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Understanding English Arbitration: Appeal of a Point of Law

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Unlike the U.S. Federal Arbitration Act, the English arbitration regime, set forth in the Arbitration Act of 1996 (the "Arbitration Act"), allows a party under certain circumstances to appeal a question of law arising out of an arbitral award. The right is found in Section 69 of the Arbitration Act.[1] This provision applies to arbitrations where the seat of the arbitration is in England and Wales (or Northern Ireland)[2] and questions of the law of England and Wales (or for a court in Northern Ireland, the law of Northern Ireland).[3]

The Arbitration Act embodies within its express guiding principles the modern policy of non-interventionism of courts in the arbitral process.[4] The English courts will only intervene in order to support the arbitral process (this policy was clearly stated in the Departmental Advisory Committee Report on Arbitration (the "DAC Report") which reported on the consultation prior to the enactment of the Arbitration Act.[5] On the question whether the rights of appeal should be abolished, the DAC Report concluded that a limited right of appeal was consistent with the parties' choice of arbitration.[6] It was an important safeguard of the arbitral process to ensure that English law was properly applied. Having chosen to submit their disputes to arbitration subject to an express choice of law, "the parties have agreed that that law will be properly applied by the arbitral tribunal" and "if the tribunal fail[s] to do this, it is not reaching the result contemplated by the arbitration agreement".[7]

While as the DAC Report noted the right of appeal is consistent with the choice of arbitration, Section 69 is not a mandatory provision of the Arbitration Act. Parties to an arbitration agreement can agree to exclude the right of appeal to the courts on a question of law.[8] Parties will be deemed to have agreed to exclude the right if they have dispensed with a reasoned award.[9] Parties often waive this right when they agree to refer their arbitration disputes to institutions with international arbitration rules which expressly exclude the right to appeal a point of law.[10] Since the choice of an English sited arbitration brings with it this right of appeal, parties may consider at

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[1] Part 1 of the Arbitration Act sets the legislative framework for arbitrations pursuant to an arbitration agreement.
[2] s. 2(1) of the Arbitration Act.
[3] s. 82(1). See *Reliance Industries Ltd and another v Enron Oil and Gas India Ltd* [2002] 1 All ER (Comm) 59 (no power to grant leave to appeal under s. 69 where the substantive law of the contract was Indian law while English law was the law of the arbitration agreement and hearings took place in London). See more recently *Schwebel v Schwebel* [2010] EWHC 3280 (TCC), paras.13 -15.
[4] See s.1 of the Arbitration Act: The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense, the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest and in matters governed by Part 1 the court should not intervene except as provided by this Part.
[5] DAC Report, paras. 20-22.
[6] DAC Report, paras. 284, 285.
[7] DAC Report, para. 285.
[8] s. 69(1) states that an appeal may be made on a point of law "unless otherwise agreed by the parties".
[9] s. 69(1).
[10] See for example Art 34(6) of the ICC Rules and Art. 26(8) of the LCIA Rules.

the time of contracting whether court intervention as a means of appeal on law may be desirable and, if not, to ensure that it is effectively excluded.[11]

If not excluded or waived, an appeal on a point of law may only be brought with the agreement of all the other parties to the proceedings or, if the parties do not agree, with the leave of the court.[12] The applicant must in any event have first exhausted any available arbitral process of appeal or review, and any available recourse for correction of an award.[13]

The threshold criteria that need to be satisfied, before the courts will grant permission to appeal, are set high so that the scope for such appeals is limited.[14] The court will only grant leave if (a) the rights of one or more parties to the arbitration will be substantially affected by the determination of the question of law, (b) the question must be one that the tribunal was asked to determine, (c) on the basis of the findings of fact in the award, the tribunal's decision on the question was obviously wrong or is a question of general public importance and the decision of the tribunal is at least open to serious doubt, and (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

The courts strictly apply these statutory tests, and "as a matter of general principle English Courts strive to uphold awards".[15] Firstly, it is essential that the question is truly a question of law. This requirement focuses on the question whether the tribunal misdirected itself or reached a decision on the question which no reasonable arbitrator could have reached.[16] This requirement will not be satisfied if the decision was "within the permissible range of solutions" open to the tribunal.[17] The appeal will also not apply to decisions based on other considerations such as equity or fairness principles applied by arbitrators.[18] The tribunal's findings of fact in the award are considered the "immutable basis" for the courts' exercise of the power to grant leave to appeal, so the courts strictly will not revisit the facts, including evidential issues (admissibility, relevance or weight of any

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[11] Parties need to use clear words to exclude the right of appeal although express reference to s. 69 is not required. For instance, it has been held that words such as "final and binding" and "final, conclusive and binding" in isolation are not sufficient, *see Essex County Council v Premier Recycling Limited* [2006] EWHC 3594 and *Shell Egypt West Manzala GmbH and anor v Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm). Under s.58(1) of the Arbitration Act, unless otherwise agreed by the parties, an arbitral award is final and binding and furthermore, as stated under s.58(2), this does not affect the right of a person to challenge the award by any available arbitral process of appeal or review or in accordance with Part 1of the Arbitration Act.

