



ARE YOU IN? OR ARE YOU OUT? AN ANALYSIS OF SECTION 69 OF THE ENGLISH ARBITRATION ACT 1996: APPEALS ON A QUESTION OF LAW

TANER DEDEZADE*

LT keywords to follow

This article is divided into five parts, namely: Introduction; How can the court's jurisdiction be ousted ("Are you out?"); How can the court's jurisdiction be included ("Are you in?"); When will the courts give permission to appeal; and Procedural aspects of s.69 of the English Arbitration Act 1996¹ ("the 1996 Act").

Introduction

The fundamental message behind this article is that the parties should agree at as early a stage as possible on whether:

- (1) they wish to oust the jurisdiction of the courts in relation to appeals on a question of law (Are you out?—s.69(1))
- (2) or whether they wish to agree to include the ability to appeal to the courts on a question of law (Are you in?—s.69(2)).

Parties that opt for arbitration as a means to resolve their dispute(s) will usually have as their objectives: finality, a wish to avoid the tiers of appeal that are available in court proceedings, a wish to save costs, or an interest in a speedy resolution to their dispute. If the parties wish to give effect to these objectives and ensure their award is free from challenge on a question of law, they are therefore encouraged to opt for the former option.

Parties are only likely to opt for the latter option if they are concerned about the arbitrator's ability to interpret the law properly. This will normally be a concern when a non-lawyer is instructed as arbitrator. This seems to be a widespread practice in the construction industry as some standard form construction contracts specifically include² a clause expressly including jurisdiction.

Parties wishing to oust the jurisdiction of the courts can do so by:

*LL.B. (Hons), Dip.ICA MCI Arb., Barrister-at-Law, Tanfield Chambers, London.

1. Readers must be aware of the challenge procedure available under s.68 of the 1996 Act. Often in practice, if a challenge to an arbitral award is mounted, a related challenge under s.68 may also need to be considered. See the recent case: *Icon Navigation v Snochem* (2003) (Comm) 405.

2. See standard from contracts such as cl.9.7 JCT 2005 SBC/Q for an example.

- (1) expressly stating so in an express clause;
- (2) by adopting institutional rules that contain an express clause to the same effect, e.g. ICC Rules;
- (3) by enabling the tribunal to determine the dispute *ex aequo et bono* or as *amiable compositeurs*; or
- (4) by opting for a system of law that is not English law to govern the arbitration.

Parties wishing to include the jurisdiction of the courts can do so by including an express clause (either by way of a bespoke clause or by adopting a clause in one of the standard forms).

What is important is that the 1996 Act gives the parties an ability to choose. Parties are encouraged to exercise that choice as not to choose will leave them at the mercy of the courts on an application for leave to appeal.³ If the decision is left in the hands of the court, i.e. on an application for leave to appeal, the courts must now work through the statutory criteria set out in s.69(3)(b)–(d) (see below).

The intention of the architects of the 1996 Act was to severely restrict the scope of permission to appeal.⁴ It appears that this objective has been met, as there do not seem to be many successful s.69 applications getting through the system. The criticisms that the courts do not appear to be applying s.9(3)(d) as it was envisaged and the potential misinterpretation of the *Northern Pioneer* case⁵ may, however, mean that there will be an increased spurt of applications in the future (see the fourth part of

3. The word now used post Civil Procedure Rules 1998 is "permission"; accordingly throughout this article the term "permission" will be used even when referring to leave under the old law.

4. As recently as August 2005, Mr Justice Jackson considered in *Surefire Systems Ltd v Guardian ECL Ltd* [2005] EWHC 1860 that there seemed to be a widespread misunderstanding about the role of the court in relation to construction arbitrations and so in order to dispel that notion he emphasised (at [42]) that where parties enter into an arbitration agreement their rights thereafter to challenge the arbitrator's award are strictly limited by the AA 1996; and no application for leave to appeal will be granted unless the prospective applicant can surmount the substantial hurdles set up by s.69.

5. *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS Northern Pioneer Schiffahrtsgesellschaft MBH & Co* (2003) 1 W.L.R. 1015 ("the *Northern Pioneer*")

the article for full discussion as to why these conclusions have been reached).

General background

Before the 1996 Act was the Arbitration Act 1979 ("the 1979 Act"), before that, the Arbitration Act 1975 and before that, the Arbitration Act 1950 ("the 1950 Act"). By 1979 the "special case" procedure and the widely abused "error on the face of the award" challenge were abolished. After the 1979 legislation came into force, however, several foreign commentators still viewed the English courts with scepticism. Several foreign commentators warned that while the front door was now bolted to the dangers of the special case, the English courts would find a new means to break the back door.⁶

After some 10 years of the 1979 Act, however, Craig, Park and Paulsson⁷ reported that

"recent English Court decisions provide every evidence that English judges will restrain abusive challenges to awards. The High Court has shown itself unwilling to let its residual power to set aside an award for 'arbitrator misconduct' be used as an avenue for 'backdoor' appeal of awards subject to an exclusion agreement".

The senior judiciary were supportive of the philosophy behind modern international commercial arbitration embodied in the doctrines of party autonomy; a need for a reduced role for the courts; and the need for speed and finality in arbitration awards. In the House of Lords, Lords Diplock and Roskill made comments supportive of these principles and critical of court procedure under the previous legislation:

In the *Nema*, Lord Diplock said:

"The parties should be left to accept, for better or for worse, the decision of the tribunal that had chosen to decide the matter in the first instance."

In *Antaios*, Lord Diplock said:

"unless judges are prepared to be vigilant in the exercise of the discretions conferred upon them ... they will allow to be frustrated the intention of Parliament, as plainly manifested by changes in procedure that these statutes introduced, to promote speedy finality in arbitral awards rather than that insistence upon meticulous semantic and syntactical analysis of the words in which the business men happen to have chosen to express the bargain made between them, the meaning of which is technically, though hardly commensensically, classified in English jurisprudence as a pure question of law" (emphasis added).

6. This is the way the Hon. Anthony Diamond and V. V. Veeder Q.C. described the position shortly after the 1979 Act came into force in the article "The New English Arbitration Act 1996: Challenging an English Award before the English Court" (????) 8 Am. Rev. Int'l Arb. 47.

7. *ICC Arbitration* (2nd edn, 1990).

After referring to his judgment in the *Nema* case, Lord Diplock commented in *Antaios* that

"at that time the way in which the parliamentary intention was being thwarted was by parties to arbitrations applying for leave to appeal from any award that involved a question that was even remotely arguable as to the construction of the relevant contract, and by some, though not all commercial judges following a policy of granting leave in virtually all such cases, albeit upon conditions ...".

