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The Role of the Court and experts in international arbitration

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1. This paper aims to consider two topics which often arise:
 - (1) Recent developments in the relationship between Courts and Arbitral Tribunals; and
 - (2) The role of expert evidence in international arbitrations.

The Relationship between Courts and Arbitral Tribunals

The historical background

1. Until comparatively recently, the English courts tended to be jealous of arbitration and to regard arbitrators as rivals to be kept in their place. In the 1856 case of *Scott v. Avery*¹, Campbell LJ advanced the theory that this arose from a desire by the judges to get cases into Westminster Hall. The traditional position was still being pursued in 1922: for instance, Scrutton LJ was indignant in *Czarnikow v. Roth, Schmidt & Co*² at the suggestion that the parties to an arbitration might, by agreement, put their chosen arbitrator beyond judicial scrutiny: “*There must be no Alsatia in England where the King’s writ does not run.*” Today, of course, the International Dispute Resolution Centre now sits on the corner of Fleet Street and Whitefriars Street where that Alsatia once was!
2. Judicial attitudes to arbitration began to change in the mid-20th century and the Commercial Court began to support the autonomy of the arbitration process. However, the courts remained heavily involved in supervising arbitrations through the ‘case stated’ procedure: an arbitrator, who was presumed likely to make an error of law, could be required to state a case on a question of law for the opinion of the court. In fact by the 1970s the right to appeal on points of law was almost automatic.
3. The regime under which decisions of arbitrators were brought before the High Court by case stated was radically altered by the Arbitration Act 1979. Section 1(4) of that Act provided that the High Court should not grant leave to appeal unless, having regard to

¹ (1856) 5 HLC 811.

² [1922] KB 478 at p. 488.

all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties. The Act itself would not have brought about such a change; it was the court's approach to the discretion given to them under the Act that achieved this.

4. In 1982 the House of Lords in *The Nema*³ gave guidance on the circumstances in which permission to appeal to the High Court from the decision of an arbitrator should be given:
 - (1) In one-off cases, leave to appeal was only granted if the decision was obviously wrong;
 - (2) In cases of general importance, permission to appeal was granted if there was a substantial likelihood that the arbitrator(s) got it wrong.
5. This decision involved reversing the approach taken by Mr. Justice Robert Goff in the Commercial Court when it fell to him to make the initial interpretation of s. 1(4) of the 1979 Act.
6. Three years after the *Nema*, Lord Diplock in *The Antaios*⁴ revisited the issue of permission to appeal and held that in arbitrations which turned on the construction of a standard term, leave 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. Lord Diplock was of the view that this applied even in circumstances where there were judicial statements (but not decisions) in other reported High Court cases which suggested that upon a question of the construction of that standard term there may among commercial judges be two schools of thought.
7. Lord Diplock's injunction led initially to the drying up of appeals in the 1980s. But a new wave of commercial judges led to a more enlightened attitude to appeals and the meaning of 'one off' for a time in the early 90s. The effect of the 1996 Act, however, has been to seek to return the position very much to the austere post-*Nema* days.

The 1996 Act

8. The objective of the 1996 Act was to improve and clarify the major elements of English arbitration law. During the consultative process which led to the enactment of the 1996 Act various commentators questioned whether the right to appeal an arbitration award on a point of law should be abolished entirely. Lord Saville, who became Chairman of

³ [1982] AC 724.

⁴ [1985] AC 191 at pp. 203-204.

the Departmental Advisory Committee in the autumn of 1994, said in a speech delivered on 4th November 1996 in London⁵:

“ Another feature of our existing law which has caused disquiet abroad and which many regard as detracting from arbitrating here is the ability to seek leave to appeal to the Court from the substantive award of the arbitral tribunal. What is said is that to allow an appeal of this kind is to frustrate the agreement of the parties to resolve their disputes by arbitration, since the result of a successful appeal is to substitute a court resolution for an arbitral resolution.”

9. The Committee decided against recommending the abolition of any right of appeal on the substantive merits of the dispute, preferring further to limit the right to appeal. Lord Saville explained the rationale behind that decision in these terms⁶:

“... it is well arguable that this limited right of appeal can properly be described as supportive of the arbitral process. Where the parties have agreed that their dispute will be resolved in accordance with English law, and the tribunal then purports to reach an answer which is not in accordance with English law, it can be said with some force that unless the Courts correct this error, the tribunal itself will have failed to carry out the bargain of the parties.”

