

Appeals from Arbitral Awards: the Section 69 Debate

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Introduction

During consultation on the draft Arbitration Bill, many felt that any right of appeal on the substantive merits should be abolished.¹ Lord Justice Saville (as he then was) set out the problem in a nutshell.²

“A feature of our existing law which has caused disquiet abroad and which is regarded by many as detracting from arbitrating here is the ability to seek leave to appeal to the court from the substantive award of the arbitral tribunal. What is said is that to allow an appeal of this kind is to frustrate the agreement of the parties to resolve their disputes by arbitration, since the result of a successful appeal is to substitute a court resolution for an arbitral resolution. There is substance in this view. Indeed we considered whether to recommend the abolition of any right of appeal on the substantive merits of the dispute. In the end we decided not to do so...”

Almost six years after the Act came into force, I co-authored an article reporting some research into appeals under section 69 to that date.³ We identified a sample of cases, being those cases relating to section 69 published in Lloyd's Law Reports, on the basis that these were selected by third parties and were likely to include the important judgments. In essence, the research tentatively concluded that section 69 appeared to give little tangible value and that consideration ought to be given to repealing it.

It is always gratifying to get a reaction. Hew Dundas wrote a thoughtful article in response.⁴ A debate was organised on the topic by the London Shipping Centre on 15 October 2003 chaired by Anthony Diamond QC; it is fair to report that the majority of those in attendance were in favour of retaining the current scheme of appeals.

In the 2004 Cedric Barclay Lecture, the Lord Mayor (a City solicitor) suggested:

¹ Departmental Advisory Committee Report, February 1996, Department of Trade and Industry, paragraph 284.

² Saville L.J. “The Arbitration Act 1996 and its Effect on International Arbitration in England” (1997) 63 *Arbitration* 104 at 108.

³ R Holmes and M O'Reilly, Appeals from Arbitral Awards: Should Section 69 be Repealed? *Arbitration* Volume 69, Number 1, February 2003, pp. 1-9(9)

⁴ H Dundas, Appeals on questions of law: section 69 revitalised. *Arbitration* Volume 69, Number 3, August 2003

I shall encourage the view that there should be *more* appeals from arbitrations to the Court not less. This challenges the orthodoxy to which I know many in this room adhere and which also obtains in many foreign jurisdictions. There is even a school of thought which regards any interference by the courts as an adulteration of the purely consensual system of arbitration. Let me develop in due course why I believe that the present restriction on appeals under the English 1996 Arbitration Act is not only stultifying the development of the common law but is also unhealthy for the development of international arbitration in the long run.

In November 2006 the Report on the Arbitration Act 1996 was published. It is a most impressive and scholarly piece of work. It appears to show that 60% of respondents considered that “the possibility of appealing on a point of law (s. 69) should be retained on the current basis.”

It might be concluded that since most people are content with the current regime that we should just accept that section 69 is what the parties want and leave it at that. But first, it is worthwhile double-checking that we have covered all the points.

Let us be clear right at the outset that this discussion has nothing to do with sections 67 and 68. There is no question that:

- (1) a person only signs up for what he signs up for – so questions of jurisdiction are properly before the court.
- (2) a person who signs up for arbitration always signs up for a fair, honest and complete arbitration – so questions of serious irregularity are properly before the court.

Accordingly, there is no suggestion that the parties should somehow be cut adrift from the legal system. We are solely concerned here with questions where the arbitrator has jurisdiction and has conducted the arbitration within reasonable parameters of regularity, but where a court considers that it would have decided a particular issue differently.

Likewise, the word “abolition” is perhaps inappropriate. There is no objection to an opt-in to an appeal system. This is entirely consistent with party autonomy and is a point to which I shall return later.

However, to allow a review of an award on the merits – without the prior agreement of the parties – strikes at the heart of arbitration as an independent and autonomous system of dispute resolution. There is, for instance, no such review of expert determination, even though those decisions might be worth very large sums. Moreover, having an appeal on the merits to a High Court judge (i.e. the same level as would have taken the case at first instance were the arbitration agreement ignored) hierarchically subordinates arbitration to litigation. To accept section 69 as it is we have to be sure that we are content to accept this affront to arbitration.

