

13th ANNUAL REVIEW OF THE ARBITRATION ACT 1996 Time to Review the Arbitration Act 1996?

PROVISIONS ON COSTS AND APPEALS: AN ASSESSMENT FROM AN INTERNATIONAL PERSPECTIVE

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Synopsis

The primary thesis of this paper is that any review of the English Arbitration Act 1996 should not be conducted by reference solely to English domestic considerations; an international perspective is required if we are to retain our place at the international arbitration top table.

At first sight this may seem a puzzling point to make; after all, the Arbitration Act 1996 was stimulated by the publication of the Model Law in 1985 and many of its sections are drawn directly from concepts in the Model Law, whose international credentials cannot be questioned.

But in those areas where the Model Law is silent or where it conflicts with long-standing English practice, the 1996 Act tends to take a somewhat more inward-looking approach. There are two areas where this is particularly acute: costs and appeals on a point of law.

In this paper I shall examine these two matters and shall offer a suggestion in each case as to how our legislation may be re-framed to take account of international practice and concerns.

Harmonisation in international arbitration: a brief review

The New York Convention 1958 represented a significant achievement. It seemed that the case for harmonisation and reciprocity in international dispute resolution had been accepted. This was reinforced in 1976 when UNCITRAL published comprehensive rules designed for *ad hoc* arbitrations.

When UNCITRAL proposed a Model Law in the early 1980s many people anticipated that by the end of that decade all major trading states would have implemented identical domestic legislation in support of international arbitration. In line with this, it was, of course, envisaged that any review or amendment of the legislation would also take place in an international context and would be expressed as an amended Model Law, which would in turn be given force of law across the world.

That of course did not happen. And that is why, 25 years later, we are assembled here in a national – rather than international – setting to debate whether our own individual arbitration legislation should be reviewed and, if necessary, amended.

Costs

Historically, the question of costs has not attracted a great deal of academic attention¹; but recently it seems to have become something of a hot topic in international arbitration, with a number of recent articles expressing concern over what is seen as the escalating cost² and

¹ But see e.g.: J K Goytanda, Awarding costs and attorneys' fees in international commercial arbitrations, 21 Michigan Journal of International Law (1999) 1-50; M P O'Reilly and E Ryan, Costs in international commercial arbitration, Ch. 9 in International Commercial Arbitration: Practical Perspectives (A. Berkeley & J. Mimmms Eds), Centre of Construction Law & Management, King's College, London, September 2001, 121 - 135.

² See e.g.: R H Kreindler, Final Rulings on Costs: Loser Pays All?, Best Practice in International Arbitration, Proceedings of the ASA Conference, Zurich 27 January 2006. J M Abascal Zamora, Reducing Time and Costs in International Arbitration, Modern Law for Global Commerce, paper delivered to the Congress to celebrate the 40th annual session of UNCITRAL, July 2007.

uncertainty over the application of existing rules.³ The ICC has issued guidance on controlling costs.⁴ And there have been a number of cases on arbitral costs decided in a variety of jurisdictions.⁵ It is estimated that between 80% and 90% of the total costs arise from the parties' direct expenses, such as representation, experts etc⁶ and hence the rule which applies as to allocation of these costs is one of great – and arguably growing – significance, particularly in smaller arbitrations where the costs make up an appreciable proportion of the sums in issues.

I do not propose to review domestic costs rules applicable in major jurisdictions around the world.⁷ Suffice it to say that there are two basic models, which we can denote respectively as the American Rule and the English Rule (although the philosophy behind the English Rule can be traced back to pre-Justinian Byzantium). Under the pure American Rule, parties pay their own costs irrespective of the outcome and share the costs of the tribunal/institution; this is based on the philosophy that access to justice is paramount and barriers to seeking justice should be eliminated. Under the pure English Rule, the “winner” recovers his reasonable costs from the “loser” who also pays for the tribunal/institution; this is based on the philosophy of indemnity – if I was right to take this action, then I should not be out of pocket for doing so. Of course there are many modifications to these rules in practice – in the US, bad faith litigation can result in cost shifting⁸ and in England new rules encourage fractional costs awards to reflect partial success.⁹

These two apparently incompatible philosophies came face to face during the negotiation of the UNCITRAL Rules on 20 April 1976. The US delegation, backed by India, made the following statement:¹⁰

The sponsors [i.e. the US and India] had found that there was a wide variety of practice in different countries as to whether parties bore their own costs of arbitration or whether the costs were borne by the unsuccessful party. It seemed, however, that no arbitration rules went so far as to provide that the unsuccessful party should pay compensation for legal assistance of the successful party without exception... [The delegation then referred to the general practice under USSR and GDR etc rules and continued.] In the United States, each party bore its own costs, with rare exceptions. Most international arbitration rules were silent on the subject of costs... The sponsors felt that a question of principle was involved, since a poorer party might hesitate to seek justice if it feared that it might have to bear the costs of a richer party. They considered that some provision should be made for costs, but that it should be flexible...

