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EDITORIAL :

It is pleasing to note that the NADR Law Reports are increasingly being cited in the High Court. There have been five reported citations to date in 2007, two from the ADR Law Reports (ADR.L.R.) and three from the Adjudication Law Reports (Adj.L.R.) which indicates that practitioner's and the judiciary now regard the reports as a valuable resource. Long may this continue to be the case. Readers should note that the Arbitration Practice and Procedure Law Reports (APP.L.R) has now reached an advanced stage in its development, covering a large percentage of the reported cases since 1996, reinforced by the data base which contains references to an even wider range of cases. The data base has now been split into three, covering Arbitration in England and Wales, General Court Practice relevant to arbitrators and Scottish Arbitration. A fourth data-base on arbitration reports from Eire is currently being developed. Indications from web-site traffic analysis indicate that the NADR web site, and in particular the law reports, is being consistently used, with in excess of 36,000 recorded hits on the site each month, predominantly from the UK, the US and Australia.

The Ministry of Justice has delivered an important research report, conducted by Professor Dame Hazel Genn, Professor Paul Fenn, Marc Mason, Andrew Lane, Nadia Bechai, Lauren Gray, Dev Vencappa entitled ***"Twisting arms: court referred and court linked mediation under judicial pressure"***[1] which contrasts strongly with the view expressed by Mr Justice Lightman in the paper "***Mediation : an approximation to justice***" which features in this edition of ADR News. Dame Genn notes that a mere 40 PI cases were referred to mediation under the court scheme in the two years covered by the report, yet news has just come of a major initiative to establish a not for profit mediation panel for PI dispute settlement which commands the support of the insurance industry. The conclusion would seem to be that whilst mediation is suitable for the settlement of PI disputes, the model currently available through the courts in London does not fit the bill.

There had been a tendency for disputes to grow like Topsy during the trial. The introduction of the Pre-Action protocol is likely to change this. In the recent case of ***Cundall Johnson & Partners Llp v Whipps Cross University Hospital NHS Trust [2007] EWHC 2178 (TCC)*** Mr Justice Jackson stayed an action, pending compliance with the protocol to ensure that the claimant spelt out clearly what they were asking for and why, to give the defendant the opportunity to respond and for negotiated settlement to be attempted. Cundall had sought payment for additional consultancy works, but without providing itemised bills or setting out why the sums were due. The Trust disputes entitlement and asserts that it could not evaluate the claims without being given itemised information, which had been requested but had not been forthcoming, and counter claims for defective work. The parties had discussed whether or not to go to adjudication, but given assertions that at least one of the claims arose out of an oral contract, it is perhaps not surprising that this was not pursued. If adjudication had been appropriate then itemised bills and grounds for entitlement would have had to be exchanged to establish crystallisation and hence jurisdiction. What then, if it had gone to arbitration instead? Discuss.

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Finally, allow me to conclude with a little extract that combines litigation with negotiated settlement, a dose of common sense and demonstrates a delicious sense of judicial humour to boot, from the unlikely world of costs, harvested from the recent Administrative Court decision of Mr Justice Silbers in ***GMC, R v Stevenson [2007] EWHC 2132 (Admin) :-***

17. **Ms Lambert:** *My Lord, there is the issue of costs.*
18. **Mr Colman:** *My Lord, there is. There are applications on both sides. My learned friend was prepared to concede six months. We asked for 12. Your Lordship has found somewhere in between. I do not know whether your Lordship thinks in those circumstances that costs should lie where they fall.*
19. **Mr Justice Silber:** *My provisional view is no order as to costs.*
20. **Ms Lambert:** *It is difficult to see that that does not have a certain compelling logic.*
21. **Mr Justice Silber:** *It does have logic ?*
22. **Ms Lambert:** *It does have a logic.*
23. **Mr Justice Silber:** *Thank you both for your help. I am very grateful.*

Such are the little things that make a life in law bearable.

G.R.Thomas : Editor

[1] www.justice.gov.uk/docs/Twisting-arms-mediation-report-Genn-et-al.pdf

Mediation : An approximation to justice[2]

By Mr Justice Lightman

When the Government gave statutory effect to the European Convention on Human Rights in the form of the Human Rights Act, the Government proudly boasted *"human rights have come home"*. The Government's welcome in words was blunted by the Government's actions. For at the same time the Government continued the process of withdrawing the protection of citizens' rights (human and otherwise) by emasculating civil legal aid at a time when the costs of enforcing or defending such rights had reached heights beyond the reach of all but the very rich and the legally aided. As a fig leaf the Government proffered as an alternative to legal aid statutory provision for the conduct of litigation on the basis of a conditional fee. The statutory provision recognises two essential components of the conduct of litigation on this basis. The first is the acceptance by the legal advisers of instructions on terms that they receive a fee below what they would ordinarily charge (or indeed nothing at all) if the action fails, but an uplifted fee up to 100% above their normal charges if the action succeeds, and this uplifted fee may be recoverable from the losing party. The second component is that the client is protected by insurance against any liability under any adverse order for costs made in case his action fails, with the premium likewise recoverable if the action succeeds from the losing party.

The Government was made aware that there were the most serious legal and ethical problems raised by the conditional fee - in particular why should the losing party be exposed to paying more in costs merely because his successful opponent finances his litigation in this manner? and how could the lawyer's conflicts of interest be resolved when agreeing with his client the uplift and determining whether to agree terms of settlement? Going beyond these problems, the inherent limitations of the conditional fee are obvious and they have later proved critical in practice; legal advisers will only agree to accept instructions on this basis and the insurer will only provide insurance if the prospects of success in the action are very high - above 80%, indeed often 90%. Otherwise it is not financially worthwhile for them to provide the required services and insurance to the client.

The Government has been willing to spend millions on luxuries such as wallpaper, the Dome and the Olympics but has been unwilling to provide funds on essentials such as affording access to justice. In this situation others have had to focus on alternatives to the resolution of disputes by the court. Resolution of disputes by arbitration could not provide an answer. Arbitration can prove as expensive as, and indeed more expensive than, court proceedings, for arbitrators charge and judges are for free. As an aside I may record the suggestion that the reason for this difference regarding the pricing of the services of arbitrators and judges is that in terms of quality you get what you pay for.

The dilemma has been accordingly how to provide the protection of the law where the citizen does not have the means to pay for it or cannot afford the risk of losing and in consequence incurring the risk of incurring liability for the opponent's costs and of consequent bankruptcy. Where can you find the wherewithal to provide protection? Advocates do it every day in court, but in the real world you cannot make bricks without straw. Mediation cannot provide such protection. But mediation affords a palliative. What it can do and does do is to open previously locked doors to a settlement. What it can afford is a mechanism through the efforts of trained intermediaries for opening the eyes of parties to the merits of the opponent's case, the issues involved, the risks and costs of litigation and the attractions of a settlement.

The practice of mediation was given a hefty boost by CPR 1.4 which provides that the court must further the overriding objective of:

(1) dealing with cases justly by encouraging the parties to use ADR if the court considers that appropriate; and

(2) facilitating the use of that procedure and helping the parties to settle.

In accordance with this rule the courts have played their part in encouraging the taking of giant strides forwarding the wide and effective use of the mediation process, but they (*like the Duke of York*) have also on occasion themselves unfortunately taken giant strides backwards. The giant strides forward include (amongst others):

(1) the abandonment of the notion that mediation is appropriate in only a limited category of cases. It is now recognised that there is no civil case in which mediation cannot have a part to play in resolving some (if not all of) the issues involved. Indeed on the Continent mediation between the accused and the victim has now a substantial part to play in criminal cases, and this development yet may find its place here;

(2) practitioners (and in particular litigators) generally no longer perceive mediation a threat to their livelihoods, but rather a satisfying and fulfilling livelihood of its own;

(3) practitioners recognise (or should recognise) that a failure on their part without the express and informed instructions of their clients to make an effort to resolve disputes by mediation exposes them to the risk of a claim in negligence;

(4) the Government itself adopts a policy of willingness to proceed to mediation in disputes to which it is a party;

(5) judges at all stages in legal proceedings are urging parties to proceed to mediation if a practical method of achieving a settlement and imposing sanctions when there is an unreasonable refusal to give mediation a chance; and

(6) mediation is now a respectable (indeed fashionable) legal study and research at institutes of learning.

We have to recognise today that under the prevailing circumstances the disadvantaged citizen for economic reasons is all too often without legal redress or protection, that this leads to a social divide between the advantaged who enjoy the protection of the law and the disadvantaged who do not and this in turn leads to understandable loss of confidence in the law and the legal system. Do not believe that justice can be readily achieved by litigants acting in person. Quite the reverse. They cannot generally distinguish what is and what is not arguable, what course serves their interest and what risks

[2] Delivered at the S.J. Berwin. Summer Reception June 2007

they run as to costs. Their liability for their opponent's costs so often renders the perceived injustice which prompted proceedings a mere pin prick in comparison with the final (self inflicted) pain. This state of affairs has brought to the fore the crucial need for mediation as a palliative - as the only available recourse of those who cannot afford the costs and risks of litigation, the chance of the approximation to justice which it affords.

