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"If at First You Don't Succeed …": A Rare Repeat Challenge of an Arbitral Award

By Robert Blackett

Kazakhstan is the world's largest exporter of uranium. Kazakhstan is party to 53 bilateral investment treaties, including with the UK, US, Canada, France, Germany and Japan and the multilateral Energy Charter Treaty. These give investors from counterpart countries the right to have their investments treated to a certain standard by Kazakhstan and to refer claims against Kazakhstan for breaches of those rights to binding arbitration.

The recent decision of Bryan J. in *Republic of Kazakhstan v World Wide Minerals Ltd & Ors* [2025] EWHC 452 (Comm) (28 February 2025) concerns a long running arbitration arising out of a failed investment in Kazakhstan's uranium industry by a Canadian company called World Wide Minerals (WWM) nearly 30 years ago. WWM claimed that in 1997 it had, due to breaches of the treaty, been deprived of its investment in a uranium processing plant and certain uranium mines after WWM had invested sunk costs of around $16.5 million. WWM claimed the value of its investment at that time was $371 million and would be around $1.9 billion today. The arbitration resulted in a more modest, but still substantial, $54.5 million arbitration award, intended to reflect the present value of WWM's sunk costs from three decades ago.

In 2020 Kazakhstan succeeded in having that award set aside by HHJ Pelling KC in *Republic of Kazakhstan v World Wide Minerals Ltd & Anor* [2020] EWHC 3068 (Comm) under section 68(2)(a) of the Arbitration Act 1996 on grounds of "*serious irregularity*" because the tribunal, in breach of its duty to give each party "*a reasonable opportunity of putting his case and dealing with that of his opponent,*" had calculated WWM's loss and awarded WWM damages on a basis which neither Kazakhstan nor WWM had been given an opportunity to make any submissions on. That award having been set aside, the issue was remitted to the tribunal.

Over three years later, having heard Kazakhstan's argument on the point, the tribunal proceeded to award WWM the same amount as before. Kazakhstan has now succeeded in challenging that second award too, this time under section 68(2)(d) because the tribunal has failed "*to deal with all the issues that were put to it*". The second award made no reference to Kazakhstan's central argument, referred to in the judgment as Kazakhstan's "*Counterfactual Case*". Essentially, even if there had been no breach of the treaty by Kazakhstan, WWM would inevitably always have failed to meet its obligations under a certain Management Agreement. That agreement would always have been terminated, and WWM would always have lost its investment and would never have recovered its sunk costs.

The judgment refrains from direct criticism of the tribunal, but even the neutral account of their second award given in the judgment is striking. The impression is of the tribunal simply having reiterated their previous decision and paid no heed whatever to the case put by Kazakhstan. Per Bryan J.:

> "*6. … the Tribunal … either (per WWM) dealt with causation and the Counterfactual Case in a single operative paragraph (paragraph 293) or (per Kazakhstan) simply did not deal with the key issue at all. What is indisputable … is that the argument that there was no loss because the Management Agreement would have been terminated in any event is not, in terms, referred to anywhere in the Award, and Kazakhstan says it is not in fact dealt with at all by the Tribunal. Equally, there is no*

record in the Award of the matters that Kazakhstan relied upon in relation to the Counterfactual Case including in its extensive written submissions, and at the oral hearing that took place over 5 days and involved evidence as to Kazakh law, and from the parties' respective accountancy experts and uranium experts, so far as they related to the Counterfactual Case, still less any findings or determinations in relation to the same. It is, on any view, a remarkable state of affairs."

"*125. … it might be thought to be quite remarkable that in a 427 paragraph Award running to some 174 pages, the Tribunal addresses the question of causation and loss in one paragraph … and even more than that, that each party places particular focus on one sentence …*"

"*136. The relevant factual context was a Counterfactual Case that was ventilated in a five-day oral hearing in front of the Tribunal, with hundreds of pages of submissions, expert evidence, cross-examination of experts and closing submissions on the Counterfactual Case, yet there is not one reference to any of this in paragraph 293, and (fundamentally) no reference whatsoever to the central aspect of the Counterfactual Case.*"

"*151. If ever there was a case where there was a failure to comply with the due process of the arbitral proceedings by a tribunal failing to deal with a central issue that was put to it, then this was it, with the failure of the Tribunal to deal with the Counterfactual Case. In such circumstances, justice calls out for that serious irregularity to be corrected.*"

The two judgments together give a useful account of the law around section 68 challenges and a salutary reminder that when writing an award:

- If some solution occurs which was not argued for by either party, it is essential to go back to the parties and seek further submissions on the point, however robust you think it is. One must avoid the temptation to go beyond what the parties argued, come up with one's own solution and implement it in an award. The temptation to do so may be strong when one is keen to avoid delay and cost and deal with the matter efficiently. But such shortcuts can lead to far more delay, cost and embarrassment than they save.

- It is essential to address the parties' arguments.

