CHAPTER ELEVEN

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CHAPTER ELEVEN

THE SUPERVISORY POWERS OF THE COURT.

INTRODUCTION :

The general supervisory powers of the court concern both supervising the arbitral process whilst it is on going as described in the preceding chapters and subsequently, once an award has been produced, in all circumstances to ensure that the tribunal acts within the powers granted to it by the parties and that it acts within the confines of the law governing the arbitral process. The supervisory powers of the Arbitration Act 1996 are informed by the governing principles of s1.

ENFORCEMENT OF ARBITRAL AWARDS.

The ability and preparedness of a court to enforce an arbitral award is central to ensuring that arbitration is a valid and viable dispute resolution process. The Arbitration Act 1996 sets out the framework for judicial support of the arbitral process, both domestic and international. Section s66, which provides for the enforcement of awards is the lynch pin. Similarly Article 35 performs the same function for the Model Law.

S66 Arbitration Act 1996. Enforcement of the award.

66(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

66(2) Where leave is so given, judgment may be entered in terms of the award.

66(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

66(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.

S66(3) provides the sole ground for resisting enforcement, namely absence of jurisdiction, but cross references the important caveat contained under s73 that a party who knowing failed to challenge jurisdiction where able to do so at an earlier stage may not save the challenge up as a fall back insurance in the event that the arbitration subsequently goes against them. The right to resist will have been forfeited.

S73 Arbitration Act 1996 : Loss of right to object.

73(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

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

73(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling-

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

Article 4. Model Law : Waiver of right to reject.

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his fight to object.

•Article 35. Model Law. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

*(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. if the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.****

*** *The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.*

Article 36. Model Law. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Unlike the Model Law the Arbitration Act 1996 provides two mechanisms for the award to be challenged, firstly in that leave of the court is required under s66(2) and further through section 67-69 challenges. However, s66(3) essentially places the s66(3) filter on the same territory as s67 in that in both cases the challenged is based on jurisdiction. Once leave to commence enforcement proceedings is granted it will of course be open to the resisting party to raise defences to enforcement on the grounds of sections 67-69.

s66 Arbitration Act 1996 and Article 35 Model Law are concerned with enforcement by the competent court, hence an English Court where the award is governed by the Arbitration Act 1996 and similarly an award governed by the law of the governing state regarding Article 35. The regime for enforcing foreign awards is governed by s100-103 Arbitration Act 1996 and the New York Convention on the Enforcement of Foreign arbitral awards as noted by s66(4).[1]

Clause 66 Enforcement of the Award DAC 1996.

273. *This reflects Article 35 of the Model Law. Enforcement through the Court provides the classic case of using the Court to support the arbitral process. Sub-section (3) (a) is intended to state the present law: see Mustill & Boyd, Commercial Arbitration, 2nd Ed., at p. 546. Sub-section (3) (b) is intended to cover cases where public policy would not recognize the validity of an award, for example awards purporting to decide matters which our law does not accept can be resolved by this means. For obvious reasons, this provision is mandatory.*

274. *Reference should be made to Chapter 6, where certain supplementary recommendations are made with respect to this Clause.*

Note however, that the final version was subject to the changes noted below.

Section 66 Enforcement of Award DAC 1997.

32. *In Paras 371 to 378 of Chapter 6 we made various suggestions for changes to the provision as it then appeared in the Bill. We were concerned that we had not covered enough of the cases where leave to enforce an award could be refused. We also suggested that it should be made clear that the list was not a closed list. However, on further reflection we concluded that it would be preferable, instead of having a list which would have to be expressed as not closed, to have no list at all; instead relying on the fact (as noted at 373 & 374) that the opening words of the provision do not require the Court to order enforcement, but only give it a discretion to do so. Thus what was subsection (3) of the Bill was deleted by amendment. However, it will be noted that in what is now Section 81 it is made clear (by an amendment to the Bill as introduced) that any rule of law relating in particular to matters which are not capable of settlement by arbitration or to the refusal of recognition or enforcement of an arbitral award on the grounds of public policy continues to operate.*

33. *The suggestion that there should be an express reference to an action on the award was adopted and this reference is now to be found in Section 66(4) of the Act. This in turn meant that the reference to an action on an award in what is now Section 81 was unnecessary and this latter reference was accordingly removed by amendment.*

34. *In Paragraph 378 of Chapter 6 we suggested that where the application was to enforce an agreed award, the Court should be notified of that fact, which should also be recorded in any order for enforcement. Upon reflection, however, it seemed to us that such requirements would be better placed in the relevant Rules of Court, and this, we are informed, will be done.*

[1] See further below.Part IV Challenging the Award under the New York Convention.

CHALLENGING AN ARBITRAL AWARD UNDER ENGLISH LAW

INTRODUCTION

Given the adversarial "*winner takes all*" nature of litigation, it is hardly surprising that there will be times when a disappointed litigant will seek to challenge and turn around the decision. This is likely in circumstances where the litigant feels strongly that the judge or arbitrator has got it wrong and the legal advisors indicate that there are potentially valid grounds for a challenge.

Whilst it is inevitable that neither judges nor arbitrators are infallible and that there will be occasions when a challenge will be successful, the decision to challenge an arbitral award is not one that should be taken lightly.[2] A frivolous challenge will simply result in additional costs and merely serve to delay the inevitable. Today, if not previously, in the light of the Arbitration Act 1996 the English courts take a robust approach to the enforcement of arbitral awards. They are very supportive of the arbitral process and are not amenable to petty challenges and nit-picking. Where the challenge is based on a mere technical breach the court will look for evidence of serious injustice or prejudice to the appellant's interests.

THE JURISPRUDENTIAL BASIS FOR CHALLENGES TO ARBITRAL AWARDS.

It is quite common for challenges to arbitral awards and construction adjudication decisions to be assimilated with Judicial Review actions in Public Law. This is understandable in that natural justice is a key feature of the supervisory powers of the court in respect of the judicial process and the arbitral process has been likened to private justice. However, it is the very fact that the arbitral process is private that places it outside the remit of Judicial Review, which is exclusively reserved to disputes between private legal personalities and state organs in respect of the exercise of state powers. It is an abuse of process to submit civil litigation to Judicial Review.[3] Nonetheless, there are striking similarities between the private challenge and judicial review which is hardly surprising since they arise out of the same conceptual base.

Ultra vires is the principal ground for challenging alleged abuses of public powers. The assertion quite simply is that a public official has strayed outside the statutory framework that prescribes the exercise of a power or failed to fulfil statutory duties and hence the resultant action or decision is unlawful. Similarly, the arbitration process (including its existence and the way it is conducted) is prescribed by the terms of the contractual agreement (both express and implied including by statutory implication as set out for example in the Arbitration Act 1996) upon which it is based. Whilst an easy trap to fall into, a breach of the contractual rules governing the arbitral process should not be referred to as being ultra vires the contract. It is quite simply a breach of contract. This issue, in relation to construction adjudication, has recently been examined extensively and confirmed by the English,[4] Scottish[5] and the Australian Courts.[6]

The judicial process is subject to the rules of natural justice. The two central rules here are 1) the right of a party to hear and to be heard (***Audi alterem partem***) and 2) the right to a hearing before an impartial arbiter (***Nemo iudex in causa sua***). These are implicit in the requirements of due process established by the Bill of Rights 1688 and reaffirmed by Article VI of the European Convention on Human Rights, now part of English Law by virtue of the Human Rights Act 1998. It is now clear, though that has not always been the case, that these basic concepts are respected and fully observed in private dispute resolution, but by other means than through judicial review. Thus, as far as arbitration and construction adjudication are concerned, the Arbitration Act 1996 and the Housing Grants Construction and Regeneration Act 1996[7] respectively provide rules to ensure that the key elements of natural justice are a feature of both processes.

[2] Leave to appeal is required in respect of litigation but not to challenge an arbitral award. However, leave is required to challenge the court's decision in respect of the challenge - s67(4), 68(4) & 69(2), criteria for the latter being set out in s69(3).

[3] ***O'Reilly v Mackman*** [1983] 2 AC 237 ; ***Law v National Greyhound Racing Club*** [1983] 1 WLR 1302.

[4] ***Macob Civil Engineering Limited v Morrison Construction Limited*** *[1999] BLR 93 :* ***Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd*** *[2000] BLR 522 :* ***Project Consultancy Group v Trustees of The Gray Trust [1999] BLR 377 : Workplace Technologies v E Squared Ltd & Mr J L Riches [2000] CILL 1607*** :

[5] ***Homer Burgess Ltd v Chirex (Annan) Ltd [1999] ScotCS 264 : Naylor (t/a Powerfloated Concrete Floors) v Greenacres Curling Ltd [2001] ScotCS 163.***

[6] ***Brodyn P/L v Philip Davenport [2004] NSWCA 394.***

[7] ***Fab-Tek Engineering Ltd v Carillion Construction Ltd [2002] ScotCS a873-01 : Karl Construction Ltd v. Palisade Properties Plc [2002] ScotCS 350 : Austin Hall Building Ltd v. Buckland Securities Ltd [2001] EWHC TCC 434***

What amounts to a fair hearing in public law and when a party is entitled to one, and if so, the extent of the hearing called for, has always been a moveable feast which depends upon the distinction between rights, mere expectations and administrative proportionality. The same is likewise true of arbitration and construction adjudication, the distinction being between the temporary and final natures of the outcomes of arbitration and adjudication.[8] Similarly, the application of these principles is modified in respect of expert determination and conciliation, but has no application to mediation since no outcome is imposed upon the parties.

THE GROUNDS FOR CHALLENGE OF AN ARBITRAL AWARD.

There are three grounds for challenging a domestic award under the Arbitration Act 1996, namely ***Jurisdiction*** under s67; ***Serious Irregularity*** under s68 and ***Appeal on a Point of Law*** under s69. In addition there are specific rules based on the New York Conventions on the Enforcement of Arbitral Awards 1958, set out in sections 100-103 of the Act in respect of International Awards. Each of these will be considered in turn below. Any challenge must be based on these provisions and the procedures prescribed by related provisions within the Act such as sections 70-73. There is no common law supplement to these rules,[9] though judicial considerations of the provisions since the Act came into force have been extensive. Frequently a multi-pronged attack on an award is mounted involving two or more grounds, e.g. a) the tribunal had no jurisdiction but even if it did either b) there was a serious irregularity in the way the tribunal conducted itself and/or c) the tribunal erred in law. In consequence some cases are authority for the application of all three provisions.[10]

GROUNDS

S67 Jurisdiction
S68 Serious Irregularity
S69 Appeal : point of law

International Awards

S103 NYCEAA 1958 : Incapacity: invalidity: jurisdiction; empanelment; set-aside; public policy

It should be noted that the grounds set out in sections 68 and 69 exclude an appeal against a finding of fact on any basis apart from it being a consequence of a serious irregularity. [11] Whilst a simple point, this appears to elude many parties and counsel. [12] It should further be noted that the courts will take a robust view of spurious

[8] ***SL Timber Systems Ltd v Carillon Construction Ltd [2001] ScotCS 167*** at para 22. *"Error of fact or law on the part of the adjudicator will not afford ground for refusal of enforcement, unless the error was of such a nature that the adjudicator's decision was, as a result, one which he had no jurisdiction to make (**Watson Building Services Limited** per Lady Paton at paragraphs [21] to [24]; **Homer Burgess Limited v Chirex (Annan) Limited** 2000 SLT 277 at 284J to 285D; **Macob Civil Engineering Limited v Morrison Construction Limited** [1999] BLR 93 per Dyson J at Paragraph [19]; **Northern Developments (Cumbria) Limited** per His Honour Judge Bowsher QC at paragraph 24)." See also the Australian case of **Brodyn P/L v Philip Davenport [2004] NSWCA 394. where** at para 57 Hodgeson JA observed that "there is some controversy as to whether denial of natural justice generally results in voidness or voidability (see for example **Ridge v. Baldwin** [1964] AC 40, **Durayappah v. Fernando** [1967] 2 AC 337, **Banks v. Transport Regulation Board (Vic)** (1968) 119 CLR 222 at 233, **Calvin v. Carr** [1980] AC 574 at 589-90, **Minister for Immigration v. Bhardwaj** (2002) 209 CLR 597 at 630-34); but in my opinion, in cases such as this where there is a disclosed legislative intention to make a particular measure of natural justice a pre-condition of validity, failure to afford that measure of natural justice does make the determination void."*

[9] S81(1) *Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to :-*
(a) matters which are not capable of settlement by arbitration,
(b) the effect of an oral arbitration agreement; or
(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.
S81(2) *Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground or errors of fact or law on the face of the award.*

[10] e.g. ***Ronly Holdings Ltd v JSC Zestafoni G Nikoladze Ferroalloy Plant [2004] EWHC 1354 (Comm).***

[11] ***Demco Investments SA v SE Banken Forsakring Holding Aktiebolag [2005] EWHC 1398 (Comm)*** There can be no appeal of facts under s69 - only an appeal of law. Mr Justice Cooke.

[12] e.g. ***Compania Sud American Vapores v Hamburg [2006] EWHC 483 (Comm).*** Bunkers overheated, damaging cargo. Arbitrators found as a fact that loss was due to negligence in operation of the vessel and accordingly the charterer was not liable by virtue of Art IV HVR. The appellants sought to establish that overheating of bunkers next to a cargo is negligence in care and handling of cargo and that in consequence a breach of Art III had arisen. Mr Justice Morison held that this was a challenge to fact not law. The Arbitrators had applied the correct test scrupulously. ***Gosse Millard*** [1929] applied. See also ***Kershaw Mechanical Services Ltd v Kendrick Construction Ltd [2006] EWHC 727 (TCC)*** Appeal against the construction of the contract regarding variations. Mr Justice Jackson conducted an extensive consideration of the role of the court under s69 and subsequently found that that arbitrator had applied the correct construction. Accordingly the appeal failed. See also ***Maridive VII v Key Singapore, Owners and Demise Charterers of the oil rig [2004] EWHC 2227 (Comm)*** The arbitrator changed the base value upon which the award was compounded and further altered the contributions of the parties in respect of a salvage and tow claim. The consequent reduction in the award was challenged. Mr Justice David Steel held that the second arbitrator made no errors of law or principle.

challenges which seek to dress up a point of fact as a point of law. The court can and will impose cost sanctions in such instances, as demonstrated by ***Vrinera v Eastern Rich Operations [2004].***[13] Vrinera sued ERO (the charterer) under a safe port clause and ERO in turn sued BAO on the safe port clause in a sub-charter, both by arbitration. In the event the actions were held to be spurious. The tribunal and the court found that the vessel was unseaworthy, which was ERO's defence against Vrinera. The question here for the court was *"Whether ERO's costs against BAO were caused by Vrinera?"* Mr Justice Langley held that they were not. The loss was actually the consequence of pursuing a hopeless case.

The facility to mount a challenge should not and cannot be used as an opportunity to retry the factual evidence. In the context of the Arbitration Act 1996 this was affirmed in ***Orchard v Hutchings [1997].***[14] During the course of an arbitration the claimant produced a plan and asserted defects in a conservatory. The applicant appealed on the basis that there was an irregularity, in that he asserted that he had never seen the plan, and that the arbitrator ignored this absence of knowledge. The court held that by implication the arbitrator believed he had actually fact seen the plan. The issue was thus one of fact and the appeal failed.

From this perspective little has changed since there was no appeal on a point of fact under the Arbitration Act 1950 either as demonstrated by ***Sembawang v Pacific Ocean [2004].***[15] The complaint was that the arbitrators finding that an owner who had lawfully terminated a ship conversion contract had not mitigated his losses by choosing a British and not a Singapore yard to complete the work. The court held that this was a question of fact, namely *"was there legally adequate mitigation"*, not law as in *"what is the lawful definition of mitigation"*. Accordingly the challenge failed.

In relation particularly to s68, rather than wait for a tribunal to deliver an award there is the facility to apply to the court under s24 Arbitration Act 1996 to remove an arbitrator where there are doubts about the arbitrator's impartiality, qualifications, physical and mental capacity and where an arbitrator has refused or failed to properly conduct proceedings or proceed with reasonable dispatch, resulting in substantial injustice.[16] In addition, by virtue of s23 parties can jointly agree to revoke the authority of an arbitrator. Furthermore, in relation particularly to s69, rather than wait for a tribunal to deliver an award that might potentially be challenged on a point of law, there is the facility to apply to the court under s45 to determine that point of law.

Supplementary Provisions related to both challenges and appeals.

Section 70 Arbitration Act 1996 contains a number of very important supplemental provisions that as stated in s70(1) concern the right to mount s67 and s68 challenges and / or an appeal under s69.

Exhausting available appeal and review facilities.

> *70(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted-*
> *(a) any available arbitral process of appeal or review, and*
> *(b) any available recourse under section 57 (correction of award or additional award).*

This provision is particularly important where institutional arbitration is involved and again where standard contract forms such as the GAFTA charter-party terms apply since it is common for such contracts to provide the facility of institutional appeal or an appeal to a trade board.

Time bar for application for challenge or review[17]

> *70(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.*

13 ***Vrinera Marine Company Ltd. v Eastern Rich Operations Inc [2004] EWHC 1752 (Comm).***

14 ***Orchard v Hutchings [1997] EWCA Civ 2269.*** Hutchinson LJ.

15 ***Sembawang Corp Ltd v Pacific Ocean Shipping Corp [2004] EWHC 2743 (Comm)*** *per* Mr Justice Gross.

16 e.g. ***Norbrook Laboratories Ltd v Tank [2006] EWHC 1055 (Comm).*** Mr Justice Colman removed an arbitrator under s24 for engaging in undisclosed contact with witnesses in order to gather evidence.

17 This is a tight timescale. Compare this with the 3 months allowed for public law judicial review applications.

Clause 70 Challenge or Appeal: supplementary Provisions: Clause 71 effect of Order of the Court. DAC '96

293. *These provisions contain time-limits and other matters in relation to challenges to the award and applications and appeals. Some of these provisions are mandatory.*

294. *The time limit in Clause 70(3) runs from the date of the award, or, where applicable, the date when a party was notified of the result of any arbitral process of appeal or review. It has been suggested that difficulties might arise if an award is held back by the arbitrators, pending payment by the parties (ie under Clause 56). It is possible that the time limit in Clause 70(3) will have expired by the time an award is released. However, the DAC is of the view that the date of the award is the only incontrovertible date from which the time period should run. Any other starting point would result in great uncertainty (eg as to the exact point at which an award is "released" or "delivered"). Further, any difficulties arising from specific circumstances can be easily remedied by way of an extension of time under Clause 79.*

Adequate reasons for the decision of a tribunal – remission to tribunal – and costs of remission

70(4) If on an application or appeal it appears to the court that the award-
(a) does not contain the tribunal's reasons, or
(b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,
the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

70(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

In the absence of adequate reasons it may not be possible for the court to deal with a jurisdiction challenge or to determine whether or not there has been a serious irregularity or error of law. This provision enables the court to remit the award for further clarification. It does not preclude a subsequent s67 / s68 challenges or a s69 appeal in the light of that clarification, though once given a challenge may not then survive the threshold requirements for a challenge.

Security of costs for a challenge or appeal

70(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.
The power to order security for costs shall not be exercised on the ground that the applicant or appellant is-
(a) an individual ordinarily resident outside the United Kingdom, or
(b) a corporation or association incorporated or formed under the law of a country outside the UK, or whose central management and control is exercised outside the UK

Interim Orders. Securing monies due under an award pending outcome of application.

70(7) 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 appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

Conditions regarding security of costs and securing monies under an award as part of leave to appeal.

70(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).
This does not affect the general discretion of the court to grant leave subject to conditions.

SUBSTANTIVE & PROCEDURAL LAW OF ARBITRATION

PART I – JURISDICTION

AUTONOMY AND JURISDICTION

The autonomy of the parties is a fundamental feature of arbitration. In the absence of consent, express or implied, to the jurisdiction of a tribunal over the disposition of a dispute[18] or an aspect of a dispute,[19] enforcement of the award by the courts may be successfully resisted. An arbitrator's jurisdiction may be challenged at an early stage by virtue of a s24 application to the court for removal of an arbitrator. However, once an award has been delivered any challenge to the award on the basis of an absence of jurisdiction will fall under the remit of s67 Arbitration Act 1996.

S67 Arbitration Act 1996. Challenging the award: substantive jurisdiction.

> *67(1) A party to arbitral proceedings may (upon notice to the other parties and to 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.*
> *A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*
>
> *67(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.*

Rules governing the jurisdiction of the tribunal.

Section 67 Arbitration Act 1996 provides the facility to challenge an award on jurisdictional grounds but does not seek to define or regulate that jurisdiction. This is left to sections 30-32 of the Act which provide the mechanisms for determining the jurisdiction of the tribunal both by the tribunal and by the courts. A party who takes no part in arbitral proceedings may question the validity of an arbitration agreement, the constitution of a tribunal or the scope of the jurisdiction of the tribunal under the agreement by virtue of s72 coupled and can avail themselves of the rights to challenge under s67 and s68, without having recourse to the s70(2) duty to exhaust arbitral procedures. However s73 provides that where a party participates in proceedings without objection the right to object may be lost.[20] Note also that by virtue of s66(3) leave to enforce an award will not be granted where it has been shown to the court that the tribunal lacked jurisdiction. Together these provisions seriously prescribe the right to challenge an award on the s67 grounds of an absence of jurisdiction.

By virtue of s30 Arbitration Act 1996[21] "***Kompetenze-Kompetenze*** *rule*", an arbitrator has jurisdiction to rule on his own jurisdiction, which reduces the role of the courts in establishing jurisdiction at the outset, but

[18] ***X Ltd v Y Ltd [2005] EWHC 769.*** Here Mr Justice Jackson was called to determine whether the subject matter of a dispute was within the scope of the arbitration jurisdiction clause.

[19] e.g. ***Ecuador v Occidental Exploration & Production Co [2006] EWHC 345 (Comm).*** Under the contract jurisdiction to deal with taxation was excluded. Did this exclusion extend to application for return of VAT. Mr Justice Aikens held that it did not. See also ***Econet Satellite Services Ltd. v Vee Networks Ltd [2006] EWHC 1664 (Comm)*** Mr Justice Field held that there was no jurisdiction to deal with set off under the contract. The applicants had confused the scope clause under UNCITRAL, regarding procedure, with the substantive law of the contract.

[20] ***Peoples' Insurance Company of China v Vysanthi Shipping Co Ltd [2003] EWHC 1655 (Comm).*** This concerned a general average claim following the grounding of a vessel. The owners successfully arbitrated the dispute and obtained an enforcement judgment. Subsequent to the award an action was commenced in the PRC followed by a late application to challenge the arbitrator's jurisdiction coupled with an application for an extension of time. The extension was refused. The challenge failed. Mr Justice Thomas found that the arbitrator was seized with jurisdiction. See also ***Oceanografia SA DE CV v DSND Subsea AS [2006] EWHC 1360 (Comm).*** Aikens J found that the applicant had waived the right to challenge jurisdiction by submitting to proceedings.

[21] **s30(1)Arbitration Act 1996** *`Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to-*
(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.
s30(2)Arbitration Act 1996. *Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.*

such a decision is subject to challenge before the courts.[22] The statutory recognition of ***Kompetenze-Kompetenze*** brings English Arbitration in line with Art 16 Model Law.[23] The previous ability to refer all questions of jurisdiction to the court tended to encourage judicial interference in the arbitral process, slowed the decision making process down, often quite unnecessarily and increased the costs of proceedings. Now Under the 1996 Act a party will raise the question of jurisdiction directly with the tribunal. The tribunal will make a determination on the question (*either as an interim award or subsequently as an integral part of the final award)* unless the parties have decided that some other body will have jurisdiction over jurisdiction. [24] Whether, or not the arbitrator is the best placed to rule on jurisdiction, is debatable. There are those who do not believe he is since he has a vested financial interest in the continuation of the process. Against this however is the fact that an arbitrator has a professional reputation to maintain, which could be damaged if his judgment is subsequently called into question by the court, particularly since abortive proceedings will have involved the parties in considerable expense both in terms of money, time and personal commitment. Where both parties agree to the question of jurisdiction being determined by the court, or the arbitrator wants, with god reason, the courts assistance an application can be made to the court under s31.[25]

[22] See ***Birse Construction Ltd v St David Ltd [1999] EWHC TCC 253***. This involved proving the existence of the contract containing the arbitration agreement which in turn gave rise to jurisdiction and accordingly the right to a stay to arbitration. Sections 5 & 9 Arbitration Act 1996 also considered by His Honour Judge Humphrey Lloyd. In ***Birse Construction Ltd v St David Ltd [2000] Lawtel AC0100051*** Recorder Colin Reese held that no contract had been concluded. The arbitration agreement was not alive. Accordingly he declined to order a stay to arbitration.