They then proposed an amendment to the Secretariat's text to read:

Each party shall bear its own expenses for legal assistance, provided, however, that the arbitrators may include such expenses as costs of the arbitration if they determine it is

³ See Kreindler op cit and A A Santens, Costs in International Arbitration: A Plea for a Debate on Early Guidance by the Arbitral Tribunal on the Principles it Will Apply when Deciding on Costs.

⁴ Techniques for Controlling Time and Costs in Arbitration. ICC Commission on Arbitration, 2007. See also the contribution by one of the co-chairman of the task force which produced the report: C Newmark, Controlling Time and Costs in International Arbitration, Chapter 6 in The Leading Arbitrators' Guide to International Arbitration, 2nd Edition 2008, (Newman & Hill, Eds), pages 81 – 96.

⁵ *Casata Limited v General Distributors Limited* [2006] NZSC 8 [whether failure to make an award as to costs leads to an incomplete award; *KH, SK and WM v Soyak International Construction & Investment Inc* [2008] Supreme Court of Sweden O-4227-06 [review of arbitrators' fees]; *VV v VW* [2008] Part 3 Case 10 High Court of Singapore [whether an award of allegedly excessive legal costs in the award was reviewable by the court].

⁶ Techniques for Controlling Time and Costs in Arbitration: estimated based on ICC arbitration awards 2003-4 that the costs were spread as follows: Costs borne by the parties to present their cases (including lawyers fees and expenses) 82%, Arbitrators' fees and expenses 16% and Administrative expenses of ICC 2%. Klaus Sachs estimates that in arbitrations in which he was part of the tribunal the costs of representation were of the order of 81%-94% of the total – see Time and Money: Pervasive Problems in International Arbitration, L. Mistelis and D M Lew, eds 2006.

⁷ See the survey in Jackson LJ's Interim Report Vol. 2 Part 11 “Review of costs regimes in other jurisdictions”: Ch 54 Scotland; Ch 55 Germany; Ch 56 France; Ch 57 The Netherlands; Ch 58 Australia; Ch 59 New Zealand; Ch 60 The USA; Ch 61 Canada; Ch 62 Eastern Carribean. Also see the research available on the Oxford University Centre for Socio Legal Studies which has been seeking to collect an authoritative database on costs from a variety of jurisdictions.

⁸ *Alyeska Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240 (1975) (“[A] court may assess attorneys' fees ... when the losing party has acted in bad faith.”).

⁹ CPR.

¹⁰ UNCITRAL A/CN.9/9/C.2/8R.13.

appropriate to do so under the circumstances of the case, and then only if such costs were claimed during the arbitral proceedings and to the extent that the amount is deemed reasonable by the arbitrators.

However, the majority on the drafting committee – including the USSR representative, whose rules had been relied on by the US delegation – decided to express the principle that the successful party should expect to recover costs. The final text that emerged reads:

Article 38 The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes... (e) the costs for legal representation and assistance of the successful party...

Article 40 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

Since then all key arbitral institutions worldwide have adopted international arbitration rules which are broadly in keeping with this text. Rules of US bodies tend not to raise a presumption that costs shall be awarded to the successful party, but do make it clear that this option is fully open. For example:

AAA International Rules 2009 Article 31: “The tribunal shall fix the costs of arbitration in its award. The tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case. Such costs may include:... (d) the reasonable costs for legal representation of a successful party...”

Society of Maritime Arbitrators Rules Rev 2009 Section 30: “...The Panel, in its Award, shall assess arbitration expenses and fees as provided in Sections 15 [stenographic record], 36 [witnesses] and 37 [arbitrator’s fees] and shall address the issue of attorneys’ fees and costs incurred by the parties. The Panel is empowered to award reasonable attorneys’ fees and expenses or costs incurred by a party or parties in the prosecution or defense of the case. Any attorneys’ fees or party costs awarded shall be quantified in the Award.”

Of course, rules to be adopted by agreement of the parties did not strike at the national sensitivity of individual states/ countries. Even in the US, it is generally the case that agreed rules as to cost shifting will be enforced, but this is based on freedom of choice, which is even closer to the American heart than the American Rule on costs. The Model Law, however, was different altogether; if common costs rules were adopted, it would involve many legislatures – most particularly the US – enacting laws which were different in philosophy from their domestic litigation rules. With this in mind, the Model Law working group stated in its report of 23 March 1982:¹¹

“99. There was wide support for the view that questions concerning the fees and costs of arbitration were not an appropriate matter to be dealt with in the model law.”