With neighbouring Russia's oil, gas and mineral resources 'off-the-menu' for Western customers and investors and the economies of Kazakhstan and other former Soviet countries with similar resources disrupted by the indirect effect of sanctions, prospective Western investors in the region face a complex mix of risks and opportunities. This latest decision serves as a reminder to investors that, when a state breaches an investment treaty, this is not a golden ticket for the investor, or guarantee of success, and that converting a breach of one's rights under the treaty into a meaningful award may be a long, winding, expensive road strewn with obstacles and leading, ultimately, to an unwelcome destination. When considering any investment, the focus must absolutely be on the fundamentals of the investment. While it is prudent to structure investments so as to secure the protections of any BITs that may be available, one should not place too much faith in the safety net that they provide.

Kazakhstan's breaches, which prompted the WWM's claim, occurred nearly three decades ago in 1996/1997. The investor started its arbitration against Kazakhstan more than six years later in 2013 and then did not obtain an award for another six years, doing so only in 2019. That 2019 award proved defective, was set aside and remitted to a partial tribunal (the presiding arbitrator meanwhile having resigned due to ill health) in November

2020. It took the partial tribunal more than two years, until March 2024, to make a second attempt at an award, and that has now also been set aside. Having set aside the award, the judge invited submissions as to how to proceed, and the outcome is unclear from the judgment. The partial tribunal had indicated they were "*unable to accept any further assignment in this matter*", so presumably the matter could not be remitted to them a second time.

Uranium

Uranium is a dense, silvery white metal which, like oxygen we breathe and iron in our blood, was formed around six billion years ago in, as Nobel laureate Arno Penzias put it, "*the fiery lifetimes and explosive deaths of stars in the heavens around us"*.

Uranium ores (uraninite) typically contain less than 1% uranium. They appear black and were known as *pitchblende*, from pitch – black and 'blenden' (meaning "to deceive"), so called because while the ores' density suggested they contain valuable metal, they used to have little economic value. By crushing the ore, exposing it to acids and then allowing the acids to evaporate, it is possible to produce bright yellow powder containing various uranium compounds, mostly uranium oxides, known as yellowcake. These have been used since at least Roman times to add a yellow colour to ceramic glazes and to glass. From the late Middle Ages, pitchblende extracted as a byproduct of silver mining from the Habsburg silver mines in Joachimsthal, Bohemia (now Jáchymov in the Czech Republic) came to be used to make a coloring agent used in glassmaking. The element itself was discovered in 1789, and the first sample isolated in 1789, but for over a hundred years it had few applications. Following the discovery of radium in 1910, an industry developed mining uranium ore principally to extract the radium associated with it for use in luminous paint.

During the Great War, the central powers suffered a shortage of molybdenum (used to make hardened steel for tool bits, artillery gun barrels and armour plate) and began substituting uranium, which has similar properties. Uranium continued to find some limited use in these applications until 1942.

Over 99% of uranium is U238, with only about 0.7% being U235. To produce fuel for nuclear reactors it is necessary to produce enriched uranium, with a higher proportion of U235 ('low enriched' fuel for nuclear reactors is around 3% U235). It is not possible to separate isotypes of the same element chemically (because they have the same chemical properties), so it is necessary to do so using a gas centrifuge which exploits the tiny mass difference between the isotopes. This is a complex multi stage process. Uranium requires to be enriched to a very high degree (around 25% U235) and is required to produce fissile material for use in nuclear weapons. The principal obstacle to making (uranium based) nuclear weapons is to manufacture, via this enhancement process, a sufficient quantity (critical mass) of fissile uranium. Once one has sufficient enriched uranium, making a bomb is straightforward. The Manhattan Project spent around $30 billion (in 2023 USD) to obtain the 63kg of fissile uranium required for one bomb. Subsequent bombs have generally used plutonium (produced in nuclear reactors from 'low enriched' fuel) rather than uranium, though such bombs are considerably more difficult to build.

For a brief time, from the commencement of the Manhattan Project in 1942, the United States sought to buy up all the world's uranium, in an attempt to deny Nazi Germany and the Soviet Union access to the raw material required for nuclear weapons. This vastly increased demand for uranium, however, prompted an upsurge in exploration, and it proved all too common (40 times more abundant than silver in the Earth's crust) with the Soviet Union, in particular, finding vast deposits in Kazakhstan.

Uranium in Kazakhstan

From the 1950s the Soviet Union established a facility 200km North of Astana called "TGK" comprising uranium mines and a uranium processing plant. A so-called ZATO or 'closed town' was established to serve the facility, originally known only by a code name, but now called Stepnogorsk. The town appeared on no official maps and its very existence was a state secret. Yellowcake produced at TGK would be transported West to a facility in Ust-Kamenogorsk for enrichment, close to the Semipalatinsk test site, where the Soviet Union had conducted its first nuclear weapons test in 1949 and would go on to test 455 weapons. From 1982 Stepnogorsk also became home to another, even more secretive, facility called SNOPB, manufacturing 300 tonnes of weaponised anthrax each year in breach of the 1975 Biological Weapons Convention. The existence of that facility would not become public knowledge in the West until 1999 when a defector called Ken Alibek published a memoir with the unwieldy but informative title *Biohazard: The Chilling Story of the Largest Covert Biological Weapons Program in the World Told from Inside by the Man Who Ran It*.

On 20 November 1989, with *Glasnost* and thawing international relations, the USSR and Canada entered into a bilateral investment treaty under which the USSR agreed that Canadian investors' investments would be accorded "*fair and equitable treatment*" (FET) in accordance with principles of international law and would not be expropriated except for adequate compensation. The treaty gave investors a right to refer claims to binding arbitration under the UNCITRAL rules.

