KINGS COLLEGE LONDON
CENTRE OF CONSTRUCTION LAW AND MANAGEMENT
PART D

THE COURT'S SUPPORTIVE AND SUPERVISORY POWERS

Peter Aeberli RIBA ARIAS ACE FCIArb
Barrister, Chartered Arbitrator, Adjudicator, CEDR Registered Mediator

INTRODUCTION

These notes consider the court's powers to enforce arbitral awards and to assist the tribunal and the parties both during and after the proceedings (the court's supportive powers) and its powers of control (its supervisory powers) over the tribunal and its awards.

PART A: THE COURT'S SUPPORTIVE POWERS IN RESPECT OF AN AWARD

If, an award is not honoured it can be enforced by action on the award or, with the court's permission, by entering judgement in the terms of the award. provided that the applicable limitation period (six years from failure to honour it unless the submission is under seal, LA 1980, s. 7)) has not expired; consider Good Challenger v. Metal Exportimport [2004] 1 Lloyd's Rep 67 (CA).[1]

Enforcement by entering judgement in terms of the award is a summary process. It is suitable in most cases where the award is for the payment of money or requires a party to do or refrain from doing something Enforcement by action on the award, preserved by AA1996, s. 66(4), is appropriate where summary enforcement has been refused or would not be granted.

If the court refuses to allow summary enforcement this does not finally determine the merits of the respondent's contentions. The claimant can still seek to enforce by action on the award. For further on this topic consider, MJ Shane, *Is it Necessary to Register an Award to Enforce it in the United Kingdom?* (2005) 71 Arbitration 46.

On the status of an award before enforcement consider Kastner v. Jason [2004] 2 Lloyd's Rep 233 (Ch D); Tribunal's "freezing" order, even if by Award (under agreed s. 39 powers), did not, of itself, create a property right capable of being registered as a caution so as to bind third parties. This accepted to be the case on appeal; [2005] 1 Lloyd's Rep 397.

---

[1] **Good Challenger**: For the purposes of s. 26 AA1950 and action on award the 6 year limitation period ran from date award not honoured (usually shortly after published) not from date of award. Note limitation period extended in this case by part payments.

© Aeberli/Kings College Centre of Construction Law 2009

Web site: www.aeberli.com
www.3paper.co.uk

1. Enforcement by action on an award

Although not universally accepted, the general view is that an action on an award is founded on breach of the implied term of the arbitration agreement that the award will be honoured, #Agromet Motoimport v. Maulden Engineering Co (Beds) Ltd [1985] 1 WLR 762; #Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyd's Rep 223.

The claimant must prove the arbitration agreement under which the award is made, the referral of disputes encompassed by that agreement to arbitration, the appointment of the tribunal in respect of that referral, the making of the award and that it has not been honoured, #The Saint Anna [1983] 1 Lloyd's Rep 637. The principal defences to such an action are likely to concern the tribunal's jurisdiction, questions of public policy, want of finality, uncertainty of meaning and time bars.

2. Summary enforcement

An award may, with the permission of the court, be enforced in the same manner as a judgement or order of the court to the same effect. If permission is given, judgement can be entered in terms of the award, AA1996, s. 66.[2] The application is made without notice. If successful, the defendant must then apply to set aside. For consideration of the procedure, see Colliers International v. Colliers Jordan Lee [2008] EWHC 1524 (Comm); [2008] 2 Lloyd's Rep 368.

The court must enforce in the terms of the award, thus it cannot order interest for the period between the award and summary enforcement; Walker v. Rowe [2000] 1 Lloyd's Rep 116. But once court had given judgement on the application interest runs at the statutory rate applicable to judgement debts, Gater Assets v. NAK Naftogaz Ukrainiy (No 3) [2008] EWHC 1108 (Comm); [2008] 2 Lloyd's Rep 295.

Provided that the award is final, in that it is not subject to a pending challenge or appeal, the court will permit enforcement unless there are real grounds to doubt its validity or there are matters that require further investigation that can only be undertaken in an action on the award; #Middlemass & Gould (a firm) v. Hartlepool Corporation [1972] 1 WLR 1643 (CA). Deutsche Schachtbau etc v. Ras al Khaimah National Oil Co [1987] 2 Lloyd's Rep 246 (CA).

- The principal grounds on which summary enforcement is likely to be refused are concerns over jurisdiction, contravention of English public policy[3] and

[2] Recourse can be had to this method of summary enforcement irrespective of whether the seat of the arbitration is in England and Wales or whether or not a seat has been designated or determined and irrespective of whether or not the award is a New York Convention Award or a foreign award, AA 1996, s.2(2)(a).

[3] Soleimany v. Soleimany [1999] QB 785 (CA). Tribunal found that contract was illegal, not enforced on public policy grounds. Although not referred to as a ground to refuse enforcement in AA1996, s. 66, the court's power to refuse recognition or enforcement of an award on grounds of public policy is expressly preserved in AA1996, s. 81(1)(c). The CA suggested that where there was prima facie evidence of illegality, the court should enquire into the matter to some

where the operative part of the award is not in a form that can be summarily enforced.