As the Supreme Court of New Zealand has observed¹²: “... it was left to each State to provide for the costs of an arbitration, if it wished to do so, in its own way.” The way this has been achieved in individual cases has not always reflected best drafting practice.¹³ In some jurisdictions, it is provided that costs will follow the event;¹⁴ in others that the American Rule is

¹¹ UN Document A/CN.9/216, (1982). Referred to by Chief Justice Elias in his judgment in *Casata Limited v General Distributors Limited* [2006] NZSC 8. See also P Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*, Kluwer, 2004 page 146.

¹² *Casata Limited v General Distributors Limited* [2006] NZSC 8 para 124 per McGrath J.

¹³ In the Australian International Arbitration Act it is not clear whether or not the rules as to costs are “opt-in” or “opt-out.” In the New Zealand Arbitration Act 1996 the rules as to costs are set out in a schedule and it is unclear from the legislation whether a failure to make an award as to costs in a substantive award results in costs lying where they fall or in an incomplete award – see *Casata* supra. The Singapore International Arbitration Act provides no express power to make an award as to costs, yet it provides that such an award is taxable and hence the power seems to arise by implication.

¹⁴ E.g. English Arbitration Act 1996, New Zealand Arbitration Act 1996.

deemed to be the default position.¹⁵ In some legislation it is provided that if no award is made as to costs, certain presumptions arise.¹⁶ In others, a party may apply for an award of costs within time limits, if the tribunal does not make an award as to costs.¹⁷ In some cases, the legislature has omitted any mention of costs at all¹⁸ which has led to uncertainty as to whether or not the tribunal has power to make an award as to costs or to allocate its own fees in any unequal way.¹⁹ So, what we have ended up with is a patchwork both in terms of effect and of clarity. This also leads to the possibility of forum shopping. For example, where the parties agree “to refer their disputes to arbitration in London or New York at the option of the claimant,” without reference to any rules which cover the question of costs, the claimant is in a position to select at his option for a regime where no attorneys’ fees can be awarded or alternatively where the parties’ reasonable legal costs will follow the event.

During the conference in 1998 to mark the 40th anniversary of the New York Convention, the Commission was encouraged to review the Model law. In a Note by the Secretariat²⁰ in 1999, a list of topics was proposed for future work. Section K dealt with the costs of arbitral proceedings. After noting the previous comment by the 1982 committee, it went on to say: “107... Since completion of the Model Law, however, a number of Model Law enactments have added provisions on the arbitral tribunal’s power to fix and allocate costs and fees. These laws often differ in substance and particularly as to the detail of the power and scope of related issues.” In paragraphs 108 – 114, the Note goes on to identify the main areas of heterogeneity.

The Model Law was revised in 2006. The question of costs was not addressed.

The management of costs

Against the background of growing concern over costs, the ICC has published a report²¹ setting out a host of practical measures that might be adopted by the tribunal to manage costs. Paragraph 85 is notable:

85. The allocation of costs can provide a useful tool to encourage efficient behaviour and discourage unreasonable behaviour. The arbitral tribunal has discretion to award costs in such a manner as it considers appropriate. It may be helpful to specify at the outset of the proceedings that in exercising its discretion in allocating costs the arbitral tribunal will take into account any unreasonable behaviour by a party...

Whilst the ICC’s commitment to increasing the efficiency of arbitration is admirable, a key point is that agreed rules on costs – including the ICC’s Rule – fail to offer the parties any reliable guidance as to how costs may be allocated and in what amount. As well as the linkage between behaviour and costs – which should not be for individual tribunals but should be an across-the-board principle set out in the rule – the lack of guidance contributes to a number of opportunities. For example:

¹⁵ Japanese Arbitration Law 2003. Art 49 provides: “(1) The costs disbursed by the parties with respect to the arbitral proceedings shall be apportioned between the parties in accordance with the agreement of the parties; (2) Failing an agreement as described in the preceding paragraph, each party shall bear the costs it has disbursed with respect to the arbitral proceedings.”

¹⁶ E.g. Mauritius Arbitration Act 2008. The default position in section 32(b) that if there is no award as to costs both parties will bear their own costs and be responsible for half the common costs.

¹⁷ E.g. Australian International Arbitration Act 1974. Section 27(4) states: “If no provision is made by an award with respect to the costs of the arbitration, a party to the arbitration agreement may, within 14 days after receiving the award, apply to the arbitral tribunal for directions as to the payment of those costs...”

¹⁸ The US Federal Arbitration Act, which pre-dates the Model Law, falls into this category. More surprisingly, the Model Law which is given force of law in Scotland was not supplemented by any provisions as to costs. It is generally assumed that the common law permits an award as to costs in Scotland and that that suffices, but this argument is not altogether convincing in an international case where the Model Law purports to be a comprehensive code. Scotland has recently enacted new legislation which corrects this.