A further aspect that needs to be accounted for is international harmonisation. We must be clear that England is out of step with the vast majority of other countries. I shall leave it to Professor Mistelis to discuss the position further. But, if we accept appeals we must do so in the clear understanding that we have subordinated international harmonisation to domestic interest.

Finally, we must cast a critical eye on the research findings. The 2006 survey was of 522 respondents, only 8 of whom described themselves as parties, but almost two-thirds of whom described themselves as lawyers. Lawyers, one might suppose – especially those who have been identified through a court users’ committee – will be naturally disinclined to allow themselves to be separated from the court system and hence will have a preference for some sort of review. Whether this result represents the views of the majority of parties, particularly smaller parties who may not use City solicitors, has not, I suggest, been established. Likewise, the phrasing of the question will be important. For example, if one of the questions read: “do you value harmonisation of arbitration law between countries?” we could imagine many would give a positive answer which could then be used to confront the respondent about his or her answer to the question concerning appeals and perhaps we would see a shift in view.

With those points in mind, let us turn briefly to the history of this topic.

Brief historical review

The English courts have traditionally been keen to supervise the performance of arbitrators. In 1865, Lord Justice Campbell advanced the theory that this arose from a desire by judges to get cases into Westminster Hall.⁵ Even as late as 1922 Lord Justice Scrutton was highly indignant at the suggestion that the parties to an arbitration might, by agreement, put their chosen arbitrator beyond judicial scrutiny.⁶ During the middle years of the 20th century, judicial attitudes to arbitration changed and the Commercial Court began to support the autonomy of the arbitral process. Nevertheless, until 1979, the court was heavily involved in supervising arbitration through the “special case” procedure, whereby an arbitrator – who was presumed likely to make an error of law – could be required to state a case on a question of law for the opinion of the court.

As a result of concerns about the effect of the special case procedure on the attractiveness of London as a centre for international arbitration, that procedure was replaced by a restricted right of appeal in the 1979 Act s.1. The scope of the appeals procedure it established was not clearly delimited. In *The Nema*,⁷ the Court of Appeal attempted to restrict the scope. Lord Denning set down a series of restrictive guidelines.⁸ Mr Justice Robert Goff refused to follow the superior court, declaring that: “I do not feel free to

⁵ *Scott v Avery* (1865) 5 HLC 811.

⁶ *Czarnikov v Roth, Schmidt & Co.* [1922] 2 KB 478 at 487, 488: “There must be no Alsatia in England where the King’s writ does not run.”

⁷ *BTP Tioxide Ltd v Pioneer Shipping Ltd, The Nema* [1982] A.C. 724 (HL).

⁸ *The Nema* [1980] 2 Ll Rep 339 (CA), *per* Lord Denning M.R. at 344-345.

apply these principles in deciding whether or not to give leave to appeal under the Act, because I am unable to discover any basis for them in the Act itself.”⁹ Goff J.’s liberal interpretation threatened to reintroduce the special case procedure, albeit in a slightly altered form. The House of Lords gave leave to appeal *The Nema*.¹⁰ Lord Diplock – following Lord Denning’s earlier lead – carried out a “breathhtakingly purposive interpretation of section 1(3)”¹¹ resulting in the now familiar “*Nema* Guidelines” setting out the type of factors that needed to be present before leave might be given. Lord Diplock said:¹²

there are, in my view, several indications in the Act itself of a parliamentary intention to give effect to the turn of the tide in favour of finality in arbitral awards (particularly in non-domestic arbitrations of which the instant case is one)....

When it was decided to overhaul the arbitration legislation in the 1990s, the opportunity arose to consider whether or not to abolish the right to appeal. As Lord Saville made clear, there were those who contended for abolition. But in the end, section 1 of the 1979 Act was largely re-enacted using the *Nema* guidelines as the basic framework for obtaining leave to appeal.