As I have repeatedly said on occasions such as the present since the decision of the Court of Appeal in ***Halsey v. Milton Keynes*** [2004] 1 WLR 3002, the achievement of this approximation requires the removal of two obstacles placed in its path by the Court of Appeal decision in that case. The court there held that:

(1) the court cannot require a party to proceed to mediation against his will on the basis that such an order would contravene the party's rights to access to the courts under Article 6 of the European Convention on Human Rights; and
(2) to impose a sanction (and in particular a sanction as to costs) on a party who has refused to give mediation a chance, the burden is upon the party seeking the imposition of the sanction to establish that the party who refused to proceed to mediation acted unreasonably. The burden is not on the party against whom the sanction is sought to prove that his refusal was reasonable.

Both these propositions are unfortunate and (I would suggest) clearly wrong and unreasonable. Turning to the first proposition regarding the European Convention my reasons for saying this are twofold:

(1) the court appears to have been unfamiliar with the mediation process and to have confused an order for mediation with an order for arbitration or some other order which places a permanent stay on proceedings. An order for mediation does not interfere with the right to a trial: at most it merely imposes a short delay to afford an opportunity for settlement and indeed the order for mediation may not even do that, for the order for mediation may require or allow the parties to proceed with preparation for trial; and
(2) the Court of Appeal appears to have been unaware that the practice of ordering parties to proceed to mediation regardless of their wishes is prevalent elsewhere throughout the Commonwealth, the USA and the world at large, and indeed at home in matrimonial property disputes in the Family Division.

The Court of Appeal refers to the fact that a party compelled to proceed to mediation may be less likely to agree a settlement than one who willingly proceeds to mediation. But that fact is not to the point. For it is a fact:

(1) that by reason of the nature and impact on the parties of the mediation process parties who enter the mediation process unwillingly often can and do become infected with the conciliatory spirit and settle; and
(2) that, whatever the percentage of those who against their will are ordered to give mediation a chance do settle, that percentage must be greater than the number to settle of those not so ordered and who accordingly do not give it a chance.

I turn to the second proposition regarding the onus of proof of reasonableness or unreasonableness. The decision as to onus must be guided by consideration of three factors:

(1) the importance that those otherwise deprived of access to justice should be given a chance of an approximation to it in this way;
(2) the commonsense proposition that the party who has decided not to proceed to mediation and knows the reasons for his decision should be required to give, explain and justify his decision; and
(3) the explicit duty of the court to encourage the use of mediation and the implicit duty to discourage unjustified refusals to do so and this must involve disclosing, explaining and justifying the reasons for the refusal. All these factors point in the opposite direction to that taken by the Court of Appeal.

A thermometer of the health of mediation today reveals its world-wide spread and appeal. It permeates the US insolvency system. Training courses are given throughout Eastern Europe. A European Directive on Europe-wide mediation is on the card. (I should add that the caveat has been "*imminent*" for a long time.) I am and have been for some years the UK Board Member of GEMME, an organisation of European Judges committed to mediation, an organisation recognised and partly financed by the European Union. Its purpose and activities are directed to promoting the use and understanding of and training in mediation within Member States.

Developments ahead (as I see them) include the following:

(1) increasing efforts to secure public awareness of the benefits and availability of mediation;
(2) increasing provision of public funds, facilities and trained mediators to facilitate mediation in all the courts and tribunals; and
(3) increased insistence (indeed pressure) on litigants to give mediation a go.

I come now to my conclusion. I see often in court the price paid by parties who have not (for any of a variety of reasons) proceeded to mediation and have in consequence picked up the heavy tab of the litigation. I have seen litigants and their families broken by the process and by the cost of litigation. Plainly it is the duty (in particular) of the law and lawyers to avoid this scenario and at the same time to afford to those who on grounds of means have been deprived of access to justice the chance of the approximation to justice that may be available through mediation. I suggest that:

(1) no thinking person can be but embarrassed by the lack of provision by the State of the means for access to the court; and
(2) no thinking person can but be disturbed by the imposition of the twin hurdles to mediation which the decision in Halsey creates to achieving the approximation to justice which the institution of the mediation process may afford.

The removal of the first hurdle is a matter for the legislature and the second is for the courts. The removal of the second by the courts may be made easier by a greater familiarity with the mediation process and by the recognition that in practice the hurdles are regularly sidestepped or overlooked without occasioning any shock waves causing tremors to the scales of justice.

PART III : ARBITRAL TRIBUNALS AND REASONS

The duty of a private arbitral tribunal to provide reasons

In England and Wales the question regarding whether or not there is a duty to provide reasons, whilst pertinent to judges, does not apply to arbitrators. As noted at the start of this examination of reasoned decision, the default position today, by virtue of section 52(4) Arbitration Act 1996, is that unless the parties otherwise agree,[3] an arbitrator subject to the Arbitration Act 1996 regime shall provide the parties with a written, signed, reasoned award. Whilst therefore reasons will be required in England & Wales even if the contract is silent upon the matter, it is a common practice for arbitration service providers to require members to provide reasons, a failure to de so being subject to disciplinary procedures as a question of professional misconduct.

In ***Armstrong v CIArb*** [1997] [4] an arbitrator issued an award in respect of alleged liability for subsidence. A complaint was made that insufficient reasons were provided. The arbitrator was asked to expand. He essentially refused asserting the reasons in the award were sufficient and self explanatory. The CIArb, Professional Conduct Committee concluded that the reasons were inadequate but did not question the actual award. Following this the Panel Management Group determined that any subsequent award would first be vetted by the PMC before being released to ensure adequate reasons were provided. Armstrong felt slighted by all this resulting in this action. The court agreed with the CIArb that the reasons were inadequate and did not address the issue at hand.

In as much as reasons, once provided, shine a light on the decision making process and render an award susceptible to review under s68 or appeal under s69 on a point of law, where the parties determine in advance that finality and/ or privacy are more higher priorities than "*the correct decision, for the right reasons*" the parties may well provide that no reasons be provided as part of the award, though it is possible for the arbitrator to provide private reasons subject to privilege that are not admissible in court.[5] This ensures that the arbitrator provides a fully considered, rather than arbitrary decision and provides the parties with a reference point for future conduct, but may result in marginally higher arbitrator fees than might otherwise have been the case, to cover the additional cost of producing the private award.

The consequences of failure to provide reasons.

The question whether or not an award could be set aside for insufficiency of reasons was addressed by the Privy Council in ***Bay Hotel v Cavlier*** [2001].[6] In the circumstances, the court did not have to decide on this matter since it found that the relevant standard was set out in the governing rules of the American Arbitration Association, as understood in US Law and the decisions were adequate by those standards. However, a separate award against a third party was set aside for lack of jurisdiction.

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 to it."* Thus the poor quality of reasons was insufficient in ***Action Navigation*** [7] to justify striking down an award. This however does not mean that no consequences flow from such failure as s70(4) below demonstrates. In addition, an award that is uncertain or ambiguous as to its effect can by virtue of Section 68(2)(f) amount to a serious irregularity.

S70(4) Arbitration Act 1996. Supplementary Provisions[8]

> *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.*

[3] ***Osei Sankofa & Chartlon Athletic Football Co Ltd v Football Association Ltd (2007) EWHC 78 (Comm).*** Mr Justice Simon held here that by the agreement of the parties the decisions of an FA Disciplinary Commission were final and thus did not require reasons, but went on to note that whilst ***Wednesbury*** unreasonableness was nonetheless a ground for challenge, the decision in question was not self evidently unreasonable. Furthermore, on the balance of convenience - viz the need of sport to produce rapid, determinative decisions, the application for relief failed.

[4] ***Armstrong, R v Chartered Institute Of Arbitrators [1997] EWHC Admin 561*** per Mr Justice Owen.

[5] ***Transmountana v Atlantic Shipping*** [1978]. *"The function of a reasoned award is not simply to identify and determine a point which the arbitrators ultimately considered to be decisive. It is to enable the parties and the court (a) to understand the facts and general reasoning which led the arbitrators to conclude that this was the decisive paoint and (b) to understand the facts, and so consider the position with respect to appeal, on any other issues which arose before the arbitrators. Where distinct issues have been argued, the award should thus indicate the nature of the findings and reasoning on each, including those which the arbitrators may not themselves have thought to be determinative. Further, it serves no useful purpose, and can be positively unhelpful, to recite at great length messages exchanged or submissions made containing assertions of fact or law; the arbitrators' finding and brief reasoning upon them are what matters. ……. Not only do reasons concentrate the mind, but on the whole they tend to satisfy the parties more than silence."*

[6] ***Bay Hotel v. Cavalier Construction Co. Ltd. [2001] UKPC 34*** per Lords Nicholls of Birkenhead; Cooke of Thorndon; Clyde; Hutton; Millett

[7] ***Action Navigation Inc v Bottiglieri Navigation Spa [2005] EWHC 177 (Comm)*** per Mr Justice Aikens.