¹⁹ In England it is generally considered that the power to award costs is entirely statutory, hence the inclusion of costs provisions for the first time in the Arbitration Act 1889. This is generally supported by US authorities: see e.g. *Bacardi Corp. v. Congresso Uniones Industriales Pureto Rico* 692 F.2d 210 (1st Cir. 1982), *Sammi Line Co. v. Altamar Navegacion* 605 F. Supp. 72 (S.D.N.Y. 1985), *Hamada v. Westcott & Waikiki Beach Ice Cream Inc.* Supreme Court of Hawai’i, 2003.

²⁰ UN Document A/CN.9/460

²¹ Techniques for Controlling Time and Costs in Arbitration, Report from the ICC Commission on Arbitration, 2007.

- There is no explicit recognition of the concept of proportionality, i.e. of the amount of costs recoverable relative to the amount in dispute.²² Awarding costs is necessarily a two-stage process; when assessing what costs are to be permitted this concept can be important.
- There is no recognition of the role of offers²³ in encouraging both efficiency and settlement.²⁴ It is arguable that even an unsuccessful offer might have an impact on proportionality – e.g. if C claims \$1m, R makes an early offer of \$0.5m and after an expensive arbitration C recovers \$0.55m, arguably C has gained a mere \$0.05m and hence his costs recovery should be proportionate to that margin rather than the totality of his recovery.

Whilst it is sometimes argued that we need fewer rules,²⁵ it hardly seems excessive to state the factors to which the tribunal may have regard.

The current English legislation

The English Arbitration Act 1996 devotes sections 59 – 65 to the question of costs. All sections, except 60, are non-mandatory. Although the drafting of the Act as a whole has been widely praised, and rightly so, the costs provisions deserve some attention. The key principle, expressed in section 61(2) is tucked away as the second subsection of the third section and is expressed in legalese which presupposes a familiarity with English domestic jurisprudence. It states:

61 (2) Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

The expression “costs should follow the event” does not have a fixed meaning even amongst English lawyers. The application of the concept has become increasingly confusing since the introduction of the CPR encouraging issue-based costs orders in litigation.

An alternative formulation used by LCIA and which expresses a similar – although not identical – idea is, I respectfully suggest, much clearer:

28.4 Unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate. Any order for costs shall be made with reasons in the award containing such order.

Other aspects of the current legislation may benefit from review. Section 60 – which is mandatory – is of somewhat uncertain scope. The provisions dealing with assessment by the court are arguably no longer of relevance. Section 65 – which provides a power to cap costs – is generally recognised to be too blunt an instrument and despite the high hopes of the DAC is rarely used.

²² The word “proportionality” appears in the preface, but does not appear in the report.

²³ Few rules or legislative provisions mention offers. The New Zealand Arbitration Act 1996 is an exception; Clause 6(2)(a) of the 2nd Schedule of the Arbitration Act 1996 provides that an offer may be taken into account where “the award of the arbitral tribunal is no more favourable to the other party than was the offer”.

²⁴ Newmark op cit page 87: “Not a great deal of research has been done on rates of settlement in international arbitration proceedings, but such research as there is suggests that settlement rates in arbitration are significantly lower than settlement rates in state court proceedings. Both research and experience of practitioners that I have questioned suggest that the average settlement rate in arbitration proceedings is around 50%, whereas settlement rates in state courts is typically above 90%.” Newmark also cites some supportive research, e.g. *Bucher*, ASA Bulletin 1995, p 568 which estimates settlement rates of approximately 50% in arbitration. What is clear, however, is that there is no body of systematic controlled research.

²⁵ J M Abascal Zamora, Reducing Time and Costs in International Arbitration, Modern Law for Global Commerce, paper delivered to the Congress to celebrate the 40th annual session of UNCITRAL, July 2007.

How might we approach a review?

Given the current range of international practice and the international arbitration community's concerns about costs management, it seems appropriate that any review will seek to ensure:

- (1) that both the access and indemnity philosophies are each fairly represented
- (2) that the parties are incentivised to behave proportionately and reasonably?

It may be appropriate to start with a clean sheet of paper. The following draft is offered for consideration for the main operative section (after sections defining costs, stating that the award as to costs should be reserved until the award on substantive issues has been given and further submissions received etc):

Section X

- (1) Unless otherwise agreed the tribunal shall, following publication of its award on substantive issues, make a further award stating how costs relating to those substantive issues are to be allocated between the parties.
- (2) Where an award is made in favour of a party the tribunal shall fix those costs in the award.
- (3) Unless otherwise agreed the following principles apply to the exercise of the duty and discretion in subsections 1 and 2 above:
 - (a) the award shall apportion liability for costs so as to reflect the relative success and failure of each party in the award or arbitration and/or as appropriate its constituent issues
 - (b) in assessing relative success and failure, the tribunal shall have regard to the sums claimed and to any offers of settlement made by a party
 - (c) in fixing legal costs, including for representation or witnesses, the amount awarded shall be limited to those costs which were necessary to pursue, or as the case may be, defend the arbitration and shall be further limited to those sums which, in the view of the tribunal, are in all the circumstances proportionate to the sums in issue
 - (d) when assessing proportionality for the purpose of fixing costs the tribunal shall have regard to the sums claimed and to any offers made
 - (e) where a party's conduct has been detrimental to the efficient progress of the arbitration, a reasonable allowance in costs – either in apportioning liability or in fixing costs – may be made to the other party to reflect this.

