APPEALS FROM ARBITRATION AWARDS

Epaminondas G.E. Embiricos

Introduction

I have been invited to speak to you today on a subject of some concern to the shipping industry, namely the restrictions which currently limit the right of appeal to the High Court from an arbitration award.

As most of you will know, this and other topics were addressed in a Report on the Arbitration Act which was prepared in 2006 by a committee under the chairmanship of Mr Bruce Harris. A good deal of effort clearly went into the committee’s work, which included inviting replies to a questionnaire from over 2,200 individuals and bodies. Wide as this consultation was, little information was gathered directly from actual users of arbitration – those who have been parties to it, or to contracts which provide for it. The overwhelming majority of replies came from lawyers or arbitrators, and of the very small percentage that came from users, few came from shipping interests. A number of representative bodies in the maritime industry were apparently not approached.

When they heard that the Act was being reviewed, their main concern was a belief, which appears to be widely held in the shipping industry, that rights of appeal are too restrictive, and that this subject merits a broader discussion than appears to have taken place for some time.

My object today is not to criticise things that are now water under the bridge: in response to these concerns an Advisory Committee has been set up under the chairmanship of Lord Mance’s to examine specifically Section 69 of the Arbitration Act 1996 (which regulates appeals from arbitration awards).

With the task of the Committee in mind, my purpose is to highlight two underlying concerns: first, that the healthy development of maritime and commercial law is liable to be impaired if access to the courts is unduly restricted, with the result that all important legal certainty is at risk of being undermined; and second, that there is no sufficient reason to deny a right of appeal when there is a reasonably arguable point of law and large sums of money at stake.

For many years, reviews of arbitration law in the UK have rested heavily on surveys of replies to questionnaires. Wide consultation is of course important, but some issues involve policy considerations beyond the direct interests of the parties to a dispute, and beyond those of any individual respondent. There is a need for discussion of what the wider policy objectives should be, and of whether consensus exists on that issue, before meaningful soundings can be taken of whether in practice these goals are being met.

I therefore hope it will be helpful to venture some observations on this subject from a shipping industry perspective. In doing so I appreciate that the law of arbitration in
this country must cater for the needs of many sectors, of which shipping is only one. However, access to the courts on points of law is of particular importance in a maritime context. Statistics gathered for Lord Mance’s Committee reveal that maritime awards have accounted for the great majority of applications for leave to appeal in recent years. Indeed, they accounted for all of the cases in 2007 and 2008 in which the court intervened. No doubt this reflects the sheer number of arbitrations which come to London from the world-wide shipping industry, but it must also reflect the intricate inter-play of legal relationships which maritime commerce involves: new issues abound as circumstances and practices change in a highly competitive world.

Participants in international shipping also differ from domestic users of arbitration inasmuch as there is a greater prospect of them deciding to resolve disputes in some other jurisdiction. For all its pre-eminence in this field, London is not without its rivals. It may therefore be of interest if those who come here by choice are clear about what it is that they find most attractive, and draw attention to any features which might undermine this appeal.

The case for wider rights of appeal

If we begin by standing back to see a bigger picture, London arbitration clauses amount to much more than just an agreement to arbitrate.

First and foremost, the parties agree that the contract will be governed by English law. Second, they agree that their disputes will be resolved in London – a venue to which they may be attracted not only by its arbitration services, but also by its judicial system (to the extent that reference to the court is appropriate), as well as by its specialist legal and insurance services and other relevant sources of expertise. Thirdly, the parties agree to submit disputes to arbitration rather than go directly to the courts.

Opinions may differ as to which of these ingredients, if any, is uppermost in the minds of the parties when entering into the contract, or which they think most important when an issue comes up. But what is clearly vital, when the law of arbitration is reviewed, is that it is not examined in isolation from the other ingredients, but recognised as part of a bigger package.

It is, I suggest, a mistake to regard the subject as solely concerned with the resolution of disputes. The fact that a contract is governed by English law is not some technical nicety of interest only in case of dispute. It is of pervasive importance throughout the negotiation, agreement and performance of the contract. Indeed it affects the terms of the contract, as the application of a less familiar legal system may make it necessary to spell out some provisions in greater detail. With large sums of money at stake, commercial people need at all stages to know where they stand, and with time often of the essence, they need to know it quickly. The importance cannot be overstated of legal certainty available to the parties and their advisers through a body of relevant case-law.
By the same token, the choice of English law should, all else being equal, make it easier to avoid disputes or, should they arise, to resolve them: proceedings settle more readily if both parties are aware of relevant precedents which reduce the scope for argument.

Consequently, although the quality of its dispute resolution services is certainly a great attraction to this country, no one should underestimate the importance of English maritime law as a cornerstone underpinning the whole structure of maritime service industries in London.

Of course, the body of precedent built up over centuries is not going to be overtaken by rival centres overnight. However there is no room for complacency.

It is now over 30 years since the special case was abolished by the 1979 Arbitration Act and replaced by the very limited right of appeal now set out in the Act of 1996.