[8] ***Bocimar v Farenco Navigation Co Ltd*** [2002] EWHC 1617 (QB). Award remitted for the statement of further reasons and any consequential variation of the award by the tribunal.

What constitutes adequate or sufficient reasons for the purposes of arbitration.

The reason for requiring reasons provides some guidance as to what amounts to adequate or sufficient or sufficient reasons, though as Lord Donaldson, R points out in ***UCATT v Grime*** (1991)[9] whilst the arbitrator must "*tell the parties in broad terms why they lose or, as the case may be, win ... In every case, the adequacy of the reasons must depend on the nature of proceedings, the character of the decision making body and the issues raised before it, particularly if they include issues of fact.*"

Section 46 Arbitration Act 1996 requires that the arbitrator decide the matter referred in accordance with the law. Accordingly the reasons should clearly demonstrate that the law has been correctly applied, since otherwise the award will be amenable to a section 69 challenge on a point of law.[10] Thus in the ***BBC v CAC*** [2003] [11] the criteria used by the CAC to determine whether or not BBC wild life camera men were professionals not entitled to union recognition, or were workers entitled to recognition, was incorrect. The decision was remitted to a new panel to re-determine the issue, applying the correct criteria. Care needs to be taken in determining what the relevant criteria are, whether set out in a contract or governing legislation. In ***Burford v Forte*** [2003][12] an appeal was mounted on the grounds that there had been a failure to comply with the mechanism for determining a dispute as set out in an arbitration clause. However, in the circumstances the court held that the arbitration terms were for establishing rent, and thus not relevant to the current action, which was concerned with non-payment.

The reasons should demonstrate that the award does not determine matters outside the jurisdiction of the tribunal, since a failure to do so could pave the way to a jurisdictional challenge under section 67 either by way of defence to a section 66 enforcement action or as an application for a declaration that the award be of no effect under section 67(1)(b). Furthermore, the reasons should demonstrate that all issues referred to the arbitrator have been dealt with and that the tribunal has taken into account all relevant information put to it, since otherwise a section 68 challenge on the grounds of a serious irregularity. [13]

The latter has provided fertile grounds for challenges where the reasons provided do not cross reference all the issues or all the evidence provided by one of the parties and set out why the tribunal did not adopt that reasoning. A failure to reference aspects of argumentation leads inexorably to an assertion that the issue or the evidence was not considered or even that the decision was based on information not put to the parties and no opportunity had been provided for that information, including expertise of the arbitrator to challenge that information. Much of the discussion regarding sufficiency of reasons relates to minor or tangential information, and whether or not any irregularity, where established, has caused or will cause substantial injustice. The question then is how much attention, if any at all, should be paid to such matters by the tribunal when delivering its award.[14] The principles here mirror those that apply to judges.[15]

In ***Ipco v Nigerian National Petroleum*** [2005],[16] an award was challenged inter alia on the grounds of inadequate reasons. Gross J. stated :-" … *As it seemed to me, the nub of this complaint was twofold. First, that the Tribunal in respect of the many individual but substantial items with which it dealt comprising the variations, while summarising the rival arguments, gave very little by way of reasons for preferring IPCO's case to that of NNPC. Secondly, that the Tribunal did not address how each of the variations had an impact on the overall time for completion of the project. Such criticisms require close scrutiny. All too easily, they can be exploited in an attempt to re-open the Tribunal's findings of fact. No arbitration Tribunal should be criticised for succinctness; nor is any Tribunal required to set out every point raised before it, still less at length.*

Had this matter stood alone, I am inclined to think that I would have been largely unsympathetic. It does not, however, do so; this criticism of the award is linked to the argument as to duplication of damages. I also accept that there may be force in the second of the principal criticisms; it is not easy on the face of the award to assess the causative impact of individual variations on the overall time for completion of the project. By way of example, this is a matter to which reference has already been made when dealing with the argument on force majeure. *In all the circumstances, this too is an aspect of the case on which I would draw back from seeking to pre-empt the decision of the Nigerian court.*"

Ambiguity and Uncertainty and Reasons

An arbitral award should be certain and free from ambiguity. Under previously the common law[17] and now under Section 68(2)(f) an ambiguous award may be rendered unenforceable in whole or in part.[18] Thus in as much as the reasons are ambiguous leading to uncertainty, the reasons could be deemed to be inadequate. However, this goes more to the clarity than the extent of the reasons. From this perspective, ambiguity may best be avoided by brevity, in that the more that is written, the greater is the scope for contradiction. Furthermore, ambiguity may arise out of a failure to specify, though the provision of the requisite specifics might not illuminate why a decision has been reached. On the other-hand, the

9 ***UCATT v Grime*** (1991) ICR 542.

10 ***The Niedersachsen*** [1986]. A reasoned award is one "*which states the reasons for the award in sufficient detail for the court to consider any question of law arising therefrom.*"

11 ***British Broadcasting Corporation, R v Central Arbitration Committee [2003] EWHC 1375 (Admin)*** per Mr Justice Moses.

12 ***Burford UK Properties Ltd v Forte Hotels (UK) Ltd [2003] EWCA Civ 1800*** per Auld LJ; Chadwick LJ; Arden LJ.

13 ***Universal Petroleum v Handels und Transportgesellschaft*** [1987]. CA. "*An arbitrator should remember to deal in his reasoned awards with all issues which may be described as having "conclusive" nature, in the sense that he should give reasons for his decisions on all issues which lead to conclusions on liability or other major matters in dispute on which leave to appeal may subsequently be sought. Such issues should not be difficult to identify.*"

14 See ***Bankers Trust Co v Government of Moscow*** 2003] EWHC 572 (Comm).

15 See ***English v Emery supra***

16 ***Ipco (Nigeria) Ltd v Nigerian National Petroleum Corp*** [2005] EWHC 726 (COM) paras 49 & 50

17 ***Duke of Beaufort v Welsh*** (1839) 10 Ad & el 527; ***Re an Arbitration between Marshall & Dresser*** (1843) 3 QB 878; ***Margulies Bros Ltd v Dafnis Thomaides & Co (UK) Ltd*** [1958] 1 Lloyd's Rep 250; ***River Plate Products Netherlands BV v Etablissement Coargrain*** [1982] 1 Lloyd's Rep 628.

18 ***Miller v De Burgh*** (1850) 4 Ex 809.

section of an award containing a direction, which taken out of context might be ambiguous, may in fact be clarified by reference to the reasons for that decision.

Applicants should where applicable first seek rectification under s57(3)(a) Arbitration Act 1996 before mounting a s68 challenge.[19] Where an ambiguity is not amenable to rectification a s57 reference would not be required.[20]

The Standard Required of Arbitrators

In as much as often arbitrators and lay tribunal members are not lawyers, the court does not impose such high standards on tribunals when expressing awards as they might for trained lawyers. Thus in ***General Feeds v Slobodna*** [1999], it was stated that the court " … *is not entitled to expect from trade arbitrators the accuracy of wording or cogency of expression that is required of a judgement."*[21] That said, reasons, where required should be adequate. The situations where the courts now require reasons appears to be expanding. Thus, in ***Halifax v Equitable Life*** [2007],[22] by analogy with section 70(4) Arbitration Act 1996 Mr Justice Cresswell held that the court can require an expert determinator / umpire to provide adequate reasons for a decision to determine an appeal against the validity of the umpire's decision.

