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27 May 2026

COMMODITIES IN FOCUS WEEKLY - ISSUE 167

SECTION 68 OF THE ARBITRATION ACT 1996: WHEN THE HIGH BAR CAN BE CLEARED

INTRODUCTION

Section 68 of the Arbitration Act 1996 ("**s. 68**") provides a mechanism for challenging arbitral awards on the ground of serious irregularity. It is well established that the threshold for such challenges is high. As was observed in *Bandwidth Shipping Corporation v Intaari (The "Magdalena Oldendorff")* [2007] 2 CLC 537 at [35], an applicant must surmount a "high hurdle", and as the DAC Report which preceded the Act made clear, the section was "really designed as a long stop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected".

Two recent Commercial Court decisions illustrate the practical application of that high threshold. In *Eagle Bulk PTE Ltd v Traxys North America LLC* [2026] EWHC 518 (Comm), handed down on 9 March 2026, Butcher J dismissed challenges under both s. 68(2)(a) and s. 68(2)(d), finding that the applicant had fallen "markedly short" of establishing a serious irregularity. By contrast, in *Indus Powertech Inc v Echjay Industries Private Ltd* [2026] EWHC 827 (Comm), handed down on 10 April 2026, Sean O'Sullivan KC (sitting as a Deputy High Court Judge) upheld challenges under s. 68(2)(d), finding that the Tribunal had failed to deal with two essential issues of causation and ordering remission of the relevant parts of the award. Together, the two decisions offer a useful illustration of where the line is drawn between a legitimate s. 68 challenge and an impermissible attempt to appeal the merits.

EAGLE BULK V TRAXYS: THE HIGH BAR HOLDS

Factual Background

The dispute arose out of a voyage charter for the carriage of 46,300 MT of petcoke cinder from India to New Orleans. On arrival, the vessel's holds were found to be flooded with water; discharge was disrupted and a dispute arose as to responsibility for delays, extra expenses and a cargo shortage. The owners claimed demurrage of approximately US$544,350.81, arguing the water was loaded with the cargo. The charterers contended it entered the holds via leaking valves in the vessel's bilge system and brought a shortage claim based on the load/discharge weight differential. The Tribunal found for the charterers on both issues. The owners' subsequent s. 57 application for clarification was denied.

The s. 68(2)(a) Challenge: Butterfly Valves

The owners' first challenge was under s. 68(2)(a), alleging that the Tribunal had breached its general duty under s. 33 by determining the case on a point not argued by either party, namely, that a defects list dated 3 February 2022 referred to butterfly valves BLV 12 and 13 as leaking and defective, when both parties' common ground was that those valves were not covered by that list.

Butcher J held that this complaint fell "markedly short". The owners were effectively seeking to appeal the Tribunal's factual findings, which was "not a legitimate use of a s. 68(2)(a) application". The 3 February list was not an "essential building block" of the Tribunal's reasoning. Rather, it had relied on multiple strands of evidence, including other defect lists, contemporaneous communications, and technical evidence consistent with leaking valves. The list was "in play", the Tribunal was "not bound by the cases of the parties as to what that document meant", and the owners had every opportunity to address the issue in their closing submissions. Even if there had been a serious irregularity, it had not caused substantial injustice.

The s. 68(2)(d) Challenge: Shortage Claims

The owners' second challenge was under s. 68(2)(d), contending that the Tribunal had failed to deal with their arguments that the weight differential was attributable to water (not cargo) and that the charterers had suffered no loss. Butcher J dismissed this too. The Award had dealt with the real issue, unexplained shortage, and the owners had simply failed to prove the differential was due to water loss, not least because the bilge drainage log was in part fabricated and in part incomplete. The Tribunal "did not fail to deal with an 'issue' because it did not consider arguments which did not, on its view of the facts, law and evidence, arise".

INDUS V ECHJAY: CLEARING THE THRESHOLD

Factual Background

The dispute arose out of a Master Supply Agreement (governed by Indian law, London-seated ICC arbitration) under which Echjay, an Indian manufacturer, became the master supplier of forgings to Indus, a US company, and its customers in the USA, Canada and Mexico. A three-member Tribunal found Indus had breached the non-compete obligation by sourcing forgings from another Indian supplier, and awarded Echjay US$4,132,895 in lost profits across six individual damages calculations for shafts and gear components.