10. It is fair to say that such an argument has not always been met with universal approval. For instance, see the Holmes and O'Reilly article 'Appeals from Arbitral Awards: Should Section 69 be repealed?'⁷
11. Under the 1996 Act there are three main ways in which the court is involved in arbitration:
- (1) In support of arbitral proceedings (s. 44);
 - (2) Challenges to the Award (ss. 67-69); and
 - (3) Jurisdiction (ss. 30-32 & 72).

This paper concentrates on the first two.

Section 44: court powers exercisable in support of arbitral proceedings

Outline

12. Section 44 of the 1996 Act provides the court with limited powers in support of arbitral proceedings. It provides as follows:

⁵ *“The Arbitration Act 1996 and its Effect on International Arbitration in England”* (1997) 63 *Arbitration* 104 at p. 108, col.1

⁶ (1997) 63 *Arbitration* 104 at p. 108, col. 2. See also para. 285 of the Departmental Advisory Committee Report.

⁷ *“Appeals from Arbitral Awards: Should Section 69 be Repealed?”* (2003) 69 *Arbitration* 1 at p. 6.

- (1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
 - (2) Those matters are—
 - (a) the taking of the evidence of witnesses;
 - (b) the preservation of evidence;
 - (c) making orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings—
 - (i) for the inspection, photographing, preservation, custody or detention of the property, or
 - (ii) ordering that samples be taken from, or any observation be made of or experiment conducted upon, the property;
 and for that purpose authorising any person to enter any premises in the possession or control of a party to the arbitration;
 - (d) the sale of any goods the subject of the proceedings;
 - (e) the granting of an interim injunction or the appointment of a receiver.
 - (3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.
 - (4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.
 - (5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.
 - (6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.
 - (7) The leave of the court is required for any appeal from a decision of the court under this section.
13. Thus pursuant to s. 44 of the 1996 Act the court has the power to protect the subject matter of the arbitration, including preventing one party from breaking the substantive agreement to which the arbitration relates. Following the Court of Appeal's decision in *Cetelem SA v. Roust Holdings*⁸ it is well established that a court may grant a temporary

⁸ [2005] 2 Lloyd's Rep. 294

injunction restraining a party to an arbitration clause from breaking the terms of the substantive agreement to which the arbitration clause relates. There are two bases for the court's jurisdiction: (1) s. 44(2)(c) of the 1996 Act and (2) s. 37 of the Senior Courts Act 1981 which confers an unlimited and general power on the court to grant temporary relief.

14. It remains to be decided whether s. 37 of the Senior Courts Act 1981 is exercisable in arbitration cases or whether s. 44 of the 1996 Act is exclusively to be used. However, such a debate is irrelevant as whichever provision is used the same principles are to be applied: see *Permasteelisa Japan KK v. Bouyguesstroï*⁹.

Recent Development

15. In *SabMiller Africa v. East African Breweries Ltd*¹⁰ Christopher Clarke J had to consider an application made under s. 44 for a temporary injunction preventing the respondent from entering into various agreements with one of applicants' competitors.
16. Christopher Clarke J held that such an application made under s. 44 of the 1996 Act imported the three-step test set out in s. 37 of the Senior Courts Act 1981 so that:
- (1) The first step was to decide whether there was a serious question to be tried.
 - (2) If so, the second step was to assess damages. If damages were an adequate remedy for the applicant, and if the respondent was in a position to pay them, then an injunction will normally not be granted. However, if damages were an inadequate remedy but the applicant is able to satisfy the standard undertaking in damages which is imposed as a condition of the grant of an injunction, then there is justification for the granting of such an injunction.
 - (3) If the position remained unresolved after the first two steps, the third step was to consider the balance of convenience.
17. In addition to these guidelines Christopher Clarke J noted three qualifications: (1) there is a general reluctance to grant mandatory as opposed to prohibitive injunctions, so that the merits become more significant where the application is to force the defendant to act rather than to restrain it from acting; (2) an injunction will not be granted to force a defendant to perform personal services and (3) if the arbitration cannot be held by the expiry of the period for which injunctive relief is sought, the court will apply the higher test of whether the claimant is likely to succeed at arbitration.