The following extract from the judgment of Megaw J, in ***In re Poyser & Mills' Arbitration*** [1964],[23] in the context of a statutory arbitration under the Agricultural Holdings Act throws some light on the need for reasons and what amounts to adequate and sufficient reasons. *"So far as paragraph 3 is concerned, there being seven items in the notice to remedy, the arbitrator has not said which of those items he found to be good, and which he found to be bad. He has not dealt with them individually; he has merely said that he* ***"found as a fact that there was sufficient work required in the notice which ought to have been done and was not done on the relevant date to justify the notice to quit."*** *I am bound to say this, and again I do not think it was disputed by Mr. Langdon-Davies, that a reason which is as jejune as that reason is not satisfactory, but in my view it goes further than that.*

The whole purpose of section 12 of the Tribunals and Inquiries Act, 1958, was to enable persons whose property, or whose interests, were being affected by some administrative decision or some statutory arbitration to know, if the decision was against them, what the reasons for it were. Up to then, people's property and other interests might be gravely affected by a decision of some official. The decision might be perfectly right, but the person against whom it was made was left with the real grievance that he was not told why the decision had been made. The purpose of section 12 was to remedy that, and to remedy it in relation to arbitrations under this Act. Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. ***The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised.*** *In my view, it is right to consider that statutory provision as being a provision as to the form which the arbitration award shall take. If those reasons do not fairly comply with that which Parliament intended, then that is an error on the face of the award. It is a material error of form. Here, having regard to paragraph 3, this award, including the reasons, does not comply with the proper form, and that is, in my view, an error of law on the face of the award and is properly so to be described rather than as technical misconduct. No one here suggests for a moment actual misconduct on the part of the arbitrator, but it may well be that what has gone wrong here is something which is capable properly of being described as both misconduct and error of law on the face of the award. If so, the fact that it is the latter brings it within the jurisdiction of this court. I do not say that any minor or trivial error, or failure to give reasons in relation to every particular point that has been raised at the hearing, would be sufficient ground for invoking the jurisdiction of this court. I think* ***there must be something substantially wrong or inadequate in the reasons that are given in order to enable the jurisdiction of this court to be invoked****. In my view, in the present case paragraph 3 gives insufficient and incomplete information as to the grounds of the decision; and, accordingly, I hold that there is an error of law on the face of the award, that the motion succeeds and the award must be set aside."*

Lord Justice Donaldson had this to say in ***Bremer v Westzucker (No2)*** [1981],[24] about reasoned arbitral awards, in the context of the Arbitration Act 1979 :-

"At the end of the hearing [the trade arbitrators] *will be in a position to give a decision and the reasons for that decision. They should do so at the earliest possible moment. The parties will have made their submissions as to what actually happened and what is the result in terms of their respective rights and liabilities. All this will be fresh in the arbitrators' minds and there will be no need for further written submissions by the parties.* ***No particular form of award is required****. Certainly no one wants a formal 'Special Case'.* ***All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is.*** *This is all that is meant by a 'reasoned award'.*

For example, it may be convenient to begin by explaining briefly how the arbitration came about -- 'X sold to Y 200 tons of soyabean meal on the terms of GAFTA Contract 100 at US.$Z per ton c.i.f. Bremen. X claimed damages for non-delivery and we were appointed arbitrators'. The award could then briefly tell the factual story as the arbitrators saw it. Much would be common ground and would need no elaboration. But when the award comes to matters in controversy, it would be helpful if the arbitrators not only gave their view of what occurred, but also made it clear that they have considered any alternative version and have rejected it, e.g., 'The shippers claimed that they shipped 100 tons at the end of June. We are not satisfied that this is so', or as the case may be, 'We are satisfied that this was not the case'. The arbitrators should end with their

[19] ***Torch Offshore LLC v Cable Shipping Inc.*** [2004] EWHC 787 (Comm)
[20] ***Gbangbola v Smith & Sherriff Ltd*** [1998] 3 All.E.R. 730.
[21] ***General Feeds Inc Panama v Slobodna*** [1999] :
[22] ***Halifax Life Ltd v The Equitable Life Assurance Society [2007] EWHC 503 (Comm)***
[23] ***In re Poyser & Mill's Arbitration.*** [1964] 2 Q.B. 467,
[24] ***Bremer Handelsgesellschaft mbH v Westzucker GmbH (No2)*** [1981] 2 Lloyds's Rep 130 at 132-

conclusion as to the resulting rights and liabilities of the parties. There is nothing about this which is remotely technical, difficult or time consuming.

It is sometimes said that this involves arbitrators in delivering judgments and that this is something which requires legal skills. This is something of a half truth. Much of the art of giving a judgment lies in telling a story logically, coherently and accurately. This is something which requires skill, but it is not a legal skill and it is not necessarily advanced by legal training. It is certainly a judicial skill, but arbitrators for this purpose are Judges and will have no difficulty in acquiring it. ***Where a 1979 Act award differs from a judgment is in the fact that the arbitrators will not be expected to analyse the law and the authorities.*** *It will be quite sufficient that they should explain how they reached their conclusion, e.g., 'We regarded the conduct of the buyers, as we have described it, as constituting a repudiation of their obligations under the contract and the subsequent conduct of the sellers, also as described, as amounting to an acceptance of that repudiatory conduct putting an end to the contract'.* ***It can be left to others to argue that this is wrong in law and to a professional Judge, if leave to appeal is given, to analyse the authorities.*** *This is not to say that where arbitrators are content to set out their reasoning on questions of law in the same way as Judges, this will be unwelcome to the Courts. Far from it. The point which I am seeking to make is that* ***a reasoned award,*** *in accordance with the 1979 Act,* ***is wholly different from an award in the form of a special case.*** *It is not technical, it is not difficult to draw and above all it is something which can and should be produced promptly and quickly at the conclusion of the hearing. That is the time when it is easiest to produce an award with all the issues in mind. … "*

The question as to adequate reasons arose again in ***Hayn Roman v Cominter*** [1982] .[25] This is what Goff J had to say about the matter : - *"Now it appears that the Committee of Appeal have affirmed the decision on damages of the arbitrators but they themselves have said nothing about damages in their reasons. I can therefore only infer that they have upheld the award of the arbitrators on the same basis as the arbitrators. The arbitrators awarded that: ". . . the Buyers pay to the Sellers $61,740.00 in compensation for the difference between the original contract price and that obtained on resale. " That resale appears to be one made consequent on the negotiations between the original shippers and the sellers as at Jan. 3, 1980. Now in these circumstances it seems to me that the Committee of Appeal should give their reasons why they reached this decision, to ascertain whether they did apply the appropriate principles of law as to the measure of damages, because if the position is that the market difference as at mid-December was at the level which the buyers have suggested then it would appear prima facie that the measure of damages, assuming that the buyers are in breach of contract in this case, was far less than the sum of $61,000 which has been awarded against them by the Committee of Appeal.*

In those circumstances, as the Committee of Appeal had this point specifically raised before them by the buyers and had to consider it, and as they have not dealt with it at all in their reasons and we simply do not know the basis upon which they reached their decision and ***as on the face of the documents it appears that they may have applied the wrong test, the matter must go back to them to give their reasons*** *for deciding that the sum to be awarded against the sellers by way of damages was the same sum as that awarded by the arbitrators.*

So I conclude that on all these three points the matter should go back to the Committee of Appeal. I reach this conclusion with much regret in view of the passage of time that has elapsed. But my attention has been drawn to the recent judgment of Lord Justice Donaldson in ***Bremer v Westzucker****, in which the learned Lord Justice did refer in the course of his judgment to the reasons which should be given by arbitrators. I think it is clear from that account given by Lord Justice Donaldson that* ***it is incumbent upon arbitrators, in giving their reasons, to explain on what basis they have rejected contentions that have been advanced before them. They are not being asked to go into great detail; they are simply being asked to deal with submissions which have been advanced before them because this is just the kind of matter which the parties****, if their contentions are rejected,* ***may wish to pursue on appeal****. Anyway, as a matter of commonsense,* ***they are entitled to know why their contentions have been rejected****. Each of the three points on which I have decided that the matter should go back to the Committee of Appeal for further reasons are points on which contentions were advanced by the buyers but the award, with all respect to the Committee of Appeal, does not have sufficient detail in it to explain why the contentions were rejected. I therefore order that the award be remitted to the arbitrators for those three matters to be clarified."*

Lord Justice Kerr delivered an extended judgement on the role of the arbitrator when delivering decisions in ***Universal Petroleum v Handels und Transportgessellschaft*** [1987]. [26] Again it was in the context of the Arbitration Act 1979 and some of his comments have been addressed by the Arbitration Act 1996 regime. Nonetheless, there is much of value to take note of in this judgement. His Lordship noted as follows :- *" … in most arbitrations arising from contractual disputes, like the present, the arbitrator's conclusion on these matters will be his point of departure for the resolution of the dispute and be embodied in one or more primary findings. Albeit that they involve conclusions of law, these findings cannot then be treated differently from other primary findings. They cannot be challenged unless either*

(i) the necessary foundation for a challenge to them has been laid, or
(ii) the remainder of the award contains material which enables their correctness in law to be challenged, or
(iii) there are gaps, inconsistencies or ambiguities in the arbitrator's reasons which cast sufficient doubt upon the correctness in law of these findings, and upon the consequent correctness of the award, to justify an order for more detailed reasons under sub-s. 5(b).

In the present case none of these applies. There is admittedly nothing in the award which casts any doubt on par. 1 so as to satisfy (ii) or (iii). As regards (i), since there was evidently argument about the contractual documents and terms, the arbitrator should have been asked specifically to give reasons for his conclusions in that regard, possibly by including a summary of the evidence on which he might base his conclusions about the terms of the contract. That would have laid the

[25] ***Hayn Roman & Co S.A. v Cominter (UK) Ltd*** [1982] 2 Lloyd's Rep 458 at 464 .
[26] ***Universal Petroleum Co Ltd v Handels und Transportgessellschaft mbH*** *[1987] 1 Lloyds Rep 517 at 527*

necessary foundation under (i) above for a question of law arising out of the award whether the findings or conclusions of law in par. 1 were sufficiently clearly erroneous to justify leave to appeal. But since this did not happen, it is now impossible to question the finality of his award on this issue.

