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Section 69 and the "Interventionism" of English Courts

Phillip Capper (White & Case LLP) · Wednesday, September 23rd, 2009 · White & Case

There is a lingering perception amongst the international arbitration community that English courts tend to be more interventionist in relation to arbitration proceedings and awards compared to some of their continental counterparts. In reality, English courts are much less interventionist than some imagine, despite provisions such as section 69 of the Arbitration Act 1996 which allows an appeal to the English courts on a question of law arising out of an award. We will see below that there is no such right to appeal in the vast majority of international arbitrations seated in England.

The recent judgment by Gloster J in Shell Egypt West Manzala GmbH and Shell Egypt West Qantara GmbH v Dana Gas Egypt Limited (formerly Centurion Petroleum Corporation) [2009] EWHC 2097 (Comm) may seem to reinforce the "interventionist" perception about English courts. The court in this case interpreted the parties' agreement that the award would be "final, conclusive and binding" as not excluding the right of appeal granted by section 69.

The judgment has been considered in detail previously on this blog, and this post does not revisit the reasoning or the conclusion of the English court on the merits. Rather, it seeks to make a broader point that viewing the English courts' power to hear appeals on questions of law arising from awards as being overly interventionist would be misconceived.

The plain fact is that, in any event, section 69 can only apply to very few arbitrations. This is for three reasons.

First, the right to appeal on a point of law applies only if the governing law of the dispute (the lex causae) is English law. This is expressly set out in the Arbitration Act – section 82(1) defines "question of law" to mean "for a court in England and Wales, a question of the law of England and Wales" – and has been confirmed in many cases where the court has refused to allow an appeal on questions concerning non-English law.

Second, where the parties choose to arbitrate under the ICC or the LCIA Rules (two of the most popular institutions for international disputes), the parties' right to appeal under section 69 is waived automatically. Article 28.6 of the ICC Rules and Article 26.9 of the LCIA Rules provide that the parties by agreeing to arbitration under the respective Rules waive their right to any recourse to a court, insofar as such waiver may be validly made. English courts have recognised and respected such waivers. In Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 43 the House of Lords confirmed that, e.g., the wording of Article 28.6 of the ICC Rules ("the parties … shall be deemed to have waived their right to any form of recourse insofar as such

waiver can validly be made") works to effectively exclude any right to appeal under section 69.

Third, where the parties opt for ad hoc arbitration or for institutional rules which do not contain waiver language akin to the ICC and LCIA Rules, the parties can exclude the application of section 69 by stating so expressly in their arbitration agreement. In this regard, it is notable that the UNCITRAL Rules as well as the rules of several popular arbitration institutions – such as the SCC, HKIAC and SIAC – do not contain a waiver of the parties' right to appeal (it is worth highlighting that recent discussions of amendments to the UNCITRAL Rules have included the insertion of a waiver in terms broadly similar to the ICC Rules). As long as parties and their legal counsel are aware of this limitation and insert explicit language to exclude the application of section 69, English courts have consistently shown that they respect the parties' choice and refuse to allow an appeal on a point of law.

Section 69 is certainly an unusual provision in a law governing international arbitrations as it allows for an appeal on a point of law as a default right. However, given the limited application of this right in practice and the English courts' inclination to respect the parties' exclusion of this right (whether by selection of ICC/LCIA Rules or by express language in the arbitration agreement), Shell v Dana should not be understood as suggesting that English courts are unfriendly towards arbitration.

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