Proposed sub-section (1) sets out the fundamental point that the tribunal is both obliged to make an award (even if it is that liability for costs lies where it falls); and that the tribunal is empowered to allocate between the parties. A number of national laws fail to state this explicitly and even the English legislation fails to be entirely clear about it.

This text pays regard to both the American Rule and the English Rule:

- the English Rule is represented in the principle – subsection 3(a) – that costs shall in the broadest sense be tied to success, thus providing an appropriate level of indemnity given the degree of success. The wording used borrows from the LCIA text: “costs should reflect the parties' relative success and failure in the award or arbitration.” It also reflects recent changes in emphasis in English practice to encourage issue-based costs awards.
- the American Rule is represented by the terms of subsection (1) where the possibility of an award that both parties pay their own costs is acknowledged and in the restriction – subsection 3(c) – on awardable costs to those which are necessary and proportionate, hence dealing with access to justice issues. Arguably this provision is tighter and leaner than the somewhat wide wording employed in the rules of major American arbitration institutions.

In relation to assessing the recoverable costs, the terminology “fix the costs” has widespread international currency. It is used in the UNCITRAL Rules 1976 and in the ICC Rules 1998.²⁶

²⁶ Article 31(3) provides: “The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne.”

Likewise it is used in a range of domestic laws relating to arbitration.²⁷ The word “fix” arguably has a clearer and more direct meaning than the word “determine” used in the current English legislation.

Proposed sub-sections 3(b), (d) and (e) promote good management of the arbitral process. Prominence is given to offers. Sub-section 3(e) goes well beyond the “bath faith” approach that in the US gives rise to a costs award even in Federal courts²⁸ and the English concept of “indemnity costs”. It effectively provides that parties have an obligation to behave in a way that is not “detrimental to the efficient progress of the arbitration” and that in failing to do so they can expect to have an adjustment made in respect of costs.

The rule proposed above – which promotes a significant departure from the traditional “costs follow the event” approach – may have been difficult to countenance in 1996. But in a post-Wolff world (ushering in issue-based costs orders) and post-Jackson world (where the very principle of cost shifting was put under an uncomfortable spotlight²⁹), perhaps such an approach is no longer even controversial.

It is submitted that legislation such as that envisaged above is in keeping with current English trends in its domestic sphere and would be palatable in almost all jurisdictions around the world – including the US and other jurisdictions that adopt the American Rule. It would enable England to take a lead in the debate over how to harmonise costs rules globally. Such a step may eventually encourage UNCITRAL to get round to addressing Section K of its 1999 list of areas for further work.

Appeals

The second area upon which I wish to touch is that of appeals on a point of law. Section 69(1) provides:

Unless otherwise agreed by the parties, a party to arbitral proceedings may... appeal to the court on a question of law arising out of the award...

This establishes the scope of the court’s general power and the fact that this is an opt-out provision. Subsection (2) provides that an appeal requires either agreement between the parties or leave (permission) granted by the court. Subsection (3) sets out the criteria for obtaining permission.

Brief historical review

Up to the beginning of the 1980s, section 21 of the Arbitration Act 1950 provided that parties could request the arbitrator to state a case for the court on a question of law. This opportunity was widely exercised; in 1978 there were 300 such cases.³⁰ This was an expensive and time consuming impediment to efficient arbitration in many cases. The Arbitration Act 1979 abolished the case stated procedure and the forerunner of section 69 was introduced; thus the new appeal process was not designed as an additional opportunity to take the matter to court but to narrow a much wider power. The criteria for obtaining leave were established by the court in the *The Nema*.³¹ Although the 1979 Act provided for an opt-out in respect of many cases, this did not apply to domestic arbitrations or to maritime, insurance or commodity cases which were placed in a special category.

In the review in the 1990s, the question arose whether the limited right of appeal was to be maintained. The two chief concerns were:

²⁷ Clause 6(1) of the New Zealand Arbitration Act 1996. In the German Civil Code section 1057, the word “fix” is used in the English translation proposed by the German Arbitration Association.

²⁸ *Alyeska Pipeline Serv. v. Wilderness Soc’y*, 421 U.S. 240 (1975)

²⁹ Jackson LJ, Final Report, chapter 4, para 3.23 which refers to the cost shifting rule’s ability to create “perverse incentives” even in major litigation.