[23] **Article 16. Model Law : Competence of arbitral tribunal to rule on its jurisdiction**

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the con-tract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitration A plea that the arbitral tribunal is exceeding the scope of its. authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

[24] **S31 Arbitration Act 1996. Objection to substantive jurisdiction of tribunal.**

31(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must, be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

31(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

31(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

31(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may-

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

31(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

[25] **S32 Arbitration Act 1996. Determination of preliminary point of jurisdiction.**

32(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.

A party may lose the right to object (see section 73).

32(2) An application under this section shall not be considered unless-

(a) it is made with the agreement in writing of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied-

(i) that the determination of the question is likely to produce substantial savings in costs,

(ii) that the application was made without delay, and

(iii) that there is good reason why the matter should be decided by the court.

32(3) An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on

Contrast the rules governing construction adjudication under the Housing Grants Act 1996, where the adjudicator is not given jurisdiction over jurisdiction by the Act or by the accompanying scheme,[26] though it is possible for the contract to expressly grant jurisdiction[27] or for the parties to subsequently expressly or impliedly accord jurisdiction.[28] In the absence of jurisdiction the adjudicator merely considers whether or not he has jurisdiction and thus whether in his opinion continuing with the adjudication is justified. It is possible for one of the parties to seek a declaration in advance from the court to determine jurisdiction or to stay the adjudication with consent of the parties pending the outcome of an application for a declaration.[29] Otherwise the question of jurisdiction will be settled by the court during any subsequent enforcement action.

The grounds used to challenge the jurisdiction of an arbitrator.

Capacity : A number of such challenges centre on the contractual capacity or otherwise of one of the parties, with the assertion that the action should have been against a company, perhaps that it was against the wrong company,[30] or alternatively against an individual not a company, or that the wrong person has been cited.[31] This is closely related to the question as to whether or not there was a legal relationship between the parties that could give rise to a dispute discussed below.

Sovereign Immunity : A frequent basis for challenge is on the grounds of sovereign immunity. This is common particularly in respect of arbitrations which involve government trading partners in Latin America and most notably trading partners in Europe which are government entities or maintain close relationships with the government where the government was previously part of the Communist Trading block.[32] These often involve complex legal issues since the relevant domestic rules governing privatisation are often not well developed, coherent, fixed or transparent.

No contract : Whilst the doctrine of separability, embodied in s7 Arbitration Act 1996,[33] has reduced the scope for challenging the jurisdiction of an arbitrator on the grounds of the invalidity of a contract, none the less where a party has not entered into a contract there is no contract from which to separate the arbitration

which it is said that the matter should be decided by the court.

32(4) Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

32(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

32(6) The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.
But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

[26] ***Project Consultancy Group v Trustees of The Gray Trust [1999] BLR 377****: Tim Butler Contractors Ltd v Merewood Homes Ltd [2000] TCC 10/00;: Workplace Technologies v E Squared Ltd & Mr J L Riches [2000] CILL 1607*

[27] ***Deko Scotland v. Edinburgh Royal Joint Venture & Anor [2003] ScotCS 113*** : example of extension of jurisdiction contained in the contract, in this case over costs.

[28] ***Whiteways Contractors v Impresa Castelli [2001] 75 Con LRHT 00/199***; ***Watson Builders Service v Millers [2001] Outer Ct of Session*** Scot.Courts.Gov.UK; ***Nolan Davis Ltd v Steven P Catton (No1) [2000] EWHC 590; Bryen & Langley v Boston [2004] EWHC 2450***

[29] ***Adonis Construction Ltd v Mitchells & Butler [2003] Adjudication SocDec 2003; William Verry Ltd v Furlong Homes Ltd [2005] EWHC 138***

[30] ***Peterson Farms Inc v C & M Farming Ltd [2004] EWHC 121 (Comm).*** The ICC arbitration award challenged here concerned claims about the supply of diseased poultry. The issue was whether the tribunal had jurisdiction to address claims by related companies in the C&M group or whether claims were limited to C&M. This in turn turned on whether Arkansas Law applied. Mr Justice Langley held that in the circumstances C&M was the only party to the reference. Accordingly the related awards were struck out.
See also ***Stansell Ltd v Co-Operative Group (CWS) Ltd [2005] EWHC 1601 (Ch)***. CRS business was transferred to CWS. Successful appeal against an interim award on jurisdiction based on the existence of a contract. His Honour Judge Blackburne upheld a contractual prohibition against assignment.

[31] ***Hussmann (Europe) Ltd. v Pharaon [2003] EWCA Civ 266.*** The first award against a company was held by the CA. (Phillips MR, Lord; Rix LJ; Scott Baker LJ.) to be invalid. However, a subsequent award, this time against the individual was valid. The applicant unsuccessfully sought to establish that the arbitrator was by that time functus officio.

[32] See for instance ***Ecuador v Occidental Exploration and Production Company [2005] EWHC 774 (Comm)***. [*2005] EWCA Civ 1116) :* Here a s67 jurisdiction challenge was mounted on the basis of foreign state immunity plea by the defendant and an assertion that the award was a treaty. Mr Justice Aikens held that the tribunal had jurisdiction. The sovereign state had submitted to the jurisdiction of the arbitrator.

[33] **S7 Arbitration Act 1996. Separability of arbitration agreement.**
Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.

agreement.[34] Thus a classic ground for challenging the jurisdiction of an arbitrator is an assertion that no contract had been concluded between the parties.[35]

No arbitration clause : Alternatively, a challenge may involve the assertion that the contract did not incorporate an arbitration clause and hence no agreement to arbitrate.[36] The definition of an arbitral agreement is set out in s6 subsections (1) & (2) Arbitration Act 1996.[37]

Written arbitration clause : There is no requirement that the underlying agreement that gives rise to arbitration proceedings be in writing,[38] but in order for an arbitrator to have jurisdiction by virtue of and subject to the Arbitration Act 1996, the arbitration agreement must be in writing according to s5. If this is not the case this does not mean that the arbitrator has no jurisdiction, but rather that any question as to jurisdiction will be governed by the common law and thus the courts will exercise jurisdiction over questions of jurisdiction. The arbitrator will not be competent to do so.

Outside Scope of arbitration agreement : Whilst the complainant may accept the appointment of an arbitrator and his jurisdiction over certain issues, the assertion here is that that jurisdiction is restricted in scope by the terms of the arbitration agreement and that the arbitrator has considered matters beyond his jurisdiction.[39]

Illegality : Jurisdiction may be challenged on the basis of the illegality of the underlying contract, either on policy grounds in England and Wales, or in some other relevant and concerned jurisdiction.[40]

GROUNDS FOR JURISDICTIONAL CHALLENGE

- Capacity
- Sovereign Immunity
- Illegality of main contract
- Existence of contract and collateral arbitration clause
- No effective arbitration clause
- Oral agreement.
- Scope of jurisdiction
- Defects in appointment

Defective appointment : Here the complaint is that the mechanism for appointing an arbitrator contained in

[34] ***Continental Enterprises Ltd. v Shandong Zhucheng Foreign Trade Group Co [2005] EWHC 92 (Comm).*** Whilst an arbitration agreement can survive the invalidity of the main agreement, an agreement tainted by incapacity would be invalid. Mr Justice David Steel found that the GAFTA panel had correctly concluded that the tribunal had in the circumstances of the case no jurisdiction.

[35] ***Primetrade AG v Ythan Ltd [2005] EWHC 2399 (Comm).*** The appellant challenged the existence of contract in a dispute concerning the liability of a holder of bill of lading for damage to a vessel due to the shipment of dangerous cargo. Mr Justice Aikens.

[36] ***Welex A.G. v Rosa Maritime Ltd. [2003] EWCA Civ 938.*** Here the court heard an application for an anti-suit injunction against Polish proceedings and a s67 jurisdictional challenge against a 1st instance decision that a bill of lading contained an arbitration clause and that accordingly the New York Convention on Enforcement of Arbitral Awards 1957 applied. The CA. (Brooke LJ; May LJ; Tuckey LJ.) rejected the appeal.

[37] **s6 Arbitration Act 1996. Definition of arbitration agreement.**

6(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).

6(2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

[38] Contrast the requirement under s107 Housing Grants Construction and Regeneration Act 1996 that a construction contract be in writing if it is to fall within the remit of Part II of the Act, otherwise the adjudicator will have no jurisdiction.

[39] ***Westland Helicopters Ltd v Al-Hejailan [2004] EWHC 1625 (Comm).*** The question here was whether or not the tribunal had the jurisdiction to award interest. The dispute concerned the United Arab Emirates (UAE). Mr Justice Colman found that there was jurisdiction and further rejected a challenge on the grounds of serious irregularity.

[40] ***Vee Networks Ltd. v Econet Wireless International Ltd. [2004] EWHC 2909 (Comm).*** This action involved challenges on the grounds of s67 jurisdiction and s68 serious irregularity. V, a Nigerian mobile telecoms company concluded a Technical Support Agreement with EWI to provide V with engineering advice etc to set up its business. V subsequently purported to cancel the agreement asserting at an arbitration that the TSA was ultra vires EWI's A&M of Association and thus unlawful and unenforceable. The tribunal found that engineering services were at the core of the TSA and thus lawful objects. V here challenged the award on the grounds 1) that the TSA was unlawful and thus the tribunal had no jurisdiction under and by virtue of the TSA and 2) further asserted a serious irregularity. Mr Justice Colman rejected the jurisdictional challenge and went on to hold that whilst the decision may or may not have been correct, there was no evidence of serious irregularity. Accordingly the challenge failed on both heads.
See also ***JSC Zestafoni G Nikoladze Ferroalloy Plant v Ronly Holdings Ltd [2004] EWHC 245 (Comm).*** Here Mr Justice Colman heard a combined 67 jurisdiction challenge and a s69 challenge on a point of law. **First issue :** *Did the parties have the right to conclude an agreement to arbitration without consent of other parties ?* Held : YES. **Second issue** : *Did they actually conclude an ad hoc agreement to refer ?* Held : YES. **Third issue :** *Was the reference unlawful under Georgian law which required approval of the ministry ?* Held : NOT APPLICABLE. The contract was subject to English Law not Georgian law and hence the question was not relevant. The decision of the court of first instance to accede to an application for a s9 stay against continuing an action before a foreign court was obviously correct.

the contract expressly or by reference to institutional rules has not been complied with often with regard to consent mechanisms, or alternatively that the wrong arbitrator has been appointed.

Reasons for jurisdictional challenge : The motivation for a s67 jurisdictional challenge may be completely genuine, in that a party has not submitted to and never intended to submit the dispute to arbitration or to a particular arbitrator. However, it is just as likely that in hindsight the imminence of an arbitral hearing and the rapid resolution of a dispute may be unwelcome news to a party; the balance between forum and choice of law may in the circumstances prove to be less advantageous to a party than had been anticipated when the contract containing the arbitration clause was formed; or the party has not been successful in the arbitration. In each of these situations a challenge to jurisdiction may provide a way of overcoming those difficulties, even if all it actually achieves is to postpone the final decision, which may well have cash flow benefits or could lead, through attrition to the other side giving up, or alternatively force that party to compromise the action.

Timing of challenge. A s67 jurisdictional challenge to an award is often mounted at an early stage of proceedings where an arbitrator has delivered an interim jurisdictional award rather than a reference being made to the court under s32 to determine the jurisdiction.[41] Note that in both situations (viz s67 or s32) the tribunal may continue proceedings pending the outcome of the court proceedings. This will require the arbitrator making a considered case management decision as to likelihood of the challenge being successful or otherwise and determining that any continued expenditure in the interim period is justified. This may well be the case where time is of the essence for the other party.

Nature of appeal proceedings and questions of fact.

Unlike s68 and 69 where it is not possible to challenge findings of fact, jurisdiction involves mixed questions of law and fact, so it is not possible to conduct an effective review of jurisdiction without revisiting the factual basis surrounding the question whether or not the parties had agreed to give the tribunal jurisdiction of part or all of a dispute. If the court were limited to questions of law and constrained by the factual findings of the tribunal virtually all challenges would fail. The Court of Appeal stated in ***Azov v Baltic [1999]*** that the court should not be placed in a worse position than an arbitrator when determining the challenge.[42] A challenge under s.67 Arbitration Act 1996 to an arbitrator's ruling as to his own jurisdiction should involve a re-hearing rather than simply a review according to Mr Justice Gross in ***Electrosteel v Scan-Trans Shipping [2002].***[43] The court is not therefore limited to evidence available to the tribunal and may consider fresh evidence. However, in ***Ranko v Antartic [1998]*** Judge Toulson declined to accede to a s79 application for an extension of time [*limited to 28 days under s70(3)*] to challenge an award on the grounds of jurisdiction partly because new evidence not available to the tribunal was adduced, which militated against the need to ensure the just, expeditious and economic disposal of cases pursuant to Practice Direction 49G of the Civil Procedure Rules 1998.[44]

Remedies available to the court.

The principal remedy is for the court to set aside the award if a jurisdictional challenge to an award is successful. It is however open to the court to salami slice an award and find that a challenge is only partially successful,[45] thus the provision allowing the court pursuant to s67(3)(b) to vary the award.

Whilst an appeal against the determination of the award by the court may be possible it should be noted that

41 ***Amec v S.S. for Transport [2004] EWHC 2339; [2005] EWCA 291 CA***. Failed challenge to an arbitrator's interim award on jurisdiction before Hooper LJ ; May LJ; Rix LJ. See also ***Metal Distributors (UK) Ltd. v ZCCM Investment Holdings Plc [2005] EWHC 156 (Comm)*** which concerned a challenge to the preliminary determination of the tribunal that it did not have jurisdiction over a counter-claim. Mr Justice Cresswell held that whilst the scope of the clause extended to counterclaims regarding quality of goods under the contract it did not extend to counterclaims arising out of alleged breaches of other contracts. Accordingly the tribunal's determination was upheld, demonstrating that the challenge can operate both for determinations asserting and for those declining jurisdiction.

42 ***Azov Shipping Co v Baltic Shipping Co [1999] 1 Lloyds's Rep 68.***

43 ***Electrosteel Castings Ltd. v Scan-Trans Shipping & Chartering SDN BHD [2002] EWHC 1993.***

44 ***Ranko Group v Antartic Maritime SA [1998] ADRLJ 35.***

45 ***Westland Helicopters Ltd v Al-Hejailan [2004] EWHC 1625 (Comm).*** This involved s67 and s68 challenges and an application for partial set aside of award on jurisdictional grounds and / or serious irregularity. Major aspects of the challenge were timed out. A minor part of the jurisdictional challenge, regarding interest, succeeded.

by virtue of sections 67(4), 68(4) and 69(6) in each case leave of the court making that determination is required. Furthermore, it is not possible to appeal any refusal of leave according to the Court of Appeal in ***Athletic Union of Constantinople v National Basketball Association* [2002]**.[46] The Court of Appeal has no jurisdiction to grant permission or to review the decision. Presumably this does not rule out judicial review by QBD, however unlikely that might be.

Challenging the award: substantive jurisdiction. Remedies

67(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order-

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

67(4) The leave of the court is required for any appeal from a decision of the court under this section.

Clause 67 Challenging the Award: Substantive Jurisdiction DAC 1996

275. Jurisdiction has already been considered in the context of that part of the Bill dealing with the jurisdiction of the arbitral tribunal: see Clauses 30 to 32.

276. Clause 31 allows the tribunal (where it has power to rule on its own jurisdiction) to make a `jurisdiction' award, either on its own, or as part of its award on the merits. Clause 67 provides the mechanism for challenging the jurisdiction rulings in such awards, and is a mandatory provision. It also provides a mechanism for challenges to the jurisdiction by someone who has taken no part in the arbitral proceedings. We deal with such persons below, when considering Clause 72.

277. To avoid the possibility of challenges to the jurisdiction causing unnecessary delay, the rights given by this Clause are subject to qualifications, which explains the reference in sub-section (1) to three other sections. In addition, sub-section (2) means that a challenge to jurisdiction does not stop the tribunal from proceeding with other aspects of the arbitration while the application is pending.

Article 34. Model Law : Application for setting aside as exclusive recourse against arbitral award

34(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

34(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it Or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the par-ties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

[46] ***Athletic Union of Constantinople ("AEK") v National Basketball Association [2002] EWCA Civ 830 :*** See also ***Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*** *[2001] 1 QB 308.*

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

34(3) An application for setting aside may not be made after three months have elapsed from the date on which the patty making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

34(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside

ADDITIONAL READING

Challenging an international arbitration award under the Arbitration Act 1996. What has changed? Norton Rose 1997

The Court's Supportive and Supervisory Powers Aeberli P. Kings College Centre of Construction Law 2003

Appealing the Unappealable : vacating the award. US Law. Dobin.S.

Errare Humanum Est. Arnold.M. Maritime Advocate

Challenging an Award. His Honour Judge Diamond QC and V. V. Veeder QC

Self assessment exercise

1. How effective, if at all, do you consider the enactment of s66 and s73 to have been in ensuring that where an international trader contracts subject to English Law and jurisdiction, in the event of a dispute being ruled upon by a tribunal, the English courts will, in the absence of wrong doing by the tribunal, support rather than frustrate that decision?
2. It is submitted that "*The effect of s67 Arbitration Act 1996 is to force a party to deal with jurisdictional challenges at the earliest possible stage.*" To what extent, if at all, do you agree with this statement?
3. "The range of remedies now available to the court with regard to jurisdictional rulings enables the courts to preserve as much as possible of an award as might be desirable in the circumstances of the case." Discuss.
4. "From determination of applications for leave to apply to the wide choice of remedies, *s67 Arbitration Act 1996 places too much discretion in the hands of the judiciary, driving a horse and cart through the concept of party autonomy!** Discuss.

PART II : CHALLENGING THE AWARD FOR SERIOUS IRREGULARITY

Introduction.

The right to challenge an award on for misconduct on the part of the tribunal or other irregularity is set out in s68(1) Arbitration Act 1996. Note that the applicant must give notice to both the other parties and the tribunal, but does not require their consent to do so. Notice ensures that the other party and the arbitrator will then be in a position to play a part in that challenge, though the extent to which the arbitrator will wish to be involved is another matter, since whilst his standing may be called into question, pro-active participation will involve costs, both in terms of time and money.

S68(1) Arbitration Act 1996 : Challenging the award: serious irregularity.

> *68(1) 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.*
> *A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).*

Whilst wide ranging, s68(2) provides a definitive list of the types of conduct which are deemed to amount to serious irregularity which give rise to a challenge, which by nature are those that one might otherwise expect to be embraced by the rules of natural justice. In ***Egmatra v Marco*** [1999],[47] Tuckey J cited with approval Para 280, DAC Report of February 1996, which described s.68: *"…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."*[48]

Accordingly, whichever ground is under consideration, the challenger must establish to the court's satisfaction that the irregularity was not only present but further that it ***"caused or will cause substantial injustice to the applicant."***[49] Thus in ***Strathclyde v Checkpoint*** [2003],[50] Ward LJ stated that, if the court was satisfied that the applicant had not been deprived of his opportunity to present his case properly and that he would have conducted his case in a similar way with or without the irregularity, the award would be upheld. In ***Walsall Metropolitan BC v Beechdale CHA [2005],***[51] it was asserted that an irregularity arose out of applying the wrong test for evaluation of rent. Even if upheld, the court considered that it would have made little difference if an alternative method had been applied and accordingly no injustice had occurred.

A serious irregularity resulted in prejudice to a party in ***Wicketts v Brine*** [2001],[52] where an arbitrator was so concerned with securing his not insubstantial fees, given the interests raised by the arbitration, that he took it on himself to issue orders at his own behest rather than at the instigation of either of the parties, including instructions that the parties should not settle the dispute without his consent. The court was scathing about the arbitrator's inability to manage the process in a proportionate manner. In the event the arbitrator was removed by the court which went on to severely cap his recoverable fees.

S68 does not provide a second opportunity to mount a jurisdictional challenge beyond that set out in s67. [53] It is not to be used as a means of launching a detailed enquiry into the manner in which the arbitrator considered the various issues.[54] The issue is not whether or not the arbitrator reached the right conclusion.[55]

[47] ***Egmatra AG v Marco Trading Corporation*** [1999] 1 Lloyd's Rep 862 per Tuckey J.

[48] ***Wetherspoon JD Plc v Jay Mar Estates [2007] EWHC 856 (TCC) para 15.***

[49] per Colman J in **Vee Networks v. Econet Wireless International Limited** [2004] EWHC 2909 (COMM) at para 90: *"….. where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process."*

[50] ***Strathclyde v Checkpoint*** [2003] EWCA Civ 84). I,

[51] ***Walsall Metropolitan Borough Council v Beechdale Community Housing Assoc Ltd. [2005] EWHC 2715 (TCC).*** per HHJ Peter Coulson.

[52] ***Wicketts v Brine Builders & Siederer*** [2001] App.L.R. 06/08 TCC. HHJ Seymour QC.

[53] ***Warborough Investments Limited v S Robinson and Sons Holdings Ltd*** [2003] EWCA Civ 751

[54] ***Weldon Plant v Commission for New Towns*** [2000] BLR 496 ; ***World Trade Corp Ltd v Czarnikow Sugar Ltd*** [2004] 2 All ER Comm.

[55] ***St George's Investment Company v Gemini Consulting Limited*** [2005] 1 EGLR 5.

S68(1) Arbitration Act 1996 : Scope of the Challenge – defining Serious Irregularity.

68(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-

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

Clause 68 Challenging the Award: Serious Irregularity DAC 1996.

278. We have drawn a distinction in the Bill between challenges in respect of substantive jurisdiction (ie those matters listed in Clause 30) and challenges in respect of what we have called "serious irregularity." We appreciate that cases may arise it which it might be difficult to decide into which category a particular set of circumstances should be placed, but since the time limits etc for both Clause 67 and Clause 68 are the same, this should cause no procedural difficulties. We are firmly of the view, however, that it is useful to have two categories.

279. The reason for this is that where jurisdiction is concerned, there can be no question of applying a test of "substantial injustice" or the like. An award of a tribunal purporting to decide the rights or obligations of a person who has not given that tribunal jurisdiction so to act simply cannot stand, though of course, if the party concerned has taken part in the arbitration, there is nothing wrong in requiring him to act without delay in challenging the award.

280. Irregularities stand on a different footing. Here we consider that it is appropriate, indeed essential, that these have to pass the test of causing "substantial injustice" before the Court can act. The Court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this Clause. The test of "substantial injustice" is intended to be a 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 the 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 long stop, 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.

281. By way of example, there have been cases under our present law where the Court has remitted awards to an arbitral tribunal because the lawyers acting for one party failed (or decided not to) put a particular point to the tribunal: see, for example, ***Indian Oil Corporation v Coastal (Bermuda) Ltd*** *[1990] 2 Lloyd's Rep 407;* ***King v Thomas McKenna*** *[1991] 2 Q.B. 480;* ***Breakbulk Marine v Dateline, 19*** *March 1992, unreported (jurisdiction recognised but not exercised).*

282. The responses we received were critical of such decisions, on the grounds that they really did amount to an interference in the arbitral process agreed by the parties. We agree. The Clause we propose is designed not to permit such interference, by setting out a closed list of irregularities (which it will not be open to the Court to extend) , and instead reflecting the internationally accepted view that the Court should be able to correct serious failure to comply with the `due process' of arbitral proceedings: cf Article 34 of the Model Law.