In the 2003 article mentioned above, we identified 14 cases out of the sample dealing with section 69. When analysed, we came up with the following tentative conclusions on what was admittedly a small sample:

“This brief survey yields a number of conclusions:

- (1) The number of appeal cases worthy of publication is relatively small compared to the very great number of arbitrations.
- (2) In very few cases – *The Lipa*¹³ was the only example that we located – was the arbitrator’s award overturned permanently.
- (3) Where first instances judges have overturned an award, the appellate courts have restored the arbitrator’s award on several occasions.¹⁴”

Since then, section 69 cases continue to come before the courts. It is now possible to identify a number where the arbitrator’s decision has been overturned and the law can be said to have been clarified. But there remain many applications for leave to appeal which are clearly devoid of merit. *Surefire Systems v Guardian ECL Limited* [2005] EWHC 1860 (TCC) is a well-known example where Mr Justice Jackson dismissed the application in the most straightforward fashion: “In my view, the first ground of appeal set out in the claim form is quite hopeless... I turn now to the second ground of appeal

⁹ *Schiffahrtsagentur Hamburg Middle East Line GmbH v Virtue Shipping Corpn Monrovia, The Oinoussian Virtue* [1981] 1 Ll Rep 533 at 538.

¹⁰ *The Nema* [1982] AC 724 (HL).

¹¹ Dyson L.J. ‘Finality in Arbitration and Adjudication’ (2000 66 *Arbitration* 288 at 291.

¹² At 739H.

¹³ [2001] 2 Ll Rep 17.

¹⁴ *The Hill Harmony* [2001] 1 Ll Rep 147 (HL); *The Happy Day* [2002] 2 Ll Rep 487 (CA).

set out in the claim form. As formulated, this ground is hopeless. It does not satisfy any of the requirements set out in section 69 of the Arbitration Act 1996.... I turn now to the third ground of appeal set out in the claim form... In my judgment, this ground of appeal is fatally flawed.”

This rigorous sifting out of cases at leave-to-appeal stage has led to what some practitioners see as a dearth of cases coming through to nourish the development of the law. The Commercial Court Report 2004 stated: “27. Concern continues to be expressed as to whether the strict requirements imposed under the Act for leave to appeal to the Commercial Court are impeding the development of the law, particularly in the field of shipping, insurance and reinsurance. This is an intractable problem, since it is probably the case that any relaxation of the requirements would lead to a reduction in the attractiveness of London as a forum for the resolution of disputes in fields other than those mentioned above. In any event, since the requirements are statutory the Court’s hands are tied.”

The Hill Harmony – is this what we seek to achieve?

Bearing in mind the comment in the 2004 Report, let us first examine one case which is often identified as an example of what is to be achieved by allowing more appeals. In the *Hill Harmony*,¹⁵ which was a 1979 Act case, the arbitrators had to decide whether, under a time-charter, the charterer could issue instructions as to which route was to be followed or whether this was a matter for the ship’s master. About US\$90,000 was at stake.

The House’s decision is summed up in the final substantive paragraph in Lord Hobhouse’s speech:

My Lords, the courts below were wrong to set aside the award of the arbitrators. Their award was not erroneous in point of law. The interpretation which they placed upon the utmost dispatch and employment clause was one which was open to them and it was likewise right for them, on the view they took of the state of the evidence, to conclude that the defence was not made out. The arbitrators’ role in deciding a dispute of this kind draws upon their experience of the shipping industry and the problems it gives rise to. Their description of the commercial character of the bargain struck in a time charter echoed that of Lord Mustill already quoted and is the same as that which I have attempted to explain. They stressed that if the owners wished to rely upon the navigation defence they must explain their position and justify what they had done. In so far as the arbitrators did have any explanation from the master, they rejected it as not providing any justification for not proceeding by the shorter northern route, the great circle route. The evidence of the recommendations of Ocean Routes was uncontradicted.

There are a number of points to be made here. First, this was always going to be a case about degree – i.e. whether the situation related to “employment” or “navigation”; arguably this case turned on questions of fact and evidence, not law. Second, assuming

¹⁵ *The Hill Harmony* [2001] 1 Ll Rep 147 (HL).

that there was a point of law in issue, if it were not for the charterer's persistence in going all the way to the House of Lords for what is a modest sum in dispute, incorrect law would have been made. Third, Lord Hobhouse reminds us of a feature of commercial law, namely that it is sometimes best applied by people with experience of the industry. Fourth, this is a case which could just as readily have derived from proceedings commenced in the court at first instance; and so a lack of arbitration appeals would not necessarily prevent a case such as this reaching the courts. And finally, we are justified in asking whether what has been achieved in terms of clarification of the law was worth the personal expense to the parties, who had to risk and ultimately pay between them costs before four separate tribunals focusing on the same point and all for \$90,000.