In December 1991, the USSR dissolved, and Kazakhstan declared independence. In the mid-1990s Kazakhstan proceeded to privatise many state industries, including its uranium mines, with the goal of attracting investment.

Kazakhstan's uranium deposits were divided into two main areas, known as the Northern Mines (around Stepnogorsk) and the Southern Mines (in the South of the country). The Southern Mines had great potential, because rather than excavating solid ore and crushing it and extracting the U_3O_8 at the surface, those deposits could be exploited using a more productive, cost effective and less polluting in-situ recovery (ISR) process where boreholes are drilled into the deposit, a solvent is pumped into them and then pumped back to the surface with the U_3O_8 in solution and dried to produce commercial 'yellowcake' U_3O_8 powder.

TGK and the Northern mines were a far less attractive prospect. The experts in the arbitration described TGK's facility as "*an absolute basket case*" such that "*in the summer of 1996, TGK was effectively bankrupt. Its debt included overdue wages for over 10,000 workers and pensions for thousands of retired employees. It was shut down, which ... meant that 65,000 residents in the nearby town of Stepnogorsk were in danger*." WWM's own case was that, absent access to material from the Southern Mines, the TGK facility and the Northern Mines were uneconomic.

WWM's Investment

WWM was a start-up junior mining company from Canada. In October 1996, WWM entered into a management contract with the relevant Kazakh government agency, under which WWM was to have substantial rights and financial and other responsibilities for managing the TGK complex, including an option to purchase the complex in the future. WWM considered the Northern Mines associated with the TGK complex "*uneconomic*" and could only have afforded to meet all the investment obligations imposed by the management agreement if WWM could secure access to the production from the Southern Mines. The management agreement, however, left several key points still to be agreed and these were listed in a schedule as "*matters to be addressed in good faith negotiations*" including any rights to the Southern Mines.

Over the next few months, WWM took steps to restore production at TGK, including extending loans of US$12.7 million to TGK, secured by a pledge over all of TGK's major assets. WWM entered into discussions concerning rights to the Southern Mines and on 28 February 1997, these led to a contract called the Strategic Alliance Agreement (SAA).

In this same period, WWM tried to sell uranium oxide from TGK's stockpile to a buyer in the US to generate cash with which to meet WWM's continuing payment obligations under the management agreement but was not granted the required export licence.

On 1 August 1997, Kazakhstan terminated the management agreement due to WWM's repeated, and continuing, failure to make payments required of it under the management agreement.

WWM's Claim

Over six years later, in December 2013, WWM started a London-seated arbitration against Kazakhstan under the USSR-Canada bilateral investment treaty. WWM claimed that Kazakhstan, by denying WWM the export licence and wrongfully terminating the management agreement, had expropriated, without adequate compensation, WWM's investment. WWM presented a single, monolithic claim to $1.914 billion for the claimed value of its investment. Since WWM considered the Northern Mines uneconomic in isolation, this was presumably intended to represent the value of WWM's (supposed) rights to the Southern Mines.

Jurisdiction

Kazakhstan challenged the tribunal's jurisdiction, arguing that it was only Russia, and not Kazakhstan, which was a successor party to the USSR bound by the Canada-USSR treaty. On 19 October 2015 (a year and ten months after the arbitration commenced), the tribunal produced a partial award on jurisdiction deciding it had jurisdiction.

Challenge to the Jurisdiction Award

Challenges to arbitration awards must be brought within 28 days of the date of the award. While the court can extend time, such extensions are not lightly granted. Section 1 of the Arbitration Act 1996 provides that it is founded on the principle that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*" and is to be interpreted accordingly. Per Akenhead J. in *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2008] EWHC 817 (TCC) "*The time limits for any court intervention in the arbitration process (including by way of application under section 68) are important and reflect the policy expressed in section 1 of the 1996 Act*". Per Popplewell J. in *Terna Bahrain Holding Company Wll v Al Shamsi & Ors* [2012] EWHC 3283 (Comm) at [27(1)] "*Any significant delay beyond 28 days is to be regarded as inimical to the policy of the Act*" [28] "*the length of delay must be judged against the yardstick of the 28 days provided for in the Act. Therefore, a delay measured even in days is significant; a delay measured in many weeks or in months is substantial*".

Sometime in 2018 (2-3 years after the award on jurisdiction had been made), Kazakhstan applied to the court seeking to challenge it. The challenge reportedly failed, and permission to appeal was refused. The judgment was unavailable at the time of writing, so one cannot be sure of the reasoning, but it seems likely that the requisite extension of time would simply have been refused because of the long delay, making it unnecessary to consider any merits of the challenge.

The 2019 Award

In the ensuing arbitration WWM presented what was in effect a rolled up, global claim on the assumption that all its allegations would succeed and that the effect of all of them taken together would amount to expropriation of an investment which reflected the value of the Southern Mines, and would have been worth $1.653 billion at the date of the award or $371 million at the date of the alleged breach. Alternatively, WWM claimed its sunk costs, said to be $16.5 million at the date of breach, plus $2.8 million spent post breach trying to recover its investment in Kazakhstan.