283. This Clause is, of course, mandatory.

Section 68 Challenging the Award: Serious Irregularity DAC 1997.

*35. In the Bill, one of the grounds for challenging an award was expressed as "uncertainty or ambiguity of the award." It was pointed out to us that this wording might encourage attempts to challenge an award under this provision on the grounds that the reasoning of the decision was uncertain or ambiguous. This was certainly not our intention. What we wanted to cover were cases where the result of the award was uncertain or ambiguous. Where the quality of the award was in question, there would only be recourse under the limited right to appeal under Section 69. To make matters clear, this part of the Section was amended and now reads "**uncertainty or ambiguity as to the effect of the award.**"*

Grounds for challenge for serious irregularity

Natural Justice. This heading, arising out of s33(1) & (2) Arbitration Act 1996 covers three separate concepts in relation to decisions on matters of procedure and evidence and during the exercise of its powers.

Bias / impartiality

Parties often lose any sense of objectivity regarding their cause, becoming attached to their view point to such an extent that they cannot believe that an arbitrator could possibly disagree with them, leading to the conclusion that where an arbitrator disagrees, that arbitrator must have been biased and the more that is at stake, the more that is the case. However, the instances where the courts determine that an arbitral decision has been tainted by bias are relatively few and far between, once viewed objectively by the court. Grievance can centre around findings as to liability and equally regarding the assessment of quantum. In ***Claire v Thames Water*** [2005],[56] a claimant was aggrieved that the arbitrator fixed the rate for assessing loss of profit at 22% rather than at 32%. Whilst the court noted that the claimant's business had been destroyed by the activities of the utilities operator and acknowledged the distress this caused, there was no evidence that the arbitrator had failed to fulfil his duties under s33 Arbitration Act 1996. The arbitrator had taken into account all the evidence and reached a decision, which he was both entitled and indeed required to do.

Tensions between the parties to arbitration and the arbitrator are not unusual. An arbitration is a contest and is likely to be hard fought, often involving tactical manoeuvres by the parties such as delaying tactics and non-cooperation with disclosures, aimed at putting the other party on the back foot or at a disadvantage. The arbitrator will exercise his powers under s34 to minimise the impact of such tactics. The arbitrator may have adopt a firm and robust approach to managing the process, which can in turn lead to allegations of bias. However, something more is required to establish bias than intemperate exchanges. There is a fine line to be drawn here between legitimate pressure by the arbitrator and undue pressure. The question arose in ***Brian Andrews v Bradshaw*** [1999],[57] as to whether or not an impatient exchange between arbitrator and respondent raised a real possibility of bias? The Court of Appeal held that in the circumstances it did not, though the issue was finely balanced. The applicant, pursing a counterclaim where the main dispute was the subject of an arbitration by a separate arbitrator, adopted an obstructive stance and counsel was slow to advise his client to adopt proposals for moving the case forward developed by the arbitrator. In addition the applicant failed to pay interim fees due to the arbitrator, who declined to release an interim award until paid. The applicant then raised a point for clarification which had already been addresses. In exasperation, it would appear, the arbitrator declined to address any new points and this led to an application to remove the arbitrator which was acceded to by the court at first instance, but subsequently overturned here by the Court

[56] ***Claire & Co. Ltd. v Thames Water Utilities Ltd. [2005] EWHC 1022.*** TCC. per Mr Justice Jackson.
[57] ***Brian Andrews v Bradshaw [1999] EWCA Civ 2008.*** before Nourse LJ, Mantell LJ, Mance LJ.

of Appeal on the grounds that whilst the letter was badly worded and misleading, there had in fact been no failure to act by the arbitrator. This was particularly so since the interim award was in fact in the applicant's favour.

Whilst bias or impartiality are the classic grounds for setting aside a judgement or award it is necessary to distinguish between actual bias or impartiality and perceived bias. The courts have long since stepped back from the stringent test that *"Justice must not only be done, but must be seen to be done"* established in ***Dimes v Grand Junction Canal***.[58] Nonetheless, the most potent challenges on the grounds of bias relate to connections between concerned lawyers and decision makers and in particular where the decision maker has a proven or apparent interest in the outcome. It will be remembered that in ***Dimes*** the judge had portfolio shares in the Canal Company, albeit that he was unaware of that fact, but nonetheless the appearance of bias was sufficient to taint the decision. This principal was upheld in ***Lawal v Northern Spirit*** [2003],[59] by the House of Lords where it was held that a QC who acted as an EAT judge should not act as counsel for a party before the EAT.

In ***Smith v Kvaerner [2006],***[60] a close relationship between a recorder from the same chambers as counsel for one of the parties, who had acted for related firms gave rise to an appearance of bias which was datal to the decision of the court. Similarly, in the context of arbitration, the court was faced with a situation in ***ASM Shipping v TTMI [2005],***[61] where the an arbitrator had previously acted as counsel in another case for a principal witness to the current arbitration. Whilst the tribunal been prepared to continue without an Umpire and to resort to an alternative Umpire if the circumstances demanded, the court held that the

[58] (1852) 3 HL Cas 759 at 793. Regarding bias and the courts see ***Taylor v Lawrence [2002] EWCA Civ 90*** **:** and ***Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117*** per Lord Justice Scott Baker

> *26. ….. The test [for bias] is expressed by Lord Hope of Craighead in* ***Porter v Magill*** *[2002] 2 AC 357, 494 at para 103: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*
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> *This test, involving a slight adjustment to the test previously propounded in* ***R v Gough*** *[1993] AC 646, brings the law into harmony with the Strasbourg interpretation of the application of Article 6 of the European Convention on Human Rights, most Commonwealth Countries and Scotland.*
>
> *27. The test for apparent bias involves a two stage process. First the Court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased: see Lord Phillips of Worth Matravers MR in* ***Re Medicaments and Related Classes Goods (No. 2)*** *[2001] 1 WLR 700, 726 para 83. An allegation of apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided: see* ***Locabail (UK) Limited v Bayfield Properties Limited*** *[2000] 2 QB 451, 480 para 25. The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing. Lord Phillips in* ***Medicaments*** *at paragraph 83 stated the principles as follows:*
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> *"(1) If a judge is shown to have been influenced by actual bias, his decision must be set aside. (2) Where actual bias has not been established the personal impartiality of the judge is to be presumed. (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice."*
>
> *28. Bias means a predisposition or prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue. In* ***R v Inner West London Coroner ex parte Dallaglio*** *[1994] 4 All ER 139, 151, Simon Brown LJ, as he then was, said: "Injustice will have occurred as a result of bias if 'the decision-maker unfairly regarded with disfavour the case of a party to the issue under consideration by him'. I take 'unfairly regarded with disfavour' to mean 'was pre-disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue."*
>
> 29. *The proceedings under consideration by the court in the present case are tribunal proceedings and not judicial proceedings. The context is critical. In* ***Modahl*** *para 128, Mance LJ said: "The principles of natural justice or fairness must adapt to their context and can be approached with a measure of realism and good sense. Appendix B para (B7) of the defendant's rules makes clear that the disciplinary committee "will consist of members of the federation drug advisory committee, or its nominees". It was both natural and appropriate that the disciplinary committee should have among its members someone with experience of doping control and its procedures. Mr Guy was chosen for this reason, and because he spoke English and came from a different national athletic federation. There is no reason to think that he held or would hold any fixed or predetermined ideas on any of the issues being raised by the claimant in her challenge to the Portuguese results."*

[59] ***Lawal v. Northern Spirit Ltd [2003] UKHL 35*** before Lords Bingham ; Nicholls ; Steyn ; Millett ; Rodger.

[60] ***Smith v Kvaerner Cementation Foundations Ltd [2006] EWCA Civ 242*** before Phillips LCJ, Clarke MR: Sir Anthony May LJ.

[61] ***ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm)*** per Mr Justice Morison, and upheld on appeal, ***ASM Shipping Ltd of India v TTMI Ltd of England [2006] EWCA Civ 1341*** by Clarke MR, Rix LJ, Longmore LJ.

arbitrator should step down. Nonetheless, the UK courts take a far more relaxed attitude towards decisions makers who merely move in the same professional circles as others and are members of the same professional organisations than do the courts in the US, where bias is sometimes taken to extreme lengths taking into account mere passing relationships, to the extent that on times it is virtually impossible to find an eligible decision maker in specialist areas, so that only the judiciary are available to adjudicate.

Failure to provide a reasonable opportunity to put one's case

The opportunity to put one's case is central to natural justice.[62] The operative word here however is *"reasonable"* and most certainly not *"every opportunity"*. What is reasonable in the circumstances of each case is a question of fact, involving a balance between the arbitrator's duty to manage the process and to ensure that costs are proportionate to the issues at hand. Where a party initially fails to engage in the process but subsequently tries to play catch up, complaints by that party of deprivation of opportunity to put forward their case are likely to be repelled as in ***Sealand v Siemens [2002],***[63] where a party ignored arbitration initially then at last minute tried to introduce a counter claim and mounted a jurisdictional challenge. The arbitrators refused to entertain the new material. The CA dismissed the challenge to that refusal.

Arbitral proceedings do not have to mirror litigation. A party aggrieved that the procedure did not include a right to respond during closing speeches challenged for lost opportunity to put its case in ***Margulead v Exide [2004].***[64] The court held, dismissing the challenge, that it is quite usual in International Arbitration for there to be no reply. The key factor is being afforded an opportunity, not the format adopted.

An example of an award being set aside on these grounds is provided by ***Miller Construction v James Moore Earthmoving*** [2000]. [65] Here Seymour J concluded "…. *the Arbitrator has, in substance, dismissed without a hearing Mr. Moore's claim for a payment in respect of unforeseen adverse physical conditions and obstructions encountered in excavations calculated on a costs basis. That, it seems to me, is a serious matter amounting to misconduct. ….. I have come to the firm opinion that, objectively, a reasonable person would think that there is a real likelihood that the Arbitrator could not come to a fair and balanced conclusion if Issue 2 were remitted to him for reconsideration as to quantum, he having eliminated from consideration a possible basis of evaluation without being addressed on the matter. I have also formed the clear view that a reasonable person would think that the Arbitrator could not, indeed, come to a fair and balanced conclusion in relation to any of the remaining issues in the arbitration, he having already demonstrated that he is unable to recognise the vital need for parties to be afforded an opportunity to be heard before he reached any decision on any controversial issue."*

In ***Fox v Welfair*** [1981],[66] the claimants first learnt of the scale and nature of their defeat when they were provided with copies of the published award, despite the fact that the defendants had not been represented. The decision was based entirely on the arbitrator's own knowledge which had not been ventilated during the hearing. Ackner J at first instance concluded that *"The arbitrator failed to provide the applicants with a fair hearing, in that he failed to give them any opportunity to deal with the very serious deficiencies which he must ultimately have found in the presentation and/or proof of their claim."* On appeal, Denning stated that *""In particular he [the arbitrator] must not throw his own evidence into the scale on behalf of the unrepresented party -- or use his own special knowledge for the benefit of the unrepresented party -- at any rate he must not do so without giving the plaintiff's expert a chance of dealing with it -- for they may be able to persuade him that his own view is erroneous."* In a similar vein Dunn LJ said that*: " ... an expert arbitrator should not in effect give evidence to himself without disclosing the evidence on which he relies to the parties, or if only one to that party. He should not act on his private opinion without disclosing it. It is undoubtedly true that an expert arbitrator can use his own expert knowledge, but a distinction is made in the cases between general expert knowledge and knowledge of special facts relevant to the particular case….. an arbitrator may be entitled to form a view that was different to the evidence that he heard, but if he did so he should bring that view to the attention of the parties."*

[62] ***Ridge v Baldwin (No 1) [1963] UKHL 2.***
[63] ***Sealand Housing Corporation v Siemens AG [2002] EWCA Civ 1145*** per Sir Andrew Morritt VC; Rix LJ.
[64] ***Margulead Ltd. v Exide Technologies [2004] EWHC 1019 (Comm).*** per Mr Justice Colman.
[65] ***Miller Construction Ltd v. James Moore Earthmoving [2000] EWHC Technology 52*** per HHJ Richard Seymour Q.C.
[66] ***Fox v Welfair*** [1981] 2 Lloyd's Law Reports 514.

Adoption of unfair procedures and exercise of case management powers

A perennial feature of arbitration concerns challenges to the admissibility of evidence, applications for discoveries and disclosure, particularly of expert reports not present before the court and the introduction of evidence from other arbitrations involving one or more of the parties. A refusal often leads to a challenge on the grounds of serious irregularity. It is however the duty under s34 Arbitration Act 1996 for the arbitrator to manage the arbitral process and in the absence of contrary agreement to make rulings on such matter. A case in point is ***Lincoln v Sun Life [2004],***[67] where the question was whether or not a prior award in an arbitration between other parties was relevant to the arbitration. The court determined that the prior award was not relevant or admissible and dismissed a subsidiary claim that the arbitrators could not rely on the assurances of a party's representatives. The court pointed out that, to the contrary, arbitrators have to rely on such assurances all the time.

It was a close run affair in ***ABB v Hochtief [2006].***[68] The nub of the dispute concerned whether or not ABB had brokered an oral agreement not to trade its shares in Athens Airport without consultation and agreement with Hochtief. If there was no agreement then it was clear that Hocktief had acted in bad faith in not dealing with the purported purchaser of ABB's shares. The tribunal held there had been an agreement, so bad faith did not arise. During the course of the hearing the tribunal had declined to order that Hochtiel disclose its records on meetings with ABB. Ultimately Mr Justice Tomlinson upheld the award but concluded his decision as follows *"Whilst the court will never dictate to arbitrators how their conclusions should be expressed, it must be obvious that the giving of clearly expressed reasons responsive to the issues as they were debated before the arbitrators will reduce the scope for the making of unmeritorious challenges as this ultimately has proved to be. It will be of little comfort to ABB but it may be instructive to know that at the end of my pre-reading in this case I was fairly certain that I would have no alternative but to remit or to set aside the award, notwithstanding the court's general approach to strive to uphold arbitration awards. I have had to strive a little harder than I might reasonably have expected. Reasons which were a little less compressed at the essential points might have been more transparent as to their meaning and might even have dissuaded the unsuccessful party from challenging the award or, at any rate, from mounting so wide-ranging a challenge."*

The method used to evaluate a claim is frequently called into question on the grounds of serious irregularity, especially when both parties urge a different method to be applied. ***Marklands v Virgin*** **[2003],**[69] concerned a rent-review arbitration between landlord (Markland) and tenant (Virgin). The transactional framework for the evaluation of a lease was predicated on an overall basis. Markland sought to challenge the decision of the arbitrator who had been appointed pursuant to the terms of the lease. Markland had proposed that the valuation be determined by applying a zonal test. The arbitrator declined and went with the overall test, which was less favourable than the zonal test to Markland. The court rejected Marklands' contention that this amounted to a serious irregularity pursuant to s68 Arbitration Act 1996. Whilst a legitimate tactic to propose alternative valuations in negotiations, he was limited to the contractual mechanism for the purposes of arbitration. Accordingly there was no irregularity and the challenge failed.

Failure to deal with all the issues

It is axiomatic that a tribunal should deal with and settle all issues before it in order to discharge its functions. That said, it is not uncommon for a tribunal to be faced, apart from the central issues, with a host of minor issues often as part of a scatter gun approach, in the hope that one of them might stick, though without any real commitment being demonstrated. In addition, many things might be referred to, which have at best a tangential connection with the issues before the tribunal. Scant attention is often paid to such matters by the tribunal, which concentrates its big guns on the central issues. Nonetheless, this frequently leads to a challenge based on a failure to deal with an issue or take a relevant matter into account.[70] When dealing with such a challenge Mr Justice Colman observed in ***Margulead v Exide*** **[2004]** that a deficiency of reasons in a reasoned award is not capable of amounting to a serious irregularity within the meaning of Section 68(2)(d) of 1996 Act unless it amounts to a *"failure by the tribunal to deal with all the issues that were put*

[67] ***Lincoln National Life Insurance Company v Sun Life Assurance Company of Canada [2004] EWHC 343.*** per Mr Justice Toulson.

[68] ***ABB Ag v Hochtief Airport GmbH [2006] EWHC 388 (Comm).*** Per Mr Justice Toulson.

[69] ***Marklands Limited v Virgin Retail Limited [2003] ALL ER (D) 438 (Nov)*** per HHJ Lewison.

[70] For an example of a failed challenge on these grounds see ***Torch Offshore Llc v Cable Shipping Inc. [2004] EWHC 787 (Comm).***

to it." Similarly in ***Benaim v Middleton*** **[2005],**[71] the court held that whilst an award was terse and to the point, particularly when contrasted with the extended submissions of the parties, nonetheless the arbitrator had done enough to demonstrate that he was entitled to reach the conclusions he did, all of which was part and parcel of choosing arbitration as opposed litigation in the first place.

There is a distinction between attaching a different weighting to evidence to that considered appropriate by the applicant and failing to take evidence into account as demonstrated by ***World Trade Corp. v Czarnikow Sugar*** **[2004].**[72] A central part of a tribunal's work is to determine how much weight it attaches to evidence. As such, it is not a matter that can be remitted under s57 for correction of an award and is not a ground for challenging the award.

In ***Fidelity v Myriad [2005],***[73] an arbitral award was challenged on the grounds that the tribunal had failed to deal with an issue. In the event the court held that whilst a side issue peripheral to the case had not been determined, nonetheless *"…. The issue before the tribunal was directed to one crucial question: did the derogation satisfy the condition precedent? The construction of the contract was in order to answer that question; there was no need to say that the clause means this and therefore the derogation fell outside it. The tribunal asked the right question; the question they asked was the question which, through their QC the Claimants themselves had invited the Tribunal to ask and answer. The suggestion that the tribunal failed to carry out this task seems to me to be obviously wrong. The issues put to the Tribunal were set out and answered by it. Any criticism made of the Award goes to the reasoning of the Tribunal rather than their failure to address an issue put to it. ….."*

By contrast, in ***Newfield v Tomlinson [2004],***[74] the court concluded that *"the Arbitrator construed '**the event**' not by reference to all the pleadings, but by reference to two other, irrelevant documents which, to put it at the very lowest, all the pleadings expressly contradicted. That was not what the parties wanted him to do: the whole point of the pleadings was to define and, as actually happened here, to narrow the disputes between the parties; the parties wanted the Arbitrator to construe the 'event' by reference to their pleadings and were entitled to have it so construed; his complete failure to do so therefore amounted to a serious irregularity. Whilst such an irregularity probably triggers each of Sections 68(2)(a) (b) or (c) it is in my judgment closest to 68(2)(c); a failure by the Arbitrator to deal with the question of costs in accordance with the procedure - the tabling of extensive pleadings settling out both parties cases – agreed by the parties' themselves and ordered by the Arbitrator. It also seems to me that … a failure by the Arbitrator to understand the material used as the basis of the award may amount to a serious irregularity, is also relevant here. …"* By the arbitrator's own admission, but for his finding he would have determined costs differently, demonstrating clearly that an injustice followed the event.

Award induced by fraud or breach of public policy

It is not surprising that a party convinced of their version of events might consider the other party's version of events false and deceitful. There is however a very thin line between this ground of appeal and an appeal on a question of fact, the only distinction being that the facts, as determined by the tribunal were allegedly the consequence of fraud. It is equally unsurprising that the court, which views the matter from an objective and impartial position, may not agree with the appellant as demonstrated by ***Thyssen v Mariana*** **[2005]** which concerned an insurance claim for cargo damage by fire and a s80(5) extension of time in respect of the s70(3) 28 day time limit to appeal. The tribunal had found no evidence of unseaworthiness. During the arbitration the claimants had alleged either unseaworthiness or deliberate fire in support of a claim for constructive total loss. They now sought to establish that the loss was due to sparks from hot works and alleged that the owners had lied about their speculated reasons for the fire, viz a discarded cigarette by a stevedore. Mr Justice Cooke held that whether or not hot works caused the fire was no longer relevant. This is a matter that should have been adduced before the tribunal. The appellants had not established that the owners had lied or deceived the tribunal. The challenge held to be an abuse of process. An application for an extension of time was refused.[75]

[71] ***Benaim (UK) Ltd. v Davies Middleton & Davies Ltd [2005] EWHC 1370 (TCC),*** per HHJ Peter Coulson.
[72] ***World Trade Corporation Ltd. v C Czarnikow Sugar Ltd. [2004] EWHC 2332 (Comm)*** per Mr Justice Colman.
[73] ***Fidelity Management SA v Myriad International Holdings BV [2005] EWHC 1193 (Comm)*** **per** Mr Justice Morison.
[74] ***Newfield Construction Ltd. v Tomlinson [2004] EWHC 3051 (TCC)*** per HHJ Peter Coulson.
[75] ***Thyssen Canada Ltd. v Mariana Maritime SA [2005] EWHC 219 (Comm)*** per Mr Justice Cooke.

A challenge to an award on the basis that the other party had not disclosed that the action was funded by a CFA was rejected in ***Protech v Al-Kharafi*** **[2005].**[76] This was not a serious irregularity.

Form of award rendering it unenforceable : Uncertain / ambiguous award

If an award is uncertain the court may remit to the tribunal for further elucidation, before finally determining what the court should do. Otherwise, an award which does not comply with the basic requirements of the Arbitration Act 1996 as to signature etc will be unenforceable. Such breaches cannot be cured after the event. However, mere slips can often be addressed after the event using the s57 procedure. However, s57 may not apply if the arbitrator has become functus officio, particularly if he is out of time for the delivery of the award.

It is often the case that whilst a party expects the arbitrator to be concise, precise and accurate, they do not present their own case with any degree of clarity. Thus in ***Sinclair v Woods*** **[2005],**[77] an interim award was challenged on the grounds of serious irregularity and the applicant sought to have the arbitrator removed. The assertion was that the arbitrator had failed in his award to address all the issues put to him or deal with the issues clearly and unambiguously. However, in the circumstances the court found no reason to criticise the arbitrator. Rather, the problem lay with the applicant who had caused considerable delay, failed to prepare his case properly and failed to bring all the evidence needed to the table. The court urged the applicant to get his act in order before the next stage of the arbitration.

In litigation there are winners and losers. Predictability can be in short supply. A salutary warning is delivered by Ward LJ in **Checkpoint v Strathclyde [2003],**[78] where he concludes as follows **"***I understand the tenant's surprise that in an arbitration of kind not only was the rent doubled but the landlord's expert's figure was accepted without a penny reduction. The result is a very substantial increase in the rent. But surprise, even sympathy, for the tenant's predicament, does not justify a finding that there was any serious procedural irregularity in the conduct of this arbitration, still less that a substantial injustice has been caused thereby. I would therefore dismiss the appeal."*

Finally, the commercial court held in ***The Pamphilos*** **[2002],**[79] that a sequence of events, none of which separately amounts to an irregularity, can be added together and their impact aggregated to constitute an irregularity. Both parties had behaved in an obstructive manner in the arbitration. The tribunal had been forced to determine the facts on very scant material and could not be criticised for drawing conclusions in the absence of proof by either party.

Challenging the award: serious irregularity. Available Remedies

In the event of a successful challenge the options available to the court are to remit the award back to the tribunal to amend or reconsider in the light of the court's determinations, to set the award aside entirely or in part or to declare that the award is of no effect, again in whole or in part. Note the rider which states that remitting the award is the default remedy wherever appropriate, which accords with respecting the autonomy of the parties in initially choosing to determine the dispute by arbitration.

Challenging the award: serious irregularity. Available Remedies

68(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 the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

68(4) The leave of the court is required for any appeal from a decision of the court under this section.

[76] ***Protech Projects Construction (Pty) Ltd. v Moh'd Abdulmohsin Al-Kharafi [2005] EWHC 2165 (Comm).*** per Mr Justice Langley.

[77] ***Sinclair v Woods of Winchester Ltd. [2005] EWHC 1631 (QB),*** per HHJ Peter Coulson.