⁹ [2007] EWHC 3508 (TCC).

¹⁰ [2009] EWHC 2140 (Comm).

Challenges to an Arbitral Award

18. There are three main ways in which an arbitration award can be challenged:

- (1) For substantive jurisdiction under s. 67 of the 1996 Act;
- (2) For a serious irregularity under s.68 of the 1996 Act; and
- (3) For an error of law under s. 69 of the 1996 Act.

Challenging the award: substantive jurisdiction

Outline

19. Section 67 of the 1996 Act is a mandatory provision (see s. 4 of the 1996 Act). It permits a party to arbitral proceedings to apply to the court:

- (1) Challenging an award of the arbitral tribunal as to its substantive jurisdiction; or
- (2) For an order declaring an award made by the arbitral tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

20. A challenge to an award pursuant to s. 67 of the 1996 Act involves a rehearing rather than a review¹¹. Only the trial judge on the original s. 67 application can grant permission to appeal against their decision under s. 67¹²: see s. 67(4). Such a restriction has been found not to be incompatible with the European Convention on Human Rights¹³.

21. The rationale underlying s. 67 of the 1996 Act is that arbitrators have to be appointed in compliance with any applicable procedure for appointment: any irregularity in their appointment invalidates the arbitration.

22. On a s. 67 application, having heard the re-hearing of the claim, the court may (1) confirm the award; (2) vary the award; or (3) set aside the award in whole or in part: see s. 67(3).

23. An application made under s. 67 must be made within 28 days of the publication of the award (s. 70(3) of the 1996 Act). Where an application is made late time may be extended under the general provisions of s. 80(5) of the 1996 Act. The 1996 Act does not provide guidance as to how the court is to exercise its discretion under s. 80(5).

¹¹ *Azov Shipping Co v. Baltic Shipping Co (No. 1)* [1999] 1 All ER 476; *Peterson Farms Inc v. C&M Farming Ltd* [2004] 1 Lloyd's Rep. 603.

¹² *Athletic Union of Constantinople v National Basketball Association* [2002] 1 WLR 2863.

¹³ *Republic of Kazakhstan v. Istil Group Ltd* [2007] 2 Lloyd's Rep. 548.

However, the relevant criteria are: (1) whether the claimant had acted reasonably in delaying; (2) whether the respondent had caused or contributed to the delay; (3) whether the respondent would suffer prejudice if time was to be extended; (4) the impact of the delay on the continuation of the arbitration; (5) the strength of the application; and (6) whether in general terms refusal of an extension would be unfair: *AOOT Kalmneft v. Glencore International AG*¹⁴. The first three are the most significant.

Recent Development

24. *Late Applications*. The court has recently considered a late application under s. 67 in *Broda Agro Trade (Cyprus) Ltd v. Alfred C Toepfer International GmbH*¹⁵

25. *The facts*. In October 2007 Toepfer commenced GAFTA arbitration proceedings against Broda for breach of a contract for the supply of wheat by Broda to Toepfer. Broda's response was to deny the existence of the contract, in that no price had been agreed and in December 2007 Toepfer commenced proceedings in Russia for a declaration to that effect. In January 2008 Toepfer commenced proceedings in the UK using the GAFTA procedure. The arbitrators issued an interim award on 3 July 2008 concluding that there was a contract. The arbitrators issued a final award on 19 February 2009, awarding damages plus interest and costs to Toepfer.

26. Broda made an application on 7 September 2009. They sought to challenge the principles set out in *AOOT* (above) and argued that s. 80(5) of the 1996 Act should be construed in accordance with CPR Rule 3.9. That CPR rule refers to:

- (1) The interests of the administration of justice;
- (2) Whether the application for relief has been made promptly;
- (3) Whether the failure to comply was intentional;
- (4) Whether there is a good explanation for the failure;
- (5) The extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
- (6) Whether the failure to comply was caused by the party or his legal representatives;
- (7) Whether the trial date or the likely trial date can still be met if relief is granted;
- (8) The effect which the failure to comply had on each party; and
- (9) The effect which the granting of relief would have on each party.

¹⁴ [2002] 1 Lloyd's Rep. 128.

¹⁵ [2009] EWHC 3318 (Comm) ; [2010] Lloyds Reports Plus 39.