Lord Roskill in the *Antaios* case agreed with Lord Diplock and added:

"Moreover with all respect to the three arbitrators in the present case, whose lengthy reasons for their award I have read with admiration for their legal learning, if reasons from which the Act of 1979 makes provision are to be given with such elaboration, the very preparation of those reasons must itself defeat the possibility of obtaining speedy arbitral decisions, independently of any question of further delay brought about by a possible appeal or appeals. In general businessmen are interested in the decision, not in its underlying legal philosophy, however much lawyers have that wider interest."

The Departmental Committee on the Law of Arbitration, chaired by Lord Steyn, regarded a series of decisions relating to procedural mishap⁸ as a "retrograde development which unjustifiably militates against the finality of arbitration awards under English law".

As a result of these adverse decisions and other reasons, the 1979 Act was considered in need of repeal. Alongside these developments, the United Nations Commission on International Trade Law ("UNCITRAL") produced the Model Law in 1985. Other countries were adopting the UNCITRAL Model Law into their laws.⁹

In England, the task of considering whether or not to adopt this Model Law was undertaken by a Committee of the Department of Trade and Industry chaired by Lord Mustill. That committee produced a report in 1989.¹⁰ The report's conclusion accepted by the UK Government was not to adopt the Model Law. The recommendations made in this report led to the drafting of the first Arbitration Bill that was produced in February 1994. This Bill turned out to be a big disappointment. The chairmanship of the Departmental Advisory Committee ("DAC") was then taken over by Lord Steyn and then finally Lord Saville. A further Bill was produced in December 1995 with the help of Toby Landau and parliamentary counsel. A comprehensive DAC report on this Bill was then

8. *King v Thomas McKenna Ltd* [1991] 2 Q.B. 480; *Indian Oil Corp v Coastal (Bermuda) Ltd* (1990) 2 Lloyd's Rep. 407; *Breakbulk Marine v Dateline* (1992) unreported; *Fletamentos Maritimos SA v Effjohn Int'l BV (No.2)* (1997) 1 Lloyd's Rep. 295.

9. See in particular the laws of France and Switzerland.

10. "A New Arbitration Act?: The Response of the Departmental Advisory Committee to the UNCITRAL Model Law (1989)" (1990) 6 *Arbitration International* 1.

produced¹¹ (“the DAC report”). It was this report that formed the basis of the 1996 Act. The DAC report is still always cited as an aid to construction of the 1996 Act and is a strong indication of the intention behind the legislators of the 1996 Act.

After the 1996 Act came into force, Lord Mustill and Stewart Boyd Q.C. described it as follows:

“The [Arbitration] Act [1996] has however given English arbitration law an entirely new face, a new policy, and new foundations. The English judicial authorities ... have been replaced by the statute as the principal source of law. The influence of foreign and international methods and concepts is apparent in the text and structure of the Act, and has been openly acknowledged as such. Finally, the Act embodies a new balancing of the relationships between parties, advocates, arbitrators and courts which is not only designed to achieve a policy proclaimed within Parliament and outside, but may also have changed their juristic nature.”

Lord Wilberforce stated¹²:

“I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system. Free to settle its own procedure and free to develop its own substantive law—yes its substantive law.”

In *Seabridge Shipping AB v AC Orsleff's EftF's A/S*,¹³ Thomas J. gave guidance under the 1996 Act as follows:

“One of the major purposes of the Arbitration Act 1996 was to set out most of the principles of the law of arbitration of England and Wales in a logical order and expressed in a language sufficiently clear and free from technicalities to be readily comprehensible to the layman. It was to be in ‘user friendly language’ As this has been the achievement of the Act, it would in my view be a retrograde step if when a point arose reference had to be made to pre-Act cases, references to such cases should only generally be necessary in cases where the Act does not cover a point ... A Court should in general comply with the guidance given by the Court of Appeal and rely on the language of the 1996 Act.”

The recent 2005 House of Lords case of *Lesotho Highlands Development Authority v Impregilo SpA* (“the *Lesotho case*”)¹⁴ considered the 1996 Act in some detail. Lord Steyn sets out¹⁵ the ethos of the 1996 Act and describes the changes brought about by the 1996 Act as radical. The preface from Mustill and Boyd, *Commercial Arbitration*,

11. Departmental Advisory Committee on Arbitration Law, Report on the Arbitration Bill (1996).

12. In the second reading of the Bill in the House of Lords explained his view of the philosophy enshrined in the Act in *Hansard*, at col.778 on January 18, 1996.

13. [1999] 2 Lloyd's Rep. 685.

14. [2005] UKHL 43.

15. *ibid.*, in Pt XI of his judgment.

and Lord Wilberforce's speech are also referred to (set out above). Lord Steyn sets out his approach to the interpretation of the 1996 Act¹⁶ and poses himself a question: can they realistically be asked to interpret the 1996 Act in the light of pre-existing case law? His answer was a plain “Clearly not”. Lord Steyn, specifically cited Thomas J. in the *Seabridge* case and clearly goes further than Thomas J. did in answer to the question relating to pre-1996 authorities. Lord Steyn also re-emphasises Lord Wilberforce's point that there are many laymen that get involved in arbitrations and that many arbitrations are conducted by non-lawyers.

More detailed background to s.69—right of appeal on a question of law

The DAC received a number of responses in its consultation to abolish the right of appeal on the substantive issues in the arbitration. It seems that the arguments in support of abolition were as follows:

- (1) If parties agree on arbitration as a means to resolve their dispute they should be able to rely on the decision of their chosen arbitrator as opposed to the decision of a court, whether or not their arbitrator has misinterpreted the law or not. If the parties wished for the courts to determine their dispute they would not have agreed to have the dispute referred to arbitration.
- (2) The UNCITRAL Model Law does not contain a provision to allow appeals on a point of law.
- (3) Many other countries have adopted the UNCITRAL Model Law.

While these arguments are perfectly tenable, the DAC decided not to embrace them and follow the abolitionists. In their opinion a more important consideration was that if the parties had agreed on a given system of law, the parties should be entitled to expect that the law would be applied properly by their chosen arbitrator. Failure to apply the law properly would do a disservice to the parties and would not achieve the result contemplated in the arbitration agreement.

This argument, of course, presupposes that the courts are in a better position to apply the law than the arbitrators. Such a proposition may well be true if the English courts are applying questions of domestic law. It is not so persuasive when the English courts are required to interpret international law.¹⁷ There is a contingent that considers that the courts are no better placed to apply the law than a chosen arbitrator, particularly if such arbitrator has legal training. It seems that the main rationale behind the DAC, however, is that as there are a number of non-lawyers acting as arbitrators and it is those individuals who may misapply the law and the courts should provide a means to remedy such misapplication.

Another argument in support of the retention of appeals on a question of law is that it enables the courts to allow

16. *ibid.*, in Pt XII of his judgment.

17. *N.B.* only a question of English law can be appealed under s.69 of the 1996 Act by virtue of s.82 of the 1996 Act.

precedents to develop in the area of commercial law, particularly on matters of public importance.