[78] ***Checkpoint Ltd. v Strathclyde Pension Fund [2003] EWCA Civ 84.***

[79] ***Bulfracht (Cyprus) Ltd. v Boneset Shipping Company Ltd. "MV Pamphilos" [2002] EWHC 2292 (Comm).***

PART III : CHALLENGING AN AWARD : APPEAL ON A POINT OF LAW

Introduction.

The right to appeal an award on a point of law is set out in s69(1) Arbitration Act 1996. The right to appeal operates on a default basis, existing unless the parties otherwise agree. If the parties decide prior to the arbitral hearing that the outcome should be final and binding without recourse to appeal they may do so.[80] This is achieved by agreeing to dispense with reasons and not by merely stating that the award is to be final and binding, since that alone will not serve to exclude the application of s69.

Note that the applicant must give notice, s69(1), to both the other parties and the tribunal, but does not require their consent to appeal. Notice ensures that the other party and the arbitrator will then be in a position to play a part in that challenge, though the extent to which the arbitrator will wish to be involved is another matter, since whilst his standing may be called into question, pro-active participation will involve costs, both in terms of time and money.

It goes without saying that the ground for appeal is that a point of law is questioned.[81] The grey area concerns mixed questions of fact and law, and hence which is the overriding issue being appealed.[82] This was discussed previously in Part I in relation to the distinction between questions of law and questions of fact. It should be noted that in an appeal on a point of law there is limited value in adducing evidence from the tribunal proceedings in support of the appeal, as demonstrated by ***Walsall MBC v Beechdale [2005],*** where His Honour Judge Peter Coulson QC stated that in a s69 appeal on a point of law material from pleadings etc is inadmissible. Evidence, to be admissible, must be directed to the award itself.[83]

Mr Justice Jackson threw valuable light on the distinction between fact and law and on what is admissible in an appeal in ***Kershaw v Kendrick [2006],***[84] which concerned an **a**ppeal against the construction of the variation provisions in a building contract. In the event the appeal failed. We pick up the narrative at para 42

"1. What evidence can the court receive in an appeal under section 69?

42. *Two authorities have been cited on this question. In* ***Foleys Ltd v East London Family and Community Services*** *[1997] ADRLJ 401, Mr Justice Coleman refused an application for leave to appeal under section 1 of the Arbitration Act 1979. He viewed with displeasure a bundle of pleadings, evidence and submissions from the arbitration, which had been placed before the court. Mr Justice Coleman said that such evidence may be admissible on an application to remit the award under section 22 of the Arbitration Act 1950 or to set the award aside for misconduct. However, such evidence was inadmissible on an application for leave to appeal on a point of law. On such an application only the arbitrator's award should be put before the court, supplemented possibly by brief evidence in respect of The "****Nema****" guidelines.*

43. ***In Hok Sport Limited v Aintree Racecourse Company Limited,*** *[2003] BLR 155, His Honour Judge Thornton Q.C. stated that the practice of the Technology and Construction Court was the same as the practice of the Commercial Court in this regard. At paragraph 18 of his Judgment Judge Thornton said this: "Whatever may have been the misconception of practitioners as to the applicable practice in the Official Referees Court before* ***Foleys*** *case was decided in March 1997, it should now be clear to experienced practitioners in the TCC that extraneous materials are not to be referred to in arbitration appeal leave applications. It is also important to stress that such materials are not admissible in the hearing of appeals on questions of law arising out of awards, particularly since many construction arbitration appeals are brought without the applicant first having had to obtain the leave of the court. This is because many construction contracts contain an arbitration clause that provides the parties' joint consent to an appeal being brought without the need to first obtain the leave of the court."*

[80] Cross reference s52(4) Arbitration Act 1996 and see also ***Sukuman Ltd v The Commonwealth Secretariat [2006] EWHC 304 (Comm).*** His Honour Judge Colman held here that a contractual term excluding appeal not contrary to the Human Rights Act. See also ***Stretford v Football Association Ltd [2006] EWHC 479 (Ch)*** per Sir Andrew Morritt.

[81] eg ***Plymouth v DR Jones (Yeovil) Ltd [2005] EWHC 2356 (TCC) :*** Challenge failed. Essentially the challenge was based on questions of fact not of law. Per HHJ Peter Coulson. See also ***Demco Investments SA v SE Banken Forsakring Holding Aktiebolag [2005] EWHC 1398 (Comm)*** : There can be no appeal of facts under s69 - only an appeal of law. Per Mr Justice Cooke.

[82] ***Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd [2005] EWHC 2912 (Comm)*** : The existence of agreement is a mixed question of fact or law that can be corrected by the court if incorrectly determined by the tribunal. Per Mr Justice Langley.

[83] ***Walsall Metropolitan Borough Council v Beechdale Community Housing Assoc Ltd. [2005] EWHC 2715 (TCC)***

[84] ***Kershaw Mechanical Services Ltd v Kendrick Construction Ltd [2006] EWHC 727 (TCC)***

Paragraph 10.4.1. of the second edition of the TCC Guide faithfully reflects the guidance given in ***Foleys Ltd*** *and* ***Hok Sport.***

44. *The present case, however, reveals that this approach may be too restrictive. Kershaw's appeal turns upon the true construction of the Qualification. The Qualification is set out verbatim by the arbitrator in paragraph 19 of his award. The Qualification forms part of a series of correspondence, which became incorporated into the sub-contract. The arbitrator helpfully identifies the relevant correspondence and documents in his award although, for obvious reasons, he does not recite them from beginning to end. Nevertheless, for the purposes of this appeal, the court needs to look at the contractual correspondence and documents, which the arbitrator has identified. The court cannot construe the Qualification in isolation; the court must read the Qualification in the context of the series of documents of which it forms part. See, for example,* ***Investors Compensation Scheme Limited –v- West Bromwich Building Society*** *[1998] 1 WLR 896 at pages 912 to 913 and* ***BCCI v Ali*** *[2001] UK HL 8; [2002] AC 251 at paragraph 39. See also* ***Scheldebouw BV –v- St. James Homes*** *[2006] EWHC 89 (TCC) at paragraph 39.* ***Sheldebouw*** *is a case where the principles stated by the House of Lords in* ***Investors Compensation Scheme*** *and* ***BCCI*** *were applied to the interpretation of a construction contract.*

45. *In my view the guidance given in* ***Hok Sport*** *should be modified to this extent. The principal document which should be considered in any appeal under section 69 of the 1996 Act is the arbitral award itself. In addition to that, however, the court should also receive any document referred to in the award, which the court needs to read in order to determine a question of law arising out of the award.*

46. *It is for these reasons that during the present appeal I have looked not only at the arbitrator's award but also at the correspondence and documents referred to in the award as comprising the sub-contract. I have not found it either necessary or helpful to examine the other documents put in evidence, such as written submissions made to the arbitrator.*

47. *The summary of the facts set out in part two of this judgment is drawn exclusively from (a) the arbitrator's award and (b) the correspondence and documents identified by the arbitrator as comprising the sub-contract.*

2. Is there a philosophy of non-intervention which should influence the court hearing an appeal under section 69(2)(a)?

48. *In his skeleton argument Mr Henderson contends that the general philosophy of non-intervention by judges (which pervades the 1996 Act) should discourage the court from allowing an appeal brought under section 69(2)(a). He cites* ***Lesotho Highlands Development Authority v Impregilo Spa*** *[2005] 3 WLR 129. Mr Henderson relies in particular upon that section of Lord Steyn's speech in* ***Lesotho Highlands*** *which is headed "The ethos of the 1996 Act".*

49. *Mr Clay, on the other hand, submits that* ***Lesotho Highlands*** *is irrelevant. That case was concerned with a challenge under section 68 of the 1996 Act, since an appeal under section 69 was barred by the ICC rules. Mr Clay further points out that in the present case the parties have expressly agreed that there should be an appeal on questions of law to the court. Therefore the court should simply decide the questions of law, which have been posed. The court should not be deterred by any philosophy or ethos of the 1996 Act.*

50. *On this issue, I accept the submissions of Mr Clay. The court must decide any questions of law raised by the appeal, however difficult or finely balanced they may be. There is no philosophy or ethos of the 1996 Act which should deter the court from answering those questions correctly, in the event that the arbitrator has erred. I reach this conclusion for five reasons:*

    1. *Party autonomy is one of the three general principles upon which Part 1 of the 1996 Act is founded. See section 1(b) of the 1996 Act.*
    2. *The parties in the present case, in the exercise of their autonomy, have agreed that an appeal shall lie to the courts on any questions of law.*
    3. *The principle of non-intervention stated in section 1(c) of the 1996 Act is qualified by the important words, "except as provided by this Part". Section 69(2)(a) of the 1996 Act is a provision falling within that exception. It expressly permits an appeal on questions of law to be brought by agreement between the parties.*
    4. ***Lesotho Highlands*** *should be distinguished because it concerned proceedings under section 68 of the 1996 Act. In* ***Lesotho Highlands*** *the general principles set out in section 1(b) and section 1(c) of the 1996 Act pointed strongly in favour of non-intervention. The consequence in* ***Lesotho Highlands*** *was that the House of Lords refused to set*

aside or remit an arbitral decision, which was wrong in law. The present case, which is brought under section 69(2)(a), is at the other end of the spectrum.

5. *The above conclusions are consistent with the observations of Judge Humphrey Lloyd Q.C. in* ***Vascroft (Contractors) Ltd v Seeboard plc*** *[1996] 78 BLR 132 at 163 - 164.*

3. What degree of deference should be shown to the Arbitrator's decisions on questions of law?

51. *The next issue which arises concerns the degree of deference which this court should show to an arbitrator's decision when determining what are the correct answers to any questions of law arising out of the award. This issue has nothing to do with any philosophy or ethos of the 1996 Act. It involves reviewing a line of authority, which stretches back over 25 years.*
52. *In* ***The "Chrysalis"*** *[1983] 1 Lloyd's Rep. 503 Mr Justice Mustill dismissed an appeal against an arbitrator's decision concerning the contractual consequences of a conflict between Iran and Iraq, whereby vessels were trapped at Basrah. The appeal was brought pursuant to section 1(3)(a) of the Arbitration Act 1979, by reason of an agreement between the parties that each should have the right of appeal on any question of law. At pages 512 to 513 Mr Justice Mustill said this: "First it is pointed out by the charterers that the arbitrator is not a commercial man, but is instead a lawyer of long experience. Hence, so it is said, the Court should be more ready than in many cases to substitute its own view of the correct solution, than if he had, for example, been a ship broker. I recognize that in the context of some types of dispute there might be force in such a submission. For example, if the issue concerned a matter of judgment in a field where long practical experience was of the essence, a judge might feel that he was just as well or ill equipped to establish the correct "bracket" as would be a legally trained arbitrator: whereas he would be much more cautious if the arbitrator himself possessed the necessary experience."*
53. ***Zermalt Holdings SA v Nu-Life Upholstery Repairs LTD*** *[1985] 2 EGLR 14 was a case concerning an application by a landlord to set aside the award made by an arbitrator in a rent review arbitration. At the start of his judgment Mr Justice Bingham said this: "As a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye, endeavouring to pick holes, inconsistencies and faults in awards, and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."*
54. *In* ***Gill & Duffus S.A. v Societe Pour L'exportation Des Sucres S.A.*** *[1968] 1 Lloyd's Rep. 322 both Mr Justice Leggatt, in the Commercial Court, and the Court of Appeal allowed an appeal against an arbitral decision of the Council of the Refined Sugar Association. Sir John Donaldson MR, giving the judgment of the Court of Appeal, said this at page 325: "For my part, like the learned Judge, I am most reluctant to reverse or differ from a trade tribunal. Nevertheless, the issue is one of construction and thus of law. The arbitrator's finding of fact is part of the contractual matrix and a very important part, but it is no more than that. There is no suggestion that the process of shipment under an f.o.b contract for sugar or indeed contracts for the sale of sugar generally are in any relevant respect different from contracts for the sale of some other soft commodity. All that is said is that those engaged in the sugar trade find strict punctuality difficult, which may well be true of other trades not to mention other individuals, and that in practice they adopt a more relaxed attitude. This seems to me to be quite insufficient to displace the construction which would usually be placed upon a term involving inter-dependent obligations in relation to the time for loading, reinforced, as it is in the present case, by the use of the imperative words, "****at latest****"."*
55. *In* ***Andre et Cie v Cook Industries Inc.*** *[1986] 2 Lloyd's Rep. 200 Mr Justice Bingham was dealing with an award of the Board of Appeal of the Grain and Feed Trade Association stated in the form of a special case. One of the issues which arose concerned the interpretation of some exchanges by telex. At page 2004 Mr Justice Bingham said this: "I should be very slow to differ from a trade tribunal on the meaning reasonably to be given to telex exchanges of the sort in issue here. Ultimately, of course, the construction of any written instrument is a question of law on which the Court is entitled and bound to rule, but the significance of a meaning attributed by the reasonable non-lawyer varies widely from instrument to instrument and according to the circumstances of the case. Here, one is dealing with communications by trader to trader, in the context of an unexpected and fast moving situation. A trade tribunal brings to the task of interpretation certain insights denied (to a greater or lesser extent) to the Court: an informed appreciation of the commercial situation as it unfolded, seen through the eyes of a trader; an understanding of the hopes and fears and pressures which moved traders at the time; an awareness of the extent to which, at the time, the future course of events appeared obscure and unpredictable; a knowledge of the language which one trader habitually uses to another.*

So, in a case such as this the court's task is not one of pure construction and I should be reluctant to differ from the board unless it appeared that the board's construction was fairly and plainly untenable."

56. *In **Fidelity Management SA v Myriad International Holdings BV** [2005] EWHC 1193 (Comm); [2005] 2 Lloyd's Rep. 508 Mr Justice Morison cited and followed the dictum of Mr Justice Bingham in **Zermalt Holdings**, which has been quoted above. **Fidelity Management** concerned a challenge under section 68 of the 1996 Act and so the details of Mr Justice Morison's reasoning are not directly in point for present purposes.*

57. *From this line of authority I derive two principles, which I shall apply in this appeal.*

    1. *The court should read an arbitral award as a whole in a fair and reasonable way. The court should not engage in minute textual analysis.*
    2. *Where the arbitrator's experience assists him in determining a question of law, such as the interpretation of contractual documents or correspondence passing between members of his own trade or industry, the court will accord some deference to the arbitrator's decision on that question. The court will only reverse that decision if it is satisfied that the arbitrator, despite the benefit of his relevant experience, has come to the wrong answer.*

4. How should the court identify any questions of law arising out of the award?

58. *The final matter to consider is how the court should identify any questions of law arising out of the award. In appeals brought under section 1(3)(a) of the Arbitration Act 1979 or section 69(2)(a) of the 1996 Act, there is no opportunity for the proposed questions of law to be refined or limited at the leave stage. See **Hallamshire Construction plc v South Holland District Council** [2003] EWHC 8 (TCC) at paragraph 11.*

59. *In relation to this matter, Mr Justice Mustill gave helpful guidance in **The "Chrysalis"** [1983] 1 Lloyd's Rep. 503. At page 507 he said: "Starting therefore with the proposition that the Court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as at present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages.*

    (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 the 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.

    In some cases the third stage will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, the third stage involves an element of judgment on the part of the arbitrator. There is no uniquely "right" answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.

    The second stage of the process is the proper subject matter of an appeal under the 1979 Act. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer whereas the arbitrator has arrived at another: and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct - for the Court is then driven to assume that he did not properly understand the principles, which he had stated.

    Whether the third stage can ever be the proper subject of an appeal, in those cases where the making of a decision does not follow automatically from the ascertainment of the facts and the law, is not a matter upon which it is necessary to express a view in the present case."

60. *These observations were made in relation to an appeal under section (1)(3)(a) of the Arbitration Act 1979. They are, however, equally applicable to an appeal under section 69(2)(a) of the 1996 Act. It should be noted that the passage, which I have just quoted, was cited by Mr Justice Langley in **Covington Marine Corp. v Xiamen Shipbuilding Industry Co. LTD** [2005] EWHC 2912 (COM).*

61. *In **The "Baleares"** [1993] 1 Lloyd's Rep. 215 the Court of Appeal reversed the decision of the Commercial Court and restored the decision of three arbitrators concerning issues arising under a charterparty. At pages 227 to 228 Lord Justice Steyn said this: "This is an appeal under s.1 of the Arbitration Act, 1979 on "a question of law arising from an arbitration award".*

    For those concerned in this case that is a statement of the obvious. But it matters. It defines the limits of the jurisdiction of the Court hearing an appeal under the 1979 Act. The arbitrators are the masters of the facts. On an appeal the court

must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the Courts. Parties who submit their disputes to arbitration bind themselves by agreement, to honour the arbitrator's award on the facts. The principle of party autonomy decrees that a Court ought never to question the arbitrators' findings of fact.

From time to time attempts are made to circumvent the rule that the arbitrators' findings of fact are conclusive. Such attempts did not cease with the enactment of the Arbitration Act 1979. Subsequently, attempts were made to argue that an obvious mistake of facts by arbitrators may constitute misconduct. It is clear that such a challenge is misconceived, see ***Moran v Lloyd's*** *[1983] 1 Lloyd's Rep. 472;* ***K/S A/S Bill Biakh v Hyundai Corporation,*** *[1988] 1 Lloyd's Rep. 187. Then an attempt was made to argue that an obvious mistake of fact may amount to an excess of jurisdiction which would enable the Court to intervene. Again, the manoeuvre to outflank the cardinal rule that the arbitrators are the masters of the fact failed. See Bank Mellat v GAA Development and Construction Co., [1988] 2 Lloyd's Rep. 44 at page 52; Mustill and Boyd, Commercial Arbitration, 2nd ed., 558. Since 1979 a number of unsuccessful attempts have been made to invoke the rule that the question of whether there is evidence to support the arbitrators' findings of fact is itself a question of law. The historical origin of the rule was the need to control the decisions of illiterate juries in the 19th Century. It never made great sense in the field of consensual arbitration. It is now a redundant piece of baggage from an era when the statutory regime governing arbitration and the judicial philosophy towards arbitration, was far more interventionist that it is today. Another transparent tactic is a submission that there is an inconsistency in the arbitrators' findings of fact. That is not a valid ground for an attack on an award. See* ***Moran v Lloyd's*** *sup., at p. 475. Parties sometimes resort to a more oblique way of challenging arbitrators' findings of fact: the court is asked to draw reasonable inferences from the arbitrators' findings of fact. The purpose is often to put forward a new legal argument which was never advanced before the arbitrators. But it is contrary to well-established principle for the Court to draw inferences from findings of fact in an award on the basis that it would be reasonable to do so. The only inferences which a court might arguably be able to draw from the arbitrators' findings of fact are those which are truly beyond rational argument. It is, however, by no means clear that it is permissible even in such a seemingly clear case for a Court to draw inferences of fact from the facts set out in the award. See Mustill & Boyd, op. cit 600. This catalogue of challenges to arbitrators' findings of fact points to the need for the Court to be constantly vigilant to ensure that attempts to question or qualify the arbitrators' findings of fact, or to dress up questions of fact as questions of law, are carefully identified and firmly discouraged."*

62. *In my view, the comments made by Lord Justice Steyn in that passage are now applicable to appeals brought under section 69 of the 1996 Act.*
63. *I shall not attempt either to paraphrase or to synthesise the guidance given in* ***The "Chrysalis"*** *and* ***The "Baleares".*** *I regard that guidance as both relevant and helpful when the court is confronted with an arbitration appeal, which has not passed through the filter of an application for leave. I shall follow that guidance in the present case. "*

Presumably, these guidelines would be equally applicable to a court operating the application for leave filter itself.

Appeal on point of law.

69(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.

69(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).

69(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.

Agreement to appeal.

Leave of the court to appeal an award – s69(2)(a) is not required where the parties have agreed to an appeal. This most frequently occurs where both parties wish to appeal different aspects of an award.

S70 restrictions on appeal.

S70(2) establishes (a) that where the parties have agreed to an alternative arbitral appeal process that process must first be exhausted before an appeal is permitted and (b) where applicable that all s57 correction of award and additional award provisions must first be complied with.

S70(3) established a 28 day time bar from the date of the award or any subsequent correction to the award under s57. This however is subject to s80(5) which states that *"Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement."*

In ***Chattan v Reigill*** *[2007],*[85] the court granted an extension of time to appeal on condition that costs were paid by the applicant. Due to banking problems the ready availability of the funds was in question and the respondent asked court to determine that accordingly the appeal was dismissed. Court held, in the circumstances the condition had been fulfilled and even if it had not been due to a technicality the overriding purpose of the CPR of serving justice would have justified a further extension.

Leave for appeal on a point of law s69(3).

The court has to be satisfied - s69(3) - on all four aspects outlined therein before an application to appeal will be granted, though the granting of leave is no indicator that the appeal will succeed, though at first blush this might seem the case where s69(3)(c)((i) is satisfied. Compare this with the requirement under **CPR 52.**3 that an applicant for appeal in respect of litigation must establish not only a compelling reason for the case to be heard but also a real prospect of success**.** [86]

[85] ***Chattan Developments Ltd v Reigill Civil Engineering Contractors Ltd [2007] EWHC 305 (TCC)*** per Mr Justice Ramsey.

[86] ***Smith International Inc v Specialised Petroleum Services Group Ltd. [2005] EWCA Civ 1357*** **per** Mummery LJ; Jacob LJ; Neuberger LJ.

1 Substantial affect on rights of the party

Assuming that an arbitration concerns substantial right as between the parties, any appeal that goes to the root of the award is likely to substantially affect the rights of the applicant. However, it is not uncommon for aspects of an award to be challenged, or for a challenge to be mounted against a determination of the tribunal, which whilst open to challenge would make little difference to the outcome of the case. This provision severely restricts the ability of a party to mount such challenges, bringing an end to "nit-picking" which in the past has strung out the decision making process for protracted periods, often for tactical or cash flow purposes. What amounts to substantial is itself potentially a moveable feast. Consider for example ***Safeway Stores v Legal & General*** *[2004].*[87] Here the court was of the view that the rent review tribunal had used an inappropriate comparators since the site had no petrol filling station whereas the comparables did. However, whilst the arbitrator was in error the maximum scope of error was a "mere" 7% and accordingly in the courts view no substantial injustice had occurred. This must be relative, since 7% of a large sum could amount to a substantial sum in other circumstances.

In **Stern v Levy [2007],**[88] a contract led to two potential, though equally imperfect interpretations. The court held that the arbitrator was legally entitled to chose one over the other. The court further noted that the consequence did not affect the outcome and in addition, the arbitrator had afforded every opportunity to the party to address the disputed issue.

2 Matter was one the tribunal was asked to determine

An appeal on a point of law is not an opportunity for a party to plead facts or law not put to the tribunal. It is not uncommon for a party to re-examine the situation after the event and having realised that there was another argument that had a prospect of success, to seek to pursue that by way of appeal. It is not a viable option. Often, a weaker alternative case is not put to a tribunal to ensure that an adverse finding as to costs does not follow, but again an appeal is not an opportunity to have another bite at the cherry in the hope that that weaker case was not so weak after all. This is demonstrated by ***Thyssen v Mariana [2005],***[89] which concerned claim for cargo damage by fire due to unseaworthiness of the vessel or alternatively a deliberate act with the objective of bringing about a constructive total loss. The tribunal found no evidence of unseaworthiness. The applicants now sought in the appeal to establish that the loss was due to sparks from hot works. The court held that whether or not hot works caused the fire was no longer relevant. Evidence in this regard should have been adduced before tribunal. Accordingly the challenge failed.

Similarly in ***Marklands v Virgin Retail*** *[2003],*[90] a rent review evaluation had been conducted on the basis of open market value, rather than by drawing hypotheticals. The court held that this was a valid method of evaluation, particularly since other methodologies had not been put to the tribunal.

3 Based upon facts:-

This is an either or section, viz either a) or b).

a) The decision was obviously wrong

Note that unlike b) below, if the decision was obviously wrong, it is not necessary to show that the issue is one of general importance.

b) Question of general public importance that is open to serious doubt

Whilst the threshold is lower, the additional hurdle of demonstrating public importance is introduced.

