Challenges to Arbitral Awards at the Seat

The Hon Mr Justice Eder

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Introduction

1. To adapt a well-worn quote by Congreve[1], hell hath no fury like an arbitration lost ! The purpose of this paper is to examine how such "fury" may be vented (legally !) by the disgruntled party to an arbitration award and how such fury is controlled by the English Courts. To be clear, this paper is not an exhaustive study; rather, my intention is to provide a general overview and to focus, in particular, on recent case-law.

2. In the context of this international arbitration conference, I readily acknowledge that this whistlestop tour of English law may seem somewhat parochial. But we are all here to learn from each other and I hope that this overview of English law and practice will assist in our discussions. As Charles Darwin stated: "*In the long history of humankind (and animal kind, too) those who learned to collaborate and improvise most effectively have prevailed.*"

3. The starting point is the Arbitration Act 1996 ("1996 Act") which sets out the statutory framework for any arbitration where the seat of the arbitration is in England and Wales or Northern Ireland [s.2]. In broad terms, any possible challenges are set out in Part 1 of the 1996 Act and fall under three main heads viz. (i) challenging an award of the arbitral tribunal as to its "substantive jurisdiction" under s67 of the 1996 Act; (ii) challenging an award on the ground of "serious irregularity" under s68 of the 1996 Act; and (iii) an appeal to the Court on a "question of law" arising out of an award made in the proceedings under s69 of the 1996 Act[2]. At the outset, it is important to note that whereas any potential appeal under s69 can be excluded by agreement of

[1] William Congreve's Zara, Act III, Scene 1.

[2] Although the different modes of challenge under ss67, 68 and 69 are discrete, it is important to bear in mind that the position in practice is often more complicated because a disgruntled party may seek to make multiple joined applications.

the parties, the right to challenge an award under s67 and s68 cannot be excluded.

4. Before examining these possible ways of challenging an award, it is important to mention some preliminary points.

General principle of non-intervention by the Court except as provided by the 1996 Act

5. First, it is important to bear in mind the overall statutory framework of the 1996 Act and the general approach of the Court to any challenge or appeal. In particular, the statutory provisions to which I have just referred i.e. ss67, 68 and 69 of the 1996 Act have to be viewed in the context of the general principles upon which Part 1 of the 1996 Act is founded. These general principles are set out in s1 of the 1996 Act. For present purposes, it is s1(c) which is all-important because it provides that in matters governed by Part 1 of the 1996 (including ss67, 68 and 69) "… *the Court should not intervene except as provided by this Part*". This general principle of "non-intervention" by the Court except as provided by the 1996 Act is important because it serves to define the nature of the interface between, on the one hand, the arbitral process and, on the other hand, the Court.

6. Thus, the possible ways of challenging an award under s67 and s68 or appealing under s69 are, in effect, exceptions to the general principle of non-intervention. This is important because, as can seen in the relevant case-law, the general approach of the Court is one which strongly supports the arbitral process. By way of anecdote, it is perhaps interesting to recall what I was once told many years ago by Michael Kerr, a former judge in the Court of Appeal and one of the leading figures in the recent development of the law of arbitration in England, when I was complaining about an arbitration that I had just lost and the difficulties in way of challenging the award. I told him that the award was wrong and unjust. He looked baffled and said: "*Remember, when parties agree arbitration they buy the right to get the wrong answer*". So, the mere fact that an award is "wrong" or even "unjust" does not, of itself,

Statistics

7. My second preliminary point is to say something about statistics – and the number of challenges, both successful and unsuccessful which are actually made under the 1996 Act. This is important because when one considers the possible challenges to an award, there is a great danger in thinking that such challenges are the "norm" or, at least, that they are not uncommon. That would be a very great mistake.

8. The main difficulty in this area is obtaining – and collating – the necessary data. In particular, there are no hard figures available as to the number of arbitrations which take place each year where the seat of the arbitration is in England and which result in the publication of an award. Certain figures are available from the main institutional bodies like the ICC, the LCIA and the LMAA. However, I would guess that there is, in addition, a large number of *ad hoc* arbitrations for which no figures at all are available. My own estimate is that there are, on average, perhaps up to about 2,000 or so English-seat awards made each year – but this may be completely wrong.

9. Whatever the correct total figure of published awards may be, the number of challenges made under ss67, 68 and 69 of the 1996 Act would appear to be relatively small. Again, reliable figures are not easy to find or to analyse - in particular, because (i) challenges launched in one calendar year may not be heard or disposed of until the following year; and (ii) challenges may be launched and then settled before any determination by the Court. In any event, I have carried out my own analysis of the cases actually determined by the Court as reported on www.bailii.org for the last three calendar years i.e 2012, 2013 and 2014 which shows the following:

a. Under s67 (no "substantive jurisdiction"): in 2012, there was a total of 7 challenges of which 3 were allowed and 4 were rejected; in 2013, there was a total of 5 challenges of which 2 were allowed and 3 were rejected; in 2014, there was a total of 6 challenges of which only 1 was allowed and 5 were rejected.

b. Under s68 ("serious irregularity"): in 2012, there was a total of 7 challenges all of which were rejected; in 2013, there was (again) a total of 7 challenges of which only 1 was allowed and the remaining 6 were rejected; in 2014, there was a total of 8 challenges of which 2 were allowed and the remaining 6 were rejected.

c. Under s69 (appeal on a "question of law"), the difficulty is that there are no published figures with regard to applications for leave to appeal. As considered further below, this procedure provides an important "sifting process". My guess is that many applications for leave to appeal are rejected. In any event, where leave to appeal is granted and determined by the Court, the relevant figures as reported on www.bailii.org are as follows. In 2012, there was a total of 14 appeals of which 8 were allowed at least in part and 6 were rejected; in 2013, there was a total of 12 appeals of which 6 were allowed at least in part and 6 were rejected; and in 2014, there was a total of 8 appeals of which 7 were allowed at least in part and 1 was rejected.

10. By way of a "health warning", I should emphasise that these are not "official" figures and may not be completely accurate. In addition, it is important to bear in mind that certain challenges/appeals are made simultaneously under more than one section with the result that there is some overlap of the figures.

11. In any event, I think that these figures are interesting and significant. In particular, they indicate at the very least that the number of successful challenges is small both in absolute terms and (if I am right as to the likely total number of awards) also in relative terms, reflecting the broad general

principle of non-intervention by the Court except as provided in Part 1 of the 1996 Act.