V. V. Veeder Q.C.¹⁸ acknowledges that it is an historical oddity that English law still allows an appeal on a question of law despite abolitionist arguments rejected by the DAC. He describes that oddity as follows:

“it is an English oddity which has helped to make English Commercial law the most useful and popular system of law in world trade. It remains unthinkable that the symbiotic link should be broken between commercial arbitration, the development of the English law and the English Commercial Court; and I can do no better than to quote from Lord Diplock’s 1978 Alexander lecture: ‘Even the most radical would-be reformers of our arbitration law do not recommend that the Special Case procedure or something like it should not be available to parties to an arbitration if this be a term of the agreement between them. It has proved a most effective instrument in the development of English commercial law; and has given to it a degree of certainty that has made it a popular choice as the law to govern commercial contracts even though they have no territorial connection with this country’.”¹⁹

The DAC therefore proposed what they considered to be a limited right of appeal with safeguards which would still be consistent with the fact that the parties have chosen to take their disputes to arbitration as opposed to the courts.

Lord Mustill and Stewart Boyd Q.C. describe the right of appeal to be

“in a considerably attenuated form ... compared with the right of appeal conferred by the Arbitration Act 1979, there are a number of changes, all of which are inspired by a general tendency against intervention in the decision of the chosen tribunal”.²⁰

Under the Arbitration Act 1979, there was an ability to exclude the right to appeal on a point of law but such rights were restricted, in relation to domestic agreements, special categories and statutory arbitrations. The 1996 Act does not include such restrictions and reference to the term “exclusion agreement” has been abandoned.

In relation to appeals, Lord Saville²¹ stated:

18. In Ch.14 of J. Lowry and L. Mistelis (eds), *Commercial Law Perspectives and Practice* (Butterworths, 2005).

19. He goes on to make comparisons with other countries: “In countries that have long broken the link between commercial arbitration, the development of national law and the state courts (like Sweden), there has grown up increasing complaints that the development of commercial law has withered away to the great disadvantage of the commercial community. Furthermore, over the last ten years the English oddity has become increasingly popular outside England, a useful example appears from the practice of the parties to arbitrations in the USA.”

20. At p.356 of their commentary on the 1996 Act contained in *Commercial Arbitration* (2001), Companion Volume to the Second Edition.

21. On November 29, 1996, Lord Saville, Lord Appeal in Ordinary, gave the Donald O’May lecture in Maritime

“we have very severely limited the right to apply to appeal from an arbitration award ... This new provision means that over and above the court’s being satisfied that the tribunal was obviously wrong in law or (in a case of general importance) that its conclusion was at least open to serious doubt, there will have to be something else which makes it just and proper for the court to substitute its own decision for that of the tribunal. This should, and is intended to make successful applications for leave to appeal from an arbitration award very rare indeed.”

How can the court’s jurisdiction be ousted (“Are you out?”)

Section 69(1) of the 1996 Act provides that unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court²² on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal’s award shall be sufficient to exclude the court’s jurisdiction under this section.

As s.69(1) is “unless otherwise agreed by the parties” it is a non-mandatory provision of the 1996 Act,²³ the parties are free to agree to exclude s.69²⁴ of the 1996 Act either expressly or by agreeing to dispense with reasons for the tribunal’s award.²⁵ In circumstances in which the parties agree that no reasons at all should be given, the parties will have effectively ousted the jurisdiction of the courts as no reasons can be analysed and hence no error of law can be identified.²⁶ The practice, however, that developed before the 1996 Act was for arbitrators to publish their reasons in “confidential” form in those cases where the parties had not asked for the award to be stated in the form of a special case. Publishing confidential reasons which did not form part of the award enabled the arbitrator to provide the parties with an explanation of his reasoning without at the same time providing an opportunity to challenge the award on that ground. This practice has lingered on subsequent to the passing of the 1996 Act and the courts have considered that if by

Law at the Institute of Maritime Law of the University of Southampton. The revised text of the lecture was published in an article: Lord Saville, “The Arbitration Act 1996” [1997] *Lloyd’s Maritime and Commercial Quarterly* 502.

22. s.105 of the Act defines “the court” as the High Court or a county court subject to further provisions set out in subs.2 and 3 of s.105.

23. See s.4 of the 1996 Act (relating to the mandatory provisions of the 1996 Act).

24. *N.B.* s.68 is mandatory and cannot be excluded so in some circumstances a challenge may still be mounted on s.68 grounds. Discussion of s.68 of the 1996 Act is outside the scope of this article.

25. The non-mandatory s.52(4) of the Arbitration Act 1996 states that the award shall contain reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.

26. See below for further detail on the courts practice on giving reasons.

agreement between the parties the arbitrator publishes his reasons in a separate document on terms, express or implied, that the parties are not to refer to them in connection with any proceedings relating to the award, the parties are bound in contract to each other and to the arbitrator not to make use of them in that way²⁷ (see *Tame Shipping Ltd v Easy Navigation Ltd* (“*The Easy Rider*”)²⁸).

If the parties do agree to exclude s.69, they must do so in writing: s.5(1) of the 1996 Act makes it clear that the expression “agreed” must be construed only if in writing. There is no reference in the 1996 Act as any form of words that should be used to effectively exclude the jurisdiction of the courts.

The parties can either use an express clause or rely on institutional rules when ousting the jurisdiction of the courts.

Express clause

Care must be taken to ensure that an express clause is clear and unambiguous. Unfortunately, it is so often the case that the arbitration clause is simply a “midnight” clause. A form of words²⁹ to oust the jurisdiction of the courts of England is as follows:

“The parties agree that the award is final and binding. The parties expressly agree to oust the jurisdiction of the courts to hear appeals on a question of law (as it is permitted to do under section 69(1) English Arbitration Act 1996).”

Institutional rules

The following rules have the effect of ousting the jurisdiction of the courts under s.69³⁰:

- (1) Art.28.6 of the ICC Rules;
- (2) Art.29.2 of the LCIA Rules; and
- (3) s.22(a) of the LMAA Rules.

“Final and binding”

The words “final and binding” found in many arbitration rules, e.g. UNCITRAL Arbitration Rules (Art.32(2)), AAA International Arbitration Rules Art.27(1), have not been considered in any English case law.

The Brief Introduction to the LCIA rules states as follows:

“it is almost universally the case that the rules of the foremost international arbitration institutions (of

27. For an analysis of whether the reasons can be referred to by the courts on a s.68 application, further consideration should be given to the *Tame Shipping* case (fn.28 below), *Atlantic Lines and Navigation Co Inc v Italmare SpA* (“*The Appollon*”) [1985] 1 Lloyd’s Rep. 597, and to *Mutual Shipping Corp v Bayshore Shipping Co* (“*The Montan*”) [1984] 1 Lloyd’s Rep. 389.