Indus challenged the Award under s. 68(2)(d), alleging that the Tribunal had failed to deal with two essential issues of causation: (1) whether Echjay had available manufacturing capacity to produce Shafts 1 and 2; and (2) whether the required design validation and production process for four gear components could have been completed within the two-year damages horizon.

The Applicable Principles

Sean O'Sullivan KC conducted a comprehensive review of the authorities on s. 68(2)(d), providing valuable guidance on two central questions: how to draw the line between an "issue" falling within s. 68(2)(d) and an "argument" falling outside it, and how to approach the question of whether the tribunal has dealt with the issue.

On the first question, he rejected the contention that quantum sub-issues were not capable of engaging s. 68(2)(d) as merely being arguments. An "issue" was a question which "fairness demanded" be dealt with and not ignored or overlooked, and characterising it as a "sub-issue" to a wider issue did not prevent it engaging s. 68(2)(d). As a rule of thumb, the Judge suggested one might ask whether the point would appear on a properly drawn up granular list of issues in court proceedings.

On the second question of whether the tribunal had dealt with an issue he emphasised that a "fair, commercial and commonsense" reading of the award was required, but that the parties should not be left to guess whether an issue had been dealt with or overlooked. If it was clear from the award that the tribunal had expressed a conclusion on the issue, that was the end of the enquiry; if it was not clear, the test involved a search for signs that the tribunal had evaluated the evidence and analysed the submissions relevant to the issue, having regard to the structure of the award. Critically, it was not enough to assert that, because of the relief granted, the tribunal must have come to a particular conclusion on the issue in question.

The Shafts: A Gap in the Decision-Making

The Tribunal had calculated damages for Shafts 1 and 2 without any discussion of capacity, before turning to Shaft 3 and refusing damages on the ground that Echjay had not demonstrated sufficient capacity. The critical paragraph referred to "the Claimant's acknowledgment" that only Shaft 3 was affected by capacity constraints, but Sean O'Sullivan KC found this was suggestive of a concession by Echjay, not a finding by the Tribunal. The structure of the Award revealed "a gap in the decision-making", with no mention of the "run@rate" studies or other evidence one would expect to see if the Tribunal had been deciding the capacity issue. The Judge concluded that the Tribunal had failed to deal with the issue, despite giving it the benefit of every reasonable doubt.

The Gear Components: The Absent Lead Time Decision

The second issue concerned the lead time for Echjay to begin commercial production of four gear components, on which the experts disagreed (7 months versus 2 years). The Tribunal adopted calculations with a 7-month lead time built in, but said nothing in its analysis about lead time, the validation process, or whether it was resolving the difference between the experts. In relation to every other controversial aspect of the calculation, ramp-up, discount rate, pricing, the Tribunal had expressly explained its reasoning; the "absence of anything similar in relation to lead time is therefore striking, and suggests that something has gone wrong".

The Award was remitted on both issues, together with consequential issues as to interest and costs.

KEY TAKEAWAYS

The two decisions confirm that the high threshold for s. 68 remains firmly in place, but *Indus Powertech* demonstrates that it can be cleared where the court identifies a genuine gap in the tribunal's decision-making, as opposed to merely inadequate reasoning.

+ In *Eagle Bulk*, the challenge failed. The disputed document was not an "essential building block", the Tribunal had dealt with the relevant issues, and it had not addressed every argument only because those arguments did not arise on its findings.
+ In *Indus Powertech*, the challenge succeeded. There were structural gaps and issues needing decision but with no decision given. There was no discussion of the relevant evidence, and no "indicia" of engagement. Cataloguing the parties' arguments in a summary section was not enough to show they had been resolved in the analysis.

Practical lessons for parties to international commodity arbitrations:

+ **Closing submissions**: Key issues and sub-issues of causation and quantum should be clearly identified as requiring determination. Where oral argument shifts away from written points, parties should ensure the tribunal is not left with the impression those points have been abandoned.
+ **Reasons vs issues**: A failure to provide sufficient reasons is not the same as failing to deal with an issue. A Tribunal can "deal with" an issue where it does not arise on its findings, and it is for the Tribunal to structure its award as it sees fit.
+ **Focus on structural deficiencies**: When bringing a s. 68 challenge, applicants should focus on genuine gaps in the decision-making and absent "indicia" of engagement, rather than on complaints about the weight given to evidence or the interpretation of documents. The former engages s. 68; the latter does not.

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