In ***White Young Green Consulting v Brooke House 6th Form College [2007],***[91] which concerned the interpretation of a management contract, and whether or not it was a fixed price contracts the court rejected eleven grounds of appeal. Mr Justice Ramsey discussed what amounts to a question of law, general importance and the criteria for appeal, including which documents could be referred to. The following extract is instructive :- "

[87] ***Safeway Stores v. Legal & General Assurance Society Ltd*** *[2004] EWHC 415 (Ch) per* Mr Justice Lewison.

[88] ***Stern Settlement v Levy [2007] EWHC 1187 (TCC)*** **per** HHJ Peter Coulson ; see also ***Walsall Metropolitan Borough Council v Beechdale Community Housing Assoc Ltd. [2005] EWHC 2715 (TCC)*** where the court noted that whichever of the disputed valuations methods was applied the outcome would have been roughly the same.

[89] ***Thyssen Canada Ltd. v Mariana Maritime SA [2005] EWHC 219 (Comm),*** per Mr Justice Cooke.

[90] ***Marklands Ltd v. Virgin Retail Ltd*** *[2003] EWHC 3428 (Ch)* per Mr Justice Lewison.

[91] ***White Young Green Consulting v Brooke House Sixth Form College [2007] EWHC 2018 (TCC),***[91]

19. *On this application, the following particular points emerge. First, the grounds of appeal for which leave is sought are expressed in many instances, in terms such as "the arbitrator erred in law". It is important in these applications that the question of law should be identified and it is, therefore, necessary to be certain that the statement that the arbitrator erred in law properly identifies a question of law which the arbitrator was asked to determine, rather than a determination based on fact.*
20. *I accept, as has been submitted by Mr. Blunt, that the correct definition of a permissible question of law was identified by Mustill J., as he then was, in* ***Vinava Shipping Co. Ltd v. Finelvet AG ("The Chrysalis")*** *[1983] 1 Lloyd's Rep. 503, where at p.507 he divided the process of the arbitrator's reasoning into three stages:*

    "(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."
21. *Mustill J said that the relevant question of law is that at (2) and that this has to be distinguished from the approach of the arbitrator at (3), which is where, in the light of the facts and the law, the arbitrator reaches his decision. Where there is an error in applying the law to the facts, then that comes outside the question of law. That is why a distinction has, in my judgment, to be made between the arbitrator's determination of a question of law and his application of that law to the facts, the latter sometimes being encompassed within the phrase "the arbitrator erred in law". Of course, as Mustill J said, the way in which an arbitrator applies the law to the facts may show that the arbitrator has not properly determined the question of law.*
22. *In addition, it is important to distinguish between a question of fact and a question of law, in particular, under s.69(3)(c). The question which the court has to decide is whether the decision of the tribunal is obviously wrong or open to serious doubt, but on the important pre-condition that this question is posed "on the basis of the findings of fact in the award." This means, in my judgment, that findings of fact cannot give rise, in themselves, to appeals on questions of law.*
23. *The second aspect which arises in this case is the question of what documents can be referred to on an application for leave to appeal under s. 69. In his decision in* ***Kershaw Mechanical Services v. Kendrick Construction Ltd****. [2006] EWHC 727 (TCC), Jackson J. had to consider the extent to which extraneous material might be admissible on an appeal which, in that case, did not require leave. He held that the position, as set out in the decision of Coleman J. in* ***Foley's Ltd. v. East London Family & Community Services*** *[1997] ADRLJ 401 and in* ***HOK Sport Ltd. v. Aintree Racecourse Co. Ltd.*** *[2003] Build L.R. 155, where His Honour Judge Thornton QC adopted the relevant passage in Foley's, might be too restrictive.*
24. *In the case of* ***Kershaw,*** *Jackson J. held that, for the purpose of the appeal, the court needed to look at the correspondence and documents which the arbitrator had identified in his award because the contract could not be considered in isolation and the court had to read the relevant contractual document in the context of a series of documents, of which it formed part.*
25. *I respectfully agree. It seems to me that, in general terms, where the court is considering the question of leave to appeal against an award, it is also necessary to have before the court both the award and any documentation which is referred to in the award and which is needed so as to make clear what the arbitrator is referring to within the part of the award relevant to the appeal. Obviously, if the arbitrator sets out the document in its full terms, there is no need for that document to be supplied but, where documents are merely referred to or summarised, it may sometimes be helpful to have those documents in front of the court. This, however, should not be seen as permitting a great deal of documentation to be provided on these applications. The general principle being that it is only the award, the grounds of appeal and the skeleton arguments which will be referred to and any additional documentation should be properly justified."*

Regarding "*general importance*" Mr Justice Jackson noted that where the interpretation of a common standard form contract is at issue this may be a matter of general importance. Large numbers of appeals are based on contract interpretation or alternatively on the application of questionable implied terms, demonstrating that this hurdle is not impossible to surmount. However, where a contract has limited application in the market

place and particularly if it is a bespoke contract, this may prove to be a difficult hurdle to surmount.[92]

4 It is just and proper that the court determine the question overriding the choice of the parties to settle the dispute by arbitration.

Another way of expressing this might be to say that a serious injustice is asserted which requires the attention of the court. This has echoes of the approach adopted in respect of s68 challenges. Again the legislation is seeking to ensure that recourse to the court over nitpicking complaints about awards are prevented. Mr Justice Lloyd noted in ***Keydon v Western Power*** [2004],[93] that there is a rebuttable presumption in favour of finality of the arbitral award. This is an echo of ***BMBF v Harland & Wolff [2001].***[94] The Court of Appeal preferred the tribunal's interpretation of a ship building contract over that of a judge and reinstated the arbitral award. The court opined that concepts of general interpretation based on commercial concepts should not override the understanding of chosen experts within the field.

Regarding s69(3)(d) Mr Justice Moore-Bick noted, not particularly helpfully, in ***Icon v Sinochem [2002]***[95] **:-**

19. …..This requirement was introduced for the first time in the 1996 Act and has no direct counterpart in the earlier legislation. The statute itself gives no further guidance on what factors the court should take into account when considering whether it is just and proper in all the circumstances for the court to determine the question in respect of which leave to appeal is sought; ***it is a matter to be determined having regard to all the circumstances of the case****. It will usually be appropriate, therefore, for the defendant to file evidence in support of any contention that the requirement is not satisfied in any particular case.*

19. The procedure governing arbitration claims is contained in CPR Part 62 and its associated practice direction. An arbitration claim (other than a claim to stay existing proceedings under section 9 of the Act) must be started by the issue of an arbitration claim form in accordance with the Part 8 procedure: see rule 62.3(1). Accordingly, any evidence on which the claimant relies must be served with the claim form in accordance with the requirements of Part 8. As far as the defendant is concerned, paragraph 12.3 of the practice direction supplementing Part 62 provides as follows:

> *"The written evidence filed by the respondent to the application must-*
>
> *(1) state the grounds on which the respondent opposes the grant of permission;*
>
> *(2) set out any evidence relied on by him relating to the matters mentioned in section 69(3) of the 1996 Act; and*
>
> *(3) specify whether the respondent wishes to contend that the award should be upheld for reasons not expressed (or not fully expressed) in the award and, if so, state those reasons." …….*

24 I think it is clear, both from the terms of section 69(3)(d) of the Act and the provisions of the practice direction, that the appropriate way in which to raise an argument of the kind advanced by the charterers in the present case is to oppose the application for leave to appeal on the grounds that it is not just and proper in all the circumstances for the court to determine the question of law in respect of which the claimant seeks leave to appeal. It will be necessary for the defendant to file evidence in support of that argument which, in a case such as the present, will be broadly the same as that which he would need to serve in support of an application under section 68. It may then be necessary to vary or supplement the standard directions contained in paragraph 6 of the practice direction to ensure that the claimant is given a sufficient opportunity to file evidence in response."

In the event, the court noted that rather than applying specialist trade knowledge to determine the meaning of a contract's provisions, the tribunal had simply done its best to work out what it meant. The court therefore did not feel constrained to follow the tribunal's interpretation and felt that it was appropriate for the court to interpret the provisions afresh.

Similarly in ***Watergate v Securicor*** *[2005],*[96] the applicant for an appeal of a rent review satisfied the substantial interest test in that the difference amounted to in excess of £50K over 5 years. The court

[92] ***Boots The Chemist Ltd v Westfield Shopping Towns Ltd [2003] NIQB 14*** *:* Was the issue one of general importance? Concerned form of lease common in a shopping precinct but not used elsewhere : Held : not of general importance. Per HHJ. Coghlin

[93] ***Keydon Estates Ltd v. Western Power Distribution (South Wales) Ltd*** *[2004] EWHC 996 (Ch).*

[94] ***BMBF (No 12) Ltd v Harland & Wolff Shipbuilding & Heavy Industries Ltd [2001] EWCA Civ 862. per*** Potter LJ; Clarke LJ; Sir Martin Nourse.

[95] ***Icon Navigation Corp v Sinochem International Petroleum (Bahamas) Co. Ltd. [2002] EWHC 2812 (Comm).***

[96] ***Watergate Properties (Ellesmere) Ltd v. Securicor Cash Services Ltd*** *[2005] EWHC 3438 (Ch)* per Mr Justice Lewison.

determined that the arbitrator had applied wrong test regarding interpretation of provisions and then concluded that since the arbitrator was not legally trained court, it was appropriate for the court to conduct the rent assessment itself rather than to remit to the arbitrator.

The application of s69(3) was dealt with at length by the Court of Appeal in ***The Northern Pioneer*** **[2002].**[97] The provenance of the current statutory provisions is set out in detail and deserves further consideration. What follows are selected abstracts from the judgement of the court, delivered by Lord Phillips MR :-

"Section 69 and its history

7. *The regime under which decisions of arbitrators were brought before the High Court by case stated was radically altered by the Arbitration Act 1979, section 1 of which provided, insofar as material:*

   "(1) In the Arbitration Act 1950 … section 21 (statement of case …) shall cease to have effect and, without prejudice to the right of appeal conferred by subsection (2) below, the High Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.

   (2) Subject to subsection (3) below, an appeal shall lie to the High Court on any question of law arising out of an award on an arbitration agreement; and on the determination of such an appeal the High Court may … (a) confirm, vary or set aside the award …

   (3) An appeal under this section may be brought by any of the parties to the reference –

   (a) with the consent of all the other parties to the reference; or

   (b) … with the leave of the court.

   (4) The High Court shall not grant leave under subsection (3)(b) above unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement…

   (7) No appeal shall lie to the Court of Appeal from a decision of the High Court on an appeal under this section unless –

   (a) the High Court or the Court of Appeal gives leave; and

   (b) it is certified by the High Court that the question of law to which its decision relates either is one of general public importance or is one which for some other special reason should be considered by the Court of Appeal…."

8. *In* ***Pioneer Shipping v B.T.P. Tioxide ('the Nema')*** *[1982] AC 724 the House of Lords gave guidance as to the circumstances in which permission to appeal to the High Court from the decision of an arbitrator should be given. In relation to the construction of a 'one-off" clause, permission should not be given unless, in the opinion of the court, the arbitrator was obviously wrong. In dealing with the approach to standard clauses, Lord Diplock said this at p.743D: "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."*

9. *Three years later, Lord Diplock had occasion to revert to this topic in* ***Antaios Compania SA v Salen AB (the 'Antaios')*** *[1985] AC 191 at p.203-4: "My Lords, I think that your Lordships should take this opportunity of affirming that the guideline given in* ***The Nema*** *[1982] A.C. 724, 743 that even in a case that turns on the construction of a standard term, "leave should not be given … unless the judge considered that a strong prima facie*

[97] ***CMA CGM S.A. v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' [2002] EWCA Civ 1878*** : per Lords Phillips MR; Rix LJ; Dyson LJ.

case had been made out that the arbitrator had been wrong in his construction", applies even though there may be dicta in other reported cases at first instance which suggest that upon some question of the construction of that standard term there may among commercial judges be two schools of thought. I am confining myself to conflicting dicta not decisions. If there are conflicting decisions, the judge should give leave to appeal to the High Court, and whatever judge hears the appeal should in accordance with the decision that he favours give leave to appeal from his decision to the Court of Appeal with the appropriate certificate under section 1(7) as to the general public importance of the question to which it relates; for only thus can be attained that desirable degree of certainty in English commercial law which section 1(4) of the Act of 1979 was designed to preserve."

10. *Section 69 of the Act has replaced the **Nema** guidelines with statutory criteria …. : (s69 is then set out in full)*
11. *The statutory criteria are clearly strongly influenced by the **Nema guidelines**. They do not, however, follow these entirely. We have concluded that they open the door a little more widely to the granting of permission to appeal than the crack that was left by Lord Diplock. We shall elaborate on this conclusion later in this judgment*
12. *Section 69(6) reproduces, in effect, section 1(6A) of the 1979 Act, which provided: "Unless the High Court gives leave, no appeal shall lie to the Court of Appeal from a decision of the High Court – (a) to grant or refuse leave under subsection (3)(b)…"*

    *Lord Diplock, in a speech with which the other members of the House concurred, considered the principles to be applied under this subsection in **the Antaios** at p.205:*

    "….leave to appeal to the Court of Appeal should be granted by the judge under section 1(6A) only in cases where a decision whether to grant or to refuse leave to appeal to the High Court under section 1(3)(b) in the particular case in his view called for some amplification, elucidation or adaptation to changing practices of existing guidelines laid down by appellate courts; and that leave to appeal under section 1(6A) should not be granted in any other type of case. Judges should have the courage of their own convictions and decide for themselves whether, applying existing guidelines, leave to appeal to the High Court under section 1(3)(b) ought to be granted or not.

    *In the sole type of case in which leave to appeal to the Court of Appeal under section 1(6A) may properly be given the judge ought to give reasons for his decision to grant such appeal so that the Court of Appeal may be informed of the lacuna, uncertainty or unsuitability in the light of changing practices that the judge has perceived in the existing guidelines; moreover since the grant of leave entails also the necessity for the application of **Edwards v Bairstow** [1956] A.C 14 principles by the Court of Appeal in order to examine whether the judge had acted within the limits of his discretion, the judge should also give the reasons for the way in which he had exercised his discretion."*
13. *Nothing in section 69 of the Act affords any grounds for departing from these principles. On the contrary, the fact that, as we have indicated, section 69 opens a little more widely the door to granting permission to appeal from the award of an arbitrator is all the more reason why the Judge's decision on the application for such permission should be final.*

Did Tomlinson J. apply the correct principles when refusing permission to appeal against the arbitrators' award?

24. *For an appeal against the award to succeed, the Charterers would have to reverse three separate findings of the arbitrators in relation to Clause 31 of the charterparty: (1) that operations in Kosovo were not 'war'; (2) that Germany was not 'involved' and (3) that the Charterers had been required to give notice of cancellation within a reasonable time and had failed to do so.*
25. *In his reasons for refusing permission to appeal, Tomlinson J. observed that the first two issues involved mixed fact and law and that the proper approach to the construction of clauses such as Clause 31 was a question of general public importance. He did not, expressly, consider whether the majority decision of the tribunal on these two issues was at least open to serious doubt. This was perhaps because even if there were grounds for challenge in relation to these two issues, such challenge would not affect the result, or the rights of the parties, unless the unanimous decision of the arbitrators on the third issue could be attacked. As to that issue, the challenge that the Charterers sought to bring was to the finding of the arbitrators that, as a matter of law, the Charterers had to exercise any right to cancel that they enjoyed within a reasonable time.*
26. *Tomlinson J. held that this challenge was not open to the Charterers because the question was not 'one which the tribunal was asked to determine', - see section 69(3)(b). He further held that there were alternative bases upon which the time that elapsed before the Charterers gave notice of cancellation might have been relevant: (1) implied term, (2)*

waiver/election and estoppel. These latter alternatives were not explored before the arbitrators. As we understand his judgment, it was because questions of waiver/election and estoppel were not explored before the arbitrators that Tomlinson J concluded that it was not open to the Charterers to challenge the Arbitrators' finding that, by reason of an implied term, notice of cancellation had to be given within a reasonable time.

27. *Given Tomlinson J's conclusion that the arbitrators were not asked to determine the critical question his decision that the application for permission to appeal must be refused was inevitable. He applied the correct principles, as laid down by section 69(3). Whether the manner of his application of those principles is open to attack remains to be considered.*

Did Tomlinson J. correctly apply the principles governing permission to appeal from an arbitration award?

28. *In the **Antaios** Lord Diplock observed, in the passage that we have quoted above, that in performing the task which confronts us, the Court of Appeal had to apply **Edwards v Bairstow** in order to decide 'whether the judge had acted within the limits of his discretion'. This demonstrates that our task is essentially one of judicial review. Insofar as Tomlinson J. has made findings of law, we can review them. Insofar as he has made findings of fact, or exercised a discretion, the familiar **Wednesbury** test falls to be applied [1948] 1 KB 223.*

"The question is one that the arbitrators were asked to determine"

29. *Section 69(3)(b) is an addition to the **Nema** guidelines, resolving a difference of view between the Commercial Court and the Court of Appeal in **Petraco (Bermuda) Ltd v Petromed** [1988] 2 Lloyd's Rep 357. In his decision giving permission to appeal to this Court, Tomlinson J. commented 'the critical question was not even raised faintly'. On behalf of the Charterers, Miss Hopkins, challenged this finding. It is first necessary to identify what Tomlinson J. considered to be 'the critical question'.*

30. *The issues that we have set out in paragraph 6 above were four of seven issues that the Charterers identified in their Claim Form in order to comply with section 69(4) of the Act. On analysis, we consider that the 'critical question' identified by Tomlinson J. was issue (iii). We so find having regard to the following passage from his reasons for refusing permission to appeal:*

    "I do not believe that it would be a proper exercise of my statutory discretion to give leave to appeal in circumstances where the arbitrators have unanimously concluded that any right to cancel which the charterers may have enjoyed was not exercised within a reasonable time and was thus lost. The applicants recognise that even were they successful on all issues relating to the war cancellation clause, there would have to be a remission to the arbitrators for them to consider whether CMA had waived or had elected not to exercise the option to cancel, that being a question which they had not been asked to determine at the hearing. The arbitrators find that CMA would have known of and been able to assess the well-publicised events within a few days. CMA adduced no evidence to lay a foundation for an argument that they could not be taken to have waived or elected not to exercise the option to cancel because they were unaware of the existence of that right, and they seem at the hearing to have argued only very faintly against the necessity to imply a term that the right must be exercised within a reasonable time. What was described by their counsel as "the more interesting question" was the nature of the term, a reflection of the debate whether the term should be formulated such that the right of cancellation is to be exercised within a reasonable time or before such lapse of time as would make the other party think that the right would not be exercised. That strikes me as an arid debate since I cannot think that the formulation of the term in these different ways can lead to a different outcome, and it would appear that CMA's Counsel came close to accepting this when he suggested that the latter, "Davenport" formulation, encapsulates the test for determining what is a reasonable time. Another way of putting the same point is that if within a reasonable time within which to ascertain that war had broken out and within which to decide the question whether, seeing that war had broken out, it was in their interests to continue to implement the contract or not, one party does not give to the other notice of cancellation, the other party is entitled to conclude that the existence of the war will not be relied upon as giving rise to the right to cancel.

    The short point is therefore that the arbitrators were not asked to analyse the matter in terms of waiver/election and evidence was not deployed before them concerning CMA's awareness or lack of awareness as to the existence of a right to cancel. The resolution of the question in fact left to the arbitrators was an objective determination of fact peculiarly within the province of the arbitrators. I conclude that it is inappropriate to give leave to appeal on the issues arising out of the war cancellation clause. The questions raised are either questions the determination of which will not substantially affect the rights of one or more of the parties or are questions which the tribunal was not asked to determine."

31. *Miss Hopkins' submissions on this point can be summarised as follows. (1) the arbitrators had held that Clause 31 was subject to an implied condition that the right to cancel had to be exercised within a reasonable time of its accrual; (2) Charterers had challenged before the arbitrators the existence of this implied condition; (3) it followed that the question of whether there was an implied term was one which 'the tribunal was asked to determine'; (4) it was the Charterers' case that mere inaction would not constitute an election, estoppel or waiver, however long it continued; (5) it was for the Owners, not the Charterers, to raise any averments of estoppel, waiver or election. They had not done so.*

32. *In support of her submission that the question of an implied term was before the arbitrators, Miss Hopkins relied upon:*
    i) *the Charterers' skeleton argument at the arbitration. This included in the issues to be determined: 'Did the option have to be exercised within any particular time? If so, did CMA exercise it within time?' The answer to these issues, suggested by the skeleton, was: 'It is not necessary to imply a term limiting the time during which the option has to be exercised. Wars wax and wane and are unpredictable'.*
    ii) *a passage of discussion between the Charterers' counsel and Sir Christopher Staughton in the course of the former's submissions:*

    "MR HADDON-CAVE: Question 3 on page 7, did the option have to be exercised within a reasonable time and if so was it exercised within a reasonable time? And his estoppel point. I see the force on why it might be thought that there was an implied term, but it's not necessarily so because, as Mr Hamilton pointed out yesterday, the character of the war changes and you may wish at some stage in the war to exercise the option, you may not.

    SIR CHRISTOPHER STAUGHTON: Are you allowed to wait and see what sort of war it is going to be?

    MR HADDON-CAVE: There is no reason why the parties could not have intended that to be the case.

    SIR CHRISTOPHER STAUGHTON: If it's established that you have to exercise the option within a reasonable time, why should you be allowed a licence to decide what's a reasonable time for you?

    MR HADDON-CAVE: That's the issue – is it necessary to imply a term? I quite see the force of that point as an option; I don't argue the point terribly forcefully, there is an authority to that effect, so I don't dwell on it or accept it. The more interesting question, perhaps, is what is the nature of that term, and I suggest that it is as Mr Davenport suggests on page 160 of his article, that the option "probably has to be exercised before such time has elapsed that will leave the other party to think that no notice of termination was going to be exercised."

    iii) *the Charterers' written closing argument, which simply repeated the matters in their skeleton argument to which we have referred at (i) above.*

33. *In their award the arbitrators made the following finding: "An option to cancel a charterparty in the event of war must be exercised within a reasonable time of the event in question. In **KKKK v Belships Co** (1939) 63 L1.l.Rep 175, Branson J said, in respect of the Japan/China war, at p183: "…. the charterers and the shipowners would be entitled here to a reasonable time within which to ascertain that war had broken out and within which to decide the question whether, seeing that war had broken out, it was in their interests to continue to implement the contract or not.""*

34. *We consider that in making this finding the arbitrators were determining a question which they had been 'asked to determine'. It is true that Mr Haddon-Cave QC had virtually conceded the point, but we consider that he did enough to prevent being shut out under section 69(3)(b) from seeking to appeal against the arbitrators' finding on the point.*

35. *No doubt because Mr Haddon-Cave challenged the implication of a term so faintly, no questions of election, waiver or estoppel appear to have been explored at the arbitration, although the cryptic statement 'and his estoppel point' in the passage that we have quoted at 32(ii) above suggests that estoppel may have received at least a passing reference in the submissions made on behalf of the Owners. In these circumstances, we do not consider that the fact that issues of election, waiver or estoppel were not explored is a bar, by virtue of section 69(3)(b), to the grant of permission to appeal issue (iii) set out at paragraph 6 above.*

36. *All of this leads us to conclude, not without hesitation, that, insofar as Tomlinson J's refusal of permission to appeal was founded on section 69(3)(b), it was not well founded. Nonetheless, if the Charterers had intended to make a serious challenge to the implication of a term, we consider that they should have laid the ground for this more*

*thoroughly. It may well be that Mr Haddon-Cave concluded that the arbitrators would feel obliged, or inclined, to follow **KKKK v Belships**. Nonetheless we think that it would have been open to him to urge them strenuously not to do so in the light of subsequent developments in the law, so as to make it plain that this was a live issue and one that would, if necessary, form the basis of a challenge before the Commercial Court. Had he done so, this would almost undoubtedly have been met with alternative allegations of election, waiver and estoppel, and these matters would have been explored. As it is, were the Charterers to be given permission to appeal to the Commercial Court and there to succeed on the ground that the arbitrators were wrong to find an implied term and that issues of election, waiver and estoppel remained to be resolved, the matter would have to be remitted to the arbitrators for further consideration. This fact would, in our opinion, have justified Tomlinson J. in declining to give permission to appeal on the ground that section 69(3)(d) was not satisfied. There were, however, other considerations that, in our opinion, justified the Judge in refusing permission to appeal.*

37. Before he could grant permission to appeal section 69 required that the Judge should find (1) that the decision of the arbitrators on the existence of an implied term was obviously wrong or that the point was one of general public importance and that the decision of the arbitrators was at least open to serious doubt and (2) that reversing the decision of the arbitrators on the point would substantially affect the rights of one or more of the parties. We turn to consider these criteria.