28. [2004] 2 Lloyd’s Rep. 626

29. Suggested by the author.

30. See *Sanghi Polyesters Ltd (India) v The International Investor (KCFC) (Kuwait)* [2000] 1 Lloyd’s Rep. 480, or the recent *Lesotho* case.

which the LCIA is one) expressly provide that any award will be final and binding and will be complied with without delay. By agreeing to be bound by such rules, the parties usually also exclude any right of appeal on the merits to a national court which may have jurisdiction to hear such appeal.”

The rationale behind the thinking set out in the introduction to the LCIA rules is that if an award is final and binding, by definition it should not be subject to appeal. The concept of finality is at the cornerstone of arbitration as a practice.

Canada

In Canada, the parties similarly can opt to exclude the jurisdiction of the courts. In *Labourers International Union of North America, Local 183 v Carpenters and Allied Workers, Local*,³¹ an Ontario case, the courts held that the words “final and binding” do operate as an exclusion agreement. In another case in Canada, *National Ballet of Canada v Glasco*,³² the courts had to consider how to interpret an arbitration clause that contained a clause referring to a single arbitrator for “binding arbitration” that would be “fully and finally disposed of” in the arbitration. The courts considered that a different interpretation should be given in a case that uses the word “binding” without reference to the word “final”, i.e. “final and binding”. Accordingly, despite the words used, “fully and finally disposed of” were not sufficient to oust the jurisdiction of the court. In the author’s view this decision is curious, as using the words “fully and finally disposed of” suggests that the intention of the parties was to preclude an appeal as it is only if there is no appeal that the decision would be fully and finally disposed of.

Australia

*Raguz v Sullivan*³³ states that the New South Wales Court of Appeal held that “mere agreement that an award shall be ‘final and binding’” would not be an exclusion agreement, especially in light of the fact that s.28 of the Act provides this as a general rule in any event (*Corner v C & C News Pty Ltd* (1989), unreported, is cited).

Case law in Australia on the meaning of the words “final and binding” is helpful as the structure of their Commercial Arbitration Act 1984 (“CAA 1984”) is similar to the 1996 Act in so far as the text of s.28 CAA 1984³⁴ is similar to the text in s.58(1) of the 1996 Act.³⁵ For this reason, arguably, the English courts are more likely to follow the Australian approach than the Canadian approach to the words “final and binding”, i.e. that these

31. (1997) 34 O.R. (3d) 472.

32. (2000) 186 D.L.R. (4th) 347.

33. [2000] N.S.W.C.A. 240.

34. “Awards to be final. Unless a contrary intention is expressed in the arbitration agreement, the award made by the arbitrator or umpire shall, subject to this Act, be final and binding on the parties to the agreement.”

35. This states that an award is final and binding but in s.58(2) it is expressly clarified that this does not affect the right of a person to challenge an award in accordance with the provisions of Pt 1 of the 1996 Act.

words alone are not sufficient to oust the jurisdiction of the courts under s.69.

The GAFTA Rules: can the exercise of an “absolute discretion” that is final and binding amount to an effective exclusion of the court’s jurisdiction under s.69?

In the GAFTA Rules, r.22 refers to the Board having an “absolute discretion” that shall be final and binding. The courts in England have had to consider this wording on a number of occasions. In the author’s view, the GAFTA Rules should simply be amended in order to avoid this complication in the future.

Essentially there are two camps:

- (1) Camp 1: The camp that states that the word “absolute” adds nothing to the word “discretion” and therefore as it is a discretion being exercised as opposed to a final decision being made, it can be reviewed (under s.69).
- (2) Camp 2: The camp that states that the word “absolute” must mean something and that it essentially means that the decision becomes unfettered and unrestrained hence making it a final (and binding) decision (excluding s.69).

In *Cook Industries v BV Handelmaatshchappij Jean Delvaux*,³⁶ the court of first instance (Leggatt J.) favoured camp 2; he accepted the buyer’s case that “an absolute discretion” was “one which is unfettered and unrestrained, not subject to review by any court”. He stated:

“that was indeed the intention of the parties, or must be taken to have been their intention by entering into a contract in these terms. They intended that the arbitrator, umpire, or as here, Board of Appeal should enjoy the widest possible discretion not subject to review of the Court.”

Leggatt J. considered a number of authorities to support his conclusion (of camp 2), in particular Lord Denning’s judgment in *Ward v James*³⁷ where Lord Denning asked: “what does the word ‘absolute’ discretion mean here? Does it add anything to the word ‘discretion’?”

Leggatt J. points out that Lord Denning was referring to the use of the word “absolute” in the context of the Rules of the Supreme Court that were subsequently held to have been ultra vires. Lord Denning continues to say:

“in *Whipps v Powell Duffryn Engineering Co. Ltd*, Lord Justice Harman said ‘every discretion is absolute if you do not confine it, and for myself I do not think the word “absolute” adds to the matter at all’ and in *Hennell v Ranaboldo* Lord Justice Diplock said the same. But I rather think that the word ‘absolute’ was used here in the sense we speak of an ‘absolute monarch’. It means that the discretion is unfettered and unrestrained, not subject to review by any court.”

36. [1985] 1 Lloyd’s Rep. 120, CA.

37. [1966] 1 Q.B. 273.

Leggatt J. also considers cases (supporting camp 1), particularly *Associated Provincial Picture Houses Ltd v Wednesbury Corp*³⁸ and *Timmerman’s v Sachs*.³⁹ The notion of “*Wednesbury* unreasonableness” is now firmly embedded in case law relating to public law. The case concerned the power of the courts to interfere with an act of executive authority exercising their discretion. Lord Greene M.R. in that case said:

“a person entrusted with a discretion must so to speak, direct himself properly in law. He must call to his own attention to the matters which is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said to be acting ‘unreasonably’.”

In the *Timmerman’s* case, Parker J. said that

“it is conceded that once it is held that the Board of Appeal had an absolute discretion that is the end of the matter, because there is nothing in the special case upon which I could conceivably say that the Board were wrong in coming to the conclusion which they did”.

This reasoning suggests that in the event that there was something wrong the court would have had a review.

Sir John Donaldson M.R. (with whom Goff L.J. and Sir Roger Ormrod agreed) essentially disposes of the point in one paragraph, at p.127 of his judgment:

“The first question which arises is whether the Court can review a discretion which is in terms stated to be ‘absolute’. For my part I have no doubt that it can. One has only to consider the possibility of mala fides . . . or the taking account of a matter which on no conceivable view could be regarded as relevant. In such cases the Court could and should intervene.”

Essentially, therefore, it seems that Sir John Donaldson came to his conclusion on the meaning of “absolute discretion” by relying on the public law notion derived from the *Wednesbury* case. This is not absolutely clear, however, as he does not state any authority to support this proposition. It seems reasonable to assume, however, that he relied on the authorities discussed by Leggatt J., namely *Wednesbury*, to arrive at his conclusion.

