ALLEN & OVERY

Appeals on Questions of Law - Worth the Trouble?

Matt Gearing QC

Wednesday, 27 January 2021

Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) [1982] AC 724 (per Lord Diplock), 742H and 743D

> Where, as in the instant case, a question of law involved is the construction of a 'one-off' clause the application of which to the particular facts of the case is an issue in the arbitration, leave should not normally be given unless it is apparent to the judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator is obviously wrong.

“For reasons already sufficiently discussed, rather less strict criteria are in my view appropriate where questions of construction of contracts in standard terms are concerned. That there should be as high a degree of legal certainty as it is practicable to obtain as to how such terms apply upon the occurrence of events of a kind that it is not unlikely may reproduce themselves in similar transactions between other parties engaged in the same trade, is a public interest that is recognised by the Act particularly in section 4.

So, if the decision of the question of construction in the circumstances of the particular case would add significantly to the clarity and certainty of English commercial law it would be proper to give leave in a case sufficiently substantial to escape the ban imposed by the first part of section 1(4) bearing in mind always that a superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote clarity in settled principles of commercial law. But leave should not be given even in such a case, unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction; and when the events to which the standard clause fell to be applied in the particular arbitration were themselves "one-off" events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to "one-off" clauses.”

Departmental Advisory Committee on Arbitration Report on Arbitration Bill 1996

284. We received a number of responses calling for the abolition of any right of appeal on the substantive issues in the arbitration. These were based on the proposition that by agreeing to arbitrate their dispute, the parties were agreeing to abide by the decision of their chosen tribunal, not by the decision of the court, so that whether or not a court would reach the same conclusion was simply irrelevant. To substitute the decision of the court on the substantive issues would be wholly to subvert the agreement the parties had made.

285. This proposition is accepted in many countries. We have considered it carefully, but we are not persuaded that we should recommend that the right of appeal should be abolished. It seems to us, that with the safeguards we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example, many arbitration agreements contain an express choice of the law to govern the rights and obligations arising out of the bargain made subject to that agreement. It can be said with force that in such circumstances, the parties have agreed that that law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fail to do this, it is not reaching the result contemplated by the arbitration agreement.

UK Arbitration Act 1996 – Appeal on Point of Law

S.69(1)

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

UK Arbitration Act 1996 – Appeal on Point of Law

S.69(2)

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

UK Arbitration Act 1996 – Two Significant Limitations (1)

Point of law must be English law.

Reliance Industries Ltd v Enron Oil and Gas India [2002] 1 All E.R. (Comm) 59

Schwebel v Schwebel [2010] EWHC 3280 (TCC) (Tab 22) at [14], a question of Jewish law was not a question of law for the purpose of s.69.

UK Arbitration Act 1996 – Two Significant Limitations (2)

Classic 3-stage test as to what amounts to a "question of law", *Vinava Shipping Co Ltd v Finelvet AG.* "The "Chrysalis":

(1) the arbitrator ascertains the facts; this process includes the making of findings on any facts which are in dispute;

(2) the arbitrator ascertains the law; this process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached;

(3) in light of the facts and the law so ascertained, the arbitrator reaches his decision.

UK Arbitration Act 1996 – Appeal on Point of Law

S.69(3)

(3) 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.

"Obviously Wrong"

> 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.

(Colman J., Arbitration and Judges—how much interference should we tolerate? Master's Lecture, London, 14 March 2006)

Judicial deference – *P v C* [2019] HKCFI 2625, at [42].

> Overall, the arbitrator was in the best position to consider and analyze in detail the documents and evidence placed before him by the witnesses in the Arbitration, to decide whether the notice was given in time, whether sufficient particulars were given, and whether the condition precedent had been satisfied, and this Court is entitled to give weight to the analysis made of such evidence by the arbitrator, in its consideration of whether his decision in the Award is obviously wrong, or open to serious doubt, or not. On my review of the Award, I do not find the arbitrator's analysis of the evidence and his findings on the Time Bar Question to be obviously wrong.

Statistics of Section 69 Applications

Year	Number of Claims	Permission Granted	Successful Appeals
2015	60	20	4
2016	46	0	0
2017 – March 2018	56	10	1
October 2017 – July 2018	87	Not available	2
October 2018 – July 2019	51	Not available	3
October 2019 – July 2020	22*	7	Not available

Source: Commercial Court Users' Group Meeting Report dated 13 March 2018; The Commercial Court Report 2018-2019 published on 27 February 2020; Commercial Court User Group Meeting Minutes dated 25 November 2020

* As at the cut-off date of the Meeting Minutes dated 25 November 2020.