³⁰ Lord Mance’s Advisory Committee, First Interim Report, Statistical Appendix para 1.

³¹ *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The Nema)* [1982] A.C.724 at 752).

- that commercial law would not be replenished if all decisions – no matter how interesting and important – were made behind closed doors;
- that if arbitrators were to be entrusted with final decisions without any right of intervention by the court, this could lead to injustice.

These are reasonable and sincerely held concerns. In the event the procedure was retained, but with the Nema Guidelines codified in section 69(3) and the “special categories” removed so that the right to exclude an appeal was made universal. So, in reality, at each review stage the possibility of an appeal has been further restricted.

Opt-outs/Exclusion of the right to appeal

Following the implementation of the 1996 Act, the LCIA and ICC drew up rules to give blanket exclusion to the limited right to appeal.

LCIA 1998 Article 26.9 All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27 [corrections]); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.

ICC 1998 Article 28.6 Every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out Any award without delay and shall be deemed to have waived their rights to any form of recourse insofar as such waiver can validly be made.

The LMAA’s stance was more complex. Based on the proviso to section 69(1) that an agreement to dispense with reasons was to be treated as an agreement to exclude appeals, the LMAA Rules stated:

LMAA 1997 Rule 23 (a) If before the award is made one or more parties... shall give notice to the tribunal that a reasoned award is required the award shall contain the reasons... (b) The parties agree to dispense with reasons in all cases where no notice shall have been given under paragraph (a) before the award is made. [Note the effect of such agreement is to exclude the court’s jurisdiction under Section 69...]

Thus the LMAA position was a qualified exclusion. LMAA revised its rules its rules in 2002 “to meet needs which have become apparent since 1997”; no change was made to rules in respect of leave to appeal, save for being renumbered as Rule 22. In 2006 the rule was changed to read: “(a) An award will contain the reasons for it unless the parties agree otherwise. (b) The parties may agree to dispense with reasons...” so that the parties must now positively agree to exclude the appeal provisions in section 69.

Note also the comment in the Mance Interim Report under the rubric “Anecdotal Evidence”:

It is known that the LCIA has recently seen, for the first time, a significant number of maritime arbitrations, suggesting that maritime parties prefer the finality of LCIA awards for maritime disputes... It may be useful to check further these different patterns of behaviour by users of London arbitration

The debate

In 1999 – even before significant data on appeals under the 1996 Act was available – the late Michael Needham published an article in which he suggested: “Preferably, the whole of s. 69 should be repealed and the matter of appeals on a question of law consigned to the dustbin of history.”³² Four years later in 2003, the present author published an article³³ which analysed the reported cases and went on to propose that consideration should be given to whether or

³² J M Needham (1999), Appeal on a point of law arising out of an award, 65 Arbitration 53.

³³ Holmes, R. and O’Reilly, M. (2003) Appeals from arbitral awards: should Section 69 be repealed? 69 Arbitration 1.

not section 69 should be repealed. Hew Dundas wrote a counter-argument in support of the limited right of appeal.³⁴ In September 2003 the London Shipping Centre hosted a well-attended seminar to discuss the question with several Commercial Court judges present. It is fair to say that a very significant majority of those in attendance were in favour of retaining the system of appeals.

Some Commercial Court judges became concerned at the lack of appeals and the impact this may have on the development of the law. The Commercial Court Report 2003-4 stated:³⁵

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.

This seems to suggest that there is a distinction between users in the fields of shipping and (re)insurance on the one hand and other users, along similar lines to that which had been drawn in the 1979 Act. In order to investigate this, a working group was set up. Whilst its remit covered the whole of the legislation, it is clear from the Commercial Court Report 2004-5 that section 69 was central to its purpose: "As stated in last year's report, there is some concern as to whether the strict requirements imposed under the Arbitration Act for leave to appeal to the Commercial Court are impeding the development of the law... This and other aspects of the Act are being considered by the working party..."

The survey published in November 2006 is an important resource. There were a little over 500 respondents, of which some 64% were lawyers. 48% of respondents claimed shipping as their main area of work. Amongst the questions put to the respondents were: "Do you think that the possibility of appealing on a point of law (s.69) should be (a) abolished entirely, (b) retained, or (c) retained but on an amended basis." 60% of respondents thought that the current scheme should be retained. 20% supported amendment of various kinds – mainly in relation to the test for grant of permission. 16% supported abolition. And 4% expressed no view. The overall conclusion of the report writers was: "75. Our view is that on the present evidence, the tests in s. 69 work satisfactorily..."³⁶

Note, however, that the evidence which is referred to is not evidence of how the system works in practice – less still as to how the power fits into an international context – but of the respondents' views. This fundamental point has not been lost on Lord Mance. In 2008 he made a request for research into the reality of section 69 appeals, although restricted to Commercial Court maritime cases. This was constituted as "Lord Mance's Advisory Committee on Section 69 of the Arbitration Act 1996." The proposal was to examine on a confidential basis the court files for the years 2006, 2007 and 2008 and to prepare relevant statistics.