- To resist enforcement on public policy grounds, nothing short of reprehensible or unconscionable conduct will suffice, conduct that can comfortably be described as fraud, conduct dishonestly intended to mislead; #Gater Assets v. NAK Naftogaz Ukrainiy (No 2) [2008] EWHC 237 (Comm); [2008] 1 Lloyd's Rep 479 (considering public policy under s. 68 and s. 103 and applying Profilati Italia and Electrim SA). But note #R v. V [2009] EWHC 1531 (Comm); [2009] 1 Lloyd's Rep 97, Contravention of English Public policy may be grounds to resist enforcement of an award on a contract subject to English law or to be performed in England. But other than in cases such as terrorism or drug trafficking, if the contract is not to English law, English public policy may not be a ground to resist enforcement unless the Award is also contrary to public policy under the law to which the contact is subject. For more on this, and a consideration of whether, on questions of illegality, the arbitrator's findings can be re-opened see Soleimany v. Soleimany [1999] QB 785 and #Westacre Investments v. Jugoimport [2000] 1 QB 288.

- Matters that were before the tribunal and are thus subject to *res judicata* do not provide grounds for refusing summary enforcement of an award; Middlemass & Gould (a firm) v. Hartlepool Corporation [1972] 1 WLR 1643 (CA).

- After the award has become final, matters that could have been raised by a challenge to or appeal from an award, or which have been the subject of an unsuccessful challenge or appeal, do not provide grounds for refusing summary enforcement, unless permission is given to challenge or appeal the award out of time, #Hall and Wodehouse Ltd v. Panorama Hotel Properties Ltd [1974] 2 Lloyd's Rep 413 (CA).

- The right to resist enforcement on jurisdictional grounds may be lost by operation of the statutory waiver, see AA1996, ss. 66(3), 73.

- Once the court has given permission for the award to be enforced, judgement can be entered in terms of the award. Although the court can sever defective

---

extent. Without conducting a full trial it should consider whether there was evidence from the other party to the contrary, whether there was material from which the tribunal could conclude that the contract was not illegal and whether there was anything, such as collusion or bad faith, to suggest that the tribunal was not competent to conduct that enquiry. Westacre Investments Inc v. Jugoimport [2000] QB 288(CA). Public policy grounds to resist enforcement. Was it against public policy to refuse to enforce an agreement where performance of the contract arbitrated was against public policy of the place of performance but not so under the public policy of the proper law of the contract or the curial law. Contract governed by Swiss law and arbitrators had not found illegality in their award. There were some breaches of rules of public policy that will lead to non-enforcement in England whatever the proper law or place of performance, but this not one of them.

parts of an award before enforcement,[4] it cannot rewrite or change the terms of the award, for instance, to add post award interest.[5]

- Remission of an award to the Tribunal may, if it does not affect the operative part, not be a bar to enforcement meantime; consider Carter v. Simpson Associates [2004] 2 Lloyd's Rep 512 (PC).[6]

Once judgement is entered, interest will run on sums awarded by the tribunal including in respect of interest, at the judgement debt rate.

3. Summary enforcement of foreign awards[7]

A New York Convention award may, with the permission of the court, be enforced in the same manner as a judgement or order of the court to the same effect. If permission is given, judgement can then be entered in terms of the award, AA1996, s. 101.[8]

The court's powers in respect of such an application are similar to those in proceedings to enforce an award under s. 66 of the Arbitration Act 1996, but the grounds on which enforcement can be refused are specified by closed list.

Certain foreign awards, other than New York Convention awards,[9] may be enforced in the same manner as under AA1996, s. 66, see AA1950, ss. 36(1), 37 as amended.

---

4 The court can sever the good from the bad, Graig Shipping Co Ltd v. International Paint and Compositions Co Ltd (1944) 77 Ll L Rep 220.

5 **Walker v. Rowe** [2000] 1 Lloyd's Rep 116. Court no longer had power to award interest on amount of award unpaid after that award, post award interest a matter for the tribunal. Judgement had to be entered in terms of the award under s. 66.

6 Carter: No rule that remittal necessarily meant that the award ceased to have any effect. Tribunal's jurisdiction only revived on the remitted matters. The rest of the award could properly form the subject matter of the action to enforce it.

7 There is a degree of uncertainty over how awards made pursuant to arbitral proceedings conducted under the law of Scotland are to be enforced in England and Wales. Awards made in other parts of the United Kingdom are governed not by these conventions but if they have become enforceable in one part of the United Kingdom, or presumably in another EU country, can by ss. 4, 18(2)(e), s. 50 of the Civil Jurisdiction and Judgements Act 1982, Schedules 7 or 8 re enforced by registration in another part of the United Kingdom, Dicey and Morris p. 630. But see Article 1 and Mark Rich & Co AG v. Societa Italiana Impianti PA, The Independent, November 21, 1988.

8 Minmetals Germany v. Ferco Steel Ltd [1999] 1 All ER (Comm) 315, application to overturn leave to enforce obtained ex *parte*. NY Convention Award, if procedural irregularity waived before the tribunal cannot be relied on to resist enforcement under s. 103(3)(e). In deciding whether to refuse enforcement on public policy grounds, court should consider the nature of the procedural injustice, whether party seeking to enforce has invoked supervisory jurisdiction of the seat of the arbitration, whether a remedy available under that jurisdiction, whether courts of that jurisdiction had conclusively determined the complaint in favour of upholding the award, and if that jurisdiction not invoked, for what reason, was he unreasonable in failing to do so.