27. *The ruling.* Teare J held that the AOOT principles were to be applied and that the wider considerations of CPR r. 3.9 were not directly relevant. Applying those principles the court refused to extend time for the following reasons:

- (1) The delay was a significant period, namely 14 months;
- (2) The reason for the delay was that Broda had not received appropriate advice on English law and had only consulted Russian lawyers. It was the court's view that it was reasonable to expect a party to a GAFTA arbitration taking place in London to seek the advice of English lawyers and this had not happened until August 2009.

(3) The delay was not the fault of Toepfer.

28. For the sake of completeness Teare J examined the criteria set out in CPR r. 3.9 and found that they added nothing to his analysis.

29. *Jurisdiction in tiered arbitrations.* UR Power GmbH v. Kuok Oils and Grains Pte Ltd¹⁶ involved a FOSFA arbitration which has its own right of appeal to a second tier arbitral tribunal. Gross J considered (but did not decide) a question relating to the operation of s. 67 of the 1996 Act in a tiered arbitration system.

30. Pursuant to s. 31(1) of the 1996 Act an objection to the arbitrators' jurisdiction must be raised not later than the time he/ she takes the first step in the arbitral proceedings. Section 73(1) of the 1996 Act states that if a party participates in an arbitration without raising a jurisdictional issue, they may not raise that issue later before the arbitrators or a court. In UR Power GmbH v. Kuok Oils and Grains Pte Ltd the applicants did not raise any jurisdictional issues before the first tier arbitral tribunal but asserted lack of jurisdiction at the second tier (the FOSFA Board of Appeal) level. The applicants then made a s. 67 application to the court and argued that they were not debarred from doing so because the matter had been raised and dealt with at the second tier level (they argued in the alternative that the Board had exercised its discretion to admit a jurisdictional challenge out of time).

31. Whilst not coming to a final decision on the question whether a jurisdictional issue has to be raised before a first tier tribunal, failing which it cannot be raised before a second tier tribunal, Gross J favoured the view that the right time to make a jurisdictional challenge was before the first tier tribunal merely saying "*the prudent course for a party contemplating a jurisdictional challenge in a two tier arbitration scheme, is to advance such objections before the first tier arbitrators. If not, it may well be at risk of losing that right*".

¹⁶ [2009] 2 Lloyd's Rep. 495

32. *Separability*. The second questions Gross J had to consider in *UR Power GmbH v. Kuok Oils and Grains Pte Ltd* was whether a challenge based upon the submission that there was no substantive contract between the parties was one which went to jurisdiction and therefore was within s. 67. The applicants argued that if there was a dispute as to whether pre-contractual negotiations had crystallised into a contract, that dispute was one of jurisdiction and not one of substance and therefore fell within s. 67 of the 1996 Act.
33. Gross J did not reach a concluded view. However, in his judgment he does indicate a clear preference for the argument that the question of the existence of a binding contract was not a jurisdictional one at all. He was not happy with drawing a distinction between a contract which was void (where the common law principle of severability as codified into s. 7 of the 1996 Act, so that provided the arbitration clause is appropriately worded it is not to be regarded as ineffective or void if there is an assertion that the underlying contract to which it relates is ineffective or void) on the one hand and a contract which had not come into existence.

Challenging the Award: serious irregularity

Outline

34. Section 68 of the 1996 Act is a mandatory provision (see s. 4 of the 1996 Act). Section 68 provides:
- (1) “A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
- (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
 - (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
 - (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
 - (d) failure by the tribunal to deal with all the issues that were put to it;

- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
 - (f) uncertainty or ambiguity as to the effect of the award;
 - (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
 - (h) failure to comply with the requirements as to the form of the award; or
 - (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
- (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
- (a) remit the award to the tribunal, in whole or in part, for reconsideration,
 - (b) set the award aside in whole or in part, or
 - (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, 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.

- (4) The leave of the court is required for any appeal from a decision of the court under this section.”

35. A “serious irregularity” is an irregularity of one or more of the kinds of irregularities set out in sub-section (2) which the court considers has or will cause substantial injustice to the applicant. The following guidance was given by the court in *The Petro Ranger*¹⁷ and drawn from the Departmental Committee on Arbitration Law, Report on the Arbitration Bill:

- (1) Section 68 sets out a closed list of irregularities (which it is not open to the Court to extend).
- (2) Section 68 reflects the internationally accepted view that the Court should be able to correct serious failure to comply with the “due process” of arbitral proceedings: cf. art. 34 of the Model Law.