The departure from the Nema guidelines

*58. In the **Antaios** Sir John Donaldson MR considered the question raised by Staughton J. of whether, where the Commercial Judge had formed the view that the arbitrators were probably right, the fact that the Court of Appeal might take a different view was any ground for granting permission to appeal to the High Court. He answered this question at pp.1369-70: "My answer to this question is that it is not if his appreciation that the Court of Appeal might take a different view has no more solid a basis than that this is in the nature of appellate courts and that if the Court of Appeal did take a different view and the parties were sufficiently persistent his own view might equally well be affirmed by the House of Lords. It is quite different if there are known to be differing schools of thought, each claiming their adherents among the judiciary, and the Court of Appeal, given the chance, might support either the school of thought to which the Judge belongs or another school of thought. In such a case leave to appeal to the High Court should be given, provided that the resolution of the issue would substantially affect the rights of the parties (s.1(4) of the 1979 Act) and the case qualified for leave to appeal to the Court of Appeal under s.1(7) of the 1979 Act as no doubt it usually would. I add this additional qualification because there is no point in the judge giving leave when he has little doubt that the arbitrator is right and that, despite adversarial argument, he will affirm the award, unless he is also prepared to enable the Court of Appeal to resolve the conflict to judicial opinion."*

Fox LJ, at pp.1377-8, agreed with him.

*59. In paragraph 9 above we have quoted what we have described as the gloss placed by Lord Diplock on his **Nema** guidelines. He went on at p.204B to explain his reasons for differing from the views of Sir John Donaldson:*

"Decisions are one thing; dicta are quite another. In the first place they are persuasive only, their persuasive strength depending upon the professional reputation of the judge who voiced them. In the second place, the fact that there can only be found dicta but no conflicting decisions on the meaning of particular words or phrases appearing in the language used in a standard term in a commercial contract, especially if, like the N.Y.P.E. withdrawal clause, it has been in common use for very many years, suggests either that a choice between the rival meanings of those particular words or phrases that are espoused by the conflicting dicta is not one which has been found in practice to have consequences of sufficient commercial importance to justify the cost of litigating the matter; or that business men who enter into contracts containing that standard term share a common understanding as to what those particular words and phrases were intended by them to mean.

*It was strenuously urged upon your Lordships that wherever it could be shown by comparison of judicial dicta that there were two schools of thought among commercial judges on any question of construction of a standard term in a commercial contract, leave to appeal from an arbitral award which involved that question of construction would depend upon which school of thought was the one to which the judge who heard the application adhered. Maybe it would; but it is in the very nature of judicial discretion that within the bounds of "reasonableness" in the wide **Wednesbury** sense [1948] 1 K.B. 223 of that term, one judge may exercise the discretion one way whereas another judge might have exercised it in another; it is not peculiar to section 1(3)(b). It follows that I do not agree with Sir*

John Donaldson M.R. [1983] 1 W.L.R. 1362, 1369H-1370B where in the instant case he says that leave should be given under section 1(3)(b) to appeal to the High Court on a question of construction of a standard term upon which it can be shown that there are two schools of thought among puisne judges where the conflict of judicial opinion appears in dicta only. This would not normally provide a reason for departing from ***The Nema*** *guideline [1982] A.C. 724 which I have repeated earlier in this speech."*

60. *The reasoning in this passage would have precluded Tomlinson J. from giving permission to appeal on the construction issue unless he had formed the view that the arbitrators' decision on that issue was probably wrong. We do not, however, consider that this part of the* ***Nema*** *guidelines survives the provisions of section 69. The criterion for granting permission to appeal in section 69(3)(c)(ii) is that the question should be one of general public importance and that the decision of the arbitrators should be* ***at least open to serious doubt****. These words impose a test which is broader than Lord Diplock's requirement that permission to appeal should not be given 'unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction'. Section 69(3)(c)(ii) is consonant with the approach of Sir John Donaldson in the* ***Antaios.***
61. *The guideline of Lord Diplock which has been superseded by section 69(3)(c)(ii) was calculated to place a particularly severe restraint on the role of the Commercial and higher courts in resolving issues of commercial law of general public importance. This is because the likelihood of conflicting judicial decisions in relation to such issues, where they related to standard clauses in widely used charterparties containing arbitration clauses, was greatly reduced by the guideline itself. We consider that the facts of this case demonstrate that changing circumstances can raise issues of general public importance in relation to such clauses that are not covered by judicial decision.*
62. *The nature of international conflict has changed over the years. The changes underlie the construction issue. The reasoning of the majority arbitrators on this issue was as follows: (1) There is no technical meaning of the word 'war'. It must be construed in a common sense way – see* ***KKKK v Bantham Shipping*** *[1939] 2 KB 554 at 558-9. (2) 'War' is to be distinguished from 'warlike activities and hostilities short of war' dealt with in clause 23(a) of the charter. 'War' means a war between nation states. (3) A businessman applying common-sense in the context of clause 31 would not regard the NATO operation in Kosovo as a war. (4) Members of NATO participating in a NATO operation are not 'involved' in the operation as a nation.*
63. *The minority arbitrator, Sir Christopher Staughton, thought that the majority arbitrators had asked the wrong question. They should have asked whether a businessman would have said that there was a war in Kosovo in March and April 1999, to which the answer would have been 'yes'. Germany, in his view, was 'involved' in the Kosovo conflict.*
64. *The difference of view between the experienced arbitrators in this case provides, of itself, ground for contending that the decision of the majority is, 'at least open to serious doubt'. We conclude that, had it not been for the fact that the arbitrators' conclusion on the 'time' issue rendered the question academic, it would have been open to Tomlinson J. in accordance with section 69 of the Act, to follow his inclination and give permission to appeal. "*

FINAL OBSERVATIONS ON s69(3)

Even where all four criteria are satisfied there is no guarantee that the appeal will succeed. Thus even though an important issue requiring the consideration of the court, this recent appeal failed in ***The Livanita*** [2007].[98].

Procedural aspects of appeal

It is not sufficient merely to identify the question of law that an applicant wishes to challenge. The applicant has to state at least in broad terms, to the satisfaction of the court why the applicant believes that the tribunal erred in law.

[98] ***Stx Pan Ocean Co Ltd v Ugland Bulk Transport A.S. (Livanita) [2007] EWHC 1317 (Comm)***. Per Mr Justice Langley

Appeal on point of law. Procedure

69(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

69(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

Note that by enlarge applications for leave to appeal will be conducted on a paper only basis unless the court (not the applicant) determines that a hearing would be needed. [99]

Leave to appeal.

69(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

Again, as with s67(4) and s68(4) the Court of Appeal has no jurisdiction to conduct an appeal of a refusal to grant leave or alternatively to consider an application for leave to appeal. This jurisdiction is exclusively reserved to the High Court hearing the challenge, against whose decision leave is requested by s69(6).[100]

Whilst the Lands Tribunal is subject to parts of the Arbitration Act 1996, there are some distinctions. It was noted in **Sinclair v Lands Tribunal** [2005], [101] that it is possible to appeal a refusal of the Lands Tribunal to allow an appeal, though in the circumstances appeal failed.

As to the criteria that a court should apply when considering an application for leave to appeal, a further extract from ***The Northern Pioneer*** **[2002]**[102] is set out here : -

Did Tomlinson J. apply the correct principles when granting permission to appeal to this Court?

14. *Tomlinson J. refused the Charterers' application for permission to appeal to the Commercial Court because he was firmly of the view that the statutory criteria set out in s69(3) of the Act precluded the grant of permission. He did so notwithstanding that he had identified issues in relation to the proper construction of a standard war cancellation clause, such as Clause 31, that were 'obviously of general public importance'. In granting permission to appeal to this Court in relation to his decision he explained why he did so: "However, on the issues relating to the war cancellation clause, I grant leave to appeal from my decision pursuant to S.69(6) of the Act, in order that the Court of Appeal may consider whether I have misapplied the statutory criteria or have approached them inappropriately inflexibly given the general public importance of the underlying question of the proper approach to the construction of a standard war cancellation clause, and, if it thinks it appropriate, give guidance."*
15. *The observations of Lord Diplock in* ***the Antaios****, which we have set out above in paragraph 12, fall to be applied, subject to this qualification. The guidelines are no longer judge made – they are statutory criteria. There is no scope for amplifying or adapting them in the light of changing practices. To the extent that there is scope for elucidation as to the manner of their application, it may be appropriate to grant permission to appeal. Subject to this, if the Judge decides that the statutory criteria for granting permission to appeal are not satisfied, he should not grant permission to appeal against that decision. His decision on the merits of the application for permission to appeal should be final.*
16. *Tomlinson J. did not identify any uncertainty as to the manner in which the statutory criteria should be applied. It was his clear view that they precluded the grant of permission to appeal. He did not point to any uncertainty in the criteria. He did not suggest any respect in which he might have misapplied the criteria. We detect that he hoped that this Court might find a way to ease the rigorous restriction that the criteria impose on review by the Commercial Court of important issues of law arising in arbitrations. Lord Diplock would not, we think, have approved the grant*

[99] ***BLCT (13096) Ltd. v J Sainsbury Plc [2003] EWCA Civ 884*** Applicant failed to convince the court that there were any special reasons why a hearing was required, holding that the grounds for appeal disclosed no reasonable prospect of success.

[100] **Mousaka Inc v Golden Seagull Maritime Inc** [2002] 1 All ER 726; Failed challenge on grounds of breach of Article 6 Human Rights Act of a brief judgement refusing an application to appeal from award of arbitrators on grounds that s69 criteria had not been met. There is no appeal against a refusal of an application to appeal. Per HHJ David Steel.

[101] ***Sinclair Investments Ltd (R) v Lands Tribunal Manuela da Graca Timothy O'Keefe*** *[2005] EWCA Civ 1305,* per Auld LJ; Laws LJ; Neuberger LJ

[102] ***CMA CGM S.A. v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' [2002] EWCA Civ 1878*** : per Lords Phillips MR; Rix LJ; Dyson LJ.

of permission to appeal for such a motive and nor do we. We shall, however, take advantage in due course of the opportunity to consider the extent to which some of Lord Diplock's observations in ***the Antaios*** *can be reconciled with the statutory criteria.*

Appeal on a point of law : Remedies

Where a party successfully appeals an award the court can vary the award, send it back to the tribunal to reconsider the award in the light of the Court's decision or set the whole or part of the award aside.

> *69(7) On an appeal under this section 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 the light of the court's determination, or*
> *(d) set aside the award in whole or in part.*
> *The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.*

An example of the court remitting an award to the tribunal is ***The MV Johnny K [2006]*** where the court determined that there was no clearly and consistently expressed finding by the arbitrators on the critical question by whom the order to sail was in fact given. With that in mind the issue was remitted to the arbitrators for consideration. Mr Justice Tomlinson noted that having complied with that instruction, it was open to the arbitrators to vary or reconfirm the award.[103]

Similarly, in ***Glencore v Goldbeam [2002],*** which concerned a disputed Head & sub charter party contract and liability for laytime, Mr Justice Moore-Bick determined that the issue was about remoteness – not causation as dealt with by the tribunal. The court remitted the award to the arbitrators since, in light of their findings no assessment had been made, in order that corrections could be made in the light of the court's determinations. [104]

As an alternative to appeal it may be more appropriate to consider availing oneself of the slip rule under s57 Arbitration Act 1996 to request that an arbitrator amend the award or make an additional award. [105]

Sufficient reasons for an appeal to take place.

Where a tribunal has not supplied sufficient reasons to enable the court to conduct an appeal the court may remit the award to the tribunal for the provision of further reasons.[106]

S69(8) Arbitration Act 1996 : Appealing the appeal

> *69(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.*
> *But no such 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.*

As with an unsuccessful challenge on the grounds of serious irregularity, there is the facility to appeal but again leave of the court is required,[107] but the additional rider is added that in considering whether or not to grant leave, the court must be of the view that there is a question of law at issue that the would benefit from further and higher judicial consideration. This therefore is a matter of establishing legal rules rather than

[103] ***Pentonville Shipping Ltd. v Transfield Shipping Inc (MV Johnny K) [2006] EWHC 134 (Comm) :*** see also ***Ocean Marine Navigation Ltd. v Koch Carbon Inc [2003] EWHC 1936 (Comm)*** : Per Mr Justice Simon.

[104] ***Glencore Grain Ltd. v Goldbeam Shipping Inc. [2002] EWHC 27 (Comm)***

[105] See ***William John Dolan t/a WJ Dolan Construction v Northern Ireland Housing Executive (2000) 2044*** per Gillen J.

[106] ***Petroships Pte Ltd Singapore v. Petec Trading & Investment Corp Vietnam [2001] EWHC Comm 418 :*** See also supra p4 ***Arbitral Tribunals and Reasons***.

[107] ***North Range Shipping Ltd v Seatrans Shipping Corporation [2001] EWCA Civ 1260 .*** court doubted right of CA to over-rule trial judge on right to appeal. Clarke LJ; Kay LJ.

reverting to the interests of the parties. However, from the parties perspective there is also the added consideration of "*some other special reason.*" *In* ***Henry Boot v Malmaison [2000]***,[108] the High court refused leave to appeal a refusal to challenge under s69. An appeal against the refusal was also denied, both because an appeal was not justified in the circumstances and further on the grounds that the CA has no jurisdiction to grant an appeal against a refusal to grant a certificate allowing appeal. The basic rule is that a party has one chance to appeal, not multiple opportunities.

Clause 69 Appeal on Point of Law. DAC 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.

286. In these circumstances what we propose is a right to apply to the Court to decide a point of law arising out of an award. This right is limited, however, in several ways.

- *i. The point of law must substantially affect the rights of one or more of the parties. This limitation exists, of course, in our present law.*
- *ii. The point of law must be one that was raised before the tribunal. The responses showed that in some cases applications for leave to appeal have been made and granted on the basis that an examination of the reasons for the award shows an error on a point of law that was not raised or debated in the arbitration. This method of proceeding has echoes of the old and long discarded common law rules relating to error of law on the face of the award, and is in our view a retrograde step. In our view the right to appeal should be limited us we suggest.*
- *iii. There have been attempts, both before and after the enactment of the Arbitration Act 1979, to dress up questions of fact as questions of law and by that means to seek an appeal on the tribunal's decision on the facts. Generally these attempts have been resisted by the Courts, but to make the position clear, we propose to state expressly that consideration by the Court of the suggested question of law is made on the basis of the findings of fact in the award.*
- *iv. We have attempted to express in this Clause the limits put on the right to appeal by the House of Lords in* ***Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)*** *[1982] AC 724.*

287. With respect to the last point, we think it is very important to do this. Many of those abroad who do not have ready access to our case law were unaware that the Arbitration Act 1979 had been construed by the House of Lords in a way that very much limited the right of appeal, and which was not evident from the words of the Act themselves.

288. The test we propose is whether, in the ordinary case, the Court is satisfied that the decision of the tribunal is obviously wrong. The right of appeal is only available for such cases, for the reasons discussed above. Where the matter is one of general public importance, the test is less onerous, but the decision must still be open to serious doubt.

289. We propose a further test, namely whether, 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.

[108] ***Henry Boot Construction (UK) Ltd v Malmaison Hotel Ltd [2000] EWCA Civ 175*** **per** Swinton Thomas LJ Waller LJ Mrs Justice Arden.

290. *We have been asked why we suggest this addition. The reason is that we think it desirable that this factor should be specifically addressed by the Court when it is considering an application. It seems to us to be the basis on which the House of Lords acted as it did in* ***The Nema*** *op. cit.. The Court should be satisfied that justice dictates that there should be an appeal; and in considering what justice requires, the fact that the parties have agreed to arbitrate rather than litigate is an important and powerful factor.*

291. *It will be noted that we have included a provision that the Court should determine an application without a hearing unless it appears to the Court that a hearing is required. This again reflects what was said in* ***The Nema*** *op. cit. about the tendency for applications for leave being turned into long and expensive court hearings. In our view, the tests for leave (ie obviously wrong or open to serious doubt) are such that in most cases the Court will be able to decide whether to allow or reject the application on written material alone.*

292. *Finally, a question has been raised as to whether an agreement in advance of the proceedings (ie contained in an arbitration clause or in the underlying contract) would satisfy Clause 69(2) (a). The Clause is intended to encompass such agreements, and in our view it plainly does so since the word agreement is not qualified. However, such an agreement will not automatically allow an appeal unless it complies with the other conditions set out in Clause 69 and 70.*

S70 Arbitration Act 1996. Challenge or appeal: supplementary provisions.

70(1) The following provisions apply to an application or appeal under section 67, 68 or 69.

70(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted-

(a) any available arbitral process of appeal or review, and

(b) any available recourse under section 57 (correction of award or additional award).

70(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

70(4) If on an application or appeal it appears to the court that the award-

(a) does not contain the tribunal's reasons, or

(b) does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal,

the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

70(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

70(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

The power to order security for costs shall not be exercised on the ground that the applicant or appellant is-

(a) an individual ordinarily resident outside the United Kingdom, or

(b) 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.

70(7) 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 appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

70(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).

This does not affect the general discretion of the court to grant leave subject to conditions.

Section 70 Challenge or Appeal: Supplementary Provisions DAC 1997.

36. *In Paragraph 380 of Chapter 6 we suggested that the power to order security or that the amount of the award be brought into Court should be extended so as to apply to applications and appeals under what is now Section 69, as well as what are now Sections 67 and 68. This suggestion was adopted and the appropriate amendments made to Section 70.*

37. *Subsection 70(6) (security for costs) was further amended in order to bring this provision into line with the amended Section 38(3), which has been referred to above.*

S71 Arbitration Act 1996 : Challenge or appeal: effect of order of court.

71(1) *The following provisions have effect where the court makes an order under section 67, 68 or 69 with respect to an award.*

71(2) *Where the award is varied, the variation has effect as part of the tribunal's award.*

71(3) *Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.*

71(4) *Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award.*

Article 16. Model Law. Competence of arbitral tribunal to rule on its jurisdiction

(*1*) *The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the con-tract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

(2) *A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitration A plea that the arbitral tribunal is exceeding the scope of its. authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.*

(3) *The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.*

Article 34. Model Law. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it Or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the par-ties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the patty making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside

S72 Arbitration Act 1996 : Miscellaneous Saving for rights of person who takes no part in proceedings.

72(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question-

(a) whether there is a valid arbitration agreement,

(b) whether the tribunal is properly constituted, or

(c) what matters have been submitted to arbitration in accordance with the arbitration agreement,

by proceedings in the court for a declaration or injunction or other appropriate relief.

72(2) He also has the same right as a party to the arbitral proceedings to challenge an award-

(a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or

(b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him;

and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.

S73 Arbitration Act 1996 : Loss of right to object.

73(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection-

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings,

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

73(2) Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling-

(a) by any available arbitral process of appeal or review, or

(b) by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.

Article 4. Model Law : Waiver of right to reject.

A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his fight to object.

Clause 73 Loss of Right to Object : DAC 1996.

297. Recalcitrant parties or those who have had an award made against them often seek to delay proceedings or to avoid honouring the award by raising points on jurisdiction etc which they have been saving up for this purpose or which they could and should have discovered and raised at an earlier stage. Article 4 of the Model Law contains some provisions designed to combat this sort of behaviour (which does the efficiency of arbitration as a form of dispute resolution no good) & we have attempted to address the same point in this Clause. In particular, unlike the Model Law, we have required a party to arbitration proceedings who has taken part or continued to take part without raising the objection in due time, to show that at that stage he neither knew nor could with reasonable diligence have discovered the grounds for his objection (the latter being an important modification to the Model Law, without which one would have to demonstrate actual knowledge, which may be virtually impossible to do). It seems to us that this is preferable to requiring the innocent party to prove the opposite, which for obvious reasons it might be difficult or impossible to do.

298. For the reasons explained when considering Clause 72, the provision under discussion cannot, of course, be applied to a party who has chosen to play no part at all in the arbitral proceedings.

ADDITIONAL READING

Arbitration Law : Keren & Andrew Tweeddale. Chapter 12.Challenging the Award.

Law & Practice of International Commercial Arbitration. Redfern & Hunter. Chapter 9. Challenge of Arbitral Awards.

Self assessment exercise

1. Evaluate the grounds under s68 for challenging an arbitral award.
2. To what extent, if at all, do you consider that the facility to appeal an arbitral award on a point of law detracts from the concept of finality in arbitration?
3. Emanuelle had a wedding dress made for her by Fergie. The contract was subject to binding and final arbitration. The wedding dress looked more like a helicopter than an elegant outfit and Emanuelle took the dispute to arbitration. The arbitrator, Flight Lieutenant Haviland found that the dress was very stylish and found in favour of Fergie. Emanuelle, horrified at the outcome wishes to appeal. Advise her.

MISCELLANEOUS AND SUPPLEMENTARY PROVISIONS

The following miscellaneous and supplemental provisions regarding arbitral proceedings are not strictly about challenging or enforcing an award, but are set out here since they follow on directly and seamlessly in the Arbitration Act 1996 from those provisions.

S74 Arbitration Act 1996 : Immunity of arbitral institutions, &c.

74(1) *An arbitral or other institution or person designated or requested by the parties to appoint or nominate an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of that function unless the act or omission is shown to have been in bad faith.*

74(2) *An arbitral or other institution or person by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated him, for anything done or omitted by the arbitrator (or his employees or agents) in the discharge or purported discharge of his functions as arbitrator.*

74(3) *The above provisions apply to an employee or agent of an arbitral or other institution or person as they apply to the institution or person himself.*

Clause 74 Immunity of arbitral Institutions etc.

299. *In this mandatory provision we have provided institutions and individuals who appoint arbitrators with a degree of immunity.*

300. *The reason for this proposal is that without such an immunity, there is in our view a real risk that attempts will be made to hold institutions or individuals responsible for the consequences of their exercise of the power they may be given to appoint or nominate arbitrators, or for what their appointed or nominate arbitrators then do or fail to do. This would provide a means of reopening matters that were referred to arbitration, something that might be encouraged if arbitrators were given immunity (as we have also proposed in Clause 29) but nothing was said about such institutions or individuals.*

301. *There is an additional point of great importance. Many organisations that provide arbitration services, including Trade Associations as well as bodies whose sole function it is to provide arbitration services, do not in the nature of things have deep pockets. Indeed much of the work is done by volunteers simply in order to promote and help this form of dispute resolution. Such organisations could find it difficult if not impossible to finance the cost of defending legal proceedings or even the cost of insurance against such cost. In our view the benefits which these organisations (and indeed individuals) have on arbitration generally fully justify giving them a measure of protection so that their good work can continue.*

Section 74 Immunity of Arbitral Tribunals etc. DAC 1997

38. *In Paragraph 381 of Chapter 6 we suggested tightening the wording of subsection 2. This suggestion was adopted by inserting into this subsection after the word "liable" the words "by reason of having appointed or nominated him." Without this amendment it could have been suggested that an immunity existed even where, for example, an institution conspired with an arbitrator to act partially.*

S75 Arbitration Act 1996. Charge to secure payment of solicitors' costs.