It is by no means clear to me that this case represents a sound basis for supposing that more appeals will improve the law's development. I am not suggesting that one case can prove the point. But just as the owner of the *Hill Harmony* failed to substantiate its navigation defence, likewise, I suggest it is incumbent on those who claim that more appeals would improve the development of the law to point to examples where this has happened to justify the claim that, all things taken into account, the expense, delay and uncertainty in commercial dealings are worth it.

Party autonomy and the implied adoption justification for section 69

The Arbitration Act 1996 s.1(b) provides: "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest." A number of commentators have attempted to justify s.69 on the grounds that this is what the parties would have expressly agreed had they considered the matter. The DAC Report suggests that this can be inferred in a case where the arbitration agreement contains an express choice of law clause.¹⁶ Lord Saville also expressed this view:¹⁷

it seems to me that it is well arguable that this limited right of appeal can properly be described as supportive of the arbitral process. Where the parties have agreed that their dispute will be resolved in accordance with English law, and the tribunal then purports to reach an answer which is not in accordance with English law, it can be said with some force that unless the courts correct this error, the tribunal itself will have failed to carry out the bargain of the parties.

It is highly doubtful whether the normal tests of contract interpretation would admit of this extrapolation; and if they did, would this not also be an argument for ensuring that any contract with an express choice of law clause, whether English or Ruritanian, be allowed an appeal – after all, why should parties under an English contract be held to their bargain, but parties under a Ruritanian contract be allowed to avoid it?

¹⁶ DAC Report para 285.

¹⁷ (1997) 63 *Arbitration* 104 at 108.

In many cases to which the Act applies, however, there is no express choice of law clause. Accordingly, the suggestion that s.69 expresses what the parties have agreed is tantamount to the assertion that the appeal provisions – or something akin to them – would be implied. The tests normally applicable to the implication of a term would rarely be met. The argument that the parties would support the limited right of appeal if they thought about it seems to give insufficient regard to the negative aspects of an appeals procedure. It is frequently said – indeed by Lord Saville in the quotation at the start of this article; likewise the quotation from the Commercial Court Report 2004 alludes to this also – that overseas parties do not want appeals. Indeed, there are good reasons why parties generally might not want an appeals procedure imposed on them. They are expensive,¹⁸ time consuming,¹⁹ create uncertainty as to the enforceability of awards and involve exposing private, commercially-sensitive matters in the public courts.

Questions of law and questions of fact

Only questions of law are appealable. This creates two distinctions which clients may find difficult to understand.

First, the distinction between questions of fact and questions of law is notoriously difficult to establish in many situations and we must agree with Judge Thornton QC that “It is never easy to define what is meant by a question of law in the context of an arbitration appeal.”²⁰ In many instances, we can only feel safe in characterising a question as one of law or fact once a court has laid down a precedent.²¹ But even then we must take care: “what is a question of law in a judicial review case may not necessarily be a question of law in the field of consensual arbitrations.”²²

Second, many cases arbitrated in London involve foreign law. In some, the parties use the working assumption that the provisions of English law are equivalent to those of the governing law.²³ But, in theory, a question of foreign law is a question of fact and unappealable as many parties have found.²⁴ This raises a significant point of principle,

¹⁸ It would be useful to carry out some empirical research into the real cost of s. 69. When a party loses an arbitration of any size, it is now virtually obligatory to scan the award with a view to appealing it. This is a surcharge on every arbitration, even if the decision is not to appeal. Then, of course, there are all the cases where an unsuccessful application for leave is made.

¹⁹ It will typically take three months from award to hearing an application for leave. As the time from issue of arbitration notice to award is frequently less than a year, the delay is proportionately significant.

²⁰ *Fence Gate Limited v NEL Construction Ltd*, TCC, 5 December 2001, per HH Judge Thornton QC at paragraph 38.

²¹ For example, *The Solholt* [1983] 1 Ll Rep 605, CA, per Sir John Donaldson MR at 608, is frequently cited as authority for the proposition that questions of mitigation are questions of fact.