[12] s. 69(2). The DAC Report, at para.292, noted that the word "agreement" was not qualified as it was intended to encompass an agreement prior to the commencement of proceedings (in an arbitration clause or in the underlying contract) provided all other requirements of ss. 69 and 70 of the Arbitration Act are met.

[13] s. 70(2) and (3).

[14] s.69(3). In limiting the right of appeal, the DAC Report (paras. 286-291) emphasized existing case law of the House of Lords in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 that already limited the right of appeal set out under the Arbitration Act 1979.

[15] *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 179 (TCC), at para. 51.

[16] For a detailed discussion see *London Underground Ltd v Citylink Telecommunications Ltd* , above, paras.50-66

[17] See *Benaim (UK) Ltd v Davies Middleton & Davies Ltd and another* [2005] EWHC 1370 (TCC), paras. 107-109.

[18] s. 46(1)(b) of the Arbitration Act provides that the tribunal shall decide the dispute, if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.

material).[19] The courts robustly reject attempts by "a disappointed party trying to dress up an appeal against findings of fact as one which turns on questions of law" thereby reaffirming the policy of the Arbitration Act to prevent "illegitimate attempts to go behind a tribunal's findings of fact".[20]

As regards the first criterion for leave that the question of law is one substantially impacting the rights of one or more of the parties, this will be determined on a case-by-case basis considering whether that question of law *will* substantially affect the rights of the parties not whether it *may* do so, so for instance the courts have indicated that they will not consider appeals on points of law which would be academic or have low monetary value.[21]

The second criterion requires that the question of law is one that the tribunal has been asked to determine. If this is not the case, the appeal process is not the proper time to do so and leave will likely be refused.[22]

The third criterion establishes different tests depending on the nature of the question. Where the question of law is one of general public importance, the test is whether the tribunal's decision is open to serious doubt. A difference of view between experienced arbitrators would, of itself, be grounds for arguing that the majority's decision is "at least open to serious doubt".[23] In other cases, the test is higher being whether the tribunal's decision is obviously wrong. "Obviously wrong" requires that the error should be clear and obvious on the face of the award itself.[24] As one judge put it, it would be on the level of "a major intellectual aberration".[25] As expressed by another judge, it is the "test of being unarguable or making a false leap in logic or reaching a result for which there was no reasonable explanation".[26]

However, demonstrating a question of general public importance is likely to be challenging. For instance, an issue as to whether a cause of action arose in respect of claims for interim and final payment under construction

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[19] *London Underground Ltd v Citylink Telecommunications Ltd,* above. See also *Alphapoint Shipping Limited v Rotem Amfert Negev Ltd.* [2004] EWHC 2232 (Comm), para 5.

[20] *St Shipping and Transport PTE Ltd v Space Shipping Ltd and another* [2016] EWHC 880 (Comm), at para. 36 where Popplewell J stated that "in the absence of an irregularity justifying relief under section 68 of the Act, the parties are bound by the findings of fact of their chosen tribunal and cannot challenge them in court, even on the grounds that they were unsupported by the evidence or that they contain internal inconsistencies" with reference to *Geogas SA v Trammo Gas Ltd* (The "BALEARES") [1993] 1 Lloyd's Reports 215 per Steyn LJ at paras. 227-228, 232 and *Demco v SE Banken Forsakring Holding Aktiebolag* [2005] 2 Lloyd's Reports 650 at paras. 38 to 48.

[21] See *St Shipping and Transport PTE Ltd v Space Shipping Ltd and another*, above, paras. 40-43. See also *Shaw v MFP Foundations & Pilings Ltd* [2010] EWHC 1839 (TCC), para. 63 (the sum at stake was so modest that the outcome could not possibly have a substantial effect on the rights of either of the parties).