12. A further analysis of these cases over this three year period also reveals what I think are two additional significant features. First, with regard to challenges under s68 (i.e. "serious irregularity"), the number of such challenges which were successful is very tiny indeed viz during this period covering 2012-2014, I calculate that there was a total of 22 challenges under s68 of which only 3 succeeded. Second, although the underlying subject-matter of cases which were the subject of challenge under s67 or s68 was quite broad, the underlying subject-matter of cases which were the subject of an appeal on a question of law under s69 was relatively narrow. Thus, during this period covering 2012-2014, there was a total of 34 appeals under s69 and, of these, the vast majority – on my calculation, some 27 i.e. approximately 80% – were shipping cases primarily charterparty disputes. This pattern reflects the long tradition in England of parties involved in such contracts being apparently keen generally to retain the right of appeal to the Court on a point of law. Apart from one insurance case, the remainder of the cases during this period involved appeals from GAFTA, FOSFA, LME and the Cotton Association – all with a similar tradition. Outside of these particular categories of cases, I suspect that parties generally agree to exclude the right of appeal on a question of law under s69 – as, of course, they are entitled to do under the 1996 Act – although, in contrast and as I have already mentioned, parties cannot exclude the right to challenge an award under either s67 or s68.

Supplementary Provisions

13. Third, it is important to note that s70 contains various provisions which apply generally to any application or appeal under ss67, 68 or 69 of the 1996 Act. Although described as "supplementary provisions", they are of great practical significance to any such application or appeal and, to the extent that they are of general effect, it is convenient to consider the most significant aspects of these provisions at the outset, viz:

a. ***Exhaustion of remedies:*** Under s70(2), any such application or appeal may not be brought if the applicant has not first "*exhausted*" any "*available arbitral process of appeal or review*". This is particularly relevant – and indeed important – in the context of certain arbitrations governed by institutional rules which provide for an internal appeal or review process[3].

b. ***Time limit:*** Any such application or appeal must be brought (i.e. application issued) within 28 days of the award although s80(5) in effect gives the Court a jurisdiction to extend that time limit[4].

c. ***Security for costs:*** Under s70(6), the Court has power to order the applicant or appellant to provide security for costs of the application or appeal and may direct that the application or appeal be dismissed if the order is not complied with[5]. However, it is to be noted that s70(6) imposes a restriction i.e. the power to order security shall not be exercised on the ground that (i) the applicant or appellant is an individual ordinarily resident out of the jurisdiction or (ii) is a corporation or association incorporated or formed under the law of a country outside the United Kingdom or whose central management and control is exercised outside the United Kingdom. There is no other formal fetter on the Court's discretion. However, in broad terms, the exercise of the discretion is exercised on the basis of the principles summarized by the Court of Appeal in *Republic of Kazakhstan v Istil Group Inc*[6] viz. (i) the Court has to act in accordance with the

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[3] See, for example, the recent decision of Andrew Smith J in *A Limited v B Limited* [2014] EWHC 1870 (Comm) with regard to the arbitration rules of the International Cotton Association Limited.

[4] The principal factors of relevance to an application for extension of time are set out in *Kalmneft v Glencore* [2002] 1 Lloyds Rep 128 at [59]; see also *The Amer Energy* [2009] 1 Lloyds Rep 293 at [13]; *Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH* [2010] EWCA Civ 1100 at [51]-[58; [2010] 1 Lloyd's Rep 533. For a recent illustration of a case where the Court granted an extension see PEC Ltd v Asia Golden Rice Co Ltd [2012] EWHC 846 (Comm); [2013] 1 Lloyd's Rep 82.

[5] See, eg., *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep 39; *X v* Y [2013] EWHC 1104 (Comm); [2013] 1 Lloyd's Rep 230; *Konkola Copper Mines v U&M Mining Zambia Ltd* [2014] EWHC 2146 (Comm); [2014] 2 Lloyd's Rep 507.

[6] [2005] EWCA Civ 1468; [2006] 1 WLR 596 at [31]-[32].

overriding objective when exercising its jurisdiction under s70(6); and (ii) the correct approach is the same as that applied by the Court in the context of its own civil procedure rules i.e. under CPR 25.12 and 25.13. For example the Court will generally order security for costs if there is "reason to believe" that the applicant/appellant will be unable to pay the respondent's costs (cf: CPR 25.13(2)(c))[7]; or if the applicant/appellant has taken steps in relation to its assets that would make it difficult to enforce an order for costs against it[8].

d. ***Security for the amount payable under the award:*** S70(7) provides that the Court may order that any money payable under the award shall be brought into Court or otherwise secured pending the determination of the application or the appeal and may direct that the application or appeal be dismissed if the order is not complied with. The scope and effect of this provision is a matter of some controversy. On its face, it appears to give the Court a broad general discretion to order security for the amount payable under an award pending determination of the application or appeal. However, there is a line of authority to the general effect that although there are no hard and fast rules, the Court should not (at least generally) order security unless the applicant/ appellant can demonstrate that the challenge to the award is (i) "flimsy" and (ii) will itself prejudice the applicant's ability to enforce it or diminishes the respondent's ability to honour it[9]. This approach is consistent with what is stated in para 380 of the Departmental Advisory Committee Report on the Arbitration Bill, February 1996 (which forms part of the legislative history to the 1996 Act) i.e. that the purpose of s70(7) was only "…*to avoid the risk that, while the appeal is pending, the ability of the losing party to honour the award may (by design or otherwise) be diminished*". However, this line of authority is

[7] The test is not one of balance of probabilities but one of "real risk": see *X v Y* [2013] EWHC 1104 (Comm); [2013] 1 Lloyd's Rep 230 at [18].

[8] *Konkola Copper Mines v U&M Mining Zambia Ltd* [2014] EWHC 2146 (Comm) at [25]-[26]; [2014] 2 Lloyd's Rep 507.

[9] See, in particular *A v B* [2011] EWHC 3302 (Comm); [2011] 1 Lloyd's Rep 363 and *X v Y* [2013] EWHC 1104 (Comm); [2013] 1 Lloyd's Rep 230.

the subject of trenchant criticism in the leading textbook *The Arbitration Act 1996*, Merkin & Flannery (5th Edition, 2014) at pp346-348. In essence, the authors suggest that if an applicant is serious about its challenge to the award and confident in its success, it ought not to baulk at being asked to "put up or shut up"; and that the power to order security for the amount payable under an award should be used more readily in support of the arbitral process. I had to consider these arguments recently myself in *Konkola Copper Mines v U&M Mining Zambia Ltd*[10]. In the event and whilst recognising that there are no hard and fast rules, I decided to follow the approach in *A v* B and *X v Y*.