There was no evidence and no submissions about what consequences should follow if the tribunal instead found that only some, not all, of the alleged breaches had been proved. This was unsurprising since to consider every possible iteration in advance of the tribunal's findings and take account of it in submissions would have been prohibitively difficult and expensive. WWM's counsel before the Tribunal invited the Tribunal, in event that WWM succeeded in establishing some breaches but not others, "… *to render a further partial award on liability and to come back to the parties on damages for the part that the Tribunal finds liability on*". Kazakhstan's submission was that if the Tribunal came to such a conclusion, WWM's claim should fail in its entirety, because the damages claim had only been formulated on the basis that its claim would succeed entirely. Neither party had submitted that, if the tribunal found some breaches to be established but not others, then it should proceed to assess damages as best it could by reference to specific breaches on the material then before it.

On 29 October 2019 the tribunal rendered an award (**2019 award**). The tribunal found:

- The SAA was "*an agreement to agree, opening an exclusive opportunity to negotiate a joint venture with Kazatomprom over aspects of the uranium production at the Southern Mines and New Deposits along the broad lines sketched out in the clauses of the Agreement; but a time-limited exclusive opportunity which would lapse after 90 days* …" so "… *could not have created vested property rights for the benefit of Claimants of a kind that could serve as the foundation for a claim (as here) for expropriation or the loss of future profits*". The Tribunal therefore rejected WWM's case that by the SAA it had secured a right of access to the production of the Southern Mines. WWM's supposed right to production from the Southern Mines had been a major part of WWM's claim.

- Kazakhstan had been entitled to terminate the management agreement, for WWM's failure to make the required payments and that termination did not breach the treaty.

- Kazakhstan had breached the treaty only in two narrow respects. Kazakhstan had not expropriated WWM's investment, but had failed to treat it fairly and equitably:

    - In not granting an export licence in relation to the contract to sell uranium to a buyer in the US

    - In failing to ensure that WWM be given timely notice of TGK's subsequent bankruptcy (WWM complained this had prevented WWM realising the value of its security)

The tribunal held (**emphasis** added):

> *"… while Claimants' investment was not expropriated, Respondent did breach its FET obligations in ways that resulted in significant injury to Claimants.* ***Whether or not Claimants' investment would have succeeded had they received a timely export license can never be determined****. Nevertheless, the failure to grant a license clearly contributed to the demise of the investment.* ***Respondent's subsequent***

> ***failure to assure that Claimants learned of the bankruptcy proceeding denied them the opportunity to seek to protect their claimed security interests in TGK's assets****. The Tribunal finds further that the resulting damage suffered by Claimants would be appropriately compensated by the recovery of their sunk costs."*

The Tribunal went on to assess WWM's sunk costs as having been $13.7 million and awarded WWM that amount as damages, plus interest from the date of the breach in 1997 and costs. When the 2019 award came to be challenged in 2020, these together exceeded $54.5 million.

From the bold text in the passage quoted above, the Tribunal evidently thought WWM had only suffered a **loss of a chance**. By denying WWM the export licence, Kazakhstan had denied WWM whatever chance WWM would have had of its investment "*succeeding*" if it had made the export sale. Of course, this begs some further questions. What does it mean for an investment to "*succeed*"? Success is a spectrum. An investment "*fail*s" to the extent that it does not break even and makes a loss (though you could say that an investment which made a smaller loss was more, "*succeeds*" to a greater extent than one which makes a greater loss). An investment "*succeeds*" to the extent that it breaks even or makes a profit.

The dispute between WWM and Kazakhstan was not subject to English (or any national) law, but only to the treaty, and the principles of international law which it incorporated. The English law position is, nonetheless, instructive. The default position in English law is that proof is all-or-nothing. A claimant has to prove its loss on the balance of probabilities. An exception applies when the loss is contingent on some hypothetical or future event. If the uncertainty is as to some future event or the hypothetical conduct of a *third party* then a court will award damages on a loss of a chance basis. The classic example is *Chaplin v Hicks* [1911] 2 KB 786 (CA). Due to the defendant's breach of contract, the claimant was deprived of her chance of winning a prize in a beauty contest. She was awarded damages, in an amount less than the prize, to represent her lost chance of having won.

Insofar as the uncertainty is as to the hypothetical conduct of *the claimant*, however, the normal all-or-nothing rule applies. The claimant has to prove, on the balance of probabilities, what it would have done (*Allied Maples Group v Simmons* [1995] 1 WLR 1602 CA, *Perry v Raley's Solicitors* [2019] UKSC 5, *Flame SA v Glory Wealth Shipping PTE Ltd*, *The Glory Wealth* [2013] EWHC 3153 (Comm)). So, in English law, WWM would have had to prove that, but for the refusal of the export licence, it would have performed all its obligations under the management agreement, kept the management agreement alive and thus, preserved whatever chance it had of making a profit under that agreement (which may have been zero, given it had no right of access to the Southern Mines). Indeed, keeping the management agreement alive might have increased WWM's loss if it would have raised more finance, and sunk more money into TGK, only to have the project fail for reasons unconnected to any breach by Kazakhstan.

