Kluwer Arbitration Blog

Why the English Right to Appeal an Arbitral Award on a Point of Law is not Anachronistic?

Tonderai Nyandoro · Monday, May 30th, 2016 · Enyo Law

A few months ago a piece was published on the Kluwer blog on s. 69 of the English Arbitration Act, a provision which gives a party to an English-seated arbitration a limited right of appeal on a point of law (absent an agreement to the contrary with its contractual counterparty). Based on a review of some twenty years of application of s.69 by the English courts, that blog queried the continued relevance of s.69 (as it is used relatively infrequently outside of the shipping sphere) and expressed concern that it might contribute to the perception that England is not as arbitration friendly as other jurisdictions where an appeal on a point of law is not possible.

In a recent lecture, Lord Thomas (the Lord Chief Justice of England and Wales) argued to the contrary that a more flexible test for permission to appeal on a point of law was needed, because arbitration is hindering the development of the common law (by taking cases away from national courts and allowing them to be decided behind closed doors). In response, Lord Saville and Sir Bernard Eder (both former Judges and now arbitrators) expressed their disagreement with Lord Chief Justice Thomas' proposal to revitalise s.69. Sir Bernard Eder pointed out that, should a more flexible test for s.69 be introduced, parties may be more inclined to exercise their contractual right to exclude the right of appeal or, worse, decide to arbitrate elsewhere, leading to fewer appeals. Lord Saville emphasised that the users of arbitration "have expressly agreed to use arbitration as their method of dispute resolution. By doing so they have agreed to accept the decision of their chosen tribunal instead of that of the court. What the English court would have decided is irrelevant".

The present blog argues that the increasing sophistication of arbitration means that an appeal on a point of law is more relevant today than it has ever been. As such s.69 is not anachronistic. This blog also maintains that s.69 plays a vital role in the continued development of English law, including English arbitration law.

The growing complexity of arbitration

Numerous authors have written about the growing procedural complexity (or the "judicialization") of arbitration (see particularly Günter Horvath). This has been a source of concern for many users of arbitration (See Queen Mary University's 2013 Survey).

The term "judicialization" refers to the fact that the arbitration procedure has progressively become more complex and more convoluted. This is reflected *inter alia* by the seemingly ever increasing

number of soft law instruments which aim to regulate every aspect of the practice of arbitration. As a result, the arbitral process has become far less distinguishable from litigation before domestic courts than ever before.

Some have argued (and we would agree) that judicialisation can be explained in part by the growing complexity, over the past two or three decades, of the disputes in respect of which arbitration is used. This is evidenced by:

- the rise in proportion of multi-party and multi-contract arbitrations; and
- the rise of disputes involving States and State entities.

At the same time, the average value of disputes referred to arbitration has also increased. According to Gerbay, in 2012, 8.7% of cases in the ICC were valued above $50 million (compared to 3.6% in 1989, taking into consideration inflation). This has been accompanied by (or perhaps caused by) a change in the types of disputes referred to arbitration. Arbitration is increasingly used in respect of M&A, Energy and even financial services disputes, while only three decades ago many (if not most) arbitrations concerned simpler sale of goods or sale of services disputes.

Renewed relevance of s.69

One can argue that, if it is correct that cross-border disputes referred to arbitration are relatively more complex now than they used to be, then there is more potential for erroneous decisions to be made by arbitral tribunals in their awards which may be costly and unfair on the losing party. The more complex a dispute, the more it is open to human error either substantively or procedurally. Likewise, the more high-value an arbitration, the more costly an error may end up being and the more likely it is that an aggrieved party may wish to preserve a right of appeal. In addition, if disputes are higher value today than ever, the additional procedural layer of s.69 (with the additional costs and delay it entails) becomes more justified. The appeal mechanism should therefore be viewed as one which benefits, rather than hinders, the arbitration process.

Jurisprudential value

But beyond this, s.69 has a jurisprudential value. It is beneficial for the continued development of English commercial law. To take just one example, the recent case of *Glencore International AG v PT Tera Logistic Indonesia (2016) EWHC 82 (Comm)* not only demonstrates the benefit of an appellate review in complex/high value arbitrations but also illustrates its jurisprudential importance in clarifying issues of English law that are relevant to businesses. This case considered whether, for the purposes of s.14 (4) of the Arbitration Act 1996, the phrase “all disputes” used in a Respondent’s notice to appoint an arbitrator was effective to interrupt a limitation period in respect of any counterclaims (which had not been made by the Respondent at the time of the notice). The appellant appealed against an arbitral tribunal’s finding that the above phrase was not so effective, and that its counterclaims were therefore time-barred. Justice Knowles upheld the appeal and effectively disagreed with two of the arbitrators who had found that the counterclaims were time-barred. Of note, Justice Knowles agreed with the appellant’s submission that the issue before the courts was one which was of market/public importance. Here we have a concise guidance on contract interpretation of the commonly used terms “all disputes”. Such guidance is, of course, important for lawyers and courts as it gives a degree of certainty that was lacking prior to this case. Without s.69, this matter would not have been referred to the courts.

Conclusion

In cases of high-stakes arbitrations with complex factual and legal scenarios, there seems to be a market for an appellate process (in this sense see William Knull & Noah Rubins). The *Glencore International AG* appeal shows that s.69 arguably serves two important functions. Firstly, to protect fairness and the legitimate expectations of its commercial users; secondly, as echoed by Lord Chief Justice Thomas, to preserve the jurisprudential value in the development of commercial law, subject as it should be to rigorous but transparent judicial scrutiny. As most arbitral institutions do not provide for internal appellate procedures, there is a case in favour of retaining at least an optional mechanism for error correction. What remains to be seen is whether parties will in fact retain for themselves the ability to exercise such a right, or whether they will continue to contract out of it in preference for legal certainty.

This blog represents the views of its author. They should not be taken to represent the views of the author's law firm, Enyo Law LLP.

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