Remedies

14. Fourth, depending on the outcome of any challenge or appeal, the Court is empowered to grant a range of possible orders. Thus, on an application under s67 challenging an award of the tribunal as to its substantive jurisdiction and pursuant to s67(3), the Court may by order (a) confirm the award; (b) vary the award; or (c) set aside the award in whole or in part. On an application under s68 and pursuant to s68(3), if there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the Court may (a) remit the award to the tribunal, in whole or in part, for reconsideration; (b) set aside the award in whole or in part; or (c) declare the award to be of no effect, in whole or in part. On an appeal under s69 and pursuant to s69(7), the Court may by order (a) confirm the award; (b) vary the award; (c) remit the award to the tribunal, in whole or in part, for reconsideration in light of the Court's determination; or (d) set aside the award in whole or in part. Of this range of possible orders, it is probably only necessary to comment briefly on the power of the Court to order remission under s68(3) and/or s69(7): although these provisions appear to give the Court a general power of remission, the Court

[10] [2014] EWHC 2146 (Comm); [2014] 2 Lloyd's Rep 507.

will consider carefully whether or not it appropriate to do so in the particular circumstances of each case[11].

15. Against that background, I turn to consider the three main potential challenges.

S67: No "substantive jurisdiction"

16. There is much learned writing – and debate - about the nature of a tribunal's "substantive jurisdiction", the so-called doctrine of *kompetenz-kompetenz* and the question as to whether an arbitral jurisdiction has jurisdiction to decide its own jurisdiction. This is not the time or place to engage in these topics. For present purposes, I simply note that under s67 of the 1996 Act, a party may (upon notice to the other parties and the tribunal) apply to the Court (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction. As to the scope and effect of this section, I would make the following observations.

17. ***Unfettered right to challenge under s67:*** First, it is important to note that there is an unfettered right of any party to arbitral proceedings to make an application under this section i.e. such party does not need any special "permission" either from the tribunal or the Court to make such application. There is no sifting process. This is in stark contrast to the procedure which exists under s69 of the 1996 Act where a party seeks to appeal on a "question of law" – although as expressly provided in s67(1), a party may lose the right

[11] See eg *Icon Navigation Corporation v Sinochem International Petroleum (Bahamas) Co Ltd* [2003] 1 All ER (Comm) 405 at [22]; *The Tzelepi* [1991] 2 Lloyd's Rep 265 at pp269-270; *MRI Trading AG v Erdenet Mining Corporation LLC* [2012] EWHC 1988 (Comm) [37]-[39]; [2012] 2 Lloyd's Rep 465; [2013] EWCA Civ 156 [26]-[28]; [2013] 1 Lloyd's Rep 638, CA. *Brockton Capital Llp v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm); [2014] 2 Lloyd's Rep 275; *E D And F Man Sugar Ltd v Unicargo Transportgesellschaft GmbH* [2013] EWCA Civ 1449 at [20]; [2013] 2 Lloyd's Rep 412.

to object (see s73) and the right to apply is subject to certain restrictions as set out in s70(2) and (3).

18. ***Substantive Jurisdiction:*** Second, what is meant by the tribunal's "substantive jurisdiction"? By virtue of the definition in s82(1), this refers to the matters specified in s30(1)(a) to (c) i.e. (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. It should also be noted that s30 provides that, unless otherwise agreed by the parties, an arbitral tribunal may rule on its own substantive jurisdiction[12] although any such ruling will not be binding on the parties.

19. ***Recent illustrations:*** The issues which arise in relation to such matters are diverse and often give rise to difficult questions of both fact and law as shown by a number of recent cases eg:

    a. *Abuja International Hotels Ltd v Meridien SAS*[13] – where the main issues were whether the arbitration agreement was unconstitutional, null and void under the Nigerian Constitution or otherwise invalid as being contrary to the public interest or on the basis of force majeure.

    b. *Tang Chung Wah & Or v Grant Thornton International Limited & Ors*[14] – where the main issue concerned certain provisions of the relevant agreement pursuant to which a Request for Arbitration was made to the LCIA which stipulated steps to be taken as a condition precedent to any arbitral process and whether such steps were not taken prior to that Request (or at all).

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[12] This reflects the principle of *kompetenz-kompetenz*: see *USC-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenorgorsk Hydropower Plant LLP* [2013] UKSC 35; [2013] 1 WLR 1889 (SC) at [35].
[13] [2012] EWHC 87 (Comm); [2012] 1 Lloyd's Rep 461.
[14] [2012] EWHC 3198 (Ch); [2013] 1 Lloyd's Rep 11.

c. *Ases Havacilik Servis Ve Destek Hizmetleri AS v Delkor UK Ltd*[15] – where the main issue was whether an arbitration clause had been effectively incorporated into the contract between the parties or was inapplicable as the governing agreement was a different contract which was subject to Swiss law and which provided for arbitration in Switzerland.

d. *Cruz City 1 Mauritius Holdings v Unitech Limited & Or/Arsanovia Limited v Cruz City 1 Mauritius Holdings* [16] – where the main issue concerned the identity of the party allegedly bound by the arbitration agreement.

e. *Lisnave Estaleiros Navais SA v Chemikalien Seetransport GmbH*[17] – where the main issue was whether a certain Framework Agreement incorporated the arbitration clause in certain General Conditions notwithstanding the absence of any reference within it to the General Conditions.

f. *Habas Sinai Ve Tibbi Gazlar Isthihsal Endustrisi AS v VSC Steel Company Ltd*[18] - where the main issue before the court was whether there had been a valid and binding arbitration agreement. This, in turn, depended on questions of ostensible authority.

g. *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd & Others* [19] – where the main issue was whether if an English law guarantee is unenforceable because it involves the commission in a foreign country of acts that are unlawful under local law is its provision for London arbitration also unenforceable ?

[15] [2012] EWHC 3518 (Comm); [2013] 1 Lloyd's Rep 254.
[16] [2012] EWHC 3702 (Comm); [2013] 2 All ER (Comm) 1137.
[17] [2014] EWHC 338 (Comm); [2013] 2 Lloyd's Rep 203.
[18] [2013] EWHC 4071 (Comm); [2014] 1 Lloyd's Rep 479.
[19] [2013] EWHC 1063; [2013] 2 Lloyd's Rep 61.

h. *The London Steam-Ship Owners' Mutual Insurance Association Ltd v (1) The Kingdom of Spain (2) The French State*[20] – where the main issue was whether certain claims advanced in the arbitration proceedings and which had been determined by the tribunal by way of a declaration of non-liability did not fall within the substantive jurisdiction of the tribunal on the grounds that France and Spain were not bound by the arbitration agreement as their direct action rights resulting from the oil spillage following the casualty of the M/T Prestige were in essence independent rights under Spanish law rather than contractual rights, non-arbitrability and (in relation to France only) waiver.

i. *Sun United Maritime Ltd v Kasteli Marine Inc.*[21] – where the only outstanding issue in certain arbitration proceedings concerned the costs of the arbitration and one of the parties alleged that that question had been already "settled" by agreement of the parties. On this basis, it was said that the tribunal no longer had any substantive jurisdiction to deal with the question of costs. This was rejected by Hamblen J in trenchant terms:

> "18. In my judgment, where there is a dispute as to whether the claim (or a claim) which has been referred to arbitration has been settled that will generally fall within the reference made to the arbitral tribunal. The alleged fact of settlement will be a defence to the continuing claim and, like any other defence, a matter for the arbitral tribunal to determine. The same applies where the only remaining claim in the arbitration is one for costs. The alleged settlement is a defence to the claim for a costs order and within the reference made. An arbitration reference generally includes the power to make an award on costs, as the Act makes clear (see sections 59 to 65). Even where there is an agreed settlement that does not generally of itself bring the reference to an end (see section 51)."