A First Interim Report was issued in May 2009.³⁷ This is an extremely valuable piece of work for two reasons. First, it gets at the real data. Second, it accepts, as a given, the need for an international perspective.

As to the statistics, the key data for the Commercial Court as a whole is set out in the table below (a modification of schedule A of the Report).

³⁴ H R Dundas (2003) Appeals on questions of law: section 69 revitalised, 69 Arbitration 172.

³⁵ Paragraph 27.

³⁶ This conclusion was remarked upon in the Report of the Commercial and Admiralty Court 2005-6 page 13 in the following terms: "It expressed the view that changes to the act were neither necessary nor desirable. This view extended to the provisions under the Act for leave to appeal."

³⁷ by V. V. Veeder QC and A Sander.

Year	Applications	Leave Granted	Award set aside, varied or remitted
2006	36	9	4
2007	58	13	4
2008	57	14	6
Average over the 3 years	50	12	5

N.B. the increase in 2007 is possibly linked to the change in LMAA rules effective for appointments on or after 1 January 2006.

Of the average of 50 applications for leave to appeal, 72% related to maritime awards; three quarters of those arose from LMAA awards. Extrapolating this data and taking account of the fact that other specialist lists such as the TCC deal with appeals suggests that about 60 awards in total have been set aside, varied or remitted since the Act came into force.

The interim report is also valuable also for its reference to the international perspective. It refers specifically to a number of cases decided outside our jurisdiction which have a bearing on how section 69 sits within an international context. It mentions in particular *Putrabali v Rena*³⁸ and *Hall Street v Mattel*.³⁹ It is worth reminding ourselves of the issues involved in these decisions:

- In *Putrabali*, goods were lost at sea. The respondent buyer refused to pay for them. The claimant seller commenced arbitration in London. The tribunal accepted the respondent's defence. The claimant appealed under section 69 and the Deputy High Court Judge allowed an appeal, remitted the matter to the tribunal which duly issued a second award inconsistent with the first. As enforcement may have taken place in France, proceedings were then issued in that jurisdiction for the recognition and enforcement of the first award – a remedy granted by the hierarchy of courts ending with the Cour de Cassation. The court's reasoning was that the first award was an instrument which was to be accorded international recognition and that whilst any local jurisprudence – i.e. section 69 – did not affect the standing of the first award in its international context.
- In *Hall Street v Mattel* the toy manufacturer and its landlord Hall Street Associates got into dispute over the lease. Both agreed to resolve the case by arbitration according to the procedures outlined in the Federal Arbitration Act (FAA); it was also agreed that the District Court could intervene if "the arbitrator's conclusions of law are erroneous." The arbitrator found for Mattel; Hall sought a review in the court. The District Court determined that the award contained errors of law. The arbitrator duly changed his award in favour of Hall Street. The matter was eventually appealed to the Supreme Court. By a 6-3 majority, the Supreme Court decided that the original decision should stand. The Court said that the provisions of the FAA are exclusive and cannot be expanded through contractual agreement.

The common policy evident from these case is that an award of a competent tribunal cannot only be vacated or set aside by a court for reasons which impugn the process of the award; if the process cannot be attacked the award is final and should be respected. The opinion of the court on questions of law which arose in the award is, according to this policy, irrelevant.

Manifest disregard

The US concept of "manifest disregard of the law" should be mentioned, at least in passing. It is possible that some may confuse this for a form of appeal on a point of law.

³⁸ *PT Putrabali Adyamulia v. S.A. Rena Holding, C.cass.*, 1ère civ., 29 June 2007

³⁹ *Hall Street Associates LLC v Mattel Inc* 552 US (2008).

The idea of “manifest disregard” is almost entirely traceable to 5 words in *Wilko v Swan*⁴⁰ – itself a difficult case involving protection for buyers of securities.

In unrestricted submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation [references omitted]. The United States Arbitration Act contains no provision for judicial determination of legal issues such as is found in the English law (Arbitration Act, 1950, 14 Geo VI, c. 27, § 21, 29 Halsbury’s Statutes of England (2d ed.) p. 106). [Emphasis added]

The comment was *obiter*. Equally to the point for present purposes, is the reference to – and highlighted contradistinction with – the English law, a point which is usually omitted in quotations from *Wilko*.