[22] *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' Schiffahrtgesellschaft mbH & Co and others*, [2003] 1 All ER (Comm) 204, at paras. 24-37. See also *Marklands Ltd v Virgin Retail Ltd* [2003] EWHC 3428 (Ch) (leave refused where the arbitrator was not asked to consider hypothetical negotiations about the value of lease raised on appeal).

[23] *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' Schiffahrtgesellschaft mbH & Co and others*, above, paras. 39-64.

[24] *Benaim (UK) Ltd v Davies Middleton & Davies Ltd and another*, above, para. 110; *AMEC Group Ltd v Secretary of State for Defence*, [2013] All ER (D) 93 (Feb), paras. 21-23, and 27; and *Morris Homes (West Midlands) Ltd v Keay & Anr* [2013] EWHC 932 (TCC), at para. 50.

[25] This phrase comes from Akenhead J's analysis in *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] EWHC 426 (TCC), [2008] 2 All ER (Comm) 493, [2008] 1 Lloyds Rep 608, at para. 31

[26] This was stated by Arden J in *HMV UK Ltd v Propinvest Friar Ltd Partnership* [2011] EWCA Civ 1708, at para. 34.

contracts was a matter of contractual construction of great significance to the construction industry,[27] while the construction of the term charterers' "agents" in an off-hire clause in a charter party was a point of general public importance in particular to the shipping sector where this term is found in both standard form and other clauses.[28] Conversely, an issue of construction in respect of a one-off contract which is not in standard form and not in regular or widespread use, [29] an issue as to whether a sublease had taken effect as an assignment of the lease in rare and unusual circumstances,[30] and an issue as to the interrelation of "best endeavours" and "diligence" clauses in a development and/or construction agreement in a highly unusual one-off situation[31] did not constitute questions of law of general public importance.

The final criterion is whether it is just and proper in all the circumstances for the court to determine the question notwithstanding that the parties have referred the dispute to arbitration. The courts have indicated that the qualifications of the arbitrator may be a relevant factor, for instance if the matter was determined by distinguished and experienced arbitrators, or it was a one-off contract, as well as the presumption of finality of the decision which underscores the arbitral process but if all the other criteria are satisfied then it would be just and proper for the court to determine the question.[32]

The provisions allowing an appeal on a point of law are unusual in international arbitration regimes where finality and certainty – hence limited scope for appeal of arbitral awards – are cornerstones of the arbitral process. As expressed by one judge, however, the established "philosophy and purpose underlying s. 69 requires the achievement of finality of awards consistently with the on-going judicial development of English commercial law".[33] The scope for s. 69 appeals is tightly framed and appeals are in consequence relatively rare. However, by way of a closing note, the Lord Chief Justice, Lord Thomas, gave a lecture early in 2016 calling for reform of the law on arbitral appeals arguing that it represented a serious impediment to the development of English commercial law, in particular the finality embedded within s. 69,[34] albeit this call for reform has been in turn robustly refuted as a "retrograde step".[35] Where one of the main reasons that parties seek arbitration over litigation is finality of arbitral awards, having defined parameters to judicial review of an arbitrator's application of law is of paramount importance. The parties using English arbitration have a considerable degree of certainty as to the finality of the arbitral process.

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[27] *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814, para. 1.
[28] *NYK Bulkship (Atlantic) NV v Cargill International SA ("The Global Santosh")* [2016] UKSC 20.
[29] *AMEC Group Ltd v Secretary of State for Defence*, above, at paras. 24-25, and 29-33.
[30] *Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd*, [2004] EWHC 996 (Ch), paras. 18-22
[31] *Morris Homes (West Midlands) Ltd v Keay & Anr,* above, at paras. 28-44.
[32] *Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd*, above, para. 23, *Benaim (UK) Ltd v Davies Middleton & Davies Ltd and another*, above, at para. 111, *Morris Homes (West Midlands) Ltd v Keay & Anr,* above, paras. 45-48, and *HMV UK Ltd v Propinvest Friar Ltd Partnership*, above, at paras. 35-37.
[33] *Alphapoint Shipping Limited v Rotem Amfert Negev Ltd.*, above, per Colman J at para. 5.
[34] "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration", The Bailii Lecture 2016 (9 March 2016).
[35] See for instance, Sir Bernard Eder, "Does Arbitration Stifle Development of the Law: Should s. 69 be revitalised?", Chartered Institute of Arbitrators (London Branch) AGM Keynote Address – 28 April 2016 and Lord Saville of Newdigate, "Reforms will threaten London's place as a world arbitration centre", The Times, April 28, 2016.