The tribunal's assumption that "*whether or not* [WWM's] *investment would have succeeded had they received a timely export licence can never be determined*" is immediately suspect. The tribunal had found that WWM had no right to production from the Southern Mines, and WWM's own case was that, without that, its investment was "*uneconomic*" (i.e. would have failed). If the money WWM received from the export would have been insufficient to keep the management agreement alive or if the management agreement was always going to be unprofitable and there was no chance of it "succeeding", then it would have failed either way. In other words, the tribunal could have clearly reached that conclusion.

One can see that the Tribunal, however, assessed WWM's loss of a chance on the basis that WWM was entitled to recover the **whole** of its investment (i.e. it was assumed that WWM would at least have broken even).

The tribunal did this despite this not having been argued for by any party and ignoring what WWM's own counsel had said about the need for further submissions.

Section 68

To succeed in challenging an award under section 68, an applicant needs to show that the arbitration, the award or the way it was obtained was affected by one or more of the various kinds of irregularity listed in 68(2), that the irregularity was "*serious*" and that the irregularity has caused or will cause "*substantial injustice*" to the applicant.

The kinds of irregularity listed in 68(2) include:

- Section 68(2)(a) "*failure by the tribunal to comply with section 33 (general duty of tribunal)*" – That section 33 imposes on arbitrators a duty to "*act fairly and impartially between the parties, giving each party an opportunity of putting his case and dealing with that of his opponent.*"

- Section 68(2)(d) "*failure by the tribunal to deal with all the issues that were put to it*"

General principles concerning challenges under section 68 are now summarised by the privy council in *RAV Bahamas Ltd v Therapy Beach Club* (RAV Bahamas) [2021] UKPC 8 and restated by Foxton J in *Czech Republic v Diag Human SE* (Diag) [2024] EWHC 503 (Comm).

"*i) The test of serious irregularity was intended to limit intervention to "extreme" cases where it could be said that 'the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.'*

ii) Serious irregularity has been recognised as imposing a 'high threshold' or as 'the hurdle.'

iii) The focus is on due process, not the correctness of the decision reached.

iv) Even if a case is shown to fall within one or more of the kinds of irregularities listed in section 68 this will only amount to a serious irregularity if the court considers that it 'has caused or will cause substantial injustice', which means 'more than some injustice.'

v) There will be substantial injustice where it is established that, had the irregularity not occurred, the outcome of the arbitration might well have been different, but it is not necessary to show that the outcome would 'necessarily or even probably be different.'

vi) Some irregularities may be so serious that substantial justice is 'inherently likely' or 'likely in the very nature of things' to result, including where 'on a central matter a finding is made on a basis which does not reflect the case which the party complaining reasonably thought he was meeting, or a finding is ambiguous, or an important issue is not addressed.'

vii) In general, there will, however, be no substantial injustice if it can be shown that the outcome of the arbitration would have been the same regardless of the irregularity."

Per Carr J. in *Obrascon Huarte Lain SA (t/a OHL International) v Qatar Foundation for Education, Science and Community Development* [2019] EWHC 2539 at [44]:

> "*As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults. The approach is to read an award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault*."

Section 68(2)(a)

Regarding challenges under section 68(2)(a) for failing to comply with the duty to give each party an opportunity of putting his case, Popplewell J. held in *Terna Bahrain Holding Company WLL v Al Shamsi* [2012] EWHC 3283 (Comm) at [85]:

> "*(1) In order to make out a case for the court's intervention under section 68(2)(a), the applicant must show:*
> *…*
>
> [points 1 to 3 apply to challenges under section 68 generally and correspond to those already set out above]
>
> *(4) There will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. If the tribunal thinks that the parties have missed the real point, which has not been raised as an issue, it must warn the parties and give them an opportunity to address the point.*
>
> *(5) There is, however, an important distinction between, on the one hand, a party having no opportunity to address a point, or his opponent's case, and, on the other hand, a party failing to recognise or take the opportunity which exists. The latter will not involve a breach of section 33 or a serious irregularity. …*
>
> *(7) In determining whether there has been substantial injustice, the court is not required to decide for itself what would have happened in the arbitration had there been no irregularity. The applicant does not need to show that the result would necessarily or even probably have been different. What the applicant is required to show is that had he had an opportunity to address the point, the tribunal might well have reached a different view and produced a significantly different outcome.*"

And, again, Popplewell J. held in *Reliance Industries Ltd & Anor v The Union of India* [2018] EWHC 822 at [32]):

> "*It is enough if the point is "in play" or "in the arena" in the proceedings, even if it is not precisely articulated … a party will usually have had a sufficient opportunity if the "essential building blocks" of the tribunal's analysis and reasoning were in play in relation to an issue, even where the argument was not articulated in the way adopted by the tribunal. Ultimately the question which arises under s. 33(a), whether there has been a reasonable opportunity to present or meet a case, is one of fairness and will always be one of fact and degree which is sensitive to the specific circumstances of each individual case.*"

Section 68(2)(d)

Regarding challenges under section 68(2)(d) for failing to deal with all the issues that were put to it, it is necessary that: (i) an "*issue*", was (ii) "*put to*" the tribunal, and (iii) they "*failed to deal with*" it. The court's approach is set out in detail in Bryan J.'s 2025 judgment in *Kazakhstan v WWM* from [34] and one should refer to that judgment for a full account of the law.