9 Awards made in a territory declared by Order in Counsel to be a

Issue estoppel arising in previous enforcement proceedings

A foreign court judgment, concerned with enforcement before that court, may give rise, in the courts of England and Wales, to an issue estoppel if (a) given by a court of competent jurisdiction, (b) judgement final and conclusive, (c) identity of parties, (d) identity of subject matter (the issue in decided by the foreign court the same as arising in the English proceedings, Carl Zeiss v. Rayner & Keeler Ltd (No 2) 1AC 853 (HL), (e) a full consideration and clear decision on that issue, which was necessary for the foreign court's decision, #Good Challenger v. Metal Exportimport [2004] 1 Lloyd's Rep 67 (CA).[10]

4. Procedure on enforcement

Other than in the case of an action on the award (where a Part 7 Claim Form should be issued), enforcement proceedings are governed by CPR, Part 62 and the related Practice Direction. The application for enforcement is made by arbitration claim form, CPR Rule 62.18.

PART B: THE COURT'S SUPPORTIVE POWERS IN RESPECT OF THE PROCEEDINGS

There may be circumstances in which the tribunal's powers are inadequate, for instance because it is not yet constituted, because the desired orders will affect persons other than the parties, or its sanctions are inadequate. In such cases, the court may be able to assist.

1. Preliminary questions of law

AA1996, s. 45 provides that application may be made to the court to determine a preliminary point of law with the agreement of the parties or the permission of the tribunal (of doubtful use). In the latter case, the court must be satisfied that determination of the question is likely to produce substantial savings in costs, that the application is made without delay, and there is a good reason why the matter should be decided by the court.

- Taylor Woodrow Holdings v. Barnes [2006] EWHC 1693 (TCC) (In both cases, the court retains a discretion whether or not to consider the application, the fact

---

territory to which the 1927 Geneva Convention applies pursuant to an arbitration agreement, to which the protocol to the 1927 Geneva Convention applies, between parties who are each subject to the jurisdiction of a Power declared by Order in Counsel to be states party to that Convention. Principally certain commonwealth countries.

[10] **Good Challenger:** If issue estoppel was made out, it irrelevant whether the English court formed the view that the foreign court decision on the issue was wrong. But the court had to be cautious before concluding that the foreign court made a clear decision on the issue, and principles of issue estoppel were are subject to overriding consideration that must work justice and not injustice. Here the question was whether the Romanian court had, on proceedings to enforce the award there, made a decision on the limitation position under English law, concluding that the claim on the award was statute barred, which bound the English court under the doctrine of issue estoppel. The court of appeal concluded that while the Romanian court's decision on the Romanian law limitation point was necessary for its decision, its decision on the English law limitation point was not, thus there was no issue estoppel.

that the parties have agreed it as the tribunal for such questions, being a strong factor in favour of hearing the application).

The status of the court's determination for the tribunal and the parties is somewhat unclear. If similar to a determination under s. 2 of the 1979 Act, now repealed, it is merely an opinion of the court, not a judgment, and thus not *res judicata*; #Babanaft International Co. SA v. Avanti Petroleum Inc [1982] 1 WLR 871 (CA).[11]

2. Enforcing the tribunal's peremptory orders

Unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal, AA1996, s; 42.

An application can be made either by the tribunal (which would be ill advised) or by a party where this is permitted by the parties' agreement, or the tribunal has given permission.

- Before granting such an application, the court must be satisfied that the applicant for the order has exhausted any available arbitral process in respect of failure to comply with the tribunal's order. It must also be satisfied that the person to whom the tribunal's order was directed has failed to comply with it within the prescribed time or, if no time was prescribed, within a reasonable time.

- On such an application the court's discretion is limited the question of whether or not it should order compliance with the tribunal's peremptory order within a specified period. Thus, the court cannot, itself, decide what sanctions to impose on a party for failing to comply with the tribunal's orders, for instance by striking out a claim or a defence in the arbitral proceedings. Neither can the court modify or amend the tribunal's peremptory order, for instance because it considers that order insufficiently clear.
- This power was considered in #Emmott v. Michael Wilson (No. 2) [2009 EWHC 1 (Comm; [2009] 1 Lloyd's Rep 233: The court's power under s. 42 is discretionary, it is not a rubber stamp. But the court is not required to satisfy itself that the tribunal's order was properly made or to rehear the application for that order, at least where the tribunal gave reasons that might reasonably be considered

[11] **Babanaft**: Donaldson LJ at 881-883, with whom the other members of the court agreed, considered s. 2 to be the successor to the old consultative case. It was a procedure under which 'put colloquially, the parties … nip down the road to pick the brains of one of Her Majesty's judges and, thus enlightened, resume the arbitration'. He considered that a decision under s. 2, like the court's determination of a consultative case, was not *res judicata*. Thus, subject to obtaining leave to appeal, if necessary, a party could appeal a subsequent award of the tribunal on the basis that it had erred in law, even though the law the tribunal had applied was that decided by the High Court on a s. 2 application in the same arbitration. If the award was not appealed or, at any rate, not successfully, then it was the tribunal's award, not the decision of the court on the s. 2 application, that under the doctrine of *res judicata*, barred the parties from re-litigating or re-arbitrating the issues decided. Note also, s. 45(6) which provides that the decision of the court on a preliminary question of jurisdiction shall be treated as if it were a judgment of the court for the purpose of any appeal.