In *Ad Hadha Trading Co v Tradigrain SA*,⁴⁰ the Board had published a correction to its award and declined to give reasons for its decision to extend time because it held that it was not required to do so. Mr Morris Q.C. was essentially arguing camp 2: the GAFTA Rules contain an agreement dispensing with the need for giving reasons for its decision: the rules contain an agreement that dispensing with reasons is “an absolute discretion” and the last sentence of r.22 states that “any decision made pursuant to this rule shall be final, conclusive and binding”.

38. [1948] 1 Q.B. 223.

39. [1980] 1 Lloyd’s Rep. 194.

40. Queen’s Bench Division (Bristol Mercantile Court) [2002] 2 Lloyd’s Rep. 512.

Judge Havelock Allen Q.C. favoured camp 1 and did not accept Mr Morris's submission. His reasoning was that the conferring of an "absolute discretion" does not, of itself, preclude review of the exercise of that discretion by the court even though the scope of any possible review may be very narrow.

Judge Havelock Allen Q.C. relied on Sir John Donaldson's judgment in *Cook* in support of his judgment.⁴¹ His reasoning (in considering the 1950 Arbitration Act) was that a court can review a discretion that is in terms stated to be "absolute".

Judge Havelock Allen Q.C. concedes first that the grounds on which the exercise of a discretion are very strictly circumscribed (limited to bad faith and the taking into account of wholly extraneous matters) and then states: "Necessarily the circumstances would be extreme and the instances rare."

Judge Havelock Allen Q.C.'s conclusion is (and reference is expressly made to s.69) that if there is a possibility of review by the court it cannot be inferred that an agreement to confer an absolute discretion on an arbitral tribunal carries with it an agreement to dispense with reasons for the tribunal's decision in exercising that decision.

Judge Havelock Allen Q.C. arrives at his conclusion by stating at [31] of his judgment:

"it is plain that the conferring of an "absolute discretion" does not itself preclude review of the exercise of that discretion by the Court."

Judge Havelock then cites Sir John Donaldson's judgment in *Cook* in support of his own judgment.

In the author's opinion, in the light of the recent judgment of *Lesotho* re-emphasising the principles to be applied when interpreting the 1996 Act and urging courts not to rely on pre-1996 authorities, it is arguable that Mr Havelock Allen Q.C. ought not to have simply relied on the pre-1996 Act authority of *Cook* to support camp 1. In the author's view, an opportunity was missed to reconsider whether in fact Leggatt J. was correct to support camp 2.

An interesting aspect of this discussion is that the courts have not differentiated between a discretion exercised by a public authority (as in the case of *Wednesbury*) and the exercise of a discretion conferred to it by an arbitration agreement. It is quite likely that a plain reading of the section to a non-lawyer ("the board of appeal may in its absolute discretion . . . any decision made by pursuant to this Rule shall be final conclusive and binding") would result in the impression that the board's decision would be final and binding. The author submits that there is a difference between a public authority exercising a discretion and a body authorised to make a decision by the parties to an arbitration agreement.

41. He describes Sir John Donaldson's judgment as "a slightly different view as to whether an absolute discretion was capable of review" when comparing it to Leggatt J.'s view. In fact, Sir John Donaldson took the opposite view to that of Leggatt J.

Ex aequo et bono or amiable compositeur

Section 46(1)(b) of the 1996 Act enables the arbitral tribunal to decide a dispute in the case *ex aequo et bono* or as *amiable compositeur* (such clauses are sometimes referred to as "equity clauses"). As a system of law has not been chosen by the parties, it follows that no question of law can arise for decision (either as a preliminary determination in accordance with s.45 of the 1996 Act) and therefore s.69 of the 1996 Act is effectively excluded by the parties.⁴² It is not intended to expand on this ground as it is self-explanatory.

Opting for a system of law that is not English law

Section 82(1) of the 1996 Act defines question of law as meaning:

"for a court in England and Wales a question of law of England and Wales, and for a court in Northern Ireland, a question of law of Northern Ireland".

The cases of *Egmata AG v Marco Trading Corp*,⁴³ *Sanghi Polyesters Ltd*,⁴⁴ *Hussman (Europe) Ltd v Al Ameen Development & Trade Co*,⁴⁵ *Reliance Industries Ltd v Enron Oil and Gas India Ltd & Natural Gas Corp*⁴⁶ and *Athletic Union of Constantinople v (1) National Basketball Association (2) Phoenix Suns (3) Federation Internationale de Basketball EV*⁴⁷ have considered s.82. The policy of the courts in these cases seems to be to delimit the questions of law which can be appealed to questions of English law. These cases support the proposition that awards based on foreign applicable law are likely to be excluded.

It is unfortunate that, to some extent, section s.82 is open to interpretation. This would have been avoided if "a question of law of England and Wales . . ." read: "a question of English law". In a non-arbitration context, the cases of *MCC Proceeds v Bishopsgate Investments*⁴⁸ and *Morgan Grenfell & Co Ltd v Sace Speciale per Lassicurazione del Credito all'Esportazione*⁴⁹ have been cited as support for the proposition that the courts have greater freedom to reach different conclusions on foreign law than it has in respect of straight forward findings of primary fact. Although application of these cases was rejected at first instance in the *Athletic Union* case, it is in the author's view arguable that the door is not closed to similar arguments in the future. It is unfortunate that the Court of Appeal was not able to deal with the point substantively for procedural reasons in the *Athletic Union* case.

42. The alternative is to opt for a system of law under s.46(1)(a) of the 1996 Act.

43. [1999] 1 Lloyd's Rep. 862.

44. [2000] 1 Lloyd's Rep. 480.

45. [2000] 2 Lloyd's Rep. 83.

46. [2002] 1 All E.R. (Comm) 59.

47. 2001, unreported.

48. (1999) C.L.C. 417: *The Times*, December 7, 1998.

49. December 21, 1999.

How can the court's jurisdiction be included? (Are you in?)

Section 69(2) provides that an appeal can only be brought with the agreement of all the other parties to the proceedings, or with the permission of the court. Section 69(2) therefore allows the parties to agree on a right to an appeal on a point of law without having to obtain permission from the court. The 1996 Act is silent as to when such an agreement can be entered into between the parties. There seems to be no reason why the parties cannot agree in advance of any disputes arising, i.e. in the arbitration agreement itself; or in any ad hoc/submission agreement or after the award itself has been rendered.

The DAC considered whether for the purposes of s.69(2)(a) the parties can agree in advance, i.e. in an arbitration clause in the underlying contract, that an appeal on a question of law can be agreed:

“The clause is intended to encompass such agreements, and in our view it plainly does so since the word agreement is not qualified. However, such an agreement will not automatically allow an appeal unless it complies with the other conditions set out in section 69 and 70.”

Unfortunately, the DAC's comments are a little confusing/ambiguous as the DAC does not specify which other conditions in ss.69 and 70 are being referred to. The only sensible and logical reading of the comments is that reference to ss.69 and 70 are references to the conditions in s.70(2) and (3) and s.69(4).