75. *The powers of the court to make declarations and orders under section 73 of the Solicitors Act 1974 or Article 71H of the Solicitors (Northern Ireland) Order 1976 (power to charge property recovered in the proceedings with the payment of solicitors' costs) may be exercised in relation to arbitral proceedings as if those proceedings were proceedings in the court.*

Clause 75 Charge to secure payment of Solicitors' costs

302. *This is a technical provision designed to maintain the present position.*

S76 Arbitration Act 1996 : Supplementary Service of notices, &c.

76(1) *The parties are free to agree on the manner of service of any notice or other document required or authorised to be given or served in pursuance of the arbitration agreement or for the purposes of the arbitral proceedings.*

76(2) *If or to the extent that there is no such agreement the following provisions apply.*

76(3) *A notice or other document may be served on a person by any effective means.*

76(4) *If a notice or other document is addressed, pre-paid and delivered by post-*

(a) *to the addressee's last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or*

(b) *where the addressee is a body corporate, to the body's registered or principal office,*

it shall be treated as effectively served.

76(5) *This section does not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.*

76(6) *References in this Part to a notice or other document include any form of communication in writing and references to giving or serving a notice or other document shall be construed accordingly.*

Article 3 Model Law : Receipt of written communications

3(1) *Unless otherwise agreed by the parties:*

(a) *any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after mailing a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;*

(b) *the communication is deemed to have been received on the day it is so delivered.*

3(2) *The provisions of this article do not apply to communications in court proceedings.*

Clause 76 Service of Notices etc. DAC 1996.

303. *The subject matter of this Clause was touched on in the MacKinnon Report which led to the Arbitration Act 1934, but at that time no action was taken.*

304. *In this Clause we have attempted to do three things.*

i. *We have stipulated that the parties can agree on how service of notices and other documents can be done.*

ii. *We have made clear that in the absence of agreement, service by any effective means will suffice.*

iii. *We have provided in sub-section (4) an option which can best be described as a `fail-safe' method, which a party may employ if he wishes, for example if he is not sure that other methods will be effective. We should emphasize that this fail safe method is not a compulsory or preferred method for service, but merely a means which, if employed, will be treated as effective.*

305. *These provisions do not apply in respect of service in Court proceedings, for the obvious reason that such service must comply with the rules of the Court concerned.*

Section 76 Service of Notices etc. DAC 1997

39. *Some minor textual amendments were made to the Bill as introduced, in order to tie this provision with others concerning the giving of notices.*

S77 Arbitration Act 1996 : Powers of court in relation to service of documents.

77(1) *This section applies where service of a document on a person in the manner agreed by the parties, or in accordance with provisions of section 76 having effect in default of agreement, is not reasonably practicable.*

77(2) *Unless otherwise agreed by the parties, the court may make such order as it thinks fit-*
- *(a) for service in such manner as the court may direct, or*
- *(b) dispensing with service of the document.*

77(3) *Any party to the arbitration agreement may apply for an order, but only after exhausting any available arbitral process for resolving the matter.*

77(4) *The leave of the court is required for any appeal from a decision of the court under this section.*

Clause 77 Powers of Court in relation to service of documents DAC 1996.

306. In this Clause we have given the Court powers to support the arbitral process so that it is not delayed or frustrated through difficulties over service. In the nature of human affairs, it is sadly the case that potential respondents to arbitration proceedings quite often go to considerable lengths to avoid service and thus to achieve this state of affairs, by making normal methods difficult or even impossible to use effectively. This Clause should, in appropriate cases, help to deal with such cases.

Section 77 Powers of Court in Relation to Service of Documents DAC 1997

40. What was subsection (5) of Clause 77 in the Bill as introduced was deleted on amendment as being unnecessary. The point was already covered by Section 76(6).

S78 Arbitration Act 1996 : Reckoning periods of time.

78(1) *The parties are free to agree on the method of reckoning periods of time for the purposes of any provision agreed by them or any provision of this Part having effect in default of such agreement.*

78(2) *If or to the extent there is no such agreement, periods of time shall be reckoned in accordance with the following provisions.*

78(3) *Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.*

78(4) *Where the act is required to be done a specified number of clear days after a specified date, at least that number of days must intervene between the day on which the act is done and that date.*

78(5) *Where the period is a period of seven days or less which would include a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded.*
In relation to England and Wales or Northern Ireland, a "public holiday" means Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday.

Clause 78 Reckoning Periods of Time

307. In our view it would be of great assistance to set out a code to deal with the reckoning of time, thus avoiding the need to refer to other sources. Hence this provision.

S79 Arbitration Act 1996 : Power of court to extend time limits relating to arbitral proceedings.

79(1) *Unless the parties otherwise agree, the court may by order extend any time limit agreed by them in relation to any matter relating to the arbitral proceedings or specified in any provision of this Part having effect in default of such agreement.*
This section does not apply to a time limit to which section 12 applies (power of court to extend time for beginning arbitral proceedings, &c.).

79(2) *An application for an order may be made-*
- *(a) by any party to the arbitral proceedings (upon notice to the other parties and to the tribunal), or*
- *(b) by the arbitral tribunal (upon notice to the parties).*

79(3) *The court shall not exercise its power to extend a time limit unless it is satisfied-*
- *(a) that any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted, and*
- *(b) that a substantial injustice would otherwise be done.*

79(4) *The court's power under this section may be exercised whether or not the time has already expired.*

79(5) *An order under this section may be made on such terms as the court thinks fit.*

79(6) *The leave of the court is required for any appeal from a decision of the court under this section.*

Clause 79 Power of Court to extend time limits relating to arbitral Proceedings

308. *Here we propose that the Court should have a general right to extend time limits, except time limits for starting an arbitration, which is dealt with specifically in Clause 12. We propose that the wording of the Clause be clarified as set out in Chapter 6 below.*

309. *This power is limited in the ways set out in this Clause. In particular, no extension will be granted unless a substantial injustice would otherwise be done and any arbitral process for obtaining an extension must first be exhausted. As we have said in other contexts, it would be a rare case indeed where we would expect the Court to grant an extension where such has not been obtained through that process. With these limitations we take the view that this provision can properly be described as supporting the arbitral process.*

Section 79 Power of Court to Extend Time Limits Relating to Arbitral Proceedings

41. *In Paragraph 382 of Chapter 6 we noted that this provision did not cover cases where the time stipulated was not one having effect in default of agreement between the parties eg what is now Section 70(3). We suggested an amendment to what is now Section 79(1). This suggestion was not adopted, but the point was covered by adding the words " the extending or abridging of periods " to what is now Section 80(5).*

S80 Arbitration Act 1996 : Notice and other requirements in connection with legal proceedings.

80(1) *References in this Part to an application, appeal or other step in relation to legal proceedings being taken "upon notice" to the other parties to the arbitral proceedings, or to the tribunal, are to such notice of the originating process as is required by rules of court and do not impose any separate requirement.*

80(2) *Rules of court shall be made-*
- *(a) requiring such notice to be given as indicated by any provision of this Part, and*
- *(b) as to the manner, form and content of any such notice.*

80(3) *Subject to any provision made by rules of court, a requirement to give notice to the tribunal of legal proceedings shall be construed-*
- *(a) if there is more than one arbitrator, as a requirement to give notice to each of them; and*
- *(b) if the tribunal is not fully constituted, as a requirement to give notice to any arbitrator who has been appointed.*

80(4) *References in this Part to making an application or appeal to the court within a specified period are to the issue within that period of the appropriate originating process in accordance with rules of court.*

80(5) *Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement.*

80(6) *Provision may be made by rules of court amending the provisions of this Part-*

(a) *with respect to the time within which any application or appeal to the court must be made,*

(b) *so as to keep any provision made by this Part in relation to arbitral proceedings in step with the corresponding provision of rules of court applying in relation to proceedings in the court, or*

(c) *so as to keep any provision made by this Part in relation to legal proceedings in step with the corresponding provision of rules of court applying generally in relation to proceedings in the court.*

80(7) *Nothing in this section affects the generality of the power to make rules of court.*

Clause 80 Notice and other Requirements in connection with legal Proceedings

310. *Legal proceedings must of course be subject to the rules of the Court concerned. We have made clear, therefore, that where the Bill provides for notice of legal proceedings to be given to others, this is a reference to such rules as the Court concerned may make; and is not a separate requirement over and above those rules.*

Section 80 DAC 1997

42. *The word "appeal" was added by amendment to this provision, so it would cover appeals as well as applications.*

43. *A minor change was also made to subsection (5) (insertion of the words "the extending or abridging of periods") in order to tie this provision in with relevant Rules of Court.*

S81 Arbitration Act 1996 : Saving for certain matters governed by common law.

81(1) *Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to-*

(a) *matters which are not capable of settlement by arbitration;*

(b) *the effect of an oral arbitration agreement; or*

(c) *the refusal of recognition or enforcement of an arbitral award on grounds of public policy.*

81(2) *Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award.*

Clause 81 Saving for certain Matters governed by Common Law

311. *As we have stated earlier, and as was stated in the Mustill Report, it would be neither practicable nor desirable to attempt to codify the whole of our arbitration law. Hence ss(1) & (2) of this Clause.*

312. *It was suggested to us that a provision preserving the common law would enable arguments to be raised and accepted which were contrary to the spirit and intent of the Bill. We do not think that this will happen, in view of the opening words of the Clause and indeed the statements of principle in Clause 1. Equally, it seems to us to be necessary to make clear that the common law (so far as it is consistent with the Bill) will continue to make its great contribution to our arbitration law, a contribution that has done much to create and preserve the world wide popularity of arbitration in our country.*

313. *Sub-section (3) is technically necessary to make clear that the repeal of the existing statutes does not have the effect of reviving the common law rules relating to errors on the face of the award.*

Section 81 Saving for Certain Matters Governed by Common Law DAC 1997

44. In Paras 383 to 386 of Chapter 6 we made a number of suggestions. First we suggested a reference to privacy and confidentiality. This suggestion was not adopted, since we finally concluded (especially as the law on this topic is in a stage of development) that it would be better to have no express reference at all, and to rely instead as necessary on the general opening words of this Section. The second suggestion (namely an express reference to whether a matter is capable of resolution by arbitration) was adopted and the words "matters which are not capable of settlement by arbitration" added by amendment. We also suggested changing the words "common law" in the title, but were persuaded that this was not really necessary.

S82 Arbitration Act 1996 : Minor definitions.

82.(1) In this Part-

*"**arbitrator**", unless the context otherwise requires, includes an umpire;*

*"**available arbitral process**", in relation to any matter, includes any process of appeal to or review by an arbitral or other institution or person vested by the parties with powers in relation to that matter;*

*"**claimant**", unless the context otherwise requires, includes a counter claimant, and related expressions shall be construed accordingly;*

*"**dispute**" includes any difference;*

*"**enactment**" includes an enactment contained in Northern Ireland legislation;*

*"**legal proceedings**" means civil proceedings in the High Court or a county court;*

*"**peremptory order**" means an order made under section 41(5) or made in exercise of any corresponding power conferred by the parties;*

*"**premises**" includes land, buildings, moveable structures, vehicles, vessels, aircraft and hovercraft;*

*"**question of law**" means-*

(a) for a court in England and Wales, a question of the law of England and Wales, and

(b) for a court in Northern Ireland, a question of the law of Northern Ireland;

*"**substantive jurisdiction**", in relation to an arbitral tribunal, refers to the matters specified in section 30(1)(a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.*

82(2) References in this Part to a party to an arbitration agreement include any person claiming under or through a party to the agreement.

S83 Arbitration Act 1996 : Index of defined expressions: Part I.

83. In this Part the expressions listed below are defined or otherwise explained by the provisions indicated-

agreement, agree and agreed	*section 5(1)*
agreement in writing	*section 5(2) to (5)*
arbitration agreement	*sections 6 and 5(1)*
arbitrator	*section 82(1)*
available arbitral process	*section 82(1)*
claimant	*section 82(1)*
commencement (in relation to arbitral proceedings)	*section 14*
costs of the arbitration	*section 59*
the court	*section 105*
dispute	*section 82(1)*
enactment	*section 82(1)*
legal proceedings	*section 82(1)*
Limitation Acts	*section 13(4)*

notice (or other document)	*section 76(6)*
party- - in relation to an arbitration agreement	*section 82(2)*
- where section 106(2) or (3) applies	*section 106(4)*
peremptory order	*section 82(1) (and see section 41(5))*
premises	*section 82(1)*
question of law	*section 82(1)*
recoverable costs	*sections 63 and 64*
seat of the arbitration	*section 3*
serve and service (of notice or other document)	*section 76(6)*
substantive jurisdiction (in relation to an arbitral tribunal)	*section 82(1) (& see s30(1)(a) to (c))*
upon notice (to the parties or the tribunal)	*section 80*
written and in writing	*section 5(6)*

Clause 82 Minor Definitions & Clause 83 Index of defined Expressions: Part 1. DAC 1996.

314. The first of these Clauses provides the definition of words and phrases which are often repeated in the body of the Bill, so that repetition of the meaning is avoided, as well as providing a ready means of discovering the meaning of certain important words and phrases. The second of these Clauses is also designed to help the reader by identifying the place where other important words and phrases are defined or explained.

Sections 82 to 83 Minor Definitions DAC 1997.

*45. In Paragraphs 387 and 388 of Chapter 6 we raised a point of drafting on the definition of "**question of law.**" This was dealt with by deleting the words "where the seat of the arbitration is" and inserting in their place the words `**for a court**."*

*46. Further minor amendments were made to Sections 82 and 83 in the light of the new Section 105 that was added (meaning of "**court**").*

The technique of employing a definitions section for the whole of Part I ensures that it is not possible to argue different meanings for the terms in different sections, thereby complicating the law.

S84 Arbitration Act 1996 : Transitional provisions.

84(1) The provisions of this Part do not apply to arbitral proceedings commenced before the date on which this Part comes into force.

84(2) They apply to arbitral proceedings commenced on or after that date under an arbitration agreement whenever made.

84(3) The above provisions have effect subject to any transitional provision made by an order under section 109(2) (power to include transitional provisions in commencement order).

Clause 84 Transitional Provisions

315. This Clause sets out the general proposition, namely that the Bill will apply to arbitral proceedings commenced after the legislation comes into force, whenever the arbitration agreement is made. There are respectable precedents for this, since the Arbitration Acts 1889, and 1934 contained a like provision. The 1950 Act, of course, was not a precedent, since this was a consolidating measure. We consider this to be a useful provision, since some arbitration agreements have a very long life indeed (for example, rent review arbitration agreements under leases) and it would be most unsatisfactory if the existing law and the proposed legislation were to run in parallel (if that is the right expression) indefinitely into the future.

316. Reference should also be made to Clause 111 .

PART IV : CHALLENGING NEW YORK CONVENTION AWARDS.

Introduction

The recognition of, enforcement of and challenge to foreign arbitration awards is dealt with by a distinct and separate part of the Arbitration Act 1996 which specifically reincorporates the Arbitration Act 1979 provisions on the incorporation of the New York Convention into English Law. The mere fact that an award is in respect of an international dispute will not be sufficient. Where the award was governed by English Law and jurisdiction s66 applies.

An arbitral award will not be enforced if the arbitration agreement was not in writing, which is more stringent than the requirement under s5 of the Act that for the Act to apply the agreement must be in writing, though that fact will not render the award unenforceable at law.

Whilst of limited importance today, it should also be noted that s99 Arbitration Act 1996 states that *"Part II of the Arbitration Act 1950 (enforcement of certain foreign awards) continues to apply in relation to foreign awards within the meaning of that Part which are not also New York Convention awards."*

The primary remit of Part III of the Arbitration Act 1996 is the recognition of foreign arbitral awards, but for present purposes this includes provisions for the refusal of recognition and thus provides an effective mechanism for a challenge to the enforcement of a foreign award.

Recognition and enforcement of New York Convention awards

New York Convention awards.

*100(1) In this Part a "**New York Convention award**" means an award made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.*

100(2) For the purposes of subsection (1) and of the provisions of this Part relating to such awards-

*(a) "**arbitration agreement**" means an arbitration agreement in writing, and*

(b) an award shall be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties.

*In this subsection "**agreement in writing**" and "**seat of the arbitration**" have the same meaning as in Part I.*

100(3) If Her Majesty by Order in Council declares that a state specified in the Order is a party to the New York Convention, or is a party in respect of any territory so specified, the Order shall, while in force, be conclusive evidence of that fact.

*100(4) In this section "**the New York Convention**" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.*

Section 100(2) New York Convention Awards DAC 1997.

58. In Paragraph 392 of Chapter 6, we recommended that this provision be amended so as to cross-refer to the definition of writing to be found in Part I of the Act, and also to incorporate our recommendation that an award be treated as made at the seat of the arbitration, regardless of where it was signed, despatched or delivered to any of the parties. This recommendation was adopted.

Mixing domestic arbitration and international arbitration law : the old & new regimes.

The CA held that an award was 'made' for the purposes of s 7(1) Arbitration Act 1975 Act when and where it was perfected, which was where it was signed, in the absence of anything in the arbitration agreement or the rules under which the arbitration was conducted, requiring some further formality in ***Hiscox v Outhwaite [1991].***[109] The award was signed and dated in Paris. It was made in Paris and was accordingly a Convention award. Where an English court was both the curial court and the enforcing court the High Court remained capable of exercising its curial jurisdiction over the arbitration and of adjourning, if it thought fit, any decision on the enforceability of the award until the pending proceedings for review had been determined. On appeal the House of Lords in ***Hiscox v Outhwaite (No 1) [1991].***[110] noted that whilst the hearing had been held in London where the award was also drafted it was in fact signed in Paris. Where then is an arbitration award '*made*' for the purposes of s7(1) Arbitration Act 1975? The House confirmed that this was Paris and the award was accordingly a Convention Award. This however led to the further question as to what extent, if at all, do the Arbitration Acts 1950 and 1979 apply to a Convention Award where the procedural law of the arbitration is that of England & Wales and thus whether or not the appellant was estopped by his conduct from raising either point ? The court concluded that the High Court had jurisdiction to exercise supervisory powers over conduct of the arbitral proceedings. Compare now s100(2)(b) which avoids this conundrum since the seat is the governing factor.

Under the Arbitration Act 1996, the crucial factor, where English procedural law applies, is the seat of the arbitration. Thus under the 1996 Act if the seat of a tribunal is England it would result in a domestic award, and the English Court would not apply the New York Convention, though a foreign court might if the parties were from differing states. Conversely, if France was the seat it would be a foreign award subject to New York Convention enforcement proceedings before the English court.

Recognition and enforcement of awards.

101(1) A New York Convention award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland.

101(2) A New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

As to the meaning of "the court" see section 105.

101(3) Where leave is so given, judgment may be entered in terms of the award.

Section 101(2) New York Convention Awards DAC 1997.

59. A minor textual amendment was made to Section 101(2), in order to refer to the new Section 105, that was added.

Evidence to be produced by party seeking recognition or enforcement.

102(1) A party seeking the recognition or enforcement of a New York Convention award must produce-

(a) the duly authenticated original award or a duly certified copy of it, and

(b) the original arbitration agreement or a duly certified copy of it.

102(2) If the award or agreement is in a foreign language, the party must also produce a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

[109] ***Hiscox v Outhwaite (No 1) [1991] 3 All ER 124.*** before Donaldson MR; McCowan LJ : Leggatt LJ. 11th March 1991

[110] ***Hiscox v Outhwaite (No 1) [1991] 3 All ER 641.*** before Lords Mackay : Keith; Brandon ; Ackner ; Oliver. 24th July 1991

Refusal of recognition or enforcement.

Challenging the Award.

The challenge under s103 takes a negative form in that as opposed to setting aside an award or declaring that it is invalid the court simply refuses to recognise or enforce it. The consequence is broadly the same but achieved by other means. However, whilst a decision to set aside an award by a competent authority of the country in which of under the law of which it was made would render the award completely unenforceable, a refusal to recognise an award by the court of one state would not prevent a party seeking to enforce the award in another jurisdiction (s103(2)(f). Thus where the losing party has funds in more than one country an applicant could seek enforcement sequentially in more than one jurisdiction until the award had been satisfied.

Refusal of recognition or enforcement.

103(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

103(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves-

- *(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;*
- *(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;*
- *(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;*
- *(d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));*
- *(e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;*
- *(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.*

103(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.

103(4) An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

103(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award. It may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.

Clause 103 New York Convention Awards DAC 1996

392. For the reasons set out in our discussion in Chapter 3, this Clause should be amended so as to cross-refer to the definition of writing to be found in Part I of the Bill, and should also incorporate the recommendation that an award should be treated as made at the seat of the arbitration, regardless of where it was signed, dispatched or delivered to any of the parties.

This is not an appeal mechanism. A party wishing to appeal the award must do so before the courts of the state where the seat of the arbitration is located. Thus an error of law is not included as a s103 ground to resist enforcement, but if the court of the arbitral seat sets aside an award a foreign court governed by the Convention no longer has jurisdiction to enforce the award. However, as noted above, since another foreign

court (i.e. not the court of the seat of the tribunal) rules against enforcement (as opposed to setting aside the award which it would not have the power to do) for whatever reason, that would not preclude an action for enforcement before a court of another Convention state. In ***Yukos Oil v Dardana [2001]*** [111] Tuckey LJ confirmed that the reasons for resisting a New York Award are contained exclusively in s103. There is no room for introducing additional grounds.

The New York Convention provisions are permissive not mandatory in the UK.
Subsections 103(2) and (3) both state that "*Recognition or enforcement of the award **may** be refused…"* it does not require refusal. Thus the discretion of the court is established, which can lead to differing outcomes before different courts.

Natural justices challenges.

Audi alterem partyem : the right to take an active part in a trial applies equally to New York Convention awards. Accordingly in ***Kanoria v Guinness [2006]*** [112] the court declined to enforce an award in circumstances where a party had not been notified of the arbitration, depriving him of the opportunity to defend himself. By contrast in ***Minmetals v Ferco*** *[1999]* [113] there was an unsuccessful attempt to set aside order to enforce two Chinese Arbitral Awards. The applicant's assertions that they had had no opportunity to put their case on a particular issue not accepted by the court, which held that they had simply failed to take up the opportunity to pursue the matter. They were not prevented from doing so.

Nemo Iudex in Causa Sua : Bias : the basic rule that an adjudicator should have no interest in the dispute and should act in an unbiased manner, whilst of universal recognition and can taint a New York or any other award, nonetheless whether the parties have appointed a tribunal knowing of its connections it is more problematical to establish bias. Thus in ***Irvani v Irvani*** [2000] [114] an application to set aside award was only partially successful in an appeal against a 1st Instance judgement that had upheld the award. Two brothers had appointed their sister as arbitrator. The court found against certain aspects of the award on the grounds of breach of the rules of natural justice, but nonetheless remitted the award back to the arbitrator for further deliberations.

Breaches of the rules of due process : Whilst challenges for breaches of rules of engagement are not uncommon, the English courts have been slow to refuse enforcement on such grounds, as demonstrated by the following cases : -

China Agribusiness v Balli Trading (1997).[115] This enforcement action was resisted on the grounds that the arbitration rules had been changed. Whilst this was true, as is common in many arbitral clauses, there was an agreement to use the rules or successor rules, and accordingly there was no reason to refuse enforcement of this CIETAC award.

General Construction v Aegon Insurance [1997]. [116] The question here concerned whether or not a paper only arbitration procedure was satisfactory under the Law of Mauritius and resulted in a enforceable award. The court upheld the award.

Tongyuan v Uni-Clan (2001). [117] Here a New York Convention award enforcement application was resisted on the grounds that there had been a change of venue for the arbitration. The court found that no prejudice had been caused by this change and further found that despite the fact that the award took an unusual format this did not afford grounds to refuse enforcement.