¹⁷ [2001] 2 Lloyd’s Rep. 348 at 351.

- (3) A serious irregularity has to pass the test of causing "substantial injustice" before the Court can act (s. 68(2)).
- (4) The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process, that the Court will take action.
- (5) The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate not litigate.
- (6) Having chosen arbitration, the parties cannot complain of substantial injustice, unless what has happened cannot on any view be defended as an acceptable consequence of that choice.
- (7) Section 68 is designed as a longstop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in s. 68, that justice calls out for it to be corrected.
- (8) Section 68 must not be used as a means of circumventing the restrictions upon the Court's power to intervene in arbitral proceedings. Further, the distinction between s. 68 and s. 69 must be maintained. In addition, the Court's powers under s. 70(4) should be borne in mind (see below).
- (9) Section 68(2)(d) ("failure by the tribunal to deal with all the issues which were put to it") does not require a tribunal to set out each step by which they reached their conclusion or to deal with each

Recent Developments

36. In *Pace Shipping Co Ltd of Malta v. Churchgate Nigeria Ltd of Nigeria*¹⁸ the applicants challenged an award on the ground that the arbitrators had not given proper reasons for their conclusion contrary to ss. 68(2)(d) and (h) of the 1996 Act. The applicants challenged the award on three grounds: (1) the majority award was ambiguous and not supported by proper reasons so that there was a serious irregularity under s. 68; (2) the arbitrators had failed to respond properly to an application under the slip rule in s. 57 of the 1996 Act to clarify their award which amounted to a serious irregularity and (3) the award was erroneous as a matter of law and permission should be given under s. 69 of the 1996 Act.

¹⁸ [2010] 1 Lloyd's Rep. 183.

37. In respect of the challenges under s. 68 of the 1996 Act, the applicants raised two heads of challenge: (1) failure by the tribunal to deal with all the issues that were put to it contrary to s. 68(2)(d) and (2) failure to comply with the requirements as to the form of the award contrary to s. 68(2)(h).
38. *The ruling.* Teare J dismissed each head. He noted that it was sufficient for a reasoned award if the arbitrators set out, on their view of the evidence, what did and what did not happen, and to explain succinctly what their decision was and why it was reached. Moreover, the award was to be read in a fair and reasonable way without being subjected to minute textual analysis. In applying those principles Teare J was satisfied that the award was not ambiguous, was explicable and made sense.
39. The further allegation of serious irregularity related to a request made by the applicant to the arbitrators under the slip rule (s. 57(3)(a) of the 1996 Act). Teare J dismissed any suggestion that the arbitrators had been guilty of serious irregularity in not amending their award. Whilst he did not comment on the nature of the applicant's s.57 application it is likely to appear to most readers of the judgment that the application under s. 57 in essence asked the arbitrators to review the evidence and to confirm that they had given due weight to particularly pieces of evidence. In effect had the court allowed the application it would have allowed via the back door what was not permitted through the front.
40. A recent decision in the Singapore court may throw light on s. 68(2)(g) of the 1996 Act. Section 68(2)(g) of the 1996 Act allows the court to set aside an award which has been obtained by fraud or contrary to public policy. This provision is triggered by a deliberate and fraudulent withholding of information by a party to the arbitration: *Profilati Italia SrL v. Paine Webber Inc*¹⁹; *The Mariana*²⁰ and *Elektrim SA v. Vivendi Universal SA*²¹. Similarly under s. 103(3) of the 1996 Act (which relates to the enforcement of New York Convention awards) the English court is authorised to refuse to recognise or enforce an award if such recognition or enforcement would be injurious to the public good or would be wholly offensive to a reasonable and fully-informed member of the public. Whilst the law in Singapore is stated differently (see s. 24(a) of the International Arbitration Act and article 34(1)(b)(ii) of the Model Law) it reaches the same conclusion.

