Kluwer Arbitration Blog

Section 69 almost 20 years on….

Matt Marshall (Enyo Law LLP) · Wednesday, June 24th, 2015 · YIAG

When the English Arbitration Bill was being debated in early 1996, a controversial issue considered was whether to retain a right of appeal on a point of law. Contrary to a number of civil code jurisdictions, the right was retained under English law, albeit in limited form and with the option to "opt-out". A key justification given at the time was that a limited right of appeal on a point of law was not inconsistent with the decision to arbitrate instead of litigate. Almost 20 years on, does this provision still serve a useful purpose or does it damage the popularity of London as a seat of arbitration?

The limited right of appeal

The English Arbitration Act 1996 (the **Act**) permits a limited right of appeal on a point of law. The right exists under section 69 of the Act and affects arbitrations seated in England and Wales (as the Act applies only when that is the seat of the arbitration) and where the law governing the merits is English law.

The right of appeal is limited. For instance, an appeal can only be brought following an award either with the agreement of all the other parties, or (more commonly) with the permission of the English court. Permission will only be granted in limited circumstances, which include: i) that the determination of the question will substantially affect the rights of one or more of the parties; ii) that the question is one which the tribunal was asked to determine; and iii) 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.

The parties are also free to "opt out" of section 69 by agreement. This commonly occurs through choice of certain institutional rules that contain a standard waiver (e.g. ICC, LCIA, SIAC), but will also be deemed where the parties have agreed to dispense with reasons for the tribunal's award.

Rationale for the inclusion of a limited right of appeal

The reasons for the inclusion of a limited right of appeal on a point of law were explained during the drafting of the Arbitration Bill, which would eventually become the Act.

'…[t]*he great balancing act which this Bill has had to perform is between those who wish to exclude the courts from all aspects of arbitration procedure and those who would like to preserve a significant measure of court supervision. Generally I believe that this Bill has got that balancing act about right…'*. (Lord Byron from a House of Lords debate on 18 January 1996)

'…[w]*e received a number of responses calling for the abolition of any right of appeal on the substantive issues in the arbitration… We have considered it carefully, but we are not persuaded that we should rec-ommend that the right of appeal should be abolished. It seems to us that with the safeguards we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate….'*. (Departmental Advisory Committee Report on the Arbitration Bill)

It was considered that there was a balance to be struck between, on the one hand, excluding the courts from unduly interfering with the arbitration procedure and, on the other hand, ensuring the parties' chosen law was properly applied. It was deemed that a limited right of appeal correctly addressed that balance.

Number of section 69 applications made

Twenty years down the line, how often is section 69 actually relied upon? A manual review of reported decisions involving a section 69 application shows the following*:

These figures are very low. Whilst, they may understate the position (applications for leave to appeal determined on the papers alone without a hearing are not reported) they indicate that very few applications are made each year, of which even fewer are successful.

It is difficult to put these figures in context. There is no means of gauging the total number of awards made with arbitrations seated in England and with an English governing law clause. It is safe to assume, judging by the number of reported LMAA cases (referred to below), that such number is most likely to be in the thousands.

Shipping cases

As previously indicated, a number of institutions that deal with general commercial arbitration include in their institutional rules a standard waiver of the parties' right to any form of appeal, review or recourse to any state court or other legal authority (e.g. ICC, LCIA, SIAC). Most likely as a consequence of such standard waivers, the most common type of dispute dealt with in section 69 applications relates to shipping. (The statistics below have been collated from a manual review of reported decisions in the High Court. They are not official statistics (and should not be relied upon as such), as there is no central database that collects this information.)

To put these figures in context, LMAA statistics show that at least 500 awards were made each year between 2010 to 2014 (excluding awards made under the intermediate claims, fast and low cost, and small claims procedures) (link). As the LMAA does not register all arbitrations commenced under LMAA Terms and Procedures, its statistics are based upon enquiries made by members. It is therefore most likely that the total number of LMAA awards made each year far exceeds this number.

Because, as confirmed by the LMAA, almost all arbitrations conducted on LMAA Terms involve contracts governed by English law, it would appear that only a very small fraction of the total number of awards made in shipping cases each year are appealed.

Opt-in or Opt-out

There are so few applications made under section 69 each year that it seems of little consequence whether or not section 69 is retained or repealed. The right has been marginalised by standard waiver provisions that appear in many institutional rules. Even where standard waiver provisions do not exist, for instance in shipping cases, the right of appeal is used sparingly.

Yet, arguably, section 69 contributes (rightly or wrongly) to the misconception that English law is not as arbitration friendly as other jurisdictions. This, in turn, may adversely affect the popularity of London and English Law as the seat and governing law of an arbitration, respectively (see, for instance, the results of the *"2010 International Arbitration Survey: Choices in International Arbitration"* conducted by the Queen Mary School of Arbitration (link)).

Given section 69 is approaching its twentieth birthday and England continues to thrive as a hub of international arbitration, perhaps such concern is purely theoretical. Nonetheless, with increasing competition for international arbitration work, the concern (theoretical of otherwise) might be dismissed by varying section 69 from an "opt-out" to an "opt-in" provision, leaving a mechanism available for parties who consider the proper application of their choice of law to be paramount, but otherwise reinforcing the perception that English law respects the parties' choice of arbitration over litigation.

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