These three decades have seen considerable growth of global trade, as well as many technological advances which have changed industry standards and practices out of all recognition. Growing public concerns in relation particularly to environmental affairs have led to a much greater volume of maritime regulation – at national and regional levels as well as in international laws – on the design, construction and operation of ships. Other modern challenges have included an increase in terrorist risks and an alarming growth in the scourge of piracy. Changes of this kind have all had their effect on maritime commerce: new risks and costs have had to be allocated, and new questions have had to be addressed as to the rights and liabilities involved.

In short, shipping and its regulators are always on the move, and undesirable vacuums can soon proliferate if English law does not keep up with these changes. The same applies where on one view the law is clear, but argument abounds on how it applies to some new set of facts which the industry faces.

There will, I am sure, be a number of us who have sought advice on some new issue of this kind, to be told that it had not yet come before the courts but had, to the knowledge of our advisers, been considered in an arbitration award. If the award favours our position then the news may seem good. But the bad news comes when we are told that the award is private, and that it is uncertain whether consent can be obtained to its disclosure. It may be unknown whether those on the other side are aware of it, let alone whether they know that you are. It may also be unknown whether the tribunal is aware of it, and, even assuming that the award can be disclosed, whether the tribunal will necessarily follow it in the absence of any formal doctrine of precedent. The uncertainty is of course even greater if there is more than one award on the issue, and inconsistency between them.

This is hardly a satisfactory way in which to conduct one’s affairs, resolve disputes, and develop a legal system.
Counter-arguments

So what are the counter-arguments which account for restrictions on the right of appeal?

As will be recalled, these were designed to overcome the problems inherent in the unsatisfactory system which existed prior to 1979, when there was a largely unfettered right to bring a stated case before the courts. The lengthy process in preparing the stated case, including a generous time limit for initiating the procedure, provided opportunities for delaying tactics which not only caused injustice between the parties, but also contributed to congestion in the courts, resulting in delay to other cases and encouraging these tactics still further.

This state of affairs ran counter to the finality which any system of dispute resolution has to deliver, but the question must be asked whether the pendulum has swung too far the other way.

This is an important issue on which there is a need to strike a balance. However desirable finality may be, it is poor recompense for injustice – as may be suffered if one of the parties reasonably feels that an error of law has been made, on which large amounts of money may turn, but faces undue obstacles in taking things further. Finality also comes at a price if a stifling of precedent results in industry repeatedly paying to resolve similar disputes.

In striking this balance it is right to take account of what the parties intended when agreeing to arbitration – provided care is taken when inferring what these intentions were.

When the relative merits of arbitration are canvassed, reference is naturally made to various ways in which it differs from proceedings in court. No doubt different people find different features of arbitration attractive, but it is quite another thing to infer from an arbitration agreement that the parties necessarily intended to adopt all these features.

For example, it is often noted that arbitration is private whereas litigation takes place in open court. That may be true – and privacy may have legitimate importance where commercially sensitive information is involved – but shipping is not an industry where factors of this kind play a significant part. Indeed, privacy is a drawback when contracts are broken with little fear of reputational damage. There can be few maritime cases, if any, where an appeal in open court would have been contrary to a genuine common intention to keep disputes behind closed doors.

There is likewise a danger of reading too much into the fact that the parties have not stipulated High Court jurisdiction when theoretically they were free to do so. Arbitration is chosen not just as a mechanism for resolving genuine disputes. More fundamentally – especially in these times of economic uncertainty and volatile markets – it provides the means of enforcing the contract. A significant proportion of maritime trade takes place in parts of the world where arbitration awards are
enforceable under the New York Convention, and where no similar arrangements apply to judgments of the High Court.

Even assuming that one of the parties prefers the High Court, in practice this cannot usually be agreed without amending an arbitration clause in a standard form. A proposal to do this will take the negotiations into legal areas where brokers are likely to need specific instructions. This can obstruct a prompt fixture, and though the proposal may in theory not be contentious, in practice it can take on deal-breaking proportions.

There are therefore good reasons to be wary of inferring from an arbitration agreement that the parties were content to give up any right of access to the court, or intended to exclude it. It has always been understood that the court retains a degree of supervisory jurisdiction: the question is not whether this exists but when it should be exercised.

There may indeed be some reservations as to whether section 69 of the 1996 Act accurately reflects what the parties intend. The section recites that when the court grants leave to appeal it does so “despite the agreement of the parties to resolve the matter by arbitration”. So far as shipping is concerned, I fear this reads too much into what is actually intended.

What the users of maritime arbitration clearly do agree on is its central feature, namely that disputes will be referred to a tribunal with knowledge and experience of maritime commerce. The object of that is of course is to maximise confidence in the facts that are found in what is, after all, a specialized field. These findings are rightly treated as final, and in practice that may also mean that few cases can go any further. None of this signifies, however, that the parties intend any restrictions on access to the court on a point of law.

**Conclusion**

In conclusion, it is to be hoped that Lord Mance’s Committee will review whether the right balance is struck by the current restrictions on access to the courts – and that it will consider whether these fairly reflect what the users of maritime arbitration actually want.

It should not be surprising if it concludes that what they really want is the best of both worlds.

After all, the judicial and arbitration systems in the UK are both of the highest quality, and both have their respective strengths. They should be seen as complementary rather than competing elements of the package I have described. With moderate relaxation of the current restrictions, this should remain as attractive in future as it has been in the past.