What can be said is that any such concept as “manifest disregard”, insofar as it survives the *Hall Street* decision at all, is narrowly confined and is probably better considered a species of irregularity or excess of jurisdiction rather than error of law.⁴¹ Accordingly, US federal law appears largely to be in the position it was 150 years ago at the date when the following ringing endorsement of arbitral autonomy was set out by the Supreme Court:

If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make the award the commencement, not the end of litigation.⁴²

Discussion

The case for abolishing section 69 can be summed up as follows:

- it is out of step with international practice
- the concept is contrary to the principle of arbitral autonomy
- parties usually value finality over ongoing uncertainty
- there is no significant evidence that arbitrators regularly made serious errors of law
- the mere possibility of an appeal increases the cost of dispute resolution as the possibility of appeal has to be considered in every case
- it creates anomalies which most parties do not understand e.g. where there were back to back arbitrations one based on English and one on Scots law
- it unfairly requires individual parties to finance the greater good just because their private commercial dispute happens to contain a hitherto unexplored point of law which might usefully be reported

These points remain valid today and it is suggested that the case for repeal is strong – even when viewed from a purely national perspective.

In the English legislation the tendency – witness the move from section 21 of the 1950 Act, to the more focused right in the 1979 Act to the 1996 Act with its possibility for universal opt-out – has been to make any review of the merits more restrictive at every stage. There is arguably, witness the Lord Mance Advisory Committee Interim Report, little left and the next logical step appears to be repeal.

Current assumptions about what the parties want may not be accurate. Thus, whilst it is undoubtedly the case that the majority of shipping lawyers say they value the appeals procedure, there is some evidence of a drift towards LCIA with its blanket exclusion.

⁴⁰ *Wilko v Swan* 346 US 427 (1953)

⁴¹ In *Hall Street* the court said in reference to this question: “Maybe the term “manifest disregard” was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. . . . Or, as some courts have thought, “manifest disregard” may have been shorthand for § 10(a)(3) or § 10(a)(4), the subsections authorizing vacatur when the arbitrators were “guilty of misconduct” or “exceeded their powers.””

⁴² *Burchell v Marsh* 58 US 344 (1855).

When the international dimension is introduced – as it ought to be – the case for repeal arguably becomes even stronger. It is almost universally accepted around the world that there is to be no appeal on the merits – and this has been further emphasised in litigation such as *Putrabali* and *Hall Street*, both decisions of “top table” countries.

Opt-in appeals

The objections raised above do not apply to an opt-in right of appeal – it is thought that even in France and the USA a properly worded opt-in would preserve the right to recognition of an award varied on appeal in England.

In such a case, the parties might be permitted to set their own criteria for the grant of permission. A variety of possibilities exist:

- parties may agree that every award may be appealed
- parties may agree what criteria apply to the grant of permission
- parties may delegate the grant of permission to the tribunal
- parties may agree to establish a formal appeals panel

The first case already exists in some JCT contracts. The second and third are combined in the LMAA Intermediate terms where the arbitrator certifies the right to appeal based on the criteria set out there, namely that the award includes a question of law of general interest or important to the trade or industry in question. As to the fourth case, some arbitral institutions have set up an arbitration appeals panel.

Those legal advisers or trade bodies with standard contracts which support appeals can encourage their clients/users to set a low hurdle for access to the courts and may include mixed questions of fact and law. It may be that under such a regime, there will be more – perhaps many more – cases moving from arbitration to the courts than do so at present. But the important thing is that this will be done fully in line with party autonomy and respect for the arbitral process. It will not be imposed on lay parties who unwittingly select London as a location for their arbitration.

The following text expresses one version of how a revised statute might deal with an opt-in appeals procedure.

Section X: Restriction on the right to appeal an award on the merits

(1) Unless the parties otherwise agree in writing, an award shall be final and binding and no appeals lies to the court as to the merits of the decision.

(2) Where the parties agree in writing that a right of appeal exists, the award shall not be considered final, recognisable and/or enforceable (including for the purposes of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958) unless and until any agreed appeal process has been exhausted or the time for appealing has expired.

(3) For the avoidance of doubt, where the parties agree that an appeal lies to the court, it shall be conducted in accordance with rules of court; but in any event an arbitration application must be made within 28 days of the date of the award.

(4) This section is subject to section A (procedural irregularity) and section B (jurisdiction).

Note that it will be necessary to clarify that the award is not to be considered effective until any appeals process is exhausted to avoid the *Putrabali / Hall Street* trap. The proposed rather inflexible 28 day rule on making an application to the court is deliberate as it is arguably imperative that the parties – and indeed foreign courts – know when the award can be recognised/enforced.

Concluding remarks

The Arbitration Act 1996 implemented those Model Law provisions which were reasonably consistent with English practice; but in areas such as costs and appeals, England arguably failed to design its provisions for wide international use. Almost 15 years on, I suggest that the time has come to review the legislation with a renewed and vigorous international outlook, and in particular questions such as costs and appeals. Only if fully does so can we look forward to a time when London is genuinely at the centre of world arbitration.