Appeal on a Question of Law in other Common Law Jurisdictions

Jurisdiction	Domestic Arbitration	Intl' Arbitration
Hong Kong	- **Opt-in;** EITHER Parties' Agreement **OR** Court's Leave subject to similar grounds as S.69 *(but no "just and proper" requirement)*	
Singapore	- **Opt-out;** EITHER Parties' Agreement **OR** Court's Leave subject to similar grounds as S.69	- **Not available** *(Proposal for an opt-in mechanism similar to S.69 currently being considered)*
Australia	- **Opt-in;** BOTH Parties' Agreement **AND** Court's Leave subject to similar grounds as S.69	- **Not available**
New Zealand	- **Opt-out;** EITHER Parties' Agreement **OR** Court's Leave *(may be granted where, having regard to all the circumstances, the determination of the question of law could substantially affect the parties' rights)*	- **Opt-in;** Same grounds as for domestic arbitration
Canada (BC and Ontario)	- **Opt-out;** EITHER Parties' Agreement **OR** Court's Leave *(BC: may be granted based on importance of the arbitration's result; OR important point of law to some class/body; OR general/public importance point of law Ontario: may be granted based on the importance of the matters at stake AND significantly affect the rights of the parties)*	- **Not available**

Approaches in other jurisdictions

PRC	- Before 2012, Chinese law provided that an award could be annulled if the court concludes that the evidence was insufficient or the application of law was seriously wrong. - Since 2012, substantive review has been removed as a basis for annulment.

Malta	- **Opt-out;** A party may appeal to the Court of Appeal on a point of law arising out of a final award.
	- Court of Appeal shall only consider the appeal if it is satisfied that:
	  - Determination of the point of law will substantially affect the rights of one or more of the parties
	  - Point of law is one which the tribunal was asked to determine or relied upon it in the award;
	  - Prima facie open to serious doubt; and
	  - Appeal does not appear dilatory and vexatious.

A case for a more flexible approach?

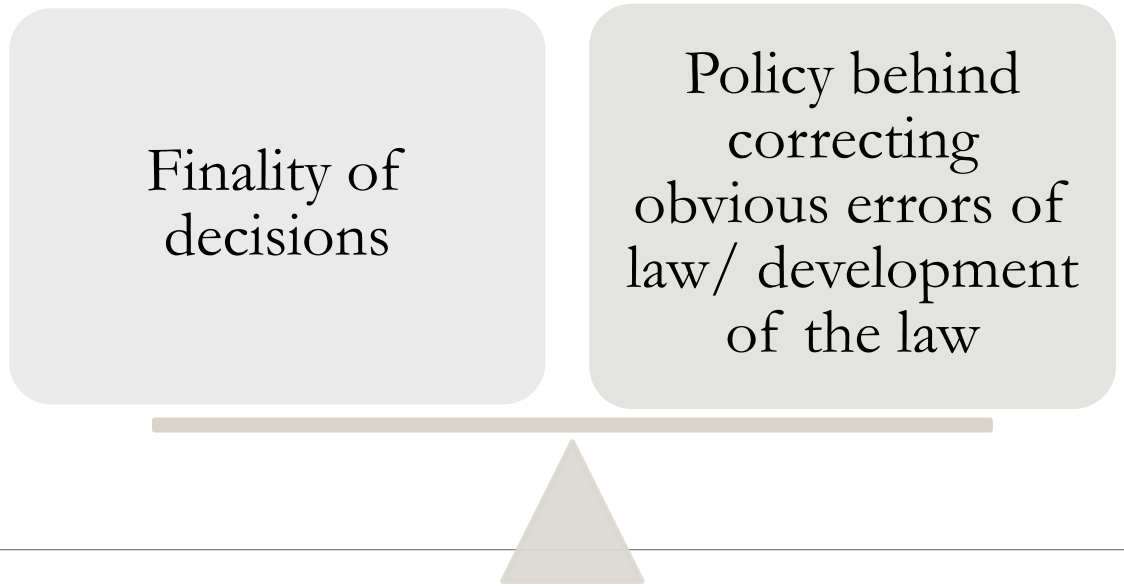
32. One answer might be to suggest that we go back to a more flexible test for permission to appeal before Lords Denning and Diplock restricted the ability to appeal by the interpretation he gave to the 1979 Act and before this was codified in the 1996 Act. That would enable the courts more readily to develop the law whilst leaving arbitration as an important means of dispute resolution.

34. So far there has been no change, but I have no doubt that change to the section 69 test is one of the options that must be considered. The restriction in relation to appeals where the question is one of general public importance is, I have little doubt, a serious impediment to the growth of the common law. The benefits to the development of the common law is therefore obvious as it would increase the potential for greater numbers of appeals which would provide the means to maintain a healthy diet of appellate decisions, capable of developing the law particularly on issues of general pubic importance.

Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration (9 March 2016) by the Right Hon. The Lord Thomas of Cwmgiedd

A necessary provision?

- The very existence of s.69 has been criticised in some quarters as being an unwarranted encroachment on the powers of the tribunal to decide the case as they see fit. As Colman J. has said, it is the section "*which gets most people hot under the collar*".
- Is a provision of this nature a necessary compromise between ensuring the finality of arbitral decisions (the pure arbitral mission) and public policy behind correcting errors and continuing the development of the body of common law.



Questions?