20. ***De novo rehearing:*** Fourth, the s67 application is not, in form, an appeal or review of any decision which the tribunal may itself have reached as to its substantive jurisdiction (as to which see below). Rather, the application involves a complete rehearing *de novo.* That approach has been confirmed by

[20] [2013] EWHC 3188 (Comm); [2014] 1 Lloyd's Rep 309.
[21] [2014] EWHC 1476; [2014] 2 Lloyd's Rep 386.

the Supreme Court in *Dallah Real Estate & Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan*[22], which also makes clear that the decision and reasoning of the arbitrators is not entitled to any particular status or weight, although (depending on its cogency) that reasoning will inform and be of interest to the Court[23]. Thus, as stated by Lord Mance at [10], a party who has not submitted to the arbitrator's jurisdiction is entitled to a "full judicial determination on evidence of an issue of jurisdiction before the English Court".

21. In practice, on the hearing by the Court of a challenge under s67, it is at least sometimes agreed that the documents disclosed and evidence adduced in the arbitration (including, for example, written witness statements and transcripts of evidence) may be relied on in Court without the necessity of the witnesses giving live evidence. But, an important question arises as to whether or not a party may seek to disclose new material not previously disclosed and adduce new evidence not previously adduced in the arbitration on the hearing by the Court of a s67 challenge. This has been considered in a number of cases including, most recently, in *Central Trading & Exports Ltd v Fioralba Shipping Company*[24] where Males J reviewed the earlier authorities[25]. In summary, he concluded (see paras 29-33) that, in general, a party is entitled to adduce evidence in a s67 challenge which was not before the arbitrators; that the Court is not bound by procedural rulings made by the arbitrators, for example as to the scope of disclosure to be provided by the parties; that the

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[22] [2010] UKSC 46, [2011] 1 AC 763.

[23] See, *Central Trading & Exports Ltd v Fioralba Shipping Company* [2014] EWHC 2397 (Comm); [2014] 2 Lloyd's Rep 449*; Stellar Shipping Co LLC v Hudson Shipping Lines* [2010] EWHC 2985; *Pacific Inter-Link SDN BHD v EFKO Food Ingredients Ltd* [2011] EWHC 923; *Habas Sinai Ve Tibbi Gazlar Isthihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071; [2014] 1 Lloyd's Rep 479.

[24] [2014] EWHC 2397 (Comm); [2014] 2 Lloyd's Rep 449.

[25] In particular, *Azov Shipping Co v Baltic Shipping Co* [1999] 1 Lloyd's Rep 68**;** *Kalmneft v Glencore International A.G.* [2002] 1 Lloyd's Rep 128 *Electrosteel Castings Ltd v Scan-Trans Shipping & Chartering Sdn Bhd* [2002] EWHC 1993 (Comm), [2003] 1 Lloyd's Rep 190; *The Joanna V* [2003] EWHC 1655 (Comm), [2003] 2 Lloyd's Rep 617; *The Ythan* [2005] EWHC 2399, [2006] 1 Lloyd's Rep 457,

Court does not have an unfettered discretion to exclude relevant evidence; and that the mere fact that the admission of new evidence would cause "prejudice" in the abstract is not a free standing ground on which such evidence may be excluded. However, the parties' right to adduce evidence is subject to the Court's own rules of procedure; and such control will be exercised in accordance with established principles, in particular the overriding objective and the interests of justice. The result is that the Court may refuse to allow a party to produce documents selectively that would prejudice the other party or to allow evidence which does not comply with the Court's own rules for ensuring that evidence is presented in a fair manner. For example (see para 33), depending on the circumstances of the particular case, a party's failure to comply with an order made by the arbitrators may be a "highly relevant consideration".

22. ***Waiver:*** Fifth, as stipulated in s73(1) a party may lose the right to object that the tribunal lacks substantive jurisdiction. In particular, a party will lose such right and be precluded from raising any such objection, if such party 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 any provision of Part 1 of the 1996 Act, any objection to the tribunal's substantive jurisdiction "… *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.*" In broad summary, this imposes a burden on a party who knows (or with reasonable diligence should know) that there is a potential objection to the tribunal's jurisdiction, to make plain that objection; and, if such party does not do so, he will lose the right to object. (This last point ties in with s31(1) and (2) which deal with objections that the tribunal lacks substantive jurisdiction at the outset or during the course of the proceedings. That is not the focus of this paper and I do not propose to consider them in detail save to note that if and when such objections are raised, s31(4) provides that the Tribunal may either (a) rule on the matter in an award as to jurisdiction; or (b) deal with the objection in its award on the merits.) A recent illustration of a case where it

was held that a party had lost the right to object is *Konkola Copper Mines v U&M Mining Zambia Ltd*[26].

S68 Serious Irregularity

23. S68(1) provides that a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the Court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. By s68(2), "serious irregularity" is defined to mean an irregularity of one or more of the kinds specified in that subsection "… *which the Court considers has caused or will cause substantial injustice to the applicant* …." The kinds of irregularity are then set out in 9 separate sub-sections viz.

> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
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> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
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> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
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> (d) failure by the tribunal to deal with all the issues that were put to it[27];
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> (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;
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> (f) uncertainty or ambiguity as to the effect of the award;
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> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
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> (h) failure to comply with the requirements as to the form of the award; or
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> (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.

[26] [2014] EWHC 2374; [2014] BUS LR D21 at [21]-[35].

[27] See, eg., *Transition Feeds LLP v Itochu Europe Plc* [2013] EWHC 3629 (Comm); *Primera Maritime (Hellas) Ltd & Ors v Jiangsu Eastern Heavy Industry Co Ltd & Anor* [2013] EWHC 3066 (Comm); [2014] 1 Lloyd's Rep 255.

At the outset, some general observations.

24. ***Unfettered right:*** First, like s67 but unlike an appeal under s69, there is an unfettered right to bring a challenge under s68 on the ground of serious irregularity. The applicant does not need permission to make the challenge.

