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There's many a slip: Obrascon Huarte Lain SA v Qatar Foundation for Education, Science and Community Development

The recent English case of *Obrascon Huarte Lain SA (trading as OHL Internacional) v Qatar Foundation for Education, Science and Community Development* has highlighted the purpose and the limits of the slip rule in *international arbitration*.

The decision highlights the competing factors that come into play when it comes to allowing corrections to awards. On the one hand, finality: ensuring that awards are upheld and the merits of the case are not be reopened. On the other, fairness: requiring that mistakes which may have an impact on the *enforceability of the award* be corrected.

This blog focuses on the role that the slip rule plays in maintaining a balance between those competing factors.

The slip rule

The doctrine of *functus officio* is well established in international arbitration; once an arbitral tribunal renders a decision on the issues submitted, it then loses any power to re-examine that decision. However, it is not unknown for arbitral awards to contain clerical mistakes or ambiguities, which may make it difficult for the successful party to enforce the award or for the unsuccessful party to assess the prospects of successfully challenging the award.



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For this reason, many modern arbitration laws and *institutional arbitration rules* give arbitral tribunals the power to correct awards. The power is usually limited, allowing tribunals to correct clerical errors or omissions in an award or to clarify any ambiguity in the award. This power is exercised under what is generally known as a “slip rule”. Examples in institutional rules include rule 50 of the *AAA Rules*, article 27 of the *LCIA Rules* and article 36 of the *ICC 2017 Rules* (previously article 35 of the ICC 2012 Rules).

The ICC Rules, for example, allow applications for the correction of “a clerical, computational or typographical error, or any errors of similar nature contained in an award”, or for the interpretation of an award, provided the application is made within 30 days of the receipt of the award.

The time limits for seeking a correction or interpretation are generally quite clear. The circumstances in which an award can be corrected, and the scope of the tribunal’s power to interpret an award, are often less clear.

Both of these issues were considered in the *Obrascon Huarte Lain* case.

The case centred around disputes arising in relation to the construction of a hospital complex. There were claims for extensions of time for the completion of the works and associated prolongation costs. The tribunal’s fourth partial award made a number of findings in relation to the claimants’ entitlement to extensions of time. However, it did not address submissions as to whether the entitlement to associated prolongation costs was limited to, and subject to compliance with, all relevant provisions of the contract.

An application was made under article 35 of the ICC 2012 Rules to correct or provide an interpretation of the award, to make it clear that findings in relation to entitlement to time and money remained subject to addressing arguments as to compliance with any contractual preconditions.

The award did not address whether there were any applicable contractual preconditions to the claimants’ rights to extensions of time and prolongation costs, and it did not intend to do so. These were issues remaining to be determined by the tribunal. On that basis, the tribunal amended 11 specific paragraphs of the award to include the words “subject to compliance with any contractual preconditions” so as correctly to reflect its decisions.

The claimants challenged the tribunal’s decision, arguing, among other things, that the changes made by the tribunal fell outside the scope of what was permitted by article 35. This gave rise to argument as to whether what the tribunal had done constituted the correction of “clerical, computational or typographical errors” or of “any errors of a similar nature”, or the “interpretation” of the award.

Correction or interpretation

In deciding to amend the award, the tribunal considered the principles applicable to applications for correction of an award under article 35.2 of the ICC Rules and said this:

“The provision for correction of the award is not aimed at substantive matters or at dealing with an interpretation of the award. The classic problems are a failure

to insert a 'not' before a verb, or where it is evident that the award should read 'claimant' instead of 'respondent', or where the figures in the dispositive either do not add up or do not correspond to those in the discussion part of the award."

In other words, applications to correct an award are limited to cases where an award contains an obvious clerical or typographical error, a miscalculation or arithmetic mistake, or where an undisputed fact has been erroneously recorded.