Briefly, regarding what is an "*issue*" the principles identified by the board in *RAV Bahamas* were:

> "*(ii) 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 demarking 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 …*
>
> *(iii) 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 …*
>
> *(iv) 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 ... 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 …*".

As to whether an issue has been "*put to*" a tribunal the board in *RAV Bahamas said* at [42]:

> "*[T]he 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*".
>
> "*There is a degree of overlap between the considerations relevant to whether there is an "issue" and whether it has been "put to" to the tribunal. It is clear that this does not require the issue to have been pleaded or included in a list of issues. It is necessary to consider the arbitration proceedings as a whole, including the pleadings and the written and oral submissions. Having done so, in general, what is required is that the tribunal's attention has been sufficiently clearly drawn to the issue, as one which it is required to determine, that it would reasonably be expected to deal with it*".

Concerning whether the tribunal has failed to "*deal with*" an issue, Foxton J. said in *Diag* at [163]:

> "*vi) 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; it does not matter for the purposes of section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently ([43]). It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length. A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue. Nor is a failure by a tribunal to set out each step by which it reached its conclusion or deal with each point made by a party a failure to deal with an issue that was put to it.*
>
> *vii) A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise. 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 ([43]).*
>
> *viii) 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) ([43]).The court can consider the pleadings and the written and oral submissions of the parties to the tribunal in this regard*".

The board in *RAV Bahamas* had also said:

> "*(xi) 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*".

This latter point was discussed by Gavin Kealey QC (sitting as a Deputy High Court Judge) in *Buyuk Camlica v Progress Bulk Carriers* (Buyuk) [2010] EWHC 442 (Comm):

> *"If the determination of an issue is crucial to the result, as in these references waiver was crucial to the question whether there was an actionable breach of contractual warranty, then however unmeritorious the arguments might be in favour of that issue the Arbitral Tribunal is bound to deal with it and, in my view, to do so in such a way, normally by reference in the Award or Reasons, as to make it evident to the parties that the Tribunal has indeed dealt with it: as His Honour Judge Humphrey Lloyd Q.C. observed in Weldon Plant v Commission for New Towns [2001] 1 All ER 264, 279:*
>
> > *".. where the decision cannot be justified as a particular key issue has not been decided which is crucial to the result ... the tribunal has not done what it was asked to do, namely to give the parties a decision on all issues necessary to resolve the dispute or disputes."*
>
> *In a similar vein was the observation of Toulson J. in Ascot Commodities N.V. v Olam International Ltd. [2002] 2 Lloyd's Rep. 277, 284:*
>
> > *"Nor is it incumbent on arbitrators to deal with every argument on every point raised. But an Award should deal, however, concisely, with all essential issues."*
>
> *As those observations recognise, there should be some form of communication, normally in the form of a decision, by an arbitral tribunal to the parties from which the latter can ascertain whether or not an essential issue has dealt with. It is not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section 68(2)(b) is to ensure that all those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined*".

The 2020 Challenge

Notwithstanding the high threshold, on 23 November 2020, in *Republic of Kazakhstan v World Wide Minerals Ltd & Anor* [2020] EWHC 3068 (Comm) HHJ Pelling upheld Kazakhstan's challenge, set aside the award and ordered it be remitted to the tribunal. He observed at [53] that Kazakhstan had had no opportunity to try persuading the tribunal that WWM's loss would have been suffered in any event:

> "*… in considering the causation issue, it would be necessary for WWM to prove what loss had been caused on the basis of the findings made by the Tribunal in relation to breach including in particular that WWM did not have any rights to the Southern Mines and [that Kazakhstan] was entitled to terminate the Management Agreement. Had this exercise been carried out the Tribunal might well have reached a*

> *different conclusion …. That WWM did not have any rights in relation to the Southern Mines may well have a substantial impact given that it was WWM's own case that without access to the Southern Mines the whole project was fundamentally loss making. It may well have been loss making whether or not the export license sought had been granted as and when it should have been granted*".

The Remitted Proceedings

There followed another phase of the proceeding, during which the parties presented extensive evidence and arguments on causation and quantum of loss based on the tribunal's findings in the first award. Kazakhstan argued that but for the export licence breach the relevant agreement (the management agreement), WWM would still have failed to make payments due thereunder, it would still have been terminated by Kazakhstan for that failure, and WWM's investment would always have been lost in any event, with the result that WWM had suffered no loss as a result of Kazakhstan's breach of its FET duty (Kazakhstan's "counterfactual case").

Following a hearing of these issues, the chair of tribunal withdrew due to ill health and the parties agreed to have the partial tribunal render an award, which they did on 26 March 2024, more than three years after the 2019 award was set aside. The dispositive part of the award said:

> *(1) "The [Export License Breach] constituted a decisive factor that, together with others, caused the eventual demise of [WWM's] investment in Kazakhstan."*
>
> *(2) "The above breach, as a breach of the guarantee under [Bilateral Investment Treaty] of fair and equal treatment for [WWM's] investment in Kazakhstan, is reasonably and appropriately compensated by the award to [WWM] of their sunk costs, assessed for the purpose in the amount of US$13.7 million.*"

Challenge to the 2024 Award

Kazakhstan sought to challenge this 2024 award under section 68(2)(d). There was no dispute that Kazakhstan's counterfactual case was an "*issue*", that it had been "*put to*" the tribunal, that it was "*very important*" and "*the centrepiece*" of Kazakhstan's argument. As noted in the introduction above, the argument before the judge came down to one paragraph in the award. WWM said that, in that paragraph, the tribunal had "dealt with" the issue. Kazakhstan said that it had not.