We would therefore allow the appeal and set aside the order for the "schedule of further reasons" on these grounds. But in the light of the arguments addressed to the Judge and to us on an important secondary aspect we consider it right to deal with this as well. Mr. Schaff placed great emphasis on it. But although his submissions were in our view clearly right in principle, they should not be allowed to detract from the main point, since in the present case this was conclusive.

It must always be remembered that the question whether or not to make an order for further reasons under sub-s. (5)(b) is only one issue in the context of the overriding question whether leave to appeal should be granted at all. It is wholly subsidiary to that main question, and this must constantly be borne in mind. The relevant tests for deciding whether or not to grant leave to appeal have of course been laid down authoritatively in ***The Nema*** *and* ***The Antaios****. But the underlying statutory test must not be forgotten. This is that leave to appeal may only be granted when the answer to the relevant question or questions of law "could substantially affect the rights of one or more of the parties"; see sub-s. (4). Thus if there are several grounds for concluding that a claim succeeds or fails, there must be no remission under sub-s. 5(b) for more detailed reasons in support of the arbitrator's conclusion on one of these grounds if the existence of the other grounds would or should still lead to a refusal of leave to appeal. The reason is that an answer from the arbitrator which is favourable to an applicant for remission under sub-s. (5)(b) on that one ground could not "substantially affect the rights of the parties" if the existence of the other grounds would still lead to a refusal of leave to appeal on the basis of* ***The Nema*** *and* ***The Antaios*** *decisions.*

That this must be borne in mind by everyone concerned is clear as a matter of common sense to avoid unnecessary proceedings, delay and costs, and also as a matter of authority. The first stage at which this point must be borne in mind is at the arbitration itself. A reasoned award is usually requested in order to lay the foundation for a possible application for leave to appeal. ***An arbitrator should*** *therefore remember to* ***deal in his reasoned awards with all issues which may be described as having a "conclusive" nature, in the sense that he should give reasons for his decisions on all issues which lead to conclusions on liability or other major matters in dispute on which leave to appeal may subsequently be sought.*** *Such issues should not be difficult to identify, and the arbitrator should if necessary be reminded about them. But all that an arbitrator has to bear in mind in that connection is effectively summarized in the judgment of Sir John Donaldson, M.R., in* ***Bremer. v. Westzucker*** *….*

The award in the present case did not follow this pattern. Both Counsel indicated, and we agree, that in that respect it is unsatisfactory. ***The arbitrator*** *seized upon only one basis for his conclusion that there had been no wrongful repudiation of the contract by the sellers. He* ***said nothing about the sellers' "additional reasons" for concluding that the presence of the additional decimals in the Saybolt certificate could not in any event have led to this consequence.*** *We will not burden this judgment with an enumeration, let alone analysis, of these "additional reasons". But* ***they had evidently been fully argued in the arbitration, and on that basis they deserved consideration and reasoned conclusions in a reasoned award.***

But since the arbitrator did not deal with them, what should have happened on the buyers' application for leave to appeal, and their intertwined application for remission for further reasons under sub-s. (5)(b)? Mr. Schaff submitted that in considering the latter application the Judge should have had full regard to the question whether the arbitrator's answers upon a remission aimed at par. 1 of his award were in any event likely "substantially (to) affect the rights of the parties", in the sense that they might lead to the grant of leave to appeal within the guidelines of ***The Nema*** *and* ***The Antaios.*** *He therefore submitted that before deciding to order further reasons under sub-s. (5)(b), the Judge shall have given full consideration to the sellers' "additional reasons" for seeking to uphold the award in their favour.*

Leaving aside the main point, that a remission aimed at par. 1 was in any event erroneous, we have no doubt that this submission is correct in principle. The prospect of granting or refusing leave to appeal against an award under sub-s. (4) in the light of the guidelines in ***The Nema*** *and* ***The Antaios*** *is clearly relevant to the decision whether to grant or refuse an application for further reasons on a particular question or questions of law under sub-s. (5)(b);* [27] *…..*

In the present case the Judge did not consider the general "appealability" of the award against the background of the sellers' additional reasons. But as Mr. Schaff readily admitted, he had not argued these points fully in the context of his opposition to the buyers' application to remit. That, no doubt, is why the Judge said no more on this aspect than the following: "I will assume that in an ordinary case, such, for instance, as one in which reasons omit express reference to one or two links in a logical chain of argument leading to a conclusion, an order would not normally be made unless leave would be ultimately likely to be granted,[28] *although the matter must always, it seems, remain ultimately one of discretion. In the present case, however, it is, in my view, impossible to gauge the strength of the applicant's arguments without further reasons, which, so far as the applicants are asking for them, should in principle ask for specific findings (1) as to the identity of the contractual document or documents and (2) as to the relevant terms of the contract and the source of those terms with reasons for those findings. … I will now stand over for further argument or submissions the terms of the schedule which will be attached to the order."*

In these circumstances Mr. Schaff's argument in this Court, that the Judge failed to have proper regard to the general appealability of the award, is hardly fair to the Judge. But it must always be borne in mind that applications of this kind

[27] see the decision of Mr. Justice Staughton in ***Warde v. Feedex International Inc.****, [1984] 1 Lloyd's Rep. 310 at p. 313* and the reference to that decision with apparent approval, which we share, in ***The Niedersachsen****, [1986] 1 Lloyd's Rep. 393 at p. 395 per Sir John Donaldson, M.R.*

[28] *(see Mr. Justice Staughton's judgment in* ***Warde v. Feedex***

inevitably have to be dealt with in the Commercial Court in a very different atmosphere and more hurriedly than their subsequent analysis and review on rare occasions in this Court. However, since both Counsel said that this second aspect also raised issues of principle about the practice concerning applications for leave to appeal under s. 1 of the 1979 Act, we will briefly state our views about them in general terms, but bearing in mind that the exercise of this jurisdiction under the 1979 Act is a matter for the Judges of the Commercial Court.

(1) The jurisdiction to order further or more detailed reasons under sub-s. (5)(b) should be exercised as sparingly as possible. Such orders involve a process of "to-ing and fro-ing" between the Court and the arbitrator, with consequential costs and delays before it is even known whether leave to appeal against the award will ultimately be granted. The effect of such orders is therefore greatly to postpone the effective finality of what was intended to be a final award. Any excessive or unnecessary resort to such orders runs counter to the purpose and policy of the 1979 Act, as explained - in particular - in ***The Nema*** *and* ***The Antaios*** *and is liable to bring the Act into disrepute.*

(2) As already explained, the need to resort to such orders should be sought to be avoided by arbitrators stating their reasoned conclusions on all important issues which have been raised in the arbitration, even though several reasons may lead to the same result.

(3) Where a party applies for an order under sub-s. (5)(b), the decision whether or not to grant the application should never be taken without giving the fullest consideration possible at that stage to the question whether leave to appeal is likely to be granted by reference to the text of sub-s. (4) and ***The Nema*** *and* ***The Antaios*** *decisions.* ***Such orders should therefore never be made simply on a basis of "Let us wait and see what the arbitrator will say", but only if there appears to be a real prospect of leave to appeal being properly granted.***

(4) The reasoning of the judgment of Lord Justice Robert Goff in ***The Barenbels****, precluding the use of evidence extrinsic to the award on applications for leave to appeal, cannot be circumvented by applications under sub-s (5)(b) and is therefore equally applicable to such applications. There is no relevant distinction between evidence given on affidavit or otherwise and information given to the Court by Counsel. In the same way as applications for leave to appeal, applications for further reasons under sub-s. (5)(b) must therefore be decided exclusively on the basis of the contents of the award.*

(5) Despite the advice to arbitrators under (2) above, there will inevitably remain some cases where, as here, the respondents to applications for leave to appeal and/or for further reasons under sub-s. 5(b) will wish to resist such applications by seeking to rely on matters which were raised in the arbitration but were not dealt with in the arbitrator's reasoned award. Should they then be able to inform the Court about those matters, whether by affidavit or through Counsel? On the present appeal both Counsel were in agreement that respondents should be entitled to do so. Although we heard no argument on the point, our present view is that this must be right. In such cases extrinsic evidence is not being used for the purpose of seeking to obtain the reversal of an award by raising questions of law which do not arise out of the award. It is used in order to inform the Court about matters with which the arbitrator has ex hypothesi failed to deal, which - in the view of the respondents - should lead the Court to refuse leave to appeal, and/or to remit under sub-s. (5)(b), on the ground that leave to appeal and/or remission could in any event not lead to a different outcome from the arbitrator's conclusion, and could therefore not substantially affect the rights of the parties. As at present advised it therefore seems to us that the reasoning and decision in ***The Barenbels*** *do not apply to respondents who oppose applications for leave to appeal and/or to remit by seeking to uphold the award. As both Counsel agreed, any other conclusion could lead to great injustice.*