Clarification not second thoughts

The tribunal also considered the scope of the power to interpret an award, emphasising that the purpose of giving the tribunal the power to interpret an award is to permit the clarification of an award so as to allow its correct execution by the parties. Quoting from the [Handbook of ICC Arbitration](#), the tribunal said this:

"It is not to be used to require the tribunal to explain, or to reformulate, its reasons. It does not provide an occasion for the reconsideration of the tribunal's decision. Should this be the basis of the parties' application, the tribunal will be quite justified in finding it unnecessary or inappropriate to render the requested interpretation...

Interpretation thus consists of eliminating any ambiguities or uncertainties, if any, and clarifying the genuine meaning of the decision without modifying it. In other words, interpretation consists of restoring the true meaning of the decision where it has been improperly expressed in the operative part, where the latter is at odds with the findings or contains uncertainties or ambiguities. Interpretation does not entail a modification or an addition to the initial decision and thus cannot jeopardise *res judicata*."

In other words, there is a distinction to be drawn between an error that affects the expression of the tribunal's thought (which can be corrected) and errors in the tribunal's thought process (which cannot). Corrections to reflect "second thoughts" are impermissible.

Margin of appreciation

The tribunal's decision was challenged and the argument before the court centred around whether the changes to the award constituted a correction of "clerical, computational or typographical errors" or of "any errors of a similar nature" and, if so, whether the tribunal had exceeded its powers.

The court took the view that the parties had adopted arbitration rules that gave the tribunal a degree of latitude as to what errors may be corrected, by allowing the correction of errors of a "similar nature" to "clerical, computational or typographical errors". It followed that there was room for reasonable disagreement as to whether certain mistakes or omissions constitute er-

rors of a “similar nature” to “clerical, computational or typographical errors” and as to whether there should be any, and if any, what “interpretation” of the award. This essentially gave the tribunal a “margin of appreciation”, something that the court should take into account when considering whether the tribunal has exceeded its powers.

The court found that the changes to the award could reasonably be regarded as the correction of errors “of a similar nature”, but, in any event, the tribunal had the power to interpret the award, and the tribunal’s decision should be interpreted as being the correction of errors or as the interpretation of the award.

Correction or additional award

Here, the tribunal made it clear that they had not intended to make a finding in respect of applicable contractual preconditions to the claimants’ rights to extensions of time and prolongation. However, it is not always straightforward to determine whether a tribunal intended to make a particular finding or it inadvertently left it out, as illustrated in a US case, [Eastern Seaboard Construction Co., Inc. v Gray Construction, Inc.](#)

In *Eastern Seaboard*, the contractor (Gray) was awarded US \$77,000 for the cost of completing the subcontractor’s work. In the course of the arbitration, it was not disputed that there was an outstanding subcontract balance of US \$66,000 but the award said nothing about the subcontract balance.

The subcontractor asked the [arbitrator](#) to “clarify” the award to deduct the subcontract balance from the amount awarded. The arbitrator issued a revised award on that basis.

Gray challenged the decision on the grounds that the amendment was not a clarification but rather a re-assessment of the merits.

On appeal, the court noted that this case was at the boundary of a permissible correction under the slip rule, but held that the right of an arbitrator to clarify an unclear award extends even to an award that is “seemingly complete” but in reality “leaves doubt whether the submission [to the arbitrator] has been fully executed.” The amendment was therefore held not to amount to a reopening of the merits of the case, but rather to clarify a latent ambiguity in the award.

Conclusion

The *Obrascon Huarte Lain SA* and *East Seaboard* cases illustrate how the line between the correction of true slips and the re-examination of the substantive findings of an arbitral tribunal can sometimes be difficult to locate. As a matter of policy, slip rules are not meant to undermine the finality of arbitration awards at all; they are pragmatic mechanisms to allow low level errors or oversights to be corrected in an efficient manner. It is, however, inevitable that parties will push the boundaries as far as they can, and will seek to use slip rules as cover to try to reverse aspects of awards with which they feel some degree of disappointment. Arbitrators and judges in the courts with supervisory jurisdiction are live to these issues, and will look carefully at the scope of the slip rule regime in question before using the limited post-award powers created to correct errors, but do no more than that.

With thanks to Emma McDonald, trainee in the International Arbitration team in London, for her contribution to this piece.