to support that decision, nor was it appropriate for the court to review the merits of the underlying claim in the arbitration. The court could decline to enforce where the order was not required in the interest of justice to assist the proper functioning of the arbitral process, as where there had been a material change of circumstances after the order was made, where the tribunal had not acted fairly and impartially, in breach of its duty, in making the order, or where it made an order it had no power to make.

- If the peremptory order concerns the payment of money, the court may be reluctant to grant what is, in effect, a mandatory injunction; consider Macob Civil Engineering Ltd v. Morrison Construction Ltd [1999] BLR 93.

3. Securing the attendance of witnesses

The tribunal only has authority over the parties to the proceedings before it. Thus, it cannot compel a reluctant witness to attend before it.

A party may use the same court procedures as are available in legal proceedings to secure the attendance before the tribunal (wherever its seat) of a witness in order to give oral testimony or produce documents or other material evidence, AA1996, s., 43.

- The power to order production of documents is concerned with particular documents required as evidence of some fact, not with ordering general discovery; BNP Paribas v. Deloitte and Touche [2004] 1 Lloyd's Rep 233 (Comm).[12] Note also Assimina Maritime v. Pakistan Shipping [2005] 1 Lloyd's Rep 525 (Comm) where the court ordered a witness to attend to give evidence, although rejecting the application that he produce insufficiently defined documents (instead it ordered certain of those documents, which were sufficiently identified to be produced for copying, under s. 44(2)).

- Tajik Aluminium v. Hydro Aluminium [2006] 1 Lloyd's Rep 155 (CA): To obtain production of documents under this provision, the documents must be specifically identified or at least described in some compendious manner that enabled the individual documents falling within the scope of the summons to be

[12] **BNP Paribas:** Arbitration between BNP and Avis, Audit partner in D&T made witness statement in support of Avis. BNP applied to issue and serve a witness summons on basis that D&T had in its power, possession, custody or control certain documents relevant to the arbitration, required a witness to attend the Court (sic) on a date to be specified to produce listed documents, the categories of which were wide and included "notes, memoranda and/or other documents relating to the preparation of the statutory accounts for December 1999 and adjustments included therein. Application dismissed, since it was an application for disclosure rather than production in evidence of documents brought to the tribunal under a witness summons. Court had to be astute that a discovery exercise was not disguised as an application to produce particular documents. A distinction between requiring documents to be produced as evidence of some fact, and asking for disclosure to trawl through documents to see if they supported the applicant's case or undermined the value of a witness's testimony. Court had no power under s. 43 to order disclosure against a third party (ie a power like in CPR 31.17). Nor was there anything in the Model Law which gave such a power, Art. 27 concerned with taking evidence, not with disclosure.

clearly identified. Ideally each document should be individually identified, but it was not necessary to go that far in every case.

These procedures can only be used with the permission of the tribunal or the agreement of the other parties to the arbitral proceedings.

4. Service of documents

AA1996, s. 76(3) allows, subject to contrary agreement, for service by any effective means and provides that delivery by pre-paid post to the addressee's last principal residence, or in the case of a corporation, to its registered or principal address is effective. Bernuth v. High Seas Shipping [2005] EWHC 3020 (Comm); [2006] 1 Lloyd's Rep 537 (an effective means is one by a recognised means of communication effective to deliver the notice or document to the addressee, whether by post, fax, telex or e-mail. If by e-mail, must the dispatched to what in fact was the e-mail address of the intended recipient and not be rejected by the system. The sender had to show that receipt had occurred; the fact that, after receipt, it never then reached the relevant manager or legal staff was not relevant).

5. Problems with service of documents

The court may make orders dispensing with or substituting service where the method of service otherwise applicable is not reasonably practicable, AA1996, s. 77. An application for such an order can only be made by party to the arbitration agreement and after it has exhausted any available arbitral process for resolving the matter.

6. Extending time limits

The court has a number of different powers concerned with extending time limits affecting arbitral proceedings.

Section 12 powers

The court has a limited power to extend contractual time limits for commencing arbitral proceedings, AA1996, s. 12; #Harbour and General Works Ltd v. Environment Agency [2000] I Lloyd's Rep 65[13] (CA), but note #Crown Estates Commissioners v. John Mowlem & Co (1994) 70 Build LR 1 (CA)).[14]

Section 50 powers

---

13 **Harbour:** Test is whether the circumstances (of the delay) were outside reasonable contemplation when the provisions agreed and just to extend time, or because conduct of one makes it unjust to hold the other to the provision. Authorities applying the "undue hardship" test are no longer relevant to the question of whether time should be extended for beginning arbitral proceedings. A party's failure to comply with a time limit through oversight or negligence by itself or its advisors, however short the period of non-compliance is not outside the reasonable contemplation of the parties, nor is failing to warn that the notice is defective a justification for extending time.