¹⁹ [2001] Lloyd's Rep. 715

²⁰ [2005] 1 Lloyd's Rep. 640

²¹ [2007]1 Lloyd's Rep. 693

41. In *Swiss Singapore Overseas Enterprises Pte Ltd v. Exim Rajathi India Pvt Ltd*²² the Singapore court laid down the principles which govern the application of the public policy rules where the successful party had withheld an important document from the arbitrators (and in reaching their decision considered the English authority of *DDT Trucks of North America Ltd v. DDT Holdings Ltd*²³):

- (1) If the fraud alleged is the shape of perjury, the applicant must prove that its new evidence could not have been discovered or produced, despite reasonable diligence, during the arbitration proceedings;
- (2) The newly discovered evidence must be decisive in that it would have prompted the arbitrator to have ruled in favour of the applicant instead of the other party;
- (3) If the fraud was in the shape of non-disclosure of a material document, the document must be so material that earlier discovery would have prompted the arbitrator to rule in favour of the applicant; and
- (4) Negligence or error in judgment in failing to discover a crucial document would not be sufficient to justify a setting aside of the award and for that purpose, the non-disclosure must have been deliberate and aimed at deceiving the arbitrator.

42. It is suggested that the English court would endorse similar principles in respect of the same conduct.

Challenging the Award: appeals on points of law

Outline

43. In 1996 the *Nema* guidelines were replaced with the statutory criteria contained in s.69. The test for permission to appeal under s. 69 is four-fold²⁴. Thus permission will only be granted if the court is satisfied:

- (a) that the determination of the question will substantially affect the rights of one or more of the parties; and
- (b) that the question is one which the tribunal was asked to determine; and
- (c) that on, the basis of the findings of fact in the award:
 - (i) the decision of the tribunal on the question is obviously wrong; or

²² [2009] SGHC 231.

²³ [2007] 2 Lloyd's Rep. 213

²⁴ Section 69 (3) Arbitration Act 1996.

- (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) 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.

44. Those statutory criteria are clearly strongly influenced by the *Nema* guidelines and the decision in *The Antaios*. The Court of Appeal in *The Northern Pioneer*²⁵ considered that s.69 “opened the door a little more widely to the granting of permission to appeal than the crack that was left by Lord Diplock”. Only a thin whisper of air now penetrates the crack in that particular door.

45. England already allows more appeals on points of law than all other jurisdictions. London is sometimes regarded as a pariah by the international arbitration community for allowing any appeals on points of law at all. One such proponent of this view is Professor Michael Needham, who in an article published in the 1999 edition of the journal ‘Arbitration’ said²⁶:

“Section 69 departs from the principles upon which arbitration is founded. It acts to the detriment of London as a centre for international arbitration. It acts as a detriment to the use of arbitration for the resolution of English domestic disputes. It places England at a disadvantage when compared against those countries that have adopted the UNCITRAL Model Law.”

46. Indeed the conclusion of a contributor at the Seventh Geneva Global Arbitration Forum in December 1998²⁷ was that “*what is clear is that less intervention by the court is appropriate, not more*”.

47. It is against such views that the well known international arbitration rules exclude the right of appeal to court.

48. Article 26.9 of the LCIA Rules provides:

“All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any

²⁵ [2003] 1 Lloyd’s Rep. 212 at p. 216, col. 1, para. 11.

²⁶ “*Appeal on a Point of Law Arising out of an Award*” (1999) 65 Arbitration 205 at p. 210.

²⁷ “*Settling Disputes on a Shrinking Planet*” given by Mr. Geoffrey M. Beresford Hartwell at the afternoon session on 2nd December 1998 at the Seventh Geneva Global Arbitration Forum.

form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made” (emphasis added).

49. Similarly Article 28.6 of the ICC Rules provides:

“Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.”

50. Section 69 of the 1996 Act is not a mandatory provision so it is perfectly acceptable (as a matter of English law) to contract out of it, which is precisely what parties do when they agree that their disputes will be governed by the LCIA or ICC Rules. Thus international arbitrations subject to these rules will severely limit the scope of the court’s role and there will be limited interaction between the court and the arbitral tribunal.

Recent Developments

51. *Procedure.* It now appears to be accepted by the English court that if there is an application for permission to appeal pursuant to s. 69 and an application under ss. 67 or 68 then the applications will be combined and heard at an oral hearing. However, Gross J in UR Power GmbH v. Kuok Oils and Grains Pte Ltd²⁸ decided the application for permission to appeal on paper only, even though oral submissions were necessary on the same issues to resolve a jurisdictional challenge.