Finally we would add, though without deciding anything further than that the order for the "schedule of further reasons" should be set aside, that we sincerely hope that the course of events in the present case was indeed exceptional, because it appears to us to have been in the highest degree unsatisfactory. We have already said that ***the full "schedule of further reasons" reads like a cross-examination of the arbitrator. If it stood, there would then have to be further argument, on the basis of the arbitrator's first and second sets of reasons, whether leave to appeal should be granted.*** *Such a course may of course be unavoidable in occasional complex cases. But* ***how can anything of the kind be justifiable in a case like the present?*** *Using the terminology of Lord Diplock in* ***The Antaios*** *case at pp. 241 and 206C, this dispute arose out of a "one-off" contractual situation and a "one-off"event.* ***What*** *therefore* ***fell to be considered on an application for leave to appeal was – "Whether the arbitrator was in the judge's view so obviously wrong as to preclude the possibility that he might be right . . . Unless the answer he would give to . . . (this) question is "Yes" he should refuse leave to appeal."***

In the present case the contractual cargo certificate showed the maximum density to be correct to the required three decimal points and the RVP to be correct to the required two decimal points. However it was put, the buyers' case rested solely on the presence of one additional decimal figure which appeared in the certificate in each case. We were told that it was not disputed on the side of the buyers that an analysis of the cargo to that degree of precision could not establish whether the cargo was in fact outside the specification. It was also undisputed that the alleged discrepancy was commercially insignificant. Against this background the arbitrator's ultimate conclusion was that the buyers had not established that by tendering this certificate the sellers had wrongfully repudiated the contract. ***How then could it be said that this conclusion was so obviously wrong that there was no possibility that it was right? Why was it ever thought appropriate to launch an application for leave to appeal in this case? and why was it not rejected out of hand?*** *…….. The appeal will be allowed."*

Mance J. returned to the issue of adequate reasons in ***Transcatalana v Incobrasa*** [1995],[29] in the following terms :- "…. *Mr. Justice Colman said in respect of an award issued by the Board of Appeal of GAFTA in* ***Cefetra v Toepfer.*** [30] *"I am*

[29] ***Transcatalana De Commercio S.A. v Incobrasa Industrial E Commercial Brazileira SA*** [1995] 1 Lloyd's Rep 215 at 217

[30] ***Cefetra B.V. v. Alfred C. Toepfer International G.m.b.H.,*** *[1994] 1 Lloyd's Rep. 93 at p. 100*

bound to say that the reasoning in par. 4.5 of the award is obscure, to say the least. In my judgment, it falls short of the clarity of exposition which parties to a London arbitration are entitled to expect for the purposes of a reasoned award under the Arbitration Act, 1979. Until the hearing of this appeal neither party had applied for the board to give further reasons for their award. As a result of discussion at the end of this hearing Mr. Hancock….. sought to apply out of time for the award to be remitted for further reasons. . . . This application is dismissed." … The present award is imbalanced between recitation on the one hand and findings and reasoning on the other. It sets out at great length messages exchanged between the various parties (many of them containing assertions of fact raised as the dispute evolved) as well as the parties' respective submissions to the board on numerous issues of fact and law. But its reasoning and finding on liability are limited to one issue and are of the utmost brevity.

More particularly, the award extends over some 41 pages, divided into sections headed "The Contracts", "The Facts", "Appellant Sellers' Submissions ", "Respondent Buyers' Submissions" and "Submissions as to the Law and GAFTA Provisions applicable" and concluding with a section of findings and the award. "The Facts" extend over 18 pages consisting mainly of verbatim recitation of messages passing between the parties. The sections on submissions comprise of 15 pages recounting arguments and submissions on facts. By contrast ***the essential findings and reasoning on liability extend to 12 lines.*** *The equivalent reasons in* ***Cefetra*** *were, it appears,* ***only five lines long****.*

This approach to the preparation of reasoned awards almost inevitably leads to uncertainty and argument about what, if anything, the arbitrators have accepted by way of evidence or decided on important issues of fact or law. ***The function of a reasoned award is not simply to identify and determine a point which the arbitrators ultimately considered to be decisive. It is to enable the parties and the Court (a) to understand the facts and general reasoning which led the arbitrators to conclude that this was the decisive point and (b) to understand the facts, and so consider the position with respect to appeal, on any other issues which arose before the arbitrators. Where distinct issues have been argued, the award should thus indicate the nature of the findings and reasoning on each, including those which the arbitrators may not themselves have thought to be determinative.*** *Further****, it serves no useful purpose, and can be positively unhelpful, to recite at great length messages exchanged or submissions made containing assertions of fact or law; the arbitrators' findings and brief reasoning upon them are what matters.*** *On the function and contents of a reasoned award generally, arbitrators will find helpful guidance in both existing case-law*[31] *and Mustill & Boyd on Commercial Arbitration (2nd ed.) pp. 377- 378."*

Scope of the Duty

The duty to provide reasons where invoked only applies to awards and not to interim orders since they concern the administration of procedure. [32] Whilst an award may subsequently relate the history of interim orders issued during the arbitration proceedings, it is too late at this stage to provide reasons and a failure to do so cannot undo the lawfulness of such orders.[33]

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WHAT MAKES A GOOD ARBITRATOR?

Dr Mair Coombes Davies

There are many views and much discussion on what makes a good arbitrator. They range from being impartial and unbiased, having the intelligence and ability to conduct the arbitration process and to reach a decision that is well-grounded in the evidence and the law, to familiarity with the substantive subject matter of the dispute as well as being available and having a fee scale with which the parties are comfortable.

However at the end of the day there is probably one thing more than any other that distinguishes an arbitrator as being a good arbitrator; the consistently high quality of the awards of that arbitrator. The style and presentation of such an award varies between arbitrators but certain information is always included. It is set out in the following checklist:

	Introduction
1	Parties details.
2	Contract and contract conditions.
3	Contract arbitration procedure or scheme rules.
4	Method of appointment, date of acceptance and seat of the arbitration.
5	Issues and redress sought.

	Jurisdiction
6	Details of any challenge to jurisdiction.
7	Arbitrator's conclusion.

[31] ***Bremer Handelsgesellschaft m.b.H. v. Westzucker G.m.b.H.,*** *[1981] 1 Lloyd's Rep. 130 at p. 133 and* ***Universal Petroleum Co. Ltd. v. Handels- und Transportgesellschaft G.m.b.H.,*** *[1987] 1 Lloyd's Rep. 517 at pp. 526-527*

[32] ***Three Valeys Water Committee v Binnie & Partners*** *[1990] 52 BLR 42.*

[33] ***Exmar BV v National Iranian Trader Co.*** *[1992] 1 Lloyd's Rep 169.*

	The arbitration process
8	Dates of pleadings and any awards, orders, directions.
9	Date of any hearing or meeting.
10	Details of any information obtained through a third party.
11	Details of any time for making the award, order, direction.
12	Details of any particular procedural problems.

	Body of the award
13	The reiteration of evidence and the arguments of the parties should be limited to the extent that is necessary to enable the parties and any independent third party e.g. a judge, to understand how the arbitrator reached his conclusions. The parties are already aware of each other's submissions. The reiteration of party submissions on a, 'cut and paste', process does not constitute reasons.
14	Whatever is written should be set down in an orderly and logical sequence.
15	If there is more than one issue or group of issues the evidence and argument relating to each and the conclusions reached should be separately identified.

	The award proper
16	Conclusions reached on various issues should be collected and reiterated under a separate heading. It is unhelpful and confusing for awards on the various issues to be scattered throughout the written award.
17	Any requirement for either party to do something should be accompanied by a timescale. This, where appropriate, should be in accordance with any contractual provision.
18	Sums of money are generally exclusive of VAT and this must be stated and explained if appropriate.
19	Interest should be dealt with.
	The arbitrator's costs should be allocated.
20	The matter of the parties costs should be addressed.
21	The document must be proof read, signed and dated.

	Presentation
22	Tidily set down in a professional manner and flow logically.
23	Grammatically correct.
24	Free of clerical errors, clerical inconsistencies such as the haphazard use of upper and lower case and paragraph numbering errors.
25	Refrain from the use of words such as, '*Claimant*', and, '*Respondent*', except to the extent that it is necessary.
26	Avoid repetition except to the extent that it is necessary for understanding or clarity.
27	Not be written on company headed paper or paper with the company or partnership logo.

	Quality
28	All the issues have been decided.
29	All evidence and argument submitted by the parties has been properly considered and reviewed.
30	The conclusions are justified by the evidence and argument.
31	The award follows logically from the conclusions.

