Appeals and challenges to arbitral awards under the English Arbitration Act 1996

Introduction

1. This paper summarizes the post-award challenge procedures potentially open to parties to an arbitration seated in England and governed by the Arbitration Act 1996 ("the Act").

2. The Act, now 20 years old, was a major overhaul of English arbitration legislation and resulted from the searching review led by Lord Saville QC. It adopted many of the principles to be found in the 1985 UNCITRAL Model Law on International Commercial Arbitration[1], but in certain key respects it departed from the Model Law's approach. One of these was in preserving a limited right of appeal to the Court on questions of law arising from an award.

3. S. 1 of the Act prescribes certain general principles which play a significant role in guiding the Court's approach to the interpretation of its substantive provisions. In particular:

> " …
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

4. The Act is therefore firmly grounded in the principle of party autonomy, with intervention by the Courts limited to minimum safeguards which are mostly focused on upholding the integrity of the arbitral process itself.

5. The Act contains a coherent scheme laying down the criteria on which the Court may intervene, including by setting aside or varying an award, or remitting it to the tribunal

[1] Since updated in 2002.

for reconsideration. These powers of the Court only apply to awards made in arbitrations seated in England[2]. (The Court has no powers to annul or vary a *foreign* arbitral award, but recognition and enforcement of foreign awards, and grounds for refusal thereof, are dealt with at Part III, ss. 99-104). The principal avenues for potential redress which a dissatisfied party will need to consider are:

a. application to the tribunal for correction of errors or slips in the award (s. 57);

b. challenge for lack of substantive jurisdiction (s. 67);

c. challenge for serious procedural irregularity (s. 68); and

d. (potentially) an appeal on a question of law (s. 69).

6. A party's right to invoke any of these procedures is closely circumscribed in order to promote the finality of awards and the speedy resolution of any challenge to an award. In particular:

a. Any appeal or application must be brought within 28 days of the award: s.70(3).[3] The Court has a discretion to extend time, but only if this is necessary to avoid a "substantial injustice" (s. 79(3)(b)), and in practice a failure to issue the Court challenge within 28 days is usually fatal.

b. S. 73(1) of the Act introduces a principle of 'statutory waiver' which precludes a party from complaining on an attempted Court challenge of matters which that party failed to object to in the arbitration:

> If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection–
>
> (a) that the tribunal lacks substantive jurisdiction,
>
> (b) that the proceedings have been improperly conducted,
>
> (c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or
>
> (d) that there has been any other irregularity affecting the tribunal or the proceedings,

[2] To be precise, seated in either England and Wales or in Northern Ireland. Scotland has its own separate law governing arbitration, the Arbitration (Scotland) Act 2010 of the Scottish Parliament.

[3] Or, if there has been an arbitral process of appeal or review, 28 days from the date the applicant was notified of the result of that process.

> he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection.

It will be seen that (a) is capable of precluding a s. 67 challenge, while (b)-(d) apply to s. 68 challenges. S. 73(1) does not bear on appeals on a point of law (s. 69), but similar considerations apply under s. 69(3)(b): the Court will not grant leave for appeals on a question of law unless the question is one that the tribunal was asked to determine.

7. In short, the Act mandates a 'cards on the table' approach. It is not possible for a party to hold objections 'up its sleeve' in the hope of deploying them later on a Court challenge.

The 'slip rule' (s. 57)

8. S. 57 of the Act provides (with key words highlighted for ease of reference):

> **57 Correction of award or additional award**
>
> (1) The parties are free to agree on the powers of the tribunal to correct an award or make an additional award.
>
> (2) If or to the extent there is no such agreement, the following provisions apply.
>
> (3) The tribunal may on its own initiative or on the application of a party–
>
> (a) correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or
>
> (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.
>
> These powers shall not be exercised without first affording the other parties a reasonable opportunity to make representations to the tribunal.
>
> (4) Any application for the exercise of those powers must be made within 28 days of the date of the award or such longer period as the parties may agree.
>
> (5) Any correction of an award shall be made within 28 days of the date the application was received by the tribunal or, where the correction is made by the tribunal on its own initiative, within 28 days of the date of the award or, in either case, such longer period as the parties may agree.
>
> (6) Any additional award shall be made within 56 days of the date of the original award or such longer period as the parties may agree.
>
> (7) Any correction of an award shall form part of the award.

