest abandonment. That was its only potential relevance. Saying more about it was therefore unnecessary. I do not agree, in the context of this detailed and careful award, with a submission of Mr Foxton's that this is to read too much into a single sentence and associated footnote.

Step 4: Substantial Injustice?

42. If the claim had survived this far, would I have considered that the irregularity I would then have found has caused, or will cause, substantial injustice to Orascom? In my judgment, the short answer is no. Even if I am wrong that this is sufficient in part to prevent there having been a relevant issue at all at Step 1, it is a complete and inevitable answer, in my judgment, to the attempt to affect the outcome by reference to the Italian law evidence relied upon that there was never a case advanced before the arbitrators that VEON knew, or ought to have appreciated, that the Italian tax authorities regarded what was

objectively a substantially grounded tax evasion charge as abandoned, weak or meritless.

Conclusion

43. In my judgment overall, this impressive, thorough and detailed award did not justify the challenge brought under section 68 of the 1996 Act. The claim fails and is dismissed.

44. Finally, there have been, in parallel, enforcement proceedings in the context of which existing orders of Males J initially granting leave to enforce the award and Knowles J affecting that order pending the determination of the section 68 challenge have been made. There is before me an uncontested application by VEON, which in the circumstances I allow, that if the section 68 claim is now dismissed, I make an order in those proceedings bringing the matter up to date by ensuring that the full award, as corrected in certain details by a later correction memorandum from the tribunal, is now enforceable and that the stay granted by Knowles J, which on its own terms terminates as a result of my dismissal of the section 68 claim, is declared to have ended.

Coda – Publication

45. What is set out above is my final, approved version of a transcript of my *ex tempore* judgment delivered in private. The hearing was conducted in private in the usual way. It did not include argument over whether I should give judgment in public or approve my judgment for publication if I delivered it initially in private. I asked for submissions by a deadline, extended briefly at the parties' request, on that issue, which the parties duly provided.

46. Having considered those submissions, in my view this case is materially identical on this issue to *Symbion Power LLC v Venco Imtiaz Construction Co* [2017] EWHC 348 (TCC), where the point is dealt with at [86]-[95]. I do not have evidence of any public comment by Orascom similar to that of Symbion as referred to in the last two sentences of [92]. However, I do have good evidence that the award in this case is now in the public domain in New York and Malta, in the context of enforcement proceedings, and that in enforcement proceedings in Luxembourg Orascom has asserted defences that appear similar to its asserted ground of challenge here under s.68, now dismissed. There is also some reason to suppose that Orascom may have in mind a similar challenge to VEON's attempts to enforce in the Cayman Islands.

47. I am also persuaded that if any difficulty might be created by the detail in the award becoming public because I have mentioned it (if that would be the effect), it would be a difficulty for VEON and not for Orascom since the focus of that detail is on VEON's dealings with the Italian tax authorities; and VEON contended for publication, expressly on the basis that it was content to run any such risk. Furthermore, although I decided this case without the need to engage in a lengthy analysis of the authorities on s.68(2)(d), (i) the analysis in paragraphs 26 to 28 above may be of interest to those engaged in arbitration seated in London and (ii) my observations as to procedure in paragraphs 2 to 5 above will be of general interest.

48. In all the circumstances, I conclude that it is right for this version of my judgment to be published, without anonymisation.