Before looking at the crucial paragraph, it is relevant to note that, elsewhere, the tribunal had set out what came to be referred to as the "route map" by which it was to decide the issue which the court had remitted back to the tribunal. The relevant route map paragraph said:

> "*As to the Respondent's position, the Tribunal accepts that it may in appropriate cases be convenient to apply a counterfactual test to help determine the existence of injury and its cause, after which a remoteness test might be applied to distinguish between compensable damage and damage that is too remote. The Tribunal is not however persuaded that international law lays down as a fixed requirement a two-stage process consisting of those elements. The true position is, as the Tribunal has already remarked, that on standard principles it is the claimant who must prove, by appropriate evidence, the loss or damage for which it claims. That is best regarded as one single process which may, according to particular circumstances, involve considerations both of injury and its causation, and of proximity.* ***Once a claimant has produced its evidence and presented the conclusions it draws from that, the respondent may of course set out to rebut them by whatever means it chooses, which may well***

> ***include in an appropriate case a counterfactual analysis designed to question whether the alleged injury was in fact suffered, or whether it was in fact caused by the alleged breach. The adjudicator will then decide the issues in dispute on the basis of the evidence and argument presented****. But, and especially in respect of alleged breaches of the FET guarantee, these are matters involving a measure of evaluation and assessment, and not the application of rigid rules.*"

Here the Tribunal did not reject a counterfactual test, but rather rejected Kazakhstan's two-stage approach (a factual test followed by a legal test) and then set out what it considered to be the correct approach (the "*true position*") in relation to causation, and identified the role that a counterfactual analysis has in that approach in rebutting a claimant's case on causation and loss, before setting out the Tribunal's Route Map: that the Tribunal would decide "*the issues in dispute on the basis of the evidence and the arguments presented*". The central argument being advanced by Kazakhstan being, of course, the counterfactual case.

The crucial paragraph 293 on which so much rested said:

> "*… the Tribunal must now give its attention to the question, what injury was caused to the Claimants' investment in Kazakhstan by the export license breach? It is incontestable that the export license breach cannot be found to be either factually or notionally a confiscation of the Claimants' investment. That would be incompatible with the Tribunal's res judicata finding that Respondent's termination of the Management Agreement was not in breach of the BIT, not to mention its finding of no expropriation (paragraph 9 above). Nor is it open to question that Claimants' investment was already at serious risk of failure by the time of the export license breach. This is so whichever is taken to be the date of breach (see further, paragraphs 396-400 below). The Parties vigorously disputed whether timely grant of an export license would have remedied this situation. However,* ***no license was in the event granted, making the failure by Respondent to respect the FET guarantee in its handling of Claimants' export license applications a decisive factor that, together with others, caused the investment's eventual demise****. As already laid down in paragraphs 244 and 268 above, the determination by the Tribunal of the injury and damage caused by this breach of the FET guarantee are matters involving a measure of evaluation and assessment, not the application of rigid rules. [G] On that foundation, the Tribunal will now consider afresh what remedy is warranted to redress the Claimants' injury, on the strength of the 'new and/or existing evidence of all issues concerning causation and the quantification of loss' as referred to in paragraph 2 of the High Court Order.*"

WWM said that the tribunal had dealt with the issue in the sentence shown in **bold**. Per Bryan J., however:

> "*127. I am in no doubt whatsoever that the Tribunal did not deal with the Counterfactual Case either in paragraph 293 or indeed, anywhere else in the Award. In this regard there is no reference to the factual matters that Kazakhstan relied upon, the disputed issues of Kazakh law that were addressed extensively by both parties in expert evidence (both in writing and in cross-examination at the July 2022 oral hearing), the extensive submissions of the parties' uranium experts which addressed (amongst other matters) whether WWM would have been able to fulfil the CE Contract, or the submissions of the parties' quantum experts addressing (amongst other matters) WWM's inability to fund TGK and satisfy its outstanding liabilities. One would expect all such matters to be dealt with as part of addressing the Counterfactual Case.*
>
> *128. Most fundamentally of all, I am satisfied that the Tribunal simply does not deal at all with the issue of whether the Management Agreement would have been terminated in any event, which is at the very heart of the Counterfactual Case. Yet further, and far from there being any statement to the*

effect that the Tribunal did not consider it necessary to determine this issue, or that a determination of a logically anterior point meant the issue did not arise (neither of which can be suggested still less established), the Tribunal has recognised at paragraph 268 that Kazakhstan was entitled to rebut causation by any means it chose, including by a counterfactual analysis, and the Tribunal had then expressly chosen a route (the Route Map) by which it would 'decide the issues in dispute on the basis of the evidence and the argument presented' (which ex hypothesi inevitably involved dealing with the Counterfactual Case and whether Kazakhstan would have terminated the Management Agreement in any event). Yet the Tribunal simply has not done so, in paragraph 293 or anywhere else in the Award).