9. In its essentials, s. 57 is similar to Article 33(1) of the Model Law.

10. Notably, if the tribunal has omitted to provide reasons for its award, a party is entitled to use the s. 57 procedure in order to require the tribunal to provide reasons.[4]

Challenge to an award for lack of substantive jurisdiction (s. 67)

11. S. 67 empowers the Court to set aside arbitral awards, wholly or in part, for lack of substantive jurisdiction. 'Substantive jurisdiction' is defined in s. 30(1) as comprising:

> "…
> (a) whether there is a valid arbitration agreement,
> (b) whether the tribunal is properly constituted, and
> (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."

12. A challenge under s. 67 is available *as of right* with no requirement to seek the Court's permission.

13. It is now well established (after some uncertainty in the very early years of the Act[5]) that a s. 67 challenge is a *de novo* re-hearing by the Court rather than limited to a review of the tribunal's decision on jurisdiction: see *Dallah* [6] at [96] where the Supreme Court held that the re-hearing approach taken by Rix J in *Azov Shipping* [7] and Tomlinson J in *Peterson Farms*[8] was "plainly right".

14. In cases where a jurisdictional issue turns on factual evidence (e.g. if the parties dispute whether an agreement was actually concluded), the Court will usually require the evidence to be presented afresh, including witnesses being cross-examined again before the Court. This is to ensure that the Court is in at least as good a position as the tribunal to determine the truth. As Rix J held in *Azov Shipping* [9]:

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[4] *Al-Hadha Trading Co v Tradigrain* [2002] 2 Lloyd's Rep. 512 at 526 col. 2. In addition, the Court has the power s. 70(4) to compel a tribunal to give reasons for its decision.

[5] Unreported judgment of Toulson J in *The Robin* [1998] ADRLN 35, referred to in earlier editions of *Russell on Arbitration*.

[6] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

[7] [1999] 1 Lloyd's Rep. 68.

[8] [2003] EWHC 2298 (Comm).

[9] Citation given in fn. 7 above; at p. 70 col. 2.

> "Where, however, there are substantial issues of fact as to whether a party has made the relevant agreement in the first place, then it seems to me that, even if there has already been a full hearing before the arbitrators the Court, upon a challenge under s. 67, should not be placed in a worse position than the arbitrator for the purpose of determining that challenge. … Similarly, the Court may well be at a disadvantage in deciding issues of foreign law in the absence of oral evidence and cross-examination of the expert lawyers."

Challenge for procedural irregularity

15. S. 68(1) entitles a party to challenge an award for "serious irregularity", which is defined in s. 68(2) by a twofold test, viz. (1) it must fall into one of the categories listed in sub-sections (a)-(i), and (2) the irregularity must "cause substantial injustice to the applicant". Sub-sections (a)-(i) are an exhaustive list of qualifying types of irregularity:

> (a) failure by the tribunal to comply with section 33 (general duty of tribunal)[10];
>
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
>
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
>
> (d) failure by the tribunal to deal with all the issues that were put to it;
>
> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
>
> (f) uncertainty or ambiguity as to the effect of the award;
>
> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
>
> (h) failure to comply with the requirements as to the form of the award; or
>
> (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

16. A partial exception to the requirement to show "substantial injustice" appears to be the issue of actual or apparent bias. It would seem that the impartiality of the tribunal is so intrinsic to the arbitral process that if an arbitrator is tainted by actual or apparent bias

[10] S. 33 provides:

(1) The tribunal shall—

(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

that, of itself, amounts to a substantial injustice without needing to prove that it would affect the result: see *ASM v TTMI*[11]at [39].

17. Under s. 68(3) the Court is not to set aside or annul an award (in whole or part) before first considering whether to remit it to the tribunal for reconsideration.

18. The arbitration claim form procedure requires a s. 68 applicant to identify its ground of challenge with precision at the outset.

19. The Court is alert to prevent parties whose real complaint is that they disagree with the tribunal's decision on the merits of the case from misusing s. 68 as a backdoor means of re-litigating their dispute. See, for example, per Flaux J in *Sonatrach*[12] at [11]:

> "The focus of the enquiry under section 68 is due process, not the correctness of the tribunal's decision … the section is designed as a long-stop available only 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. This point, that section 68 is about whether there has been due process, not whether the tribunal "got it right", is of particular importance in the present case, where, upon close analysis, the claimants' real complaint is that they consider that the tribunal reached the wrong result, which is not a matter in relation to which an arbitration Award is susceptible to challenge under section 68."

20. The Court nonetheless does grant relief under s. 68 without hesitation in an appropriate case: see, for example, *Soeximex*[13], where a GAFTA appeal board had completely omitted to deal with at least one crucial point on which the applicant would probably have succeeded had the tribunal not omitted it.