25. ***Closed list:*** Second, s68 sets out a closed list of irregularities which it is not open to the Court to extend; and reflects the internationally accepted view that the Court should be able to correct serious failure to comply with the "due process" of arbitral proceedings[28].

26. ***Conduct of arbitration:*** Third, it is important to bear in mind that s68 is generally concerned with the arbitrators' conduct of the arbitration, not with the correctness of the arbitrators' decision[29]. Thus, it is clear that a finding of fact is a matter for the tribunal and, absent serious irregularity of one or more of the kinds specified, cannot properly be challenged under s68. As stated by Field J in a recent case[30]:

> "*… the duty to act fairly is distinct from the autonomous power of the arbitrators to make findings of fact and it will only be in the most exceptional case, if ever, that a failure to refer to a particular part of the evidence will constitute a serious irregularity within s68. Findings of fact were for the tribunal …*".

27. ***Substantial injustice:*** Fourth, it is perhaps obvious but nevertheless crucial to understand that any applicant seeking to challenge an award under s68 must not only show the existence of some "serious irregularity" of the kind specified but also that this has caused or will cause "substantial injustice" to the applicant and that, as appears from para 280 of the DAC Report, this is a very high threshold:

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[28] See, in particular, *The Petro Ranger* [2001] 2 Lloyd's Rep 348 at 351.

[29] See, eg. *Abuja International Hotels v Meridian SAS* [2012] EWHC 87 (Comm) at [48] to [49]; [2012] 1 Lloyd's Rep 461; *Flame SA v Glory Wealth Shipping PTE Ltd* [2013] EWHC 3153 (Comm) at [102]; [2013] 2 Lloyd's Rep 653. A possible exception drawn to my attention by Prof Besson would seem to be under s68(2)(g) where the award itself is contrary to public policy.

[30] *Brockton Capital Llp v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm); [2014] 2 Lloyd's Rep 275. See also *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd* [2002] 2 Lloyd's Rep 681; *Sonatrach v Statoil* [2014] EWHC 875 (Comm) at [14],[17] & [18].

> "… The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, clause 68 is really designed as a longstop, only available 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 …." (emphasis added)

18. As stated by Tomlinson J in *ABB AG v Hochtief Airport GmbH*[31], there are many other judicial pronouncements to similar effect, *e.g.*

- *Fidelity Management v Myriad International Holdings*[32] (Morison J: a *"long stop"* to deal with *"extreme cases where … something … went seriously wrong with the arbitral process"*);
- *World Trade Corporation Ltd v Czarnikow Sugar Ltd*[33];
- *Cameroon Airlines v Transnet*[34] (Langley J: *"the test is indeed an extreme case"*);
- *The Pamphilos*[35] (Colman J: *"the substance and nature of the injustice goes well beyond what could reasonably be expected as an ordinary incident of arbitration"*);
- *Profilati Italia v* PaineWebber[36] (Moore-Bick J: *"it is intended to operate only in extreme cases"*);
- *The Petro Ranger*[37] (Cresswell J: "*S68 is designed as a longstop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in s68, that justice calls out for it to be corrected*");

[31] [2006] EWHC 388 (Comm); [2006] 2 Lloyd's Rep 1 at [63].
[32] [2005] EWHC 1193 (Comm); [2005] 2 Lloyd's Rep 508.
[33] [2004] 2 All ER (Comm) 813, 816 (Colman J).
[34] [2004] EWHC 1829 (Comm) at para 94.
[35] [2002] 2 Lloyd's Rep 681, 687.
[36] [2001] 1 All ER (Comm) 1065, 1071.
[37] [2001] 2 Lloyd's Rep 348, 351.

- *Egmatra v Marco Trading*[38] (Tuckey J: "*no soft option clause as an alternative for a failed application for leave to appeal*")[39].

28. ***Serious irregularity:*** As recognized by Cooke J in the recent decision of *Konkola Copper Mines v U&M Mining Zambia Ltd*[40] there is a slight tension in some of these cases[41] as to the extent to which a party applying under s68 needs to show that the alleged "serious irregularity" has affected the ultimate result. He dealt with this aspect at para 19 of his Judgment as follows:

> "19 … S68 is concerned with the fairness of the process but the ultimate question is one of substantial justice. The claimant is thus required to show that, had he had an opportunity to address any point where he says he was not given that opportunity, "the tribunal might well have reached a different view and produced a significantly different outcome". To my mind it is plain that, since it is necessary for the applicant to show that the serious irregularity "has caused or will cause substantial injustice to the applicant", he cannot succeed in that unless he can establish that he had at least a reasonably arguable case contrary to the findings of the tribunal."[42]

As to what constitutes "serious irregularity", the statutory categories which I have already set out above largely speak for themselves. I do not propose to examine each separate category in turn; and time certainly does not allow such an exercise. In any event, that is perhaps unnecessary and a little tedious given that most of the decided cases turn very much on their own particular facts.

29. ***Duty to act fairly:*** However, I would draw specific attention to the very first stated kind of serious irregularity i.e. s68(2)(a) which concerns the failure by the tribunal to comply with s33 of the 1996 Act. This is important because s33 sets out the general duty of the tribunal in very broad terms i.e. a duty (a) to 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) to adopt procedures suitable to the circumstances of the

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38 [1999] 1 Lloyd's Rep. 826, 865.

39 See also, most recently, *Lorand Shipping Limited v Davof Trading (Africa) BV* [2014] EWHC 3521 (Comm).

40 [2014] EWHC 2374 (Comm); [2014] BUS LR D2,

41 See, eg., *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm); [2005] 1 Lloyd's Rep 192; *ABB AG v Hochtief Airport GmbH* [2006] EWHC 388 (Comm); [2006] 2 Lloyd's Rep 1; *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749 (TCC); [2007] 2 All ER (Comm) 694.

42 *Brockton Capital Llp v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm) at [31]; [2014] 2 Lloyd's Rep 275.

particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. Recent cases illustrate both the breadth and limitations of this category.

30. Again, the recent decision of Cooke J in *Konkola Copper Mines v U&M Mining Zambia Ltd*[43] is of particular interest because it raised the question (which is not uncommon) of what a tribunal should do in circumstances where one of the parties simply decides not to participate in a particular hearing. What should the tribunal do? Carry on regardless? Adjourn? There is no doubt that in such circumstances, the tribunal may continue with the proceedings in the absence of that party[44]. However, this is subject to the tribunal's general duty under s33 including the duty to act "fairly". In the event, Cooke J had no hesitation in that case in concluding that the tribunal did not act in breach of its duty under s33 in adopting the procedure which it did; and that there was therefore no serious irregularity under s68(2)(a).