Irrespective of any agreement that an appeal should be allowed from an arbitrator's award, there can be no similar agreement for there to be an appeal to the Court of Appeal by virtue of s.69(6):

“the leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.”

Other requirements that must be fulfilled

As long as s.70(2) and (3) are complied with, s.69(2)(a) has the effect of precluding either party from having to satisfy the court that permission should be given.

Express clause

In the same way as an express clause can be used to oust the jurisdiction of the courts, there is no reason why a clause cannot be used to include the jurisdiction. Many of the comments made in the previous part of the article as to the need for clear and unambiguous clauses equally apply to this part. A suggested clause would be similar to the one found in the JCT (98) Contract:

“the parties hereby agree pursuant to section 69(2) Arbitration Act 1996 that either party may appeal to the High Court on any question of law arising out of an award made in an arbitration under an

arbitration agreement and the parties agree that the High Court should have jurisdiction to determine any such question of law.”

Case law to consider on the point include: *Taylor Woodrow Civil Engineering Ltd v Hutchinson IDH Development Ltd*⁵⁰ and *Fencegate Ltd v NEL Construction*.⁵¹

When will the courts give permission to appeal?

If there is no agreement between the parties and permission to appeal is required, permission shall only be given if the court is satisfied that the determination of the question will substantially affect the rights of one or more of the parties⁵²; that the question is one which the tribunal was asked to determine⁵³; that, on the basis of the findings of fact in the award the decision of the tribunal on the question is 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.

Section 69(3) is clear as to its intention that all the criteria in subs.(a) to (d) need to be satisfied in order for permission to be given.

The wording in s.69(3)(a) is almost identical to s.1(4) of the 1979 Act. Under the 1979 Act, the first case to consider that form of words was *The Nema*.⁵⁴ In the case of the *Antaios*,⁵⁵ Lord Diplock again had cause to consider the circumstances in which permission to appeal should be given. Section 69 of the 1996 Act, although heavily influenced by the *Nema* guidelines, has replaced them and adds further new statutory criteria. Section 69(3)(b)–(d) are all new statutory criteria adopted by the 1996 Act.

Section 69(3)(c) and the CMA case

In the *Northern Pioneer* case, Lord Phillips said that

50. (1988) 75 Con. L.R. 1.

51. (2001) 82 Con. L.R. 41.

52. For a question of law to substantially affect the rights of one or more of the parties would involve that point of law affecting the entire outcome of the arbitration, not a small part of the award. *President of India v Jadranska Slobodna Plovidba* [1992] 2 Lloyd's Rep. 274.

53. The 1996 Act, s.69(3)(b), requires the question to be one which the tribunal was asked to determine. The significance of this additional criterion is that the question of law must have been raised at the arbitration proceedings. This has had the effect of reversing the decision in *Petraco (Bermuda) Ltd v Petromed International SA* [1988] 2 Lloyd's Rep. 357. The effect of this section is that the parties are estopped from seeking permission to appeal on a point not raised at the arbitration. This clearly narrows the scope of appeals that were open under the 1979 Act.

54. *Pioneer Shipping v B.T.P. Tioxide* (“*The Nema*”) [1982] A.C. 724.

55. *Antaios Compania SA v Salen AB* (“*The Antaios*”) [1985] A.C. 191.

“the statutory criteria are strongly influenced by the Nema guidelines. They do not however follow these entirely. We have concluded that they open the door a little more widely to the granting of permission to appeal than the crack that was left by Lord Diplock”.

Lord Phillips sets out guidelines on the criteria to s.69 of the Act and the departure from the *Nema* guidelines. The following question is identified: if the commercial court judge formed the view that the arbitrators were probably right, was the fact that the Court of Appeal might take a different view a sufficient ground for granting permission to appeal?

Sir John Donaldson M.R. answered this question in his judgment in the Court of Appeal in the *Antaios* case by saying that in the event that there are known to be differing schools of thought, each claiming their adherents among the judiciary, and the Court of Appeal, given the chance, might support either the school of thought to which the judge belongs or another school of thought, permission to appeal should be allowed as long as ss.1(4) and 1(7) are complied with.

Lord Diplock's answer to the same question (overturning Sir John Donaldson's judgment) is that it is the very nature of judicial discretion that within the bounds of “reasonableness” in the wide *Wednesbury* sense of that term, one judge may exercise the discretion one way whereas another judge might have exercised it in another. Accordingly, Lord Diplock concludes that this would not normally provide a reason for departing from the *Nema* guidelines.

Lord Phillips concludes at [60] of his judgment in the *Northern Pioneer* case that

“We do not consider that this part of the Nema guidelines [Lord Diplock's answer to the question] survives the provisions of section 69. The criterion for granting permission to appeal in section 69 (3)(c)(ii) is that the question should be one of general public importance and that the decision of the arbitrators should be at least open to serious doubt. These words impose a test which is broader than Lord Diplock's requirement that permission to appeal should not be given ‘unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction’. Section 69(3)(c)(ii) is consonant with the approach of Sir John Donaldson MR in the *Antaios*. The guideline of Lord Diplock which has been superseded by section 69(3)(c)(ii) was calculated to place a particularly severe restraint on the role of the commercial and higher courts in resolving issues of commercial law of general public importance”.

Now that the *Nema* guidelines have been replaced by statutory criteria, the flexibility of guidelines given by the judiciary ceases. Lord Diplock was interpreting essentially what is now s.69(3)(a) and he used the words “obviously wrong” which were clearly adopted by the drafters in the Act in s.69(3)(c)(i). The fact that the legislators adopted this but allowed as an alternative the criterion in s.69(3)(c)(ii) has had the effect of lowering the threshold from “obviously wrong” to “open to serious

doubt” (when there is a question of general public importance). This was the intention of the legislators as set out in paras 287–291 DAC report.

In the event that the question is not of public importance, Lord Diplock's view will continue to prevail and the extract from Lord Phillips's judgment in the *Northern Pioneer* case will not be relevant.

The oft-cited quotation from Lord Phillips⁵⁶ is nothing more than a reiteration of what was intended by the architects behind the 1996 Act, as can be seen by the DAC report,⁵⁷ and should not be cited out of context. There is no new point raised. It is clear from the criteria set out in s.69(3) that in a case where there is a question of general public importance, the threshold that needs to be overcome (“open to serious doubt”) is lower than is usually the case (“obviously wrong”)—derived from the *Nema* test.

As a matter of policy, however, the *Northern Pioneer* case does appear to bring to the fore again that the courts are keen to emphasise the importance of the development of the commercial law (that “English oddity”).