14 **Crown**: A distinction was made between clauses that directly barred claims and those that did so collaterally by, as in that case, making matters evidentially conclusive (see JCT final certificate clause). Is there a difference between substantive and evidential rights?

Unless otherwise agreed by the parties, the court has power, where substantial injustice would otherwise be caused, to extend the time for making an award where that time is limited by or in pursuance of an arbitration agreement, AA1996, s. 50.

Section 79 powers

Unless otherwise agreed, the court has a general power, where substantial injustice would otherwise be caused, to extend time limits agreed by the parties in relation to arbitral proceedings or specified in a non mandatory provision of Part I of the Arbitration Act 1996, AA1996, s.79. There have been a number of cases concerning the exercise of s. 79 powers.

- Gold Coast v. Naval Gijon SA [2006] EWHC 1044 (Comm); [2006] 2 Lloyd's Rep 400[15] (The question of whether substantial injustice would be caused involved not only the question of whether failure to comply with the time limit was excusable, but also whether the application or step for which a time was laid down had a substantial prospect of success).

- Aoot v. Glencore [2002] 1 Lloyd's Rep 128.[16] (ss. 70(3) and 79 compared).

- Equatorial Traders v. Louis Dreyfus [2002] 2 Lloyd's Rep 638 (must apply for discretionary relief promptly);[17] John Mowlem v. SS for Defence (2000) CILL 1655 (parties stipulating that, unless they agreed, the arbitration was to be concluded in six months, did not exclude the courts' s. 79 power. Court could extend this period where necessary to avoid substantial hardship).

7. Obtaining evidence and preserving property and assets

Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power to make orders about the following matters as it has for the purposes of and in relation to legal proceedings, AA1996, s. 44.[18]

The relevant matters are listed in s. 44(2). They are the taking of the evidence of witnesses, preserving of evidence, making of orders relating to property that is the subject of the proceedings or as to which any question arises in the proceedings, selling

---

15 **Gold Coast**: Application for extension of s. 57 time limits. Also relevant were the Aoot v. Glenclore factors for s. 80; eg the need to avoid unnecessary delay and expense by court intervention, whether the delay was reasonable and explicable, and weigh these against any substantial injustice to the applicant of not extending time.

16 **Aoot**: Section 79 does not apply to time limit in s. 70(3), as the 28 day period does not apply in default of party agreement.

17 **Equatorial**: Party seeking interlocutory relief should apply as soon as reasonably possible after it out to have appreciated that such relief was required. Did not do so here, so application to extend 21 day period for appeal to Board of Appeal refused. Note comments that an inexperienced party, lacking legal advice, might be treated more leniently

18 **Re Q's Estate** [1999] 1 Lloyd's Rep 931. A clause providing for exclusive jurisdiction of arbitration in London, not such an agreement so as to oust the court's power to grant Mareva injunctions as a conservatory measure, more specific words required. Discharged here, on the merits not for want of jurisdiction.

of goods that are the subject of the proceedings and the granting of interim injunctions and appointing receivers.

- Assimina Maritime v. Pakistan Shipping [2005] 1 Lloyd's Rep 525 (Comm)[19] (no power under s. 44(2) to order disclosure from a third party).

- For an example of an interim injunction obtained in support of arbitral proceedings, see Lauritzencool v. Lady Navigation [2005] 1 Lloyd's Rep 260.[20]

Taking the evidence of witnesses

Different procedures apply depending on whether the witness is in England and Wales and their evidence in required in respect of domestic or non-domestic proceedings, and where the witness is out of the jurisdiction. Consider Commerce Insurance v. Lloyd's [2002] 1 WLR 1323 (Comm)[21] (The court has a discretionary jurisdiction to make an order for the examination of witnesses in England and Wales in support of arbitral proceedings, even though the seat of the arbitration is in New York and the curial law is the law of New York).

Preserving evidence

The court can, for instance, make a search order (formerly an Anton Piller order) to secure the preservation of evidence that is or may be relevant to the proceedings. Such an order is exceptional as it requires the party to whom it is directed to allow named representatives of the applicant to enter the specified premises and search for, examine and remove or copy the articles specified in the order.

Property relevant to the proceedings

The court has for the purpose of and in relation to arbitral proceedings the same power as it has in legal proceedings to make orders relating to property which is the subject of the proceedings or as to which any question arises in the proceedings.

---

19 **Assimina**: Arbitration concerned grounding of vessel in a port. Claimant sought disclosure of report from W, prepared for the port. Court held that power to preserve, inspect or preserve documents only concerned those that could be specifically described, not, as in an application for ordinary disclosure, merely by reference to issues. Court ordered inspection and copying of documents which it considered met this test, as these concerned a question in the arbitration and if order, not made, might cease to exist or be rendered unobtainable.

20 **Lauritzencool**: The substance of the injunction was that the defendant was not, until the final award in the arbitration, to employ two named ships in a manner inconsistent with the time charter or fix them with any third party for employment during the period of that charter. In reaching this conclusion the court applied the American Cyanamid test, as refined in Bath v. Mowlem [2004] BLR 153, serious issue to be tried, damages not an adequate remedy, balance of convenience.