CHALLENGING AN AWARD : PART III : 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.[34] 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.[35] The grey area concerns mixed questions of fact and law, and hence which is the overriding issue being appealed.[36] 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.[37]

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],***[38] 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."*

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*

[34] 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.

[35] 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.

[36] ***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.

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

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

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],*[39] 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. [40]

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].*[41] 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],**[42] 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],***[43] 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],*[44] 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.

[39] ***Chattan Developments Ltd v Reigill Civil Engineering Contractors Ltd [2007] EWHC 305 (TCC)*** per Mr Justice Ramsey.
[40] ***Smith International Inc v Specialised Petroleum Services Group Ltd. [2005] EWCA Civ 1357 per*** Mummery LJ; Jacob LJ; Neuberger LJ.
[41] ***Safeway Stores v. Legal & General Assurance Society Ltd*** *[2004] EWHC 415 (Ch) per* Mr Justice Lewison.
[42] ***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.
[43] ***Thyssen Canada Ltd. v Mariana Maritime SA [2005] EWHC 219 (Comm),*** per Mr Justice Cooke.
[44] ***Marklands Ltd v. Virgin Retail Ltd*** *[2003] EWHC 3428 (Ch)* per Mr Justice Lewison.

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]***,[45] 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 :- "

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.[46]

[45] ***White Young Green Consulting v Brooke House Sixth Form College [2007] EWHC 2018 (TCC)***,[45]

[46] ***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

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],[47] that there is a rebuttable presumption in favour of finality of the arbitral award. This is an echo of ***BMBF v Harland & Wolff [2001].***[48] 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]***[49] **:-**

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],*[50] 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 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].**[51] 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

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

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

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

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

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

(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 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].[52].

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.

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. [53]

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).[54]

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], [55] 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]**[56] 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.*

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

53 ***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.

54 **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.

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

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

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 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.[57]

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. [58]

As an alternative to appeal it may be more appropriate to consider availing oneself of the slip rule facility under s57 Arbitration Act 1996 to request that an arbitrator amend the award or make an additional award. [59]

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.[60]

Appealing the appeal

> ### Appeal on point of law. 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,[61] 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 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],***[62] 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.

Part IV of this series, in the next edition of ADR News, will look at challenging international arbitral awards.

[57] ***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.

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

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

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

[61] ***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.

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

MEDIATION CASE CORNER

Case Commentary by Corbett Haselgrove Spurin

Phelps v Stewarts (a firm) & Anor [2007] EWHC 1561 (Ch)

Contribution under Civil Liability Contribution Act to a mediated settlement : Failed application.

Bernard Livesey QC. 2nd July 2007

Simpson v Bowker [2007] EWCA Civ 772

Company in liquidation : CVA entered into - terms including legal costs of litigation of a claim against a debtor company to be reimbursed. Simpson a director funded litigation but settled through mediation. He received his legal costs but failed to recover the settlement / mediation costs : Held : recovery governed by the terms of the CVA. Settlement costs not covered, so not recoverable. Mummery LJ; Laws LJ; Moses LJ. 26th July 2007.

Vellacott v The Convergence Group Plc [2007] EWHC 1774 (Ch)

Costs to include the wasted costs of a mediation. What was on offer at that time was far in excess of what the party had been entitled to recover. S51 SCA 1981 provides that the court has the power to award "the costs of and incidental to the proceedings. " The sense of the words "and incidental to" is to extend rather than restrict what the receiving party is entitled to recover. Para 17.3 Chancery Guide, 2005, recognises that the court may make costs orders in respect of any recourse the parties may have to an ADR. Mr Justice Rimer. 31st July 2007.

CONSTRUCTION CASE CORNER

Case commentary by

Corbett Haselgrove Spurin

DGT Steel & Cladding Ltd v Cubbitt Building & Interiors Ltd [2007] EWHC 1584 (TCC)

Stay to adjudication. Where contract required adjudication pre-litigation. Whether the same dispute as previously adjudicated giving rise to right to litigate : Held : Distinct and separate dispute : Stay granted. HGCRA optional scheme not applicable. Re jurisdiction to grant a stay ***Channel Tunnel. v Balfour Beatty*** [1993] AC 334; ***Cott UK Ltd. v. FE Barber Ltd.*** [1997] 3 All ER 540. ***Cape Durasteel Ltd. v Rosser & Russell Building Services Ltd.*** [1995] 46 Con LR 75, ***Herschel v Breen*** [2000], ***Wireless PLC v. IBM UK Ltd.*** [2002] EWHC 2059 (Comm) referred to. Regarding binding adjudication ***Cape*** referred to. As to distinct disputes ***Mivan v Lighting Technology*** [2001]; ***Holt v Colt*** [2001], ***Skansa v EDRC*** [2003] ; ***Halki Shipping Corp v. Sopex Oils Ltd.*** [1998] 1WLR 726). ***Edmund Nuttall v RG Carter Ltd*** [2002] .; ***Fast Track v Morrison*** [2000] referred to. HHJ Peter Coulson. TCC. 4th July 2007

Dunn v Glass Systems (UK) Ltd [2007] EWHC B2 (QB)

Strike out for abuse of process : failures in claim process : breach of CPR : Application to strike out post adjudication trial of construction dispute : ground that particulars of claim are prolix ; unintelligible ; no clear case ; failure to comply with CPR. Held : " *I … have serious reservations about the competence of Mr Dunn. The criticisms of Mr Grant show that he has no idea how to draft a pleading. The nature of his submissions seriously leads me to doubt his judgment. My provisional view is that this is a matter where all the papers ought to be referred to the Bar Standards Board for the protection of the public. However before I take that step I shall hear submissions both from Mr Grant and Mr Dunn at the resumed hearing.*" ***McPhilemy v Times Newspapers*** [1999] 3 All ER 775; ***Mahon v Rahn*** [2000] 1 WLR 2150; ***Barnes v Handf Acceptance*** [2004] EWHC 1095 (Ch); ***O'Neill v Clarke*** [2005] EWHC 178 cited regarding particulars of claim.

HHJ John Behrens. QBD Newcastle upon Tyne. 11th July 2007

London Underground Ltd v Citylink Telecommunications Ltd [2007] EWHC 1749 (TCC)

S68 AA 1996 Challenge s68 : s69 : global claims : Challenge and cross challenge S68 Arbitration Act 1996 - Serious Irregularity : s69 Challenge - Point of law : All challenges failed : Award upheld. Issue - applications for extensions of time in construction contract : Appeal against post adjudication arbitration. Laing v Doyle partially approved as a method of dealing with global claims at least in arbitration – though not necessarily in litigation : clear evidentiary link required – but even if global claim fails some proven claims may survive. Ramsey Mr Justice. TCC. 20th July 2007

Michael John Construction Ltd v St Peters Rugby Football Club [2007] EWHC 1857 (TCC)

Double jeopardy : The Gollege dispute sent on to arbitration by different legal personalities to the origing adjudication enforced in 2006. Arbitrator delivered an interim award on jurisdiction proclaiming current applicant the actual party to the contract & dispute. s67 AA 1996 jurisdiction reference - award set aside - personalities subject to determination by enforcing court - where any new evidence should have been canvassed. Issue now res judicata. ***Marston Thompson and***

Evershed Plc v Benn *(1998) CLY No.4875.* ***London General Omnibus Company v Pope*** *(1922) 38 TLR 270* referred to. ***Arnold v National Westminster Bank plc*** [1991] 3 All ER 41 applied. HHJ David Wilcox. TCC. 30th July 2007

Norwest Holst Ltd v Danieli Davy Distington [2007] All ER (D) 120 (Jul)

Construction Contract s105 : declaration. Construction Contract s105 : Adjudication stayed by the parties pending the outcome of this application for a declaration to determine jurisdiction. The court held that a contract for the design and construction of a casting pit was essentially a construction operation and thus within the HGCRA - and not covered within the exemption for plant. Mr Justice Ramsey: TCC. 9th July 2007

Pierce Design International Ltd v Johnston [2007] EWHC 1691 (TCC)

Payment post determination; Cl 27 JCT : no insolvency : no withholding : Determination and payment of sums previously due : Court analysed ***Melville Dundas v Wimpey*** which held that JCT clauses 27.6.5.1 complies with s110 / 111 HGCRA : then held on the facts that the sums were due 28 days before determination and had been unreasonably withheld in that there were no withholding notices issued. What is unreasonable must be judged at time of withholding not in light of subsequent events. Summary judgement granted. ***Bouygues v Dahl-Jensen*** *[2000] BLR, 522;* ***KNS v Sindall Ltd.*** [2001] 17 Const.L.J., 178 considered. HHJ Peter Coulson. TCC. 17th July 2007