[111] ***Yukos Oil Company v Dardana Ltd [2001] EWCA Civ 1077.*** Tuckey LJ. However, see later regarding State Immunity
[112] ***Kanoria v Guinness [2006] EWCA Civ 222.*** before Lord Phillips. Sir Anthony Clarke. May LJ 21st February 2006.
[113] ***Minmetals Germany GmbH v. Ferco Steel Ltd*** [1999] C.L.C. 647. Colman J.
[114] ***Irvani v Irvani [2000] 1 Lloyd's Rep 412*** : CA. before Nourse J, Buxton LJJ, Ferris J. 9th December 1999.
[115] ***China Agribusiness development Corp v Balli Trading (1997) Lawtel AC7100112.*** Before Longmore J. Commercial Court. 20th January 1997
[116] ***General Construction Ltd v Aegon Insurance Co (UK) Ltd [1997] EWHC TCC 368.*** HHJ. Bowsher. 21st May 1997.
[117] ***Tongyuan (USA) International trading Group v Uni-Clan Ltd (2001) Lawtel AC0100770 :*** Before Moore-Bick J Commercial Court. 19th January 2001

Personality challenge

Svenska v Lithuania [2005].[118] Lithuania took part in an arbitration in Denmark. They objected to jurisdiction. The tribunal made a preliminary ruling in favour of jurisdiction which Lithuania did not object to. The successful claimants secured an enforcement judgement in England. Lithuania sought here to set aside enforcement on the grounds of State Immunity. The court held that whilst in usual circumstances this would amount to an issue estoppel, evidence that the tribunal's determination was not final and binding under Danish Law meant Lithuania could still rely on state immunity.

Norsk Hydro v Ukraine [2002]. [119] **S100 AA 1996 : Set aside orders.** Application to set aside two court orders. Swedish Arbitral award. Order for enforcement of foreign award. Interim third party debt order. Order set aside – made against the wrong legal personality.

Public policy challenges.

Illegality under domestic and or foreign law. It is a longstanding rule of public policy that the courts will not, under the guise of contract, sanction what would amount to illegality, fraud or other wrongdoing such as blackmail, coercion or duress in the UK or the EC, [120] whether the conduct took place in the UK or elsewhere, conduct of a kind essentially lawful in the UK but illegal abroad (e.g. usury in Islamic States) excepted.[121] ***Omnium v Hilmarton [1999].*** [122] is a case in point. Hilmarton had acted as a lobbyist in Algeria. Algerian statute prohibits the intervention of a middleman in connection with any Public Contract or agreement within the ambit of foreign trade. However, such activity would be lawful in Switzerland which was the seat of the tribunal and the tribunal, having determined that no bribery had been established, determined that the lobbying contract was enforceable under Swiss Law. Omnium had paid the first installment of commission but had then sought to evade liability for the second installment. The tribunal awarded damages for breach. The English Court enforced the award.

By contrast foreign tax evasion, whilst the subject of foreign law, would be an offence in the UK if UK tax law was evaded. Thus in ***Soleimany v Soleimany [1998]*** [123] it was held that an English Court will not enforce an award that involves enforcing an illegal contract, whether that illegality arise out of English Law or the law of a friendly foreign country. A father and son had been engaged in the illegal export of carpets from Iran, with the objective of evading tax laws. Whilst a Beth Din arbitral court in London ignored the illegality during the course of the resultant award, the English Court declined enforcement.

On the other hand, the court will be quick to identify late allegations of fraud or illegality, where the issue was not raised during the arbitral proceedings and the other party had had no opportunity to address the matter. Thus in ***Daad Sharab v Usama Salfiti [1996].***[124] A late attempt to resist enforcement of an award in relation to agency commissions by introducing new evidence that the commercial activities of an agent were allegedly considered to be conduct categarised as illegal "mediation" in Libya were resisted by the court.

A mere allegation of fraud is insufficient, even to establish a stay of an enforcement action as demonstrated by ***Billadean v Snamprogetti [1997].*** [125] which concerned an appeal under s3 Arbitration Act 1950 against a refusal to stay enforcement of two New York Awards on policy grounds, namely fraud and no actionable case to enforce by arbitration. The CA held that both issues had already addressed adequately at first

[118] ***Svenska Petroleum Exploration AB v Government of the Republic of Lithuania [2005] EWHC 9 (Comm).*** Nigel Teare QC 11th January 2005.

[119] ***Norsk Hydro ASA v State Property Fund of Ukraine [2002] EWHC 2120 (Comm) :*** Gross Mr Justice. Commercial Court. 18th October 2002

[120] ***Eco Swiss China Time (Competition) [1999] EUECJ C-126/97*** **:** Before Iglesias, President. Where a domestic court would set aside an award for policy reasons – it should likewise for policy reasons regarding breach of EU law.

[121] ***Soinco SACI v Novokuznetsk Aluminium Plant [1997] EWCA Civ 3014 :*** Whilst unenforceable in Russia – there was nothing against English Policy to convince the court that a New York award should not be enforced. CA on appeal from Mr Justice Butterfield before Phillips LJ; Waller LJ; Chadwick LJ. 16th December 1997

[122] ***Omnium de Traitement et de valorisation. v. Hilmarton Ltd [1999] 2 Lloyd's Rep 222:*** Before Walker J. Commercial Court 24th May 1999

[123] ***Soleimany v Soleimany [1998] EWCA Civ 285*** CA before Morritt LJ; Waller LJ; Sir Christopher Staughton. 19th February 1998.

[124] ***Daad Sharab v Usama Salfiti [1996] EWCA Civ 1189.*** CA before Nourse LJ; Judge LJ; Waller LJ. 12th December 1996.

[125] ***Billadean International SA v Snamprogetti Ltd [1997] EWCA Civ 1036*** . CA before Saville LJ; Brooke LJ.

instance and again rejected the application for a stay pending application to appeal. Similarly in ***Westacre v Jugoimport [1999].*** [126] an order for enforcement of New York award was appealed on the grounds that the underlying contract induced by bribery. The Swiss Arbitration had already considered and rejected the allegation. The Court of Appeal refused to take the bribery point and rejected the appeal.

In ***Minmetals v Ferco*** *[1999]* [127] a further ground for challenge to the enforceability of this CIETAC award was unsuccessfully made on the basis that it was contrary to public policy.

Reprehensible conduct during the course of the arbitration. ***Gater Assets v Nak Naftogaz Ukrainiy [2008].*** [128] involved an appeal against an enforcement order on the grounds of public policy – namely an absence of full and frank disclosure. The court concluded that if material now available had been put to the tribunal it would not have altered the outcome and hence the award stood.

Temporary stay of enforcement.

It is not uncommon for a party to resist enforcement on the grounds that the award is subject to a pending challenge in the court of another state. Similarly a stay of English proceedings can be granted in favour of foreign arbitration. Thus ***Ssanyong v Daewoo Cars (1999).*** [129] involved an application for a temporary stay of action pending the issue of Korean award. The court considered that there was no reason to impugn the tribunal which was provided for by choice of law & arbitration clause and accordingly a stay was ordered.

Apis v Fantazia (2000). [130] involved an application for stay of enforcement of an award pending hearing of application to set aside award. The award a New York Convention award from Slovia's perspective, where an enforcement action was pending.

Similarly ***IPCO v Nigerian National Petroleum [2005].*** [131] concerned an application to set aside enforcement order or to stay enforcement pending challenge and cross application for security of costs. The court held that there was an arguable defence in respect of duplication in award. 13M was un-disputably due – and immediate payment ordered plus 50M security to be paid into court pending outcome of challenge before Nigerian court. In due course the matter came back before the court in ***IPCO v Nigerian National Petroleum [2008].*** [132] with an application for partial enforcement of the award which was subject to a previous adjournment of enforcement action pending the outcome of a challenge before a Nigerian Court, in circumstances where 3 years had passed and that challenge still ongoing. The court held that it could award partial enforcement of elements of award not seriously subject to challenge and duly did so.

Yukos Oil v Dardana Ltd [2002]. [133] concerned a challenge to an enforcement ruling. At first instance the court stayed enforcement pending trial but subject to security by the applicants. The CA rejected an appeal against those conditions, The court at first instance and the CA both considered that the challenge was very tentative at best. A Swedish award was currently being challenged in Sweden. The CA stayed enforcement pending the outcome of Swedish proceedings and a prior security or costs order was discharged.

State / Sovereign Immunity [134]

Contrary to the earlier statement that the grounds for resisting an award set out in s103 are mutually exclusive, this has not prevented challenges to enforcement on the grounds of State Immunity, both in terms of jurisdiction of the tribunal and secondly regarding jurisdiction in enforcement proceedings and execution proceedings.[135] The English Courts are governed by the State Immunities Act 1978, which by virtue of s9

[126] ***Westacre Investments Inc v Jugoimport-SDRP Holding Co Ltd [1999] EWCA Civ 1401.*** Before Waller LJ; Mantell LJ; Sir David Hirst.

[127] ***Minmetals Germany GmbH v. Ferco Steel Ltd*** [1999] C.L.C. 647. Colman J.

[128] ***Gater Assets Ltd v Nak Naftogaz Ukrainiy [2008] EWHC 237 (Comm)*** **:** Before Tomlinson Mr Justice 15th February 2008.

[129] ***Ssanyong Motor Distributors Ltd v Daewoo Cars Ltd & Daewoo Corp (1999) Lawtel*** **:** Before Wright J, Commercial Court . 23rd April 1999.

[130] ***Apis AS v Fantazia Kereskedelmi KFT (2000) Lawtel AC0300496.*** Before Raymond Jack J. Commercial Court 21st September 2000.

[131] ***IPCO (Nigeria) Ltd v Nigerian National Petroleum Corporation [2005] EWHC 726 (Comm).*** Gross, Mr Justice 2005.04.27

[132] ***IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation [2008] EWHC 797 (Comm).*** Before Mr Justice Tomlinson. 17th April 2008.

[133] ***Yukos Oil Company v Dardana Ltd*** *[2002] EWCA Civ 543.* Before Thorpe LJ; Mance LJ; Mr Justice Neuberger

[134] See for instance ***Ecuador v Occidental Exploration and Production Company [2005] EWHC 774 (Comm).*** **[***2005] EWCA Civ 1116)*

[135] For a successful challenge see ***Tsavliris Salvage (International) Ltd v The Grain Board of Iraq [2008] EWHC 612 (Comm)*** **:** Mr Justice Gross. 10th April 2008

will enforce an arbitral agreement where the resisting state had agreed in writing to submit a present or future dispute to arbitration. Thus the following are instances where the plea of state immunity against enforcement of an award was rejected by the English Court :-

Sabah Shipyard v Pakistan [2002], [136] Sabah sought to enforce an award against the Government of Pakistan. The Government and its trading party sought to appeal the award and procured an indefinite injunction in Pakistan. The English Court issued an injunction against those proceedings. The Government of Pakistan had waived state immunity before the English Court. The decision was upheld on appeal.

Svenska v Lithuania [2005], [137] Lithuania took part in an arbitration in respect of an exploration venture defending a claim for damages in relation to the issuing of licences. The arbitral tribunal held that the State was a party to the arbitration agreement. Enforcement action in England unsuccessfully resisted on grounds of state immunity.

Svenska v Lithuania [2006], [138] The question here was whether or not the State of Lithuania was a party to a commercial contract and an arbitration agreement, in an appeal against an enforcement of award action. In the circumstances the State was a party. The award was enforceable.

Ecuador v Occidental [2005] :[139] The court here was concerned with whether or not questions as to tax involving a state party are justiciable either by arbitration or the court. A challenge to an award was met by a sovereign state immunity plea by the defendant asserting that the award was a treaty. The court held it had jurisdiction since the sovereign had submitted to the jurisdiction of the arbitrator.

Occidental v Ecuador [2005] EWCA Civ 1116: [140] The appeal from the above case was met by a challenge to the jurisdiction of English court to hear a challenge to an award, whose seat was stated to be London England. The court held that it had jurisdiction, and the plea of state immunity and non-justiciability was rejected.

Selina Mohsin v Commonwealth Secretariat [2002]. [141] In this case the court affirmed that the Commonwealth Secretariat does not enjoy State Immunity from arbitral proceedings.

Related matters impacting upon New York Arbitrations and Awards.

> ***Saving for other bases of recognition or enforcement.***
> *104. Nothing in the preceding provisions of this Part affects any right to rely upon or enforce a New York Convention award at common law or under section 66.*

Section 104 New York Convention Awards DAC 1997.

> ***Section 104 Saving for Other Bases of Recognition or Enforcement***
> *61 . The concern recorded at Paragraph 393 of Chapter 6 did not lead to any amendment.*

First it should be noted that many English Arbitral awards are potentially New York awards outside the UK. For this reason the significance of the New York Convention is canvassed in many judgements regarding s66 jurisdiction applications and s67-69 challenges.

In addition, a wide range of cases deal with applications in support of or challenging aspects of New York convention arbitrations, where s100-104 are not specifically raised. Some of these are noted below.

136 ***Sabah Shipyard (Pakistan) Ltd. v Pakistan [2002] EWCA Civ 1643 :*** CA before Pill LJ; Waller LJ; Sir Martin Nourse. 14th November 2002.

137 ***Svenska Petroleum Exploration AB v Lithuania [2005] EWHC 2437 (Comm).*** Before Mrs Justice Gloster. 4th November 2005

138 ***Svenska Petroleum Exploration AB v Lithuania [2006] EWCA Civ 1529:*** CA before Sir Anthony Clarke, MR; Scott Baker LJ; Moore-Bick LJ. 13th November 2006.

139 ***Ecuador v Occidental Exploration and Production Company [2005] EWHC 774 (Comm) :*** Mr Justice Aikens. 29th April 2005

140 ***Occidental Exploration & Production Company v Republic of Ecuador [2005] EWCA Civ 1116:*** CA before Lord Phillips MR, Clarke LJ; Mance LJ. 9th September 2005

141 ***Selina Mohsin v. The Commonwealth Secretariat*** [2002] EWHC 377 (Comm) : Mr Justice David Steel. 1st March 2002.

Security of costs. ***Gater Assets v Nak Naftogaz Ukrainiy [2007].*** [142] concerned a successful application for security of costs against a defendant's application to set aside a New York Convention enforcement award where the defence had little likelihood of success, as confirmed on appeal in***Gater Assets v Nak Naftogaz Ukrainiy [2007]. CA.*** [143]

Garnishee Order : New York Award. ***Soinco v Novokuznetsk Aluminium [1996].*** [144] Attempt to overturn a garnishee order in support of a Swiss Award on the grounds that there was a risk that the guarantor might have to pay out twice on the guarantee. Held : No real danger established. Garnishee order sustained.

Stay & denial of justice under Scottish Law. The issue in ***Crouch Mining Ltd v British Coal [1996].***[145] pursuant to s4 Arbitration Act 1950, was whether a stay to arbitration, due at end of project, likely to be in 2004 deprived a party of opportunity of justice? The court held that it did not. This is what the parties contracted for and must therefore live with.

Stay to arbitration – anti-suit : ***Bankers Trust v Jakarta Hotels [1999].*** [146] involved a successful anti-suit injunction against Indonesian litigation in support of an LCIA arbitration agreement.

Notice of discontinuance. In ***Sheltam v Mirambo Holdings [2008].*** [147] a party gave a notice of discontinuance of a challenge to a New York Convention arbitration. The discontinuance notice was challenged to prevent outstanding issues before the English Court being used as a ground for resisting enforcement abroad. The court held that the discontinuance would be permitted subject to assurance that the ground would not be relied upon to prevent a foreign enforcing court obtaining jurisdiction.

Joinder : ***ABCI v Banque Franco-Tunisienne [2002].*** [148] involved an application for joinder regarding an action for enforcement of a New York Award. The court held that the purpose of joinder was for matters not relevant to enforcement / resistance under the New York Convention and accordingly the application was refused.

Anti-suit injunction : ***American Insurance v Abbott Laboratories [2003].***[149] concerned an application pursuant to CPR r. 6.20(5)(c). challenging the validity of arbitration agreement.

NEW YORK AWARDS AND THE MODEL LAW

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

•Article 35. Recognition and enforcement

35(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

*35(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. if the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.****

****The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.*

142 ***Gater Assets Ltd v Nak Naftogaz Ukrainiy [2007] EWHC 697 (Comm).*** before Mr Justice Field.

143 ***Gater Assets Ltd v Nak Naftogaz Ukrainiy [2007] EWCA Civ 988:*** Before Buxton LJ; Rix LJ; Moses LJ. 17th October 2007.

144 ***Soinco SACI v Novokuznetsk Aluminium Plant [1996] EWCA Civ 620*** **before** Phillips LJ ; Waller LJ; Chadwick LJ

145 ***Crouch Mining Ltd v British Coal Corporation (t/a British Coal) [1996] EWCA Civ 981*** **: before** Saville LJ; Brooke LJ.

146 ***Bankers Trust Co v P.T. Jakarta International Hotels & Developments [1999] 1 Lloyd's Rep 910:*** Before Cresswell J. Commercial Court 12th March 1999

147 ***Sheltam Rail Company (Proprietary) Ltd v Mirambo Holdings Ltd [2008] EWHC 829 (Comm) :*** Before Mr Justice. Aikens. Commercial Court. 21st April 2008

148 ***ABCI v Banque Franco-Tunisienne [2002] EWHC 2024 (Comm).*** Before HHJ Chambers QC

149 ***American International Speciality Lines Insurance Co. v Abbott Laboratories [2003] 1 Lloyd's Rep 267 :*** Before Cresswell J Commercial Court. 28th November 2002

Model Law Commentary : 8. Recognition and enforcement of award;

45. The eighth and last chapter of the Model Law deals with recognition and enforcement of awards. Its provisions reflect the significant policy decision that the same rules should apply to arbitral awards whether made in the country of enforcement or abroad, and that those rules should follow closely the 1958 New York Convention.

(a) Towards uniform treatment of all awards irrespective of country of origin

46. By treating awards rendered in international commercial arbitration in a uniform manner irrespective of where they were made, the Model Law draws a new demarcation line between "international" and "non-international" awards instead of the traditional line between "foreign" and "domestic" awards. This new line is based on substantive grounds rather than territorial borders, which are inappropriate in view of the limited importance of the place of arbitration in international cases. The place of arbitration is often chosen for reasons of convenience of the parties and the dispute may have little or no connection with the State where the arbitration takes place. Consequently, the recognition and enforcement of "inter-national" awards, whether "foreign" or "domestic", should be governed by the same provisions.

47. By modelling the recognition and enforcement rules on the relevant provisions of the 1958 New York Convention, the Model Law supplements, without conflicting with, the regime of recognition and enforcement created by that successful Convention.

(b) Procedural conditions of recognition and enforcement

48. Under article 35(1) any arbitral award, irrespective of the country in which it was made, shall be recognised as binding and enforceable, subject to the provisions of article 35(2) and of article 36 (which sets forth the grounds on which recognition or enforcement may be refused). Based on the above consideration of the limited importance of the place of arbitration in international cases and the desire of over-coming territorial restrictions, reciprocity is not included as a condition for recognition and enforcement.

49. The Model Law does not lay down procedural details of recognition and enforcement since there is no practical need for unifying them, and since they form an intrinsic part of the national procedural law and practice. The Model Law merely sets certain conditions for obtaining enforcement: application in writin8, accompanied by the award and the arbitration agreement (article 35(2)).

(c) Grounds for refusing recognition or enforcement

50. As noted earlier, the grounds on which recognition or enforcement may be refused under the Model Law are identical to those listed in article V of the New York Convention. Only, under the Model Law, they are relevant not merely to foreign awards but to all awards rendered in international commercial arbitration. while some provisions of that Convention, in particular as regards their drafting, may have called for improvement, only the first ground on the list (i.e. 'The parties to the arbitration agreement were, under the law applicable to them, under some incapacity") was modified since it was viewed as containing an incomplete and potentially misleading conflicts rule. Generally, it was deemed desirable to adopt, for the sake of harmony, the same approach and wording as this important Convention.

The manner in which the Model Law is incorporated into different states may vary, in that it may apply to both domestic disputes between nationals or may be restricted to disputes between nationals and foreigners or potentially only in respect of foreign awards. Thus, the Model Law may not impact upon the enforcement and recognition of domestic awards, as in Greece where two separate codes apply, viz the pre-existing arbitration law continues to apply to domestic arbitration, the code incorporating the model law being restricted to arbitrations with a foreign element, irrespective of whether the seat of the arbitration is Greece or elsewhere.

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

Model Law Commentary : 7. Recourse against award

40. National laws on arbitration, often equating awards with court decisions, provide a variety of means of recourse against arbitral awards, with varying and often long time-periods and with extensive lists of grounds that differ widely in the various legal systems. The Model Law attempts to ameliorate this situation, which is of considerable concern to those involved in international commercial arbitration.

(a) Application for setting aside as exclusive recourse

41. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other means of recourse regulated in another procedural law of the State in question. An application for setting aside under article 34 must be made within three months of receipt of the award. It should be noted that "recourse" means actively "attacking" the award; a party is, of course, not precluded from seeking court control by way of defence in enforcement proceedings (article 36). Further-more, "recourse" means resort to a court, i.e. an organ of the judicial system of a State; a party is not precluded from resorting to an arbitral tribunal of second instance if such a possibility has been agreed upon by the parties (as is common in certain commodity trades).

(b) Grounds for setting aside

42. As a further measure of improvement, the Model Law contains an exclusive list of limited grounds on which an award may be set aside. This list is essentially the same as the one in article 36(1), taken from article V of the 1958 New York Convention: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present his case; award deals with matters not covered by submission to arbitration; composition of arbitral tribunal or conduct of arbitral proceedings contrary to effective agreement of parties or, failing agreement, to the Model Law; non-arbitrability of subject-matter of dispute and violation of public policy, which would include serious departures from fundamental notions of procedural justice.

43. Such a parallelism of the grounds for setting aside with those provided in article V of the 1958 New York Convention for refusal of recognition and enforcement was already adopted in the European Convention on International Commercial Arbitration (Geneva, 1961). Under its article IX, the decision of a foreign court setting aside an award for a reason other than the ones listed in article V of the 1958 New York Convention does not constitute a ground for refusing enforcement The Model Law takes this philosophy one step further by directly limiting the reasons for setting aside.

44. Although the grounds for setting aside are almost identical to those for refusing recognition or enforcement, two practical differences should be noted. Firstly, the grounds relating to public policy, including non-arbitrability, may be different in substance, depending on the State h' question (i.e. State of setting aside or State of enforcement). Secondly, and more importantly, the grounds for refusal of recognition or enforcement are valid and effective only in the State (or States) where the winning party seeks recognition and enforcement, While the grounds for setting aside have a different impact The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(l)(e) of the 1958 New York Convention and article 36(l)(a)(v) of the Model Law.

New York Award and The Republic of Eire

Brostrom Tankers AB v. Factorias Vulcano SA [2004].[150] It was asserted that since the award purportedly may have infringed Spanish Law it would be against Irish Public Policy to enforce the award resulting in a 90% greater recovery than would be available under Spanish Law. Opposing council asserted that the dispute was governed by Norwegian Law and further disputed whether under the facts the claim was caught by Spanish Insolvency Legislation. In the circumstances Mr Justice Kelly concluded that enforcement did not offend Irish Public Policy and upheld the award.

[150] ***Brostrom Tankers AB v. Factorias Vulcano SA*** [2004] IEHC 198 (19 May 2004).

Self Assessment

1 Compare and contrast the prerequisites for enforcement of an Award under the domestic provisions of the Arbitration Act 1996 with those regarding foreign awards under the New York Convention

2 Compare and contrast the grounds for resisting an Award under the domestic provisions of the Arbitration Act 1996 with those regarding foreign awards under the New York Convention.

3. What is the distinction between a domestic and a foreign award?

4. To what extent is it either possible or desirable for the English Courts to exercise supervisory jurisdiction over the conduct of international arbitral proceedings which might lead to the setting aside of an award for misconduct by the tribunal?

ADDITIONAL READING

Enforcement of foreign arbitral awards & a comparative analysis in certain jurisdictions. Jeffery Elkinson

A potential appeal process for arbitration. Prof. G,M.B. Hartwell

New York Convention – a supra national code? Prof. G.M.B. Hartwell

Enforcing the award and the New York Convention. Richard Kreindler

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Challenging the international award : What has changed? Norton Rose 1997.

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