31. The duty which arises under s33 involves affording the parties a right to be given a fair opportunity to deal with any issue which will be relied upon by the tribunal when arriving at its conclusion and making its award[45]. Thus, a tribunal that makes an award on the basis of points not advanced by the parties or in respect of which they were not given a fair opportunity to comment will amount to a breach of s33 and therefore constitute a serious irregularity under s68(2)(a)[46]. The position is otherwise if, for example, a party fails to recognize or take a point which exists. Generally, this will not involve a breach of s33 or a serious irregularity[47].

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43 [2014] EWHC 2374 (Comm); [2014] BUS LR D2.
44 This is expressly recognized as a possible course of action under s41(4) of the 1996 Act; and certain institutional rules also deal expressly with such situation.
45 *Zermalt Holdings SA v Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14, 15; *The Vimeira* [1984] 2 Lloyd's Rep 66, 74–75: *Vee Networks Ltd v Econet Wireless International Ltd* [2004] EWHC 2909 (Comm); [2005] 1 Lloyd's Rep 192, 208.
46 *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749; [2007] 2 All ER (Comm) 694.
47 *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi and others* [2012] EWHC 3283 (Comm); [2013] 1 Lloyd's Rep 86 at para 85(5); *Brockton Capital Llp v Atlantic-Pacific Capital Inc* [2014] EWHC 1459 (Comm) at [22]; [2014] 2 Lloyd's Rep 275.

32. There is a particular danger of infringing the duty to act fairly where the arbitration takes place on paper[48]. A good recent example of this happening is *Lorand Shipping Ltd v Davof Trading (Africa) BV MV "Ocean Glory"*[49] where, in an arbitration conducted on paper without an oral hearing, the clamant and the respondent had each sought a particular form of relief and the tribunal adopted what would appear to have been a "third way" or "half-way house" which had not been raised by either party. In the event, I held that this constituted a serious irregularity and, accordingly, I remitted the award to the tribunal for further consideration.

33. Difficult questions sometimes arise where a party is not represented at the hearing. For example, to what extent is the tribunal obliged – as part of its duty to act fairly – to put questions to a party's witness in the absence of the other party? And if the tribunal fails to do so, will this constitute a serious irregularity? This point was recently considered in the context of a s68 challenge in *Interprods Ltd v De La Rue International Ltd*[50] where Teare J. stated as follows:

> "36. It cannot be said that an arbitrator must always put points to a party's witnesses in the absence of the other party. Whether fairness requires him to do so depends upon all the circumstances of the case, including the nature of the point, its importance and whether the witness has sufficiently dealt with the point …"

In the event, on the facts of that case, the challenge was rejected by the Court.

34. ***Failure to deal with all issues:*** I should also briefly mention s68(2)(d) (i.e. failure by the tribunal to deal with all the issues that were put to it) if only because (i) this is a matter of great practical importance to arbitrators when considering and writing their award; and (ii) it is often used as a basis of challenge. In essence, there are four questions for the Court: (i) whether the relevant point or argument was an "issue" within the meaning of the sub-section; (ii) if so, whether the issue was "put" to the tribunal; (iii) if so, whether the tribunal failed to deal with it; and (iv) if so, whether that failure

[48] See eg, *Pacol Ltd v Joint Stock Co Rossakhar* [2000] 1 Lloyd's Rep 109, 115
[49] [2014] EWHC 3521 (Comm).
[50] [2014] EWHC 68 (Comm); [2014] 1 Lloyd's Rep 540.

has caused substantial injustice[51]. As to the first of these questions, I can do no better than refer to paragraph 16 of the Judgment of Andrew Smith J. in *Petrochemical Industries Co v Dow Chemical* where he stated as follows:

> "…A distinction is drawn in the authorities between, on the one hand "issues" and, on the other hand, what are variously referred to as (for example) "arguments" advanced or "points" made by parties to an arbitration or "lines of reasoning" or "steps" in an argument (see, for example, *Hussman (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83, 97 and *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (The "Pamphilos")* [2002] 2 Lloyd's Rep 681, 686). These authorities demonstrate a consistent concern to maintain the "high threshold" that has been said to be required for establishing a serious irregularity (see *Lesotho Highlands Development Authority v Impergilo SpA and Ors* [2005] UKHL 34 paragraph 28 and the other judicial observations collected by Tomlinson J in *AAB AG v Hochtief Airport GMBH and anor* [2006] EWHC 388 paragraph 63). The concern has sometimes been emphasised by references to "essential" issues or "key" issues or "crucial" issues (see respectively, for example, *Ascot Commodities NV v Olam International Ltd* [2002] 2 Lloyd's Rep 277, 284; *Weldon Plant v Commission for New Towns* [2001] 1 All ER 264, 279; and *Buyuk Camlica Shipping Trading and Industry Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 442 (Comm)), but the adjectives are not, I think, intended to import a definitional gloss upon the statute but simply allude to the requirement that the serious irregularity result in substantial injustice: *Fidelity Management SA v Myriad International Holdings BV* [2005] EWHC 1193 at paragraph 10. They do not, to my mind, go further in providing a useful test for applying section 68(2)(d)."

35. ***"Dealt with":*** As to the question whether the tribunal has "dealt with" an issue, this depends upon a consideration of the award. As Mr Gavin Kealey QC said in *Buyuk Camlica Shipping Trading and Industry Co Inc v Progress Bulk Carriers Ltd*[52] at paragraph 38:

> "It is not sufficient for an arbitral tribunal to deal with crucial issues in pectore, such that the parties are left to guess at whether a crucial issue has been dealt with or has been overlooked: the legislative purpose of section [68 (2)(d)] is to ensure that all those issues the determination of which are crucial to the tribunal's decision are dealt with and, in my judgment, this can only be achieved in practice if it is made apparent to the parties (normally, as I say, from the Award or Reasons) that those crucial issues have indeed been determined."

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[51] See per Andrew Smith J in *Petrochemical Industries Co v Dow Chemical* [2012] EWHC 2739 (Comm); [2012] 2 Lloyd's Rep 691 at [15]; and also, generally, the decision of Flaux J. in *Primera Maritime (Hellas) Ltd & Ors v Jiangsu Eastern Heavy Industry Co Ltd & Anor* [2013] EWHC 3066 (Comm); [2014] 1 Lloyd's Rep 255.

[52] [2010] EWHC 442 (Comm); [2011] BUS LR D99.

However, in considering whether a tribunal has "dealt with" an issue, the approach of the Court (on this as on other questions) is to read the 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[53]. Further, a tribunal does not have to "set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration"[54]; nor does a tribunal fail to deal with an issue that it decides without giving reasons (or a fortiori without giving adequate reasons)[55]; and a tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". For example, it can "deal with" an issue by making clear that it does not arise in view of its decision on the facts or its conclusions[56].