Stirling v. Westminster Properties Scotland Ltd [2007] ScotCS CSOH_117

Meaning of dispute : personality : Work carried out by company promoter - contract concluded pre-incorporation. Following failure to honour applicantion No 6 post certification, in the absence of a withholding notice, notice of adjudication given first in companys name then later in promoters name Enforcement Act : defence - no dispute. Held : crystallisation occurred by date of final notice though not necessarily directly after due date for payment. Some reasonable period of time required during which the subject matter of the dispute could be clearly communicated and an opportunity afforded to explain why no payment was forthcoming. ***Amec Civil Engineering Ltd v Secretary of State for Transport,*** [2005] 1 WLR 2339. ***Fastrack Contractors Ltd v Morrison Construction Ltd,*** [2000] BLR 168. As to personality, the defenders tried to have it both ways, first denying a relationship with the company but then asserting that all correspondence having been in the name of the company there was no correspondence or communication with the claimant prompoter. Held : company correspondence acted as agent of the promoter. ***Charrington & Co Ltd v Wooler,*** [1914] AC 71, ***Prenn v Simmonds,*** [1971] 1 WLR 1381; ***Reardon Smith Line Ltd v Hansen-Tangen,*** [1976] 1 WLR 989, ***Bovis Construction (Scotland) Ltd v Whatlings Construction Ltd,*** 1994 SC 351, ***Bank of Scotland v Dunedin Property Investment Co Ltd,*** 1998 SC 657, ***Waydale Ltd v DHL Holdings (UK) Ltd (No 2),*** 2002 SLT 224, ***Glasgow City Council v Caststop Ltd,,*** 2002 SLT 47 referred to. Lord Drummond Young: Outer House Court of Session. 9th July 2007

ARBITRATION, PRACTICE & PROCEDURE CASE CORNER

Case Commentary by Corbett Haselgrove Spurin

Albon v Naza Motor Trading Sdn Bhd (No 4) [2007] EWHC 1879 (Ch)

Anti-suit injunction : renewal. Granted since respondent would not unconditionally accept that the question as to whether a signature had been forged was solely in the jurisdiction of the English Court - it would be oppressive and unconscionable to allow a duplication of proceedings. Mr Justice Lightman. 31st July 2007

ASM Shipping Ltd. v Harris & Ors [2007] EWHC 1513 (Comm)

S28 AA 1996 : Application for removal or arbitrators : Smith Mr Justice Andrew. 28th June 2007

Bea Hotels NV v Bellway Llc [2007] EWHC 1363 (Comm)

S67 AA 1996 : Challenge s67 to jurisdiction on grounds that the contract had been repudiated.
Cooke Mr Justice. 12th June 2007.

Berkeley Community Villages Ltd v Pullen [2007] EWHC 1330 (Ch)

Fair dealing – implied terms. Owner having contracted for the development of a site subject to a percentage of profit, sold off part of that site. Was this a breach of contract – preventing the full exploitation of the development contract. YES. Damages. Mr Justice Morgan. Chancery 7th June 2007.

C v D [2007] EWHC 1541 (Comm)

S44 AA 1996 : Application for anti suit injunction to prevent challenge to an award. Mr Justice Cooke. 28th June 2007.

CTI Group Inc v Transclear SA [2007] EWHC 2070 (Comm)

Whether 1) tribunal erred in law in deciding that two f.o.b. contracts for the sale of cement to Mexico from Indonesia and Taiwan were frustrated by the intervention of Cemex, a company with a monopoly in the supply of cement in Mexico, with the result that no supplier in Asia would supply cement 2) whether the tribunal erred in holding in the alternative that the contracts were subject to an implied term that if suppliers refused to supply cement because of the buyers\' intended use of or intended destination, both parties would be discharged from any liability or obligation under the contracts. Mr Justice. Field. Commercial Court. 14th September 2007

Dyson Technology Ltd v Strutt [2007] EWHC 1756 (Ch)

Costs : assessment : common costs : How to divide the common costs of the action. Common costs are non-specific costs general to the action in the sense that they do not relate to the handling of any particular issue and would have been incurred whatever issues were involved and specific common costs which relate to work done on more than one issue in the case, but which are not separated for the purposes of charging out time or as disbursements. Interrelationship with costs following event or events. Mr Justice Patten. Chancery Division. 24th July 2007.

Ecuador v Occidental Exploration & Production Co [2007] EWCA Civ 656

S67 AA 1996 : Challenge : Jurisdiction. Failed appeal against decision of first instance court upholding the award & jurisdiction. CA on appeal from QBD (Mr Justice Aikens) : affirming court at first instance, the arbitrators had jurisdiction to deal with matters that impacted upon VAT. CA before Sir Anthony Clarke MR; Buxton LJ; Toulson LJ. 4th July 2007.

Golden Fleece Maritime Inc v ST Shipping & Transport Inc [2007] EWHC 1890 (Comm)

Liability for losses arising out of changes in the law. Liability for hire arising out of changes to national legislation requiring work on chartered vessels and restricting the range of vessels in the intervening period– viz ship-owner or charterer to bear the risk. Held : Liability fell on the owner. A variety of other claims as to speed and capacity referred to arbitration and outside the scope of the courts jurisdiction. Mr Justice Cooke. 2nd August 2007

Howell v Lees Millais [2007] EWCA Civ B1

Apparent bias : successful appeal against a judge's refusal to recuse himself
CA before Sir Anthony Clarke MR Sir Igor Judge; Buxton LJ. 4th July 2007.

IXIS Corporate & Investment Bank v WestLB Ag [2007] EWHC 1748 (Comm)

Consolidation application. Failed application for consolidation of cases. Mr Justice Aikens. 18th July 2007.

Kolden Holdings Ltd v Rodette Commerce Ltd [2007] EWHC 1597 (Comm)

Conflicts : Application for stay to Cyprus refused. English court first ceised of action. same parties involved even though a change of name. Arts 28 / 28 Council Regulation (EC) 44/2001. Mr Justice . Aikens 4th July 2007.

Koyama, R (on the application of) v University of Manchester [2007] EWHC 1868 (Admin) i

Application for judicial review of University exam and disciplinary procedures. Gilbart QC. 27th July 2007.

Long Beach Ltd v Global Witness Ltd [2007] EWHC 1980 (QB)

Confidentiality : Should documents indicating fraud by public official exhibited in open court in Hong Kong be subject to privilege and confidentiality? Hong Kong Court unusually and inexplicably injuncted publication. s25 Civil Jurisdiction and Judgments Act 1982. Third party web-publisher not subject to Hong Kong jurisdiction. Held : No privilege. No explanation for the potentially fraudulent conduct evidenced by the documents. Publication in the public interest.
Mr Justice Stanley Brunton. 15th August 2007

Loon Energy Inc v Integra Mining [2007] EWHC 1876 (Comm)

S9 AA 1996 : Stay : declarations : Application for stay to arbitration : applications for declarations on interpretation of terms of contract. Mr Justice Langley. 31st July 2007.

OAO Northern Shipping Co v Remolcadores De Marin SL (Remmar) [2007] EWHC 1821 (Comm)

S68 AA 1996 serious irregularity : Application under s68 Arbitration Act 1996 for an order setting aside, alternatively remitting for further consideration, an arbitral award. Arbitration set aside for serious irregularity and resubmitted to the tribunal for further consideration. Mrs Justice Gloster. 26th July 2007.

Ruttle Plant Hire Ltd v S.S. for the Environment, Food & Rural Affairs [2007] EWHC 1773 (TCC)

Amendment application. An application for permission to amend, which raises a novel question of principle viz whether the rule in Henderson v Henderson can be invoked as a ground for opposing amendments in existing litigation. This judgment is a sequel to ***Ruttle v SS for Environment*** [2006] EWHC 3426 (TCC). Mr Justice Jackson. 16th July 2007.

Samengo-Turner v J & H Marsh & McLennan (Services) Ltd [2007] EWCA Civ 723 (12 July 2007)

Anti-suit injunction. Application for anti-suit injunction to prevent litigation in New York over contracts of employment governed by UK Law, aimed at examining breach of solus agreement / non-competition terms regarding ex employees.
CA before Tuckey LJ; Longmore LJ; Lloyd L:J.. 12th July 2007.

Starlight Shipping Co v Tai Ping Insurance Co Ltd., Hubei Branch [2007] EWHC 1893 (Comm)

S44 AA 1996 : Anti-suit : s37 SCA : Pre-emptive anti-suit injunction application in support of arbitration. Granted.
Mr Justice Cooke : 1st August 2007.

The Capaz Duckling) 2007] EWHC 1630 (Comm)

s44 AA 1996 Application for world-wide freezing order in support of arbitration. Mr Justice Steel.11th July 2007

Tamil Nadu Electricity Board v St-Cms Electric Company Private Ltd [2007] EWHC 1713 (Comm)

s72 AA 1996 Application for declaration that a tribunal had jurisdiction over a dispute. Conflicts - whether English or Indian law applies. Mr Justice Cooke. 16th July 2007.

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