21 **Commerce**: Because s. 44 was available irrespective of whether the seat was, see s. 2(3). The court's power in support of proceedings before it is contained in CPR 34.8. But, since the purpose of the application was to obtain a deposition, not to obtain evidence for use in the proceedings, the order sought was inappropriate. Also the application did not give any indication of the issues for which the requested evidence was required, and why it is necessary. Thus, refused.

© Aeberli/Kings College Centre of Construction Law 2009

Web site: www.aeberli.com
www.3paper.co.uk

The orders that the court can make in support of arbitral proceedings are for the inspection, photographing, preservation, custody or detention of the property, or for the taking of samples from, the making of observations of or the conducting of experiments on the property. The court can, for the purpose of such orders, authorise any person to enter any premises in the possession or control of a party to the arbitration. These powers are more limited than those available in legal proceedings.[22]

The sale of goods

The court's power to sell goods in support of arbitral proceedings is also more limited than in the case of legal proceedings. Although it can order the sale of goods of a perishable nature or which for any other good reason it is desirable to sell quickly, CPR, Rule 25.1(1)(c)(iv), it can only do so if they are the subject of the proceedings, not where any question arises in respect of them on a claim. Neither can it order the sale of land. Compare CPR, Rule 25.1(2) with AA1996, s. 44(2)(d).[23]

Interim injunctions

The court can grant interim injunctions in support of arbitral proceedings, CPR, Rule 25.1(1)(a). In addition to the usual interim injunctions, the court can grant freezing injunctions (formerly Mareva injunctions) restraining a party from dealing with its assets. If this power is insufficient, it may be that the court has an interim power to grant supportive injunctions under s. 37 of the Supreme Court Act 1981;[24] but note Cetelem SA v. Roust Holdings Ltd [2005] EWCA Civ 618 (CA).

Note, in Pacific Maritime v. Holystone Overseas Ltd [2007] EWHC 2319 (Comm); [2008] 1 Lloyd's Rep 371 the court held, in respect of an application for the preservation of assets, that since any order the tribunal might make would not bind third parties or be

---

22 The court can, in the case of legal proceedings before it, make orders relating to property against a person who is not a party to those proceedings, CPR, Rule 25.1(1)(j) and Supreme Court Act 1991, s. 34(3). It is unclear whether it can make such orders in support of arbitral proceedings.

These powers are limited to property that is the subject of the proceedings or as to which a question arises in the proceedings. This is a more limited jurisdiction than the court has in legal proceedings before it. Consider CPR, Rules 25.1(1)(i) and 25.1(2).

23 It is unclear whether the limitation on the court's power of sale in support of arbitral proceedings to "goods", as opposed to "property" (The word used in CPR, Rules 25.1(1)(c) and 25.1(2)) was intended to further limit this power to the sale of chattels or whether it encompasses all forms of personal property, for instance financial instruments such as shares. RSC 1883 Order L rule 2, the predecessor to RSC Order 29 rule 4 and CPR, Rule 25.1(c)(iv) referred to "goods", not "property". Nevertheless, it was held to be wide enough to enable the court to order the sale of shares in a company on the grounds that these were perishable in the sense of being capable of falling in value, Evans v. Davis [1893] 2 Ch 216. But note Mustill & Boyd (1989), p. 331.

24 Supreme Court Act 1981, s. 37(1), gives the High Court power to grant interlocutory and final injunctions, or appoint receivers "in all cases in which it appears to the court to be just and convenient to do so".

buttressed by sufficient sanctions, this was a case where the tribunal, even though appointed, lacked the power to act effectively.

Appointing receivers

The court can appoint a receiver by interim or final order when it appears just and convenient to do so, Supreme Court Act 1981, s. 37. See also CPR, Schedule 1 (RSC Order 30). A court appointed receiver is an officer of the court. His duty is to submit accounts to the parties as directed by the court, collect the property identified in the order appointing him and pay it into court or as the court directs.[25]

8. Limits on the court's powers in respect of evidence, property and assets

The court can only exercise these supportive powers if or to the extent that the tribunal, and any arbitral or other institution or person vested by the parties in that regard, cannot or is unable, for the time being, to act effectively, AA1996, s. 44(5).[26]

The court's powers differ depending on whether or not the case is one of urgency.

- In a case of urgency the court can make such orders as in thinks necessary for the purpose of preserving assets or evidence, on the application (without notice) of a party or intended party to the arbitral proceedings; s. 44(3). Assets can include chooses in action, such as contractual entitlements, as well as tangible assets: #Cetelem SA v. Roust Holdings Ltd [2005] EWCA Civ 618.

  Note Cetelem SA v. Roust Holdings Ltd [2005] EWCA Civ 618 (CA)[27] (court's powers under s. 44(3) are limited to cases of necessity and where necessary to preserve evidence or assets, but could exercise any s. 44(2) power, including an interim mandatory injunction, to this end). The CA held that, on this point, Hiscox Underwriting. V. Dickson [2004] 2 Lloyd's Rep 438 (Comm)[28] (where, in effect, a

---

25 A receiver may be appropriate where the property in question, for instance business assets or investment land, must be actively managed or commercially utilised in order to retain its value and its management or use is being neglected, whether because of the impasse created by the dispute or because of the attitude of the party in possession of the property.

