Kluwer Arbitration Blog

Do Arbitration Users Really Value Finality?

Peter Hirst (Clyde & Co.) · Monday, June 4th, 2018 · Clyde & Co.

Two recent pieces of recent research raise the question of whether arbitration users really value finality in arbitration or take it for granted. Is it time (again) to discuss whether s69 Arbitration Act 1996 is meeting users' needs?

Arbitration Act 1996, s69

Section 69 of the Arbitration Act 1996 (AA 1996, s 69) is a non-mandatory section which provides that an arbitral award may be appealed on a point of law in limited circumstances. Permission to appeal can be obtained by either the agreement of all parties to the proceedings (which is unusual) or granted by the court where the court is satisfied that:

· The determination of the question will substantially affect the rights of one or more of the parties

· The question was one which the tribunal was asked to determine

· That on the basis of the findings of fact in the award:

- The decision of the tribunal was obviously wrong or
- The question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- 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

On the appeal the court may confirm or vary the award or remit the award to the tribunal in whole or in part for reconsideration, or set aside the award.

Clearly, given the parties' agreement to arbitrate, the use of the courts to ultimately determine the dispute (though not this is on law only and even then the court can decide to remit the award to the tribunal) is a significant step as, arguably, it makes the court the ultimate legal arbiter of the arbitration.

Commercial Court statistics

The Commercial Court Users' Group Meeting Report from 13 March 2018 available here gives statistical insight into the number applications made for permission to appeal arbitral awards and even lower success rates for those who are granted permission.

The s69 statistics show that:

- 2015: 20 out of 60 permission granted, 4 successful appeals
- 2016: 0 out of 46 permission granted, 0 successful appeals
- 2017 (to date): 10 out of 56 granted, 1 successful appeal

While the levels of permission granted have fluctuated 2015 to 2017 from 33% to 0% to 18%, there is really no discernible trend to indicate that permission is becoming easier or harder to obtain.

The number of successful appeals remains low with a 'high' of 4 successful appeals in 2015 appearing unusual.

The 2017 statistics are stated as being 'to date' but it is not clear which date in 2017 they run to. Already in 2018 there have been successful s69 applications including recently in *Agile Holdings v Essar* in which the award was set aside in its entirety (as the decision was binary the court decided there was no reason to remit it to the tribunal). (*Agile Holdings Corporation v Essar Shipping Ltd* [2018] EWHC 1055 (Comm)).

These statistics bear out what those who participate in arbitration already know – that it is difficult to obtain permission to appeal and even more difficult to appeal successfully. One potential reason for the low number of applications for permission is the exclusion of s69 incorporated into leading institutional rules such as those of the LCIA and ICC. Under these institutional rules parties exclude the right to appeal which, as it is not a mandatory rules under the Arbitration Act 1996, is permitted.

Do users want a route of appeal?

The recent Queen Mary/White & Case 2018 International Arbitration Survey: The Evolution of International Arbitration showed that only 16% of respondents viewed finality as one of the three most important characteristics of arbitration. This is interesting as finality is often thought/stated to be one of the greatest benefits of arbitration over traditional litigation routes. Perhaps the survey result shows that parties assume finality because of the exclusion of s69 either voluntarily or by incorporation of major arbitral rules. Alternatively, they can see the benefit of some form of appeal process which is a common feature to court systems and therefore 'arbitration finality' is not important to them.

It is worth remembering that the inclusion of s69 was controversial at the time of drafting the Arbitration Act 1996 (notably the DAC Report), not least because it is a departure from the UNCITRAL Model Law on which the Arbitration Act and many other international arbitration laws are based. Indeed, it is in large part due to this controversy that s69 is couched in such narrow terms and designed to be so difficult to obtain both the permission to appeal and appeal itself.

More recently the low numbers of cases on appeal has been cited by the Lord Chef Justice Lord Thomas as detrimental to the development of English law as points of law are determined in private by tribunals which then precludes them from becoming of precedential value and thus developing the law (notable several other senior judicial figures disagreed). While for many this is not sufficient reason to widen the scope for arbitral appeals it has opened the door to discussions around what is best for arbitrating parties and whether decisions by tribunals which are not subject to review under law provide fair outcomes for parties.

Where now?

The Commercial Court's statistics demonstrate that the DAC's intentions of the Arbitration Act 1996 and the narrow gateway to the court have been successful (most likely aided by arbitral institutional rules). While it is not possible to say for certain, if s69 was not precluded by the ICC and LCIA it is not unreasonable to predict that the number of applications for permission to appeal would rise significantly, though the proportion of successful appeals would not as the 'high bar' for success would remain. One interesting side effect of such a change however would be to see the impact it had in other areas of arbitration:

- Would the public nature of an appeal by which the previously secret arbitration comes into the public eye undermine one of the fundamental benefits of arbitration (confidentiality was rated by 36% of the Queen Mary respondents as one of the three most important characteristics of arbitration)?
- Would parties then simply decide to litigate (though 60% of Queen Mary respondents valued avoiding national courts)?
- Would parties 'opt out' of s69 in their arbitration agreements (as they are currently free to do) if the institutional rules did not already incorporate this option?
- Would arbitrators feel a greater weight of responsibility on decided the law knowing that it may be open to judge's scrutiny?

The questions are endless and many an arbitration conference will no doubt continue to address them.

A key point to be left with is to focus on party autonomy and the parties' right to choose the arbitration procedure they want. Parties need to be aware of the mon-mandatory nature of s69 and their choice of institutional rules' impact on their ability to appeal an award on a point of law. This choice should be consciously made and fully understand by all involved.

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