S69: Appeal on a Question of Law

36. At the risk of repetition, it is important to note that the structure of s69 is quite different from either s67 or s68. In particular, there is no automatic entitlement or "right", as such, to appeal against an award. Rather, by s69(1), unless otherwise agreed by the parties[57], a party 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 …";* and, by s69(2), an appeal only lies either (i) with the agreement of all of the parties or (ii) with the leave i.e. permission of the Court; and the circumstances in which the Court may grant such leave are strictly circumscribed by the express terms of s69(3) which provides as follows:

> "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,

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[53] *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*. [1985] 2 EGLR 14 at p.14F per Bingham J.
[54] *Hussman (Europe) Ltd v Al Ameen Development and Trade Co and Ors* [2000] 2 Lloyd's Rep 83 paragraph 56.
[55] *Margulead Ltd v Exide Technlogies* [2004] EWHC 1019 (Comm) at paragraph 43; [2005] 1 Lloyd's Rep 324.
[56] *Petrochemical Industries Co v Dow Chemical* [2012] EWHC 2739 (Comm); [2012] 2 Lloyd's Rep 691 at [27].
[57] Clear words are needed to exclude the right of appeal. Thus, a provision in an arbitration agreement that the award shall be "final and binding" or even "final, conclusive and binding" will not be effective: see, e.g., *Essex County Council v Premier Recycling Ltd* [2006] EWHC 3594; *Shell Egypt Wesrt Manzala GmbH v Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm); [2010] 1 Lloyd's Rep 109.

(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."

The application for leave

37. The application for leave to appeal is a crucial sifting stage of the process; and there are detailed Court rules governing such application including the service of written evidence both by the applicant in support – and by the respondent in opposition – to the grant of leave to appeal: see CPR 62.15. In general, the applicant will serve written evidence in order to seek to persuade the Court that the statutory requirements for the grant of leave are satisfied i.e. that (i) a "question of law" arises out of the award; (ii) the determination of such question will "*… substantially affect the rights of one or more of the parties*"; (iii) the question is one which the tribunal was asked to determine; (iv) on the basis of the facts in the award, the decision was either (a) "obviously wrong" or (b) one of "general public importance" and the decision of the tribunal is at least "open to serious doubt"; and (v) it is "*just and proper in all the circumstances for the Court to determine the question.*" I attach as an Appendix a flow-chart describing the questions which need to be considered by the Court when considering an application for leave to appeal under s69.

"Question of law arising out of an award"

38. A threshold requirement of any would-be appeal under s69 is that it involves a question of law arising out of the award. In this context, the reference is to a question of English law as opposed to any other system of law.[58] But what is meant by a "question of law"? At first blush, the answer would seem relatively straightforward. The intention is obviously to limit the scope of any possible

[58] See, e.g., *Schwebel v Schwebel* [2010] EWHC 3280; [2011] 2 All ER (Comm) 1048.

appeal and, in particular, to exclude any appeal on a question of fact[59]. In many cases, the distinction between a question of law and a question of fact is perfectly clear; and there are many instances in the authorities of questions of law which have been considered by the Court by way of an appeal under s69 including, for example, the question whether a shipowner claiming damages for charterers' repudiation of a time charter must give credit for the capital value of having sold the vessel upon repudiation for a greater sum than the value of the vessel at the contractual date for redelivery under the charter[60]? Or what are the proper legal principles applicable to the assessment of damages[61]? But, it is important to emphasise that, as a matter of English law, the proper construction of a contract is equally a question of law: the law reports are littered with appeals of this kind[62].

39. The position is complicated by the fact that, in truth, many questions of law involve what might be described as a "mixed" question of law and fact. That was the situation in one of the very first cases which came before the Court under the old Arbitration Act 1979 – which was (in relevant respect) the predecessor to the present 1996 Act. The main issue in that case[63] was whether a consecutive voyage charterparty had been "frustrated" in whole or in part. The sole arbitrator upheld the shipowner's argument that it had been frustrated in part. The charterer sought leave to appeal on the basis that the question as to whether the charterparty was frustrated was a question of law arising out of the award. The shipowner opposed the grant of leave on the basis that such question was, in effect, a question of fact (or at least a "mixed"

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[59] In *Guangzhou Dockyards v ENE Aegiali I* [2010] EWHC 2826; [2011] 1 Lloyd's Rep 30, the Court rejected the argument that the parties had agreed to an appeal on a question of fact and stated that it was "very doubtful" that the Court had inherent jurisdiction to hear an appeal on questions of fact even if the parties were to agree such an appeal.

[60] *Fulton Shipping Inc of Panama v Globalia Business Travel S.A.U. (formerly Travelplan S.A.U) of Spain* [2014] EWHC 1547 (Comm).

[61] *Flame SA v Glory Wealth Shipping PTE Ltd* [2013] EWHC 3153 (Comm); [2013] 2 Lloyd's Rep 653.

[62] See, e.g., *E D And F Man Sugar Ltd v Unicargo Transportgesellschaft GmbH* [2013] EWCA Civ 1449; [2014] 1 Lloyd's Rep 412 which concerned the meaning of the term "mechanical breakdown".

[63] *B.T.P Tioxide Ltd v Pioneer Shipping Ltd (MV Nema)* [1980] 1 Lloyd's Rep. 519 (Note). [1980] 2 Lloyd's Rep 83.

question of law and fact). Such argument was given short shrift indeed by no less a judge than Robert Goff J.

> "… Now, with the utmost respect to Mr. Diamond, this is an old warhorse that has been trotted out of the stable. The last time it was seen on the battlefield was in *The Angelia*,[1972] 2 Lloyd's Rep. 154, some seven years ago. After that unsuccessful appearance, it was returned to the stable and so far as I know has been munching hay happily for the last seven years, so much so that everyone has forgotten about it. But, here it is again and I am simply going to say this, that I find myself in total agreement with every word of what Mr. Justice Kerr said in *The Angelia*. I had thought that this was now accepted law. Mr. Justice Kerr there pointed out that not only was *In re Comptoir Commercial Anversois and Power, Son and Co.*, [1920] 1 K.B. 868 C.A., not cited to Mr. Justice Devlin in Citati, but that since Citati water has been flowing very rapidly under the bridge indeed and in *Tsakiroglou and Co. Ltd. v. Noblee Thorl G.m.b.H.*, [1961] 1 Lloyd's Rep. 329; [1962] A.C. 93, and *Davis Contractors Ltd. v. Fareham Urban District Council* [1956] A.C. 696, both decisions of the House of Lords, it was made clear beyond doubt that frustration is, in the ultimate analysis, a question of law …."