52. *Obviously wrong.* In National Trust v. Fleming²⁹ Henderson J commented on the “obviously wrong” test where he said:

“The ‘obviously wrong’ test is, self evidently a stringent one which will seldom be satisfied. It carries with it the implication that the error should normally be demonstrable on the face of the award itself, and that it should not require too close a scrutiny to expose it. The threshold is very much higher than the usual test of ‘a real prospect of success’ which the court applies to applications for permission to appeal under CPR r. 52.3(6)(a). The reason for this, of course, is that arbitration is essentially an alternative method of dispute resolution which the parties have agreed to choose in preference to litigation in court. Moreover, in most cases, including the present one, they will have agreed to submit resolution of the dispute to an arbitrator who is not a trained lawyer. The court should therefore be very sparing in its interventions in the arbitral process, and this philosophy is reflected in the provisions of section 69.”

²⁸ *Ibid.*

²⁹ [2009] EWHC 1789 (Ch)

Expert evidence – do’s, don’ts and insider tips

“An expert is a man who has made all the mistakes which can be made in a very narrow field”

(Niels Bohr, 1885-1962, Danish physicist)

53. The role of an expert is to provide independent opinion evidence based on their expertise and the facts before them. Where, as in England, the parties are given a great deal of freedom to appoint (and pay for) their own experts, experts are often criticised by the other party as advocating a party’s case and (in the more extreme cases) for a “hired gun”.
54. In the majority of cases lawyers, consultants and experts will have developed their understanding of the role of expert evidence from their own domestic litigation, governed by the domestic civil procedure rules, practices and guidelines. That traditional approach of a particular country will, as pointed out by Nicholas Gould, often be “*transposed into the international dispute resolution arena*”.

The International Arbitration Rules

55. It is a common feature of international arbitration rules that the tribunal can appoint experts. The tribunal may identify the issues that it is to decide and order the parties to provide relevant information. See:
- (1) ***Article 20 (3) & (4) of the ICC Rules*** which provides that unless otherwise agreed by the parties in writing, the tribunal may appoint one or more experts and information can be provided to them, and the parties shall have an opportunity to examine the experts in a hearing.
 - (2) ***Article 21 of the LCIA Rules*** which provide that unless otherwise agreed by the parties in writing, the tribunal may appoint one or more experts to report on “specific issues”, who shall remain “*impartial and independent of the parties throughout the arbitration*”. The parties can then be given the opportunity to question the expert on their report and “*to present expert witnesses in order to testify on the points at issue*”.
 - (3) ***Article 27 of the UNCITRAL Arbitration Rules*** which provides that a tribunal may appoint one or more experts to report to it, in writing, on specific issues, such issues to be determined by the tribunal.

- (4) *Article 26 UNCITRAL Model Law* similarly provides as Article 27 of the UNCITRAL Arbitration Rules.
- (5) *Article 22 of AAA/ ICDR Rules* similarly provides the tribunal with the power to appoint one or more independent experts to report to it, in writing, on specific issues which it decides. However, pursuant to Article 22(v) the tribunal will give the parties an opportunity to question the expert at a hearing and the parties may present expert witnesses to testify on the points at issue.

Rules for Expertise/ Experts Protocol

56. In addition to the specific arbitration rules for experts there are two other sources of rules and/or procedures which parties might wish to consider:

- (1) The ICC's Rules for Expertise; and
- (2) The Chartered Institute of Arbitrators' Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration ("the CI Arb Protocol").

57. On 1 January 2003 the ICC's Rules for Expertise came into force. Those rules support the three services provided by the ICC, namely: (1) the proposal of experts; (2) the appointment of experts and (3) the administration of expertise proceedings.

58. The CI Arb Protocol was launched in October 2007 and is aimed at improving the efficiency and economy of preparing and giving expert evidence in international arbitration. The Protocol gives effect to three fundamental principles: (1) each party is entitled to know, reasonably in advance of the hearing, the expert evidence relied on by each party; (2) experts should not act as advocates for the party who appointed them and (3) prior to the hearing there should be the greatest possible degree of agreement between the experts.