21. In order to reduce the scope for unmeritorious challenges prolonging the proceedings and delaying enforcement of awards, the Court has adjusted its own rules to permit flimsy s. 68 challenges to be dismissed on paper in the first instance, and with costs sanctions if the applicant insists on an oral hearing and still fails: see para. O8.8 of the Admiralty & Commercial Court Guide:

> If the nature of the challenge itself or the evidence filed in support of it leads the court to consider that the claim has no real prospect of success, the court may exercise its

[11] *ASM Shipping of India v Through Transport Marine Insurance Ltd* [2005] EWHC 2238 (Comm).

[12] *La Société pour la Recherche, la Production, le Transport, la Transformation let la Commercialisation des Hydrocarbures S.P.A. (Sonatrach) v Statoil Natural Gas LLC* [2014] EWHC 875 (Comm).

[13] *Soeximex SAS v Agrocorp International Pte Ltd* [2011] EWHC 2743

> powers under rule 3.3(4) and/or rule 23.8(c) to dismiss the application without a hearing. …
>
> … Where the court makes an order dismissing the application without a hearing the applicant will have the right to apply to the court to set aside the order and to seek directions for the hearing of the application. If such application is made and dismissed after a hearing the court may consider whether it is appropriate to award costs on an indemnity basis.

Appeal on a question of law (s. 69)

22. The parties are free to exclude any possibility of appeals to the Court on questions of law by agreement. (This contrasts with the protections under ss. 67-68, considered above, which are mandatory). An agreement to dispense with reasons is deemed to be an agreement to exclude appeals under s. 69: see s. 69(1). The ICC and LCIA Rules both contain provisions excluding any appeal under s. 69. The default position under the LMAA Terms 2012, r. 22(a) is that the award will contain reasons (so s. 69 relief is possible), unless otherwise agreed.

Question of law

23. Appeals are only possible on a question of *English* law: s. 82(1).[14]

24. Courts continue to look to the (pre-1996) decision in *The Chrysalis*[15], which separated the tribunal's decision-making into three analytical stages, *viz.* (1) ascertain the facts, (2) ascertain the law, and (3) apply the law to the facts. Of these, only (2) is the proper sphere for appeals to the Court. Decisions on the application of the law to the facts are generally not appealable under s. 69: *Benaim* at [107][16]. However, a question of mixed fact and law is potentially reviewable under s. 69.[17]

[14] If an issue is governed by a foreign law, and the parties have not adduced submissions or expert evidence to ascertain the content of the foreign law, then the tribunal can follow the court's approach in such circumstances of *presuming* that foreign law is the same as English law. If the tribunal takes that approach, its decision on what English law is, is not reviewable under s 69: *Reliance Industries v Enron Oil & Gas India* [2002] 1 Lloyd's Rep. 645.

[15] *Vinava Shipping Co Ltd v Finelvet A.G.* [1983] 1 Lloyd's Rep. 503.

[16] *Benaim v Davies Middleton* [2005] EWHC 1370.

[17] But it is difficult to state the test: see *Russell on Arbitration* at para. 8.139; perhaps it can be expressed as: 'if there is a clear error of principle rather than application'.

25. Notably, whilst in domestic court proceedings a judge is regarded as having erred *in law* if he makes a factual finding for which there was no (or wholly insufficient) evidence, under the Act this is not a reviewable error: *Demco*[18], *Citylink*[19].

The filter of permission to appeal

26. In contrast to ss. 67-68, the route of challenge under s. 69 is *not* available as of right (unless the parties agree otherwise: see paras. 33-35 below). Rather, an appeal on a question of law needs the Court's permission. S. 69(3) imposes a fourfold limitation on the Court's power to grant permission to appeal:

> Leave to appeal shall be given only if the court is satisfied–
>
> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question is one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award–
>
> (i) the decision of the tribunal on the question is obviously wrong, or
>
> (ii) the question is one 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.

27. In short, under s. 69(3)(c) the Court has to take a *prima facie* view of the merits of the appeal, and decide whether the tribunal's decision on the question of law was "obviously wrong", or if it is a point of "general public importance", and if so whether it is "open to serious doubt".

28. In all cases, the Court will read the award in a broad and commercial way, not engaging in minute textual analysis and not being astute to look for flaws, as recent case law confirms:

> As a matter of general approach, the courts strive to uphold arbitration awards. The approach is to read an arbitration award in a reasonable and commercial way, expecting as is usually the case, that there will be no substantial fault that can be found with it. Furthermore not only will the court not be astute to look for defects, but in

[18] *Demco Investments v SE Banken Forsakring* [2005] EWHC 1398.