And so, on this basis, Robert Goff J. granted leave to appeal. However, a very different view was expressed on the substantive hearing by both the Court of Appeal and the House of Lords. In particular, Lord Diplock, in a seminal judgment, stated that what was then the new Arbitration Act 1979 gave effect to the "turn of the tide" in favour of finality as against "meticulous legal accuracy"; and that *The Nema* was the sort of case in which leave to appeal on a question of construction ought not to be granted. It is difficult to underestimate the importance of this speech by Lord Diplock: it fundamentally changed the process under English law of appealing against an arbitration award and thereby changed the shape of modern arbitration in England.

40. The result is that the Court will not generally give leave to appeal or substitute its own decision for that of the tribunal on points which might be said to involve a question of law (e.g., whether on the particular facts a party had wrongfully repudiated or renounced a contract) unless the Court decides that the arbitral tribunal had or might have misdirected itself in point of law[64]. In considering the question whether or not an award can be shown to be wrong in

[64] See, e.g., *Compagnie General Maritime v Diakan Spirit S.A. (The Ymnos)* [1982] 2 Lloyd's Rep 574.

law, the modern approach is to be found in the Judgment of Mustill J in *Vinava Shipping Co Ltd v Finelvet AG ("The Chrysalis")*[65] i.e. the answer is to be found by dividing the arbitrator's process of reasoning into three stages viz.

> "(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 the light of the facts and the law so ascertained, the arbitrator reaches his decision."

41. However, difficulties remain. Take, for example, the question (which often arises) as to the meaning or proper construction of the terms of a written contract. As I have already stated, that is, as a matter of English law, a "question of law". As explained by Lord Diplock in *The Nema*, the reason for this is a legacy of the system of trial by juries; and, despite the disappearance of juries in civil cases in England, it is far too late to change the technical classification of the ascertainment of the meaning of a written contract as being a "question of law"[66]. The law reports are littered with examples of appeals from awards on that basis. However, following the decision of the House of Lords in *ICS v West Bromwich Building Society*[67], there has been a marked trend in favour of parties seeking to rely on what is often described as "factual matrix" evidence or expert evidence as an aid to construction[68]. The result is that the question of construction may depend upon an assessment of such factual matrix or expert evidence and, to that extent, will rest upon factual conclusions reached by the arbitrators. In such cases, although there is no doubt that the question of construction is ultimately a question of law, any appeal may, in practice, be difficult, if not impossible. Equally, if and to the

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65 [1983] 1 QB 503.
66 [1982] AC 724 @ p736A-G
67 [1991] 1 WLR 896 in particular per Lord Hoffmann at pp912-913. See, generally, *Chitty on Contracts*, 31st Edition, Vol 1 paras 12-117 to 12-120.
68 See, e.g., *MRI Trading AG v Erdenet Mining Corp LLC* [2013] EWCA Civ 156; [2013] 1 Lloyd's Rep 638.

extent that the tribunal may rely upon such factual matrix or expert evidence in reaching its conclusions with regard to the construction of the contract, it is important that such material is properly set out in the award because, on any appeal, the Court will not be able to look outside of the award[69].

42. It is important to note that s69 requires that the question whether the tribunal's decision was "obviously wrong" or "open to serious doubt" must be determined "on the basis of the facts in the award". Thus, it is not open to an applicant to seek to introduce or otherwise to refer to facts outside of the award; and consequently, the pleadings and the evidence in the arbitration will be inadmissible[70]. This is sometimes ignored by the applicant but the Courts (rightly) adopt a very strict approach in this regard[71]. Generally, the application for leave is almost always considered on "paper" i.e. there is generally no oral hearing; the Court does not deliver a formal Judgment but will make an order – either granting or refusing leave – with very brief reasons.

"Obviously wrong"

43. The "obviously wrong" test has been considered in a number of cases – most colourfully perhaps by Lord Donaldson:

> "This is not however to say that, even in a one-off case, an arbitrator is to be allowed to cavort about the market carrying a small palm tree and doing whatever he thinks appropriate by way of settling the dispute. What it does amount to is that the Courts will normally leave him to his own devices and leave the parties to the consequences of their choice. They will only intervene if it can be demonstrated quickly and easily that the arbitrator was plainly wrong."[72]

44. More recently still, Colman J. described the test as follows:

> "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

[69] See, again, *MRI Trading AG v Erdenet Mining Corp LLC* [2013] EWCA Civ 156; [2013] 1 Lloyd's Rep 638 in particular at [25]-[28]. In such a case, the respondent may be well advised to serve what is called a respondent's notice and to make an application for an under s70(4) that the tribunal states further reasons.

[70] See, eg., *Dolphin Tanker Srl v Westport Petroleum Inc* [2010] EWHC 2617 (Comm); [2011] 1 Lloyd's Rep 550.

[71] In order to get around this stricture, the applicant may seek an order under s70(4) for further reasons.

[72] *The Kelaniya* [1989] 1 Lloyd's Rep 30.

> '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."[73]

Appeals

45. Finally, I should mention the possibility of further appeals to the Court of Appeal but it is important to emphasise that there is no automatic right of appeal. In summary, it is possible to appeal a decision of the High Court in respect of a challenge under s67 or s68 or for leave to appeal under s69 but only with the leave of the Court itself[74]; and on the decision of the High Court on a substantive appeal under s69, s69(8) expressly provides in effect that no appeal lies without the leave of the Court which shall not be given unless the Court considers that the question is one of "general importance" or is one which for some other special reason should be considered by the Court of Appeal.

46. The prospect of such further appeals is often the subject of criticism when compared to some other jurisdictions. However, it is (again) important to emphasise that, in practice, such appeals are extremely rare indeed. Thus, my analysis of the cases reported on www.bailii.org during the three year period 2012-2014 shows that there were no appeals at all to the Court of Appeal in respect of challenges under either s67 or s68. As to s69, there was a total of only 6 appeals from the High Court to the Court of Appeal (i.e. 2 in 2012, 3 in 2013 and 1 in 2014) – all of which were rejected by the Court of Appeal. In addition, I should mention that although there is the possibility of further appeals from the Court of Appeal to the Supreme Court, there were in fact no such appeals at all during this period under s67, s68 or s69. This pattern strongly underlines the robust approach of the English Courts in supporting speed and finality in the arbitral process.

Bernard Eder

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[73] The Master's Lecture, entitled 'Arbitration and Judges – How much interference should we tolerate?' (London, 14/03/2006) cited by Coulson J. in *Amec Group Ltd v Sec of State for Defence* [2013] EWHC 110 (TCC); 146 Con LR 152.

[74] See s67(4), s68(4) and s69(6) respectively. This is subject to a possible exception in circumstances involving a breach of Art 6 of the European Convention of Human Rights: see *ASM Shipping Ltd v TTMI Ltd* [2006] EWCA Civ 1341; [2007] 1 Loyd's Rep 136.

APPENDIX:
Questions to be considered by the Court on an application for leave to appeal under s69