26 The two most likely situations in which this requirement will be satisfied are where the tribunal has not yet been appointed or where the order sought concerns, or will only be effective if observed by persons who are not parties to the relevant arbitration agreement.

27 **Cetelem**: First instance judge had granted an interim freezing injunction ex party and, considering its powers to act in emergency were not limited to those in s. 44(3), granted a mandatory induction for the signing of and delivery up of documents necessary for a share transfer. CA held that, even though *ex parte* powers were limited to s. 44(3), court could do this since, necessary for preserving of an asset, a contractual right in this case. The fact that the granting of such an interim injunction might be determinative of the issues in the arbitration, did not preclude the use of the s. 44(3)jurisdiction, but might be relevant to its exercise.

28 **Hiscox**: Hiscox sought an order requiring SM to give it access to documents evidencing insurances written by D&M under the terms of a biding authority agreement between Hiscox and D&M which D&M, in alleged breach of that agreement, proposed to divert to a new binding authority granted by a third party. Held: court could grant an

limited form of early disclosure against a party was granted under s. 44(2)), was wrongly decided. See also NB Three Shipping v. Harebell Shipping [2005] 1 Lloyd's Rep 507 (Comm)[29] (Order for early disclosure refused, tribunal's powers, when constituted, considered sufficient).

- In all other cases the court can only act on the application of a party to the arbitral proceedings, made on notice to the other parties and with the agreement of those parties or the permission of the tribunal. This means that proceedings must have commenced and, in most cases, the tribunal established before the application is made; s. 44(4).

9. Discharging court orders in respect of evidence, property and assets

If the court makes an interim order in respect of evidence, property and assets it will, have to consider what further orders are necessary if circumstances change and once the arbitral proceedings end.

Where such an order is made in support of arbitral proceedings, the court can, in effect, delegate the decision of when its order is to cease to have effect, in whole or in part, to the tribunal, AA1996, s. 44(6).[30]

---

interim injunction of this type since tribunal (not fully constituted, and reluctance by D&M to appoint its arbitrator until day of court hearing) could not act effectively. The s. 44(2)(e) power not limited to the s. 44(3) matters, despite views of DAC to the contrary. The principle that interim injunctions would not readily be granted if the effect of doing so was to effectively deicide the matter at issue, which was to be determined by the arbitrator, and if the effect of so dong would be to usurp the arbitrator's function, could yield to the requirements of justice if urgency and fairness required it in order that justice could be administered. The Court decided it should grant an interim injunction in narrow terms. The case was one of urgency, and damages were not an adequate remedy since difficulties in showing what business the applicant would or would not have been obtained if not able, though access to the records, to offer quotes for renewal.

29 **Three Shipping**: Disclosure a matter for the arbitrators. If early disclosure wanted, apply to them.

30 It is unclear if any order made by the court would deprive the court of power to set aside its own order. If not, difficulties could arise where the tribunal exercises the power delegated to it and a party seeks to challenge the tribunal's determination by application to the court.

It is not clear what is meant by the tribunal, or another person or institution, having power in relation to the subject matter of the court's order. For example, the tribunal generally has power in relation to property that is owned by a party, but although such property may be the subject matter of a court order, that order may have been directed at persons other than the party concerned, for example, a bank where the property was held. It seems unlikely that the tribunal could discharge such an order, since it affects persons who are not parties to the arbitration agreement under which it was appointed.

In many cases the court's order will have been made on terms. If the tribunal is given power to set aside that order, what effect does this have on the terms on which the order was made and how are any undertakings, such as the undertaking in damages which is generally

10. Procedural issues

Applications to the court for the exercise of its supportive powers should be made in accordance with CPR Part 62 and the related Practice Direction. Such applications are generally commenced by arbitration claim form. The Practice Direction sets out standard directions governing the procedure to be followed.

PART C: COURT SUPERVISION OF THE PROCEEDINGS

The court does not have inherent jurisdiction to supervise the conduct of arbitral proceedings so as, for instance, to correct errors in or remit procedural rulings, or to make declarations about matters entrusted to the tribunal.[31] The court's powers to intervene during the course of arbitral proceedings are statutory and thus limited to situations that merit the draconian remedy of removing an arbitrator; #Bremer Vulkan v. South India Shipping Corporation[1981] AC 909.

1. The statutory power to remove an arbitrator

The court may remove on an arbitrator on any of the following grounds, AA1996, s. 24.

Where circumstances exist that give rise to justifiable doubts as to an arbitrator's impartiality, s 24(1)(a). This encompasses both actual and apparent bias.