59. The 2010 IBA Rules on the Taking of Evidence in International Arbitration³⁰ can be adopted by parties and arbitral tribunals in whole or in part, at the time of drafting the arbitration clause or once an arbitration commences. Alternatively they can, if parties wish, be used as guidelines. They are designed to provide "*an efficient, economical and fair process for the taking of evidence in international arbitration*" (see Foreword to the Rules). The IBA Rules provide a useful harmonisation of the procedures commonly used in international arbitration and reflect processes developed in both civil and common law

³⁰ The Rules are due to be adopted by Resolution of the IBA Council at a date in May 2010. At the time of producing this paper it is unclear on what date the Rules are to be adopted.

systems. In respect of expert evidence Article 5 deals with Party-Appointed Experts and Article 6 deals with Tribunal Appointed Experts.

General Tips

60. Not all cases will require expert evidence. The single most important observations to be made with regard to the role of expert evidence are that (1) it must be relevant to the issues in dispute; (2) must be given by a person who is properly qualified to give it and (3) must be the true and independent opinion of the expert.

61. It is not uncommon for a party to an arbitration (in which the rigid controls on the use of expert evidence imposed by a judge at a Case Management Conference in Commercial Court proceedings are absent) to seek to adduce a swathe of expert evidence which is not in fact relevant to the issues which are properly in dispute in the reference. This sort of approach merely increases the costs burden of a reference and the length of time needed in order to determine it. If the tribunal is to manage the arbitration efficiently and effectively, and write an award which addresses each of the issues, they will need a focused list of issues. Thus, it is important for parties to cooperate at the earliest sensible stage in order to determine together what are the main issues to which expert evidence will be relevant. This is particularly so where the IBA Rules are adopted or being used as a guideline as Article 2.3 provides that the Tribunal is encouraged to identify to the parties, as soon as it considers appropriate, any issues that (a) may be regarded as relevant to the case and material to its outcome and (b) for which a preliminary determination may be appropriate. If the parties already have a working list of issues this process will be much easier. See also Article 2.2 of the IBA Rules.

62. More common, however, is the mistaken belief of a party that its expert is equipped to speak on a number of issues, some of which are strictly outside the field of expertise of that expert. This can be a fatal error. In the event that a party finds itself at a final hearing with an expert who seeks to give evidence on issues which are not strictly within his experience, that party may well find that the evidence of that expert as a whole is undermined and that, in the meantime, it is unable to offer any expert evidence to counter that of the other party on the issues upon which its own expert is unable to speak.

63. Equally important is the need to appoint an expert who has relevant *recent* experience within his field of expertise. There many respected experts willing to give evidence who, for example, have been professional expert witnesses for 30 years and not, therefore, been on the ground practising in their field for 30 years. Such experts will be of little assistance in a case which involves issues which arise out of aspects of a particular practice or technology which are of very recent provenance.

64. So:

- (1) Do discuss the issues in dispute with the other parties at an early stage with a view to producing (with or without the assistance of the tribunal) a detailed list of issues.
- (2) Do consider and test whether any of those issues really require expert evidence.
- (3) Don't appoint an expert who does not have relevant *recent* experience.
- (4) Don't allow an expert to speak on a number of issues, some of which are strictly outside the field of that expert's expertise.
- (5) Do test the expert's opinions expressed in their draft reports but don't interfere too much with the report.
- (6) Don't allow any expert you appoint to behave like an advocate for your case.

65. *Footnote on foreign law expertise.* In international arbitration the arbitrators will often be from different jurisdictions. Moreover, international arbitrations often involve issues of foreign law (foreign in the sense that just because the contractual forum is England, the governing law is often not English). The question then becomes, in such circumstances, what expertise is required in respect of the foreign law? In an English court hearing, experts on the foreign law would be required to produce reports and be tendered for cross examination. However, it does not automatically follow that this will be the case in an international arbitration and the issue should be explored with the tribunal at an early date. By way of example (based on a recent ICC case):

- (1) A joint venture agreement between a Danish company and an American company which was subject to Swiss law with arbitration in London.
- (2) The 3 man ICC tribunal was made up of arbitrators from Denmark, Switzerland and England.
- (3) As one of the arbitrators was a Swiss lawyer the parties were not required to produce expert reports on the relevant Swiss law principles but were required to address the Swiss law principles and make submissions on them in their written documents.

(4) In those circumstances each side retained Swiss law advice but did not disclose any reports and merely set out in their submissions the applicable Swiss law principles and case law.

66. It is also worth considering if a foreign law is involved whether a party should appoint an arbitrator from that foreign law jurisdiction.

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