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Appeals on a Point of Law in the English Courts: Further Restrictions

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The judgment in the case of *Mary Harvey v. Motor Insurer's Bureau* (QBD (Merc) (Manchester), Claim No: 0MA40077, 21 December 2011) just before Christmas provided another opportunity for the English courts to rule on their ability to consider appeals on a point of law.

This controversial power, retained in the UK's Arbitration Act notwithstanding its absence from most other national legal systems, has often been criticised. Perhaps for this reason, the trend of the English courts in recent years has been increasingly to restrict its application. This latest, fully reasoned, judgment is no exception.

The Claimant, Mary Harvey, was a victim of a road traffic accident, and applied to the Motor Insurer's Bureau ('MIB') for compensation for her injuries. Dissatisfied with the amount of compensation awarded, she served notice on the MIB requiring the matter to be submitted to arbitration. After an oral hearing, the arbitrator concluded that there was no evidence to infer that the driver of the vehicle that struck her was driving negligently, and concluded that the Claimant was not entitled to any compensation. She applied to the court, seeking leave to appeal under section 69 of the UK Arbitration Act on a question of law arising out of the Award.

In his judgment, Judge Hegarty QC reiterated certain features of appeals under section 69. It was clear that its provisions were 'of a highly restrictive nature'. First, the only type of appeal that the courts can entertain is one involving a question of law arising out of an award, and that question must be one which the tribunal was asked to determine. Second, in the absence of an agreement between the parties, leave of the court is required before an appeal can be pursued, and, unless the question is one of 'general public importance', leave can be granted only if the decision is 'obviously wrong'.

The court dismissed the application on the grounds that in essence this was an appeal on a question of fact, not of law. Citing the judgment of Steyn LJ in *Geogas SA v. Trammo Gas Limited (The Baleares)* [1993] 1 Ll Rep 215 at 228, the Judge affirmed the principle that any question as to the admissibility, relevance or weight of any evidential material was a matter solely for the arbitrator. The arbitrator's findings of

fact were 'effectively immune from scrutiny' by the courts, and this included not only primary facts but also any secondary findings or inferences of a factual nature.

The Judge commented further that: 'I very much doubt if even a total absence of any evidential basis for a finding of fact can give rise to a question of law for the purposes of section 69', though 'it might conceivably amount to a serious irregularity under section 68(2)(a) of the Act'. A question of law might arise if, on the basis of the facts found by the tribunal, the conclusion which it reached was 'outside the range which could properly have been arrived at by a tribunal which had properly directed itself as to the applicable law'. But it must still be possible to conclude that the error arose from a misapprehension or misapplication of law.

The case also raised questions regarding the application of the maxim *res ipsa loquitor* in this context, but after a full review the judge concluded that any failure to apply this maxim would not necessarily constitute an error of law, since 'it simply refers to the way in which factual inferences may be drawn from other factual findings'.

Under English law (and virtually all other national systems) appeals are not possible from arbitral awards on questions of fact, probably even if the parties expressly so agree (*Guangzhou Dockyards Co Ltd v. ENE Aegiali 1* [2010] EWHC 2826). Nevertheless, in contrast to the UNCITRAL Model Law and most other national systems, the provisions of the UK Arbitration Act are clear that there may be circumstances in which an appeal on a point of law will be available – the underlying justification focusing on the general public interest in the law being correctly applied. But this case reaffirms the very limited grounds on which an appeal on a point of law may be available. As Judge Hegarty noted, this limited right reflects 'the increasing recognition accorded to the autonomy of the arbitral process'.

Of course, section 69 is a non-mandatory provision: in contrast to rights to challenge awards under sections 67 (lack of jurisdiction) and 68 (serious irregularity), the parties can, by agreement, opt out of it. This requires clear language, however (see, for example, *Shell Egypt West Manzala GmbH v. Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm)). An opt-out is also achieved where parties elect to apply institutional rules such as those of the ICC or the LCIA, whose articles 34(6) and 26.9 respectively provide for a waiver of a right to any form of recourse regarding the award, insofar as such waiver can validly be made.

As mentioned, there are few other legal systems where a right to appeal on a point of law exists, and it seems their number is diminishing. There is no express right under the US Federal Arbitration Act ('FAA') to appeal an arbitral award on a point of law. US courts have found in the past that awards could be set aside where there has been a 'manifest disregard of the law' (following the dictum in *Wilko v. Swan* 346 US 427 (1953)). But recent cases suggest that this may no longer be the correct position, and Awards may only be challenged on the basis of the specific categories set out in the FAA (*Hall Street Associates, LLC v. Mattel, Inc* 522 US 576 (2008), followed in *Medicine Shoppe International, Inc v. Turner Investments, Inc* 614 F3d 485 (8th Cir. 2010)). Under English law, the right to appeal on a point of law is enshrined in statute, but the circumstances in which it can be invoked are applied by the courts only on a very restrictive basis.

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