²² Steyn LJ in *Geogas SA v Trammo Gas Ltd, The Baleares* [1993] 1 Ll Rep 215 at 231 (CA).

²³ As happened in *Reliance Industries Ltd v Enron Oil and Gas India Ltd* [2002] 1 Ll Rep 645.

²⁴ *Egmatra AG v Marco Trading Corporation* [1999] 1 Ll Rep 862; *Sanghi Polyesters Ltd (India) v International Investor (KCFK, Kuwait)* [2000] 1 Ll Rep 480; *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] 1 Ll Rep 65; *Reliance Industries Ltd v Enron Oil and Gas India Ltd* [2002] 1 Ll Rep 645; *Athletic Union of Constantinople v National Basketball Association* [2002] 1 Ll Rep 305.

namely why Parliament felt it appropriate to extend the section 69 protection to English contracts, but not to foreign contracts – including those governed by Scots law and systems based on English law.

Many clients will be confused by these distinctions. Indeed, I suggest that many lawyers are confused by them.

An opt-in solution?

There are many difficulties with retaining a system of appeals on the merits in its present form. These range from the theoretical to the practical. By way of reminder, the main ones are:

- (1) it is inconsistent with party autonomy, as the decision of chosen tribunal is overridden by the court's decision
- (2) it puts England out of step with other jurisdictions
- (3) hierarchically, it subordinates the decision of the chosen tribunal to that of the court, because the decision of the arbitrator is appealed to a single judge at the same level as first instance proceedings would have been commenced had the agreement to arbitrate been ignored
- (4) the restriction to a review of points of English law may create an unreal distinction, e.g. where there are two disputes involving the construction of the same words in an English contract and a Scottish contract, only one is appealable
- (5) a right of appeal means a surcharge on every case because every award must be reviewed, many applications for leave are issued to preserve time (many of which are then unceremoniously dismissed) and in those cases where an appeal is genuinely advanced, this can be very expensive and disruptive.

But we must recognise that those who advocate more appeals do so with a sense of genuine concern for the development of the law. The Commercial Court Report 2004 described the issue as “intractable”. But I am not sure that it is. A potential solution is to make it clear that parties can, by agreement, “opt-in”. Those sectors of industry – shipping, insurance and reinsurance have been specifically mentioned – will, if the clients perceive it to be in their interest, endorse forms of contract with a right of appeal enshrined in the agreement. Those clients who prefer to have court supervision of the merits can do likewise; these are likely to be the types of client who can afford to bear the cost of appeals, allowing the smaller less sophisticated parties to avoid appeals or at least make allowance for them.

The opt-in solution is wholly unobjectionable in terms of party autonomy, harmonisation and the problem of the subordination of arbitration. The default position is that the

arbitrator's decision is final, unless the parties have agreed otherwise. Likewise, there is no "superior" in the High Court overseeing the arbitrator's assessment of the law and facts, unless the parties specifically agree – if parties choose to agree an appeals mechanism, they can create their own arbitral appeal structure or they can elect to go to the court.

But, having made this suggestion, I remain doubtful whether there will be many subscribers. Consider section 69(2) of the Act, which already enables a party, by agreement, to an appeal without leave of the court.²⁵ Despite concerns that the leave to appeal requirements are too restrictive, this is not a widely-used provision. Why, it might be asked, do those who contributed to the view that there were not enough appeals not encourage their clients to take advantage of this provision, which has now been on the statute book for 10 years?

Perhaps – and I leave this for people to decide for themselves – it is much more difficult to persuade commercial clients that appeals are a good thing than it is to persuade their lawyers.

²⁵ See *Kershaw Mechanical Services v Kendrick Construction* [2006] EWHC 727 (TCC) for an example of a recent appeal advanced pursuant to a prior agreement. It was suggested by the respondent that the ethos of the 1996 Act meant that the court should always be cautious about disturbing the decision of the arbitrator. Mr Justice Jackson made it clear that where there is an agreement to allow an appeal without leave, there is no policy restraining the court from hearing the matter fully as it would any other matter before it. The judge expressly invoked the principle of party autonomy in reaching that view.