[19] *London Underground v Citylink* [2007] EWHC 1749, para [65].

> cases of uncertainty it will so far as possible construe the award in such a way as to make it valid rather than invalid.[20]

Obviously wrong

29. The 'obviously wrong' test is clearly a high threshold – but it is easier to state than to apply. Colman J has offered some guidance[21], which could be termed the 'Chablis test':

> "What is obviously wrong? Is the obviousness something which one arrives at…on first reading over a good bottle of Chablis and some pleasant smoked salmon, or is 'obviously wrong' the conclusion one reaches at the twelfth reading of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter."

30. Recent case law provides a sense of the Courts' continuing strict approach: see *HMV v Propinvest*[22], per Arden LJ:

> [5] It will be apparent from section 69 that rights of appeal from an arbitration award are severely restricted. It is not enough, therefore, simply to show that there is an arguable error on a point of law. Nor is it enough that the judge to whom the application for leave is made might himself or herself have come to a different answer. The required quality of the accepted error is that it must be "obviously wrong". Thus the alleged error must be transparent. It must also, at the least, be clear. The word "obvious" is a word of emphasis which means that the courts must not whittle away the restriction on rights of appeal in subsection (c)(i) by being over generous in their determination of the clarity of the wrong.
> …
> [8] … the memorable phrase "a **major intellectual aberration**"[23] … which I have found a useful way of bringing to mind that the error on which we are concerned, if there be an error, must be an obvious one.
> …
> [34] … Therefore I take the view that the interpretation to which the arbitrator came in this case was one which did not meet the test of being **unarguable** or making a **false leap in logic** or reaching a **result for which there was no reasonable explanation**. I am not, therefore, able to conclude that this conclusion was "obviously wrong". (Emphasis added).

[20] *Bunge SA v Nibulon Trading BV* [2013] EWHC 3936 (Comm), citing principles enunciated by the Court of Appeal in *MRI v Erdenet* [2013] EWCA Civ 156.

[21] In a 2006 lecture titled, "Arbitration and Judges – How much interference should we tolerate?" which was referred to in *AMEC v Secretary of State for Defence* [2013] EWHC 110.

[22] *HMV UK v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708.

[23] Used by Akenhead J in *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] 1 Lloyd's Rep. 608.

General public importance

31. The essence of this test is whether the decision is of wider interest in the market: examples would be interpretation of widely used standard clauses, or even individually clauses of a type that raise commonly encountered issues. By contrast, interpretation of "one-off" individually negotiated clauses is unlikely to be of general public importance.[24]

Open to serious doubt

32. This test requires little elaboration. In the leading case, *The Northern Pioneer*,[25] it was held that this test was less restrictive than the pre-Act test of "a strong prima facie case … that the arbitrator had been wrong". If it is an unsettled point on which there are conflicting judicial decisions, it will inevitably be open to serious doubt (and *perhaps* conflicting *dicta* suffice). If a legally qualified arbitrator has dissented on the point, that too is a strong indication that it is open to doubt.

Permission filter can be removed by agreement

33. The requirement for permission to appeal applies unless all parties agree to the bringing of an appeal on a question of law (s. 69(2)(a)). It is possible for the parties to agree to the bringing of an appeal, in which case the permission stage under s. 69(3) does not apply and the Court will decide the appeal, whether or not the question of law would have passed muster under the filtering tests in s. 69(3)(c).

34. The agreement for the purposes of s. 69(2)(a) can be made in advance of any dispute, e.g. in the arbitration clause itself, as was confirmed in *Royal & Sun Alliance Insurance plc* v. *BAE Systems (Operations) Ltd*[26].

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[24] *The Kelaniya* [1989] 1 Lloyd's Rep. 30 at 32. The Courts still cite with approval the leading pre-Act case of *The Nema* [1982] AC 724 where Lord Diplock held that: "… if the decision of the question of construction in the cirucmstances of the particular case would add significantly to the clarity of English commercial law it would be proper to give leave … bearing in mind always that a superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than promote clarity in settled principles of commercial law."

[25] *CMA CGM S.A. v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' Schiffahrtgesellschaft mbH & Co* [2002] EWCA Civ 1878, at [60].

[26] [2008] EWHC 743. The arbitration clause provided: "… Any party to the Dispute may appeal to the court on a question of law arising out of an award made in the arbitral proceedings."

35. The Act therefore offers commercial parties a choice between: (a) no appeals at all (by excluding s. 69), **or** (b) allowing any appeals without having to meet the s. 69(3) thresholds, **or** (c) the default position of allowing appeals but only if the relatively strict criteria in s. 69(3) are met.

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