129 As for the highlighted sentence on which WWM places so much reliance … I agree with the submission made by Kazakhstan that this cannot possibly be construed as the Tribunal dealing with the Counterfactual Case. The words 'no license was in the event granted' is simply a statement of the actual factual position (and indeed the basis for the Export License Breach itself). It is a given before one even considers the issues on causation that arose to be dealt with by reference to the Counterfactual. This cannot make 'the failure by the Respondent to respect the FET guarantee in its handling of Claimant export license' a factor, still less a decisive factor, that caused the investment's eventual demise – that is the very issue the Tribunal was supposed to be dealing with, yet it does not do so in this sentence or anywhere else .... Equally, 'together with others' cannot possibly be a reference to the Counterfactual Case as on that Counterfactual Case it is a trump card that would have meant that WWM has suffered no loss (so it cannot be a factor that 'together with others' causing [sic] the demise of the investment), and equally if it was demonstrated it would be a 'knock-out' blow to loss being suffered by WWM at all. Weighed in the scales it would, by its very nature, outweigh all other factors.

130. In short, the Tribunal has failed to follow its own Route Map and has failed to deal with the Counterfactual Case. This is not a case where there is any ambiguity, whether in the sentence relied upon by the parties, or in paragraph 293, or in the Award as a whole. Nor is there any issue of "interpretation" of the Award that arises. It is clear that the Counterfactual Case has not been dealt with by the Tribunal.

131. Notwithstanding the skill and eloquence with which the submissions to the contrary were advanced by Mr Edey KC, the reality is that he had thin gruel to work with, and those submissions do not bear examination, still less do they lead to a contrary conclusion. …

136. Nor is there any substance in WWM's submission that the Tribunal must have dealt with the Counterfactual Case 'implicitly' on the basis that it would have had the Counterfactual Case 'well in mind' …

139. Mr Edey KC also repeatedly made the crie de cœur that it was not likely that an experienced tribunal such as the present Tribunal would fail to deal with the Counterfactual Case or that, in other expressions used by him, the Tribunal would have 'fumbled it' or 'dropped the ball'. Such submissions are commonly, if not invariably, rolled out by a respondent, and prayed in aid as to inherent probabilities, as an attempted rebuttal when it is said that a tribunal has failed to deal with an issue that was put to it. But that is, with respect, to look at matters from the wrong end of the telescope.

> *140. The reason why the Tribunal went wrong is because it went wrong. Experienced tribunals do fail to deal with issues that are put to them. With the greatest of respect to the eminent arbitrators in this case, even Homer nods, and experience does not bring with it infallibility, and even the most knowledgeable and skilled arbitrators can fall into error or have lapses of judgment. It is because experience shows that tribunals do fail to deal with issues that are put to them that Parliament has legislated that there will be a serious irregularity where there is 'a failure by the tribunal to deal with all the issues that were put to it' (in the very words of section 68(2)(d)). This is a statutory recognition (if one were needed) that tribunals do, indeed, fail to deal with important issues that were put to them. Indeed the law reports are replete with examples where a tribunal has failed to deal with an essential issue that was put to it (or where a tribunal has dealt with a case on a basis that the parties have not had the opportunity to address the tribunal on – as indeed has already occurred in the present case in relation to this very Tribunal, with the first reference under section 68(2(a)).*"

The judge went on to find that this was a serious irregularity and had caused Kazakhstan substantial injustice, concluding:

> "*151. If ever there was a case where there was a failure to comply with the due process of the arbitral proceedings by a tribunal failing to deal with a central issue that was put to it, then this was it, with the failure of the Tribunal to deal with the Counterfactual Case. In such circumstances, justice calls out for that serious irregularity to be corrected.*
>
> *152. Accordingly, Kazakhstan's challenge to the Award under section 68(2)(d) succeeds, and is upheld.*
>
> *153. The parties were in agreement that if the section 68 challenge succeeded, as it has, they would each wish to address me as to the appropriate relief that should be ordered, ...*"

Conclusion

The case leaves an unflattering impression of the tribunal's approach, seemingly having approached the remitted issue with their previous conclusion in mind (WWM gets its sunk costs, which the tribunal thinks are $13.7 million) and, perhaps unconsciously, set out then to justify that foregone result, without regard to the arguments presented. Given the counterfactual argument seems to have been the central issue, it is intriguing as to what the tribunal can have spent the other 427 paragraphs of the award discussing.

For those writing awards the judgments, this case is a reminder of the scrutiny to which high value awards, in particular, may be subject and of the need to take care always to: (i) invite submissions from the parties on any reasoning or result which one is contemplating but which was not being advocated by either party and (ii) to deal with the arguments being made by the parties.

One suspects that there may be a temptation to exhibit less rigour in one's reasoning and take an overly merits based, Solomonic approach whenever (i) the right to appeal on a point of law under section 69 has been excluded and especially (ii) when the case is to be decided *ex aequo et bono* or is governed by a scant treaty and broad principles of international law, rather than by a detailed, mature system of national laws. While any resulting award may be immune to public challenge on any errors of law, it is worth bearing in mind that errors in

one’s logic and reasoning may, in an appropriate case, still be exposed by challenges under section 68(2)(a) or (d).