Section 69(3)(d)

The final condition in s.69(3) is s.69(3)(d): that “it is just and proper in all the circumstances for the court to determine the question”. This clause, in effect, gives the court an overriding discretion as to whether or not to give permission. Although, expressly, there was no such provision in the 1979 Act, it seems that the courts considered that there was an inherent discretion in determining permission and, for example in *National Rumour Co SA v Lloyd-Libra Navegacao SA*⁵⁸ the principle that quick arbitrations should not be granted leave save in exceptional circumstances was introduced. Lord Saville considered that

“there will have to be something else which makes it just and proper for the court to substitute its own decision for that of the tribunal. This should, and is intended to make successful applications for leave to appeal from an arbitration award very rare indeed”.

The DAC⁵⁹ stated that the reason for the inclusion of the section was that the court should be satisfied that justice dictates that there should be an appeal; and in considering what justice requires, the fact that the parties have agreed to arbitrate rather than litigate is “an important and powerful factor”.

Stewart Shackleton⁶⁰ considered that the function of s.69(3)(d), presumably with the intention of the DAC in

56. “[T]he statutory criteria are strongly influenced by the Nema guidelines. They do not however follow these entirely. We have concluded that they open the door a little more widely to the granting of permission to appeal than the crack that was left by Lord Diplock.”

57. fn.11 above, at paras 287–291.

58. [1982] 1 Lloyd's Rep. 472.

59. fn.11 above, at para.290.

60. In the article “The internationalisation of English Arbitration Law” (2000) 11(1) *ICC International Court of Arbitration Bulletin*.

mind, was for the courts to balance the state's interest in the exclusive production of English legal norms with the parties' decision not to resolve disputes via local courts and to accord weight to the parties' choice of arbitration rather than litigation.

The Court of Appeal in the *Northern Pioneer* case did not provide guidance on how to assess whether it would be just and proper in circumstances where a question of law was a question of general public importance and also open to serious doubt.

The omission by the Court of Appeal of consideration of s.69(3)(d) in the *Northern Pioneer* case could be perceived as the courts impliedly finding that if a question was considered to be of public importance and open to serious doubt, then it would follow that it must also be just and proper under s.69(3)(d) to give permission. This, however, was not a ruling that was made and it is submitted that the proper construction of the statute should be that permission to appeal should not be granted except in the most exceptional circumstances (following the approach in the *National Rumour* case).

The courts in general do not seem to have adopted s.69(3)(d) in the way in which it was intended. Without guidance from the higher courts; however, it does not seem likely that the courts will alter this practice particularly in the light of the *Northern Pioneer* case.

As a result of this lack of guidance in the *Northern Pioneer* case, a question arises: how should the courts consider s.69(3)(d) after concluding that subs.69(3)(a), (b) and c(ii) are made out?

It is obvious that the parties wished for the dispute to be disposed of by arbitration as an arbitration cannot go ahead without the consent of the parties (at least at the outset). The guidance given by the DAC⁶¹ and the test posed by Stewart Shackleton,⁶² therefore, seem very difficult to apply. If the parties were that committed to the process of arbitration as a final and binding process, then surely they would exercise their right to oust the jurisdiction of the courts under s.69(1). It will be of no surprise to the winning party, however, if the losing party soon after receiving the award is quick to resile from its original intentions to arbitrate or be bound by any arbitration award. The losing party is likely to go to any lengths to attempt to set aside the award, particularly when large sums of money are involved.

Jackson J. stated in *Surefire Systems Ltd v Guardian ECL Ltd*⁶³:

“there are good reasons for parties in the construction industry to choose arbitration. The parties obtain a resolution (almost always a final resolution) of their disputes by a suitably qualified individual of their own choosing. There is, however, a price to be paid. The parties cannot have their cake and eat it. The parties cannot refer their factual or technical disputes first to an arbitrator and then to a judge of the TCC.”

61. See fn.59 above.

62. See fn.60 above.

63. [2005] EWHC 1860.

Readers of this authority, however, should note that Jackson J. was only considering the situation between the parties when no decision was exercised to include the jurisdiction of the courts under s.69(2). In such circumstances, the parties arguably can have their cake and eat it (provided only the appeal is on a question of law). This leads on to the thorny question of whether an issue is one of law or one of fact:

Question of law/question of fact

An appeal under s.69 of the 1996 Act can only be on a question of law, not on a question of fact. This distinction is notoriously difficult to draw and arises in almost all areas of law when it comes to a question of appeal. A detailed analysis of the distinction between a question of law and a question of fact is not attempted in this article. There is a multitude of case law in which the courts have had to consider whether an issue falls into the category of an error of law or simply a finding of fact.⁶⁴

The latest guidance comes from the Technology and Construction Court (“TCC”). In *Demco Investments & Commercial SA v SE Banken Forsakring Holding Aktiebolag*,⁶⁵ Cooke J. stated that the legislative intent of s.69(3) of the Act was to prevent parties seeking to dress up questions of fact as questions of law. Jackson J. expressly approved this approach in the *Surefire* case and added that any party seeking leave to appeal under s.69 must take, as his starting point, the arbitrator's findings of fact. He must then identify the question of law arising from those facts, on which the arbitrator fell into error.

In *Northern Elevator Manufacturing v United Engineers (Singapore)*,⁶⁶ the proposition was put forward that for the purposes of the 1996 Act, an error of law arises where the arbitrator errs in ascertaining the legal principle which is to be applied to the factual issues in the dispute, and does not arise if the arbitrator, having identified the correct legal principle, goes on to apply in incorrectly.

The *Northern Elevator* proposition was endorsed by H.H. Judge Coulson in *Benaim (UK) Ltd v Davies Middleton & Davies Ltd (No.2)*⁶⁷ and reference was also made to Lord

64. By way of example, in *Boulos Gad Tourism v Uniground Shipping Co* (2001), unreported, the charterers sought to persuade the court that a demonstration of unsafety amounts ipso facto to a demonstration of prevention of performance. Tomlinson J. held that: “In my judgment, the question which the charterers seek to raise is not in fact a question of law at all. It is a question of fact, no doubt, in every case whether the unsafety which has been demonstrated can amount to a prevention from performance, or a prevention of performance. As I pointed out during the course of the argument, safety is a relative concept. All maritime adventures, indeed I suppose all commercial adventures, are subject to some degree of risk. It seems to me that the arbitrator here directed himself entirely properly in concluding that the question which he had to resolve was whether the charterers had been prevented from fulfilling their obligations. That was an inquiry of fact. The arbitrator's conclusion on that is final and cannot properly be made the subject of an appeal.”

65. [2005] EWHC 1398 (Comm) at [36].

66. [2004] 2 S.L.R. 494.

67. (2005) 102 Con L.R. 1.

Steyn's judgment in *The Matthew*⁶⁸ that there can be no error of law if the arbitrator reached a decision which was within the permissible range of solutions open to him.

In 2005 there were a number of cases in which the error of law was unclear. In *Plymouth City Council v DR Jones (Yeovil) Ltd*,⁶⁹ H.H. Judge Coulson criticised such conduct and emphasised that

“in an application of this sort, the alleged error of law should be set out in clear, unambiguous terms by a claimant, and made directly referable to a paragraph or paragraphs of the award. This has just not been done here”.

