In Defence of Section 69 of the English Arbitration Act

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In our experience, many lawyers tend to shift a little uncomfortably in their seats when conversation turns to section 69 of the English Arbitration Act 1996, which gives parties to an arbitration sited in England & Wales the opportunity to appeal against an award on a point of law where the substantive law governing the dispute is English law. Although similar appeal mechanisms appear in the arbitration laws of many other developed jurisdictions (such as the United States, Singapore, Australia and New Zealand), they continue to be controversial within the arbitration community at large, for at least two, principal reasons.

Firstly, section 69 arguably threatens vital public policies favouring the finality of arbitral awards, which, some would say, instead become a mere preliminary step to court proceedings. Secondly, when a party appeals against an award to a national court, the cloak of arbitral confidentiality is at least partially lost since the national court’s determination of the appeal will often go on the public record.

These seemingly compelling criticisms – which, we must note, apply equally in other contexts (for example, on a challenge at the recognition and enforcement stage) – have resulted in many parties contracting out of section 69. They also led the LCIA to draft its rules so that parties are taken automatically to have contracted out of section 69 (the ICC Rules have a similar effect, but this was not in response to section 69). However, all this antipathy begs the question of whether section 69 is actually a sheep in wolf’s clothing.

The statistics, at least, tend to show that section 69 only ever poses a threat to the finality of arbitral awards in an extremely limited number and category of cases. In a study carried out by the London Maritime Arbitrators Association last year, it was found that 151 section 69 applications to appeal were made between 2006 and 2008, of which 36 obtained leave to appeal, and only 14 resulted in the setting aside, variation or remittal of an award. A further statistic of interest is that of the 14 successful appeals within the sample time-frame, only one concerned a subject-matter other than shipping. This valuable study therefore shows that even in the narrow context of shipping arbitration, successful appellants are few and far between. More importantly for those critics of section 69, it demonstrates that in mainstream commercial arbitration, section 69 has no discernible effect on the finality of arbitrators’ decisions.

The statistics also highlight that section 69 is meeting its policy aims. The Departmental Advisory Committee (“DAC”) makes clear in its report on the drafting of the 1996 Act that section 69 was only ever intended to provide a very narrow route of appeal. Thus, section 69 contains a number of

safeguards, including section 69(3)(c)(i), which states that leave to appeal an award will only be granted if the error of law made by the arbitrator is "obviously wrong." In this regard, the threat to the finality of arbitral awards is kept to an absolute minimum.

What about confidentiality? Again, the sheep appears from beneath the wolf's clothing. Recent High Court rulings have confirmed the very limited categories of evidence that can be put before the court in a section 69 appeal, such that it will only be in the clearest of cases that an appeal will be allowed. In *Sylvia Shipping Co. Limited v Progress Bulk Carriers Ltd.* [2010] EWHC 542 (Comm) and *Great Western Trains Company Ltd. v Network Rail Infrastructure Ltd* [2010] EWHC 117 (Comm), Gross J and Hamblen J made obiter comments suggesting that, in general, the only documents that would be admissible in a section 69 appeal would be the award and the contract governing the dispute between the parties. This view was confirmed in the most recent case of *Dolphin Tanker SRL v Westport Petroleum Inc* [2010] EWHC 2617 (Comm), in which the appellants founded their appeal on expert reports and other documents, some of which had not been before the arbitrator. In deciding that these documents were inadmissible, Simon J confirmed that in normal circumstances, only the award and underlying contract would be admissible on appeal. In addition, in certain circumstances, the court may rely on those documents that the court "needs in order to determine the question of law" (emphasis added by the judge), namely documents to which the award refers and which have a contractual effect. However, Simon J emphasised that an appeal on a question of law is confined to facts found by and the commercial background included in the award.

The safeguards contained in the Act itself, and these strict limits on evidence admissible in section 69 appeals mean not only that it will be very difficult for parties to prove their case on appeal to the requisite standard (thus protecting the finality of the award) but also that the confidentiality of the underlying arbitration is, to the greatest extent possible, maintained. If the parties can only put the award and the relevant contract before the court, then a section 69 appeal should only be successful if the error of law is clear on the face of the award. Similarly, it is only in the rarest of circumstances that appellants will be able to show that an arbitrator's findings on the law have been so egregious as to be "obviously wrong."

Bearing in mind the limited effect of section 69, it is difficult to see how its existence is objectionable (and this was certainly the view taken by the DAC). No parties to an arbitration who have chosen English law as the substantive law of their dispute can wish their arbitrator to make "obviously wrong" findings on the law. When such errors are made, surely it is in the interests of justice that those errors are corrected. So long as the English jurisdiction to correct obvious errors of law stays within its proper bounds, it is suggested that no-one need feel the least bit uncomfortable when confronted with this modest (non-mandatory) avenue for appeal.

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