Procedural aspects of s.69

An application for permission to appeal must identify the question of law to be determined and state the grounds on which it is alleged that permission to appeal should be granted. The court shall determine an application for permission to appeal under this section without a hearing unless it appears to the court that a hearing is required. The permission of the court is required for any appeal from a decision of the court under this section to grant or refuse permission to appeal. On an appeal under this section the court may confirm the award, vary the award, remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or set aside the award in whole or in part. The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the permission of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

Should there be a hearing to determine the issue of permission?

The presumption under s.69(5) is that there should not be a hearing. The court can, however, decide to conduct a hearing to determine the matter if required. There is no guidance in the statute as to the circumstances that should be taken into account in making this decision.

In the *Fencegate*⁷⁰ case, H.H. Judge Anthony Thornton Q.C. envisaged that no hearing would be required. In *HOK Sport Ltd v Aintree Racecourses Co Ltd*,⁷¹ H.H. Judge Thornton Q.C. allowed a hearing for an application for permission. In *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd (“Pamphilos”)*,⁷² Colman J. considered that it was

68. [1992] Lloyd's Rep. 323.

69. [2005] EWHC 2356.

70. fn.51 above, at [6].

71. [2003] B.L.R. 155 at 160.

72. [2002] 2 Lloyd's Rep. 681.

sensible and more cost-effective to allow oral argument where an application was brought together with a related s.68 challenge.⁷³ Following the *Northern Pioneer*⁷⁴ case, it seems that the practice that is encouraged by the Court of Appeal is clear written grounds and submissions without an oral hearing that are succinct enough to enable a Commercial Court judge to consider the grounds within a 30-minute time slot. This indeed was what was envisaged in the DAC report.⁷⁵

In *Newfield Construction Ltd v John Lawton Tomlinson, Kathleen Christine Tomlinson*⁷⁶, H.H. Judge Coulson highlighted that parties were tempted to use the cover of a s.68 application in order to argue the detail of their s.69 application orally. He described such a course as contrary to the Arbitration Act and the CPR and stated that it would not be permitted.

In relation to documentation, Judge Coulson considered that he should only have regard to the award itself which in that case includes correspondence in which the arbitrator set out his reasons for the costs award and documents on which he relies in giving that explanation.⁷⁷ Jackson J. in the *Surefire* case reiterated this approach as follows:

“the evidence which is admissible on an application for leave to appeal is strictly limited. Such evidence will generally comprise (a) the award itself and (b) any evidence relevant to the issue whether the identified question of law is of general public importance. In some cases, it may also be necessary to look at the pleadings, or written submissions in the arbitration, in order to ascertain what were the questions which the arbitrator was asked to determine⁷⁸... where an application for leave to appeal is made, the court should not be burdened with vast tracts of inadmissible evidence, nor should the court be burdened with many pages of intricate argument about the factual issues which the arbitrator has decided. The preparation of such material is a waste of time, effort and costs.”⁷⁹

The practice of the courts in giving reasons when granting/refusing permission to appeal

The general practice of the courts under the 1979 Act was to give no reasons. This changed after the 1996 Act. In the *North Range Shipping* case, the Court of Appeal considered whether the *Antaios* guidelines should be upheld in the light of Art.6 of the European Convention

73. See also *Foley's Ltd v City and East London Family and Community Services* [1998] A.D.R.L.J. 401.

74. ????, at [23] of his judgment.

75. fn.11 above, at para.291.

76. [2004] EWHC 3051 at [24].

77. See also *Walsall Metropolitan Borough Council v Beechdale Community Housing Association Ltd* [2005] EWHC 2715.

78. fn.63 above, at [22].

79. *ibid.*, at [42].

on Human Rights.⁸⁰ Tuckey L.J. gave the lead judgment in which he made reference to comments made by Bingham L.J. that he personally regretted that commercial judges should have been enjoined against giving reasons in [the *Antaios*] way⁸¹; Judge David Steel's practice as set out in *Mousaka Inc v Golden Seagull Maritime Ltd*⁸²

“to go further than merely refusing permission (with or without express reference to the statutory criteria) and to give some reasons why I had concluded that the arbitrators were correct (or at least not prima facie wrong) on the merits”

and the general principle that the right to a fair hearing generally carries with it an obligation to give reasons.⁸³

Tuckey L.J. states in the *North Range Shipping* case⁸⁴ that the *Antaios* guidelines no longer hold good and gives guidance as to the extent of reasons that should be given.

Is there a route of appeal to the Court of Appeal if the High Court judge refuses permission to appeal?

Tuckey L.J. sets out in his reasoning at [11] of his judgment in the *North Range Shipping* case that it is clear that there

80. ????. “In the determination of his civil rights ... everyone is entitled to a fair and public hearing”. There is no specific reference to anything about reasons.

81. In a lecture given in October 1987, “Reasons and Reasons for Reasons: Differences between a Court Judgment and an Arbitration Award” (1988) 4 Arb. Int. 141.

82. [2002] 1 W.L.R. 395 at 404.

83. See Tuckey L.J.'s judgment in the *North Range Shipping* case, fn.80 above, at [20], and the cases of *Hiro Balani v Spain* (1995) 19 E.H.R.R. 566 at [27] and *Garcia Ruiz v Spain* (1993) 31 E.H.R.R. 589.

84. fn.80 above, at [27] and [28] of his judgment.

is no appeal from the judge's refusal to give permission on the merits. This follows from the language of the statute, s.69(8) and was confirmed by the Court of Appeal in the case of *Henry Boot Construction (UK) Ltd v Malmaison Hotel*.⁸⁵ Nor could the judge have given permission to appeal to the Court of Appeal because s.69(8) only applies if there has been a decision of the court of first instance “on an appeal”. If the judge refuses permission to appeal then there is no appeal.

Does the court have a residual jurisdiction conferred to it by CPR 52.10(2)(a)?

The court does have a residual jurisdiction to set aside a judge's decision for misconduct and a general power to set aside a decision under CPR 52.10(2)(a)⁸⁶ which is not circumscribed by s.69 of the 1996 Act.⁸⁷

85. [2001] Q.B. 388.

86. 52.10:

“(1) In relation to an appeal the appeal court has all the powers of the lower court. (Rule 52.1(4) provides that this Part is subject to any enactment that sets out special provisions with regard to any particular category of appeal—where such an enactment gives a statutory power to a tribunal, person or other body it may be the case that the appeal court may not exercise that power on an appeal)

(2) The appeal court has power to—affirm, set aside or vary any order or judgment made or given by the lower court; refer any claim or issue for determination by the lower court; order a new trial or hearing; make orders for the payment of interest; make a costs order.”

87. See Tuckey L.J.'s judgment in the *North Range Shipping* case, fn.80 above, at [14].