- The modern test for apparent bias is whether the circumstances found by the court would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased.[32] In the case of a party appointed arbitrator, the court appears to be willing to accept a greater degree of ongoing professional relationship with the appointing party than would otherwise be acceptable; Transcomin SA v. Gibbs [1985] 1 Lloyd's Rep 586.[33]

- Apparent bias usually arises from a relationship between the arbitrator and a party or with the subject matter of the proceedings, but it can also arise because of the manner in which the arbitrator conducts the proceedings. For example:

  Where the arbitrator expresses concluded views, as opposed to a mere predisposition to prefer the case of one party, about issues relevant to the parties' dispute, in circumstances which demonstrate that he has prejudged the issues prior to considering the parties' evidence and submissions and will be unable to approach the matter with an open mind, Hagop Ardahalian v. Unifert International SA [1984] 2 Lloyd's Rep 84.

  Where the arbitrator fails to conduct the proceedings impartially, for instance, by repeatedly making unjustified accusations of deliberate

---

given by an applicant for an interim injunction, to be enforced?

31 There may be a residual jurisdiction to make declarations, where a legal right has been infringed.

32 Magill v. Porter (2002) 2WLR 37 (HL).

33 See also Bremer Handelsgesellschaft mbH v. ETS Soules et Cie [1985] 2 Lloyd's Rep 199.

delay against one of the parties, Damond Lock Grabowski v. Laing Investments (Bracknell) Ltd (1992) 60 Build LR 112.

Norbrook Laboratories v. Tank [2006] EWHC 1055 (Comm); [2006] 2 Lloyd's Rep 485 (direct contact with witnesses without keeping an accurate record of what the witness said and giving to the parties for comment, gave rise to a real possibility that the tribunal was biased).

Where an arbitrator does not possess the qualifications required by the arbitration agreement, s. 24(1)(b).[34]

Where an arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts about his capacity to do so, s. 24(1)(c).

Where an arbitrator has refused or failed to properly conduct the proceedings, or to use all reasonable dispatch in making an award, and substantial injustice has been or will be caused to the applicant, s. 24(1)(d). This is, ordinarily, the only remedy available to a party who is seriously dissatisfied with the manner in which the tribunal is conducting the proceedings or with the tribunal's procedural decisions.

- This ground for possible removal encompasses the categories of serious irregularity, AA1996, s. 68.[35] But the court will only remove in exceptional circumstances. It must be satisfied that a reasonable person would no longer have confidence in the arbitrator's ability to come to a fair and balanced conclusion on the issues, #James Moore Earthmoving v. Miller Construction Ltd [2001] BLR 322 (CA).[36]

- The substantial injustice relied on must have a real existence. The test is that it has been or will be caused, not that it might be; Groundshire v. VHE Construction [2001] BLR 395.[37]

---

[34] The purpose of this provision is somewhat obscure since the appointment of a person who does not have the qualifications required by the parties arbitration agreement is, in general, invalid and he will not have substantive jurisdiction.

[35] The s. 24(1) (d) grounds may be wider in that repeated errors of law in procedure or in substantive issues might be sufficient to justify removal. See comment in Port Sudan Cotton Co v. Govindaswamy Chettier & Sons [1977] 1 Lloyd's Rep 166, 178, reversed on other grounds, [1977] 2 Lloyd's Rep 5.

[36] **Moore**: Applying the test in Lovell Partnerships Northern Ltd v. AW Construction PLC (1996) 81 BLR 83, 89 (CA).

[37] **Groundshire**: Only remove where there are reasons for loss of confidence in the arbitrator, despite similarities of wording with s. 68. Policy of the Act is to remit in preference to setting aside or declaring it to be of no effect or removing the arbitrator. Sections. 24 and 68 apply where substantial injustice has been or will be (not may be) caused. Substantial means having a real existence, not just more than de *minimus*. Since the applicant had not exhausted its resources under s. 57 (did not ask the arbitrator for clarification and to explain his reasons) court had no alternative but to refuse the application, see s. 70(2)(b).

© Aeberli/Kings College Centre of Construction Law 2009

Web site: www.aeberli.com
www.3paper.co.uk

If there is an arbitral or other institution or person vested by the parties with the power to remove an arbitrator, the court shall not exercise its power to remove an arbitrator unless satisfied that the applicant has first exhausted any available recourse to that institution or person, such recourse includes requests for clarification under s. 57. Consider Groundshire v. VHE Construction [2001] BLR 395.

The tribunal may continue the arbitral proceedings and make an award while an application to remove an arbitrator is pending before the court, AA1996, s. 24(3).

Where the court removes an arbitrator it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid, AA1996, s. 24(4). The parties must consider how he is to be replaced and the implications of his removal on the proceedings at that time.

2. Procedure

An application to the court to remove an arbitrator must be made by arbitration claim form in accordance with CPR Part 62. The application must be made on notice to the other parties, the arbitrator concerned and any other arbitrators

PART D: COURT SUPERVISION OVER AN AWARD

The principal methods for disputing an arbitral award are by recourse to the court under its statutory powers to set aside or vary and award or to declare it to be of no effect or, if the parties have agreed to an arbitral process of appeal or review, by recourse to that procedure and, if dissatisfied with the outcome of that procedure, then by recourse to the court.

1. Agreed procedures for disputing an award

If the parties have agreed or the Arbitration Act 1996 provides procedures for disputing an award, these must be exhausted before a challenge or appeal is brought before the court, AA1996, s. 70 (2).

2. Statutory grounds for disputing an award

In contrast to its restricted power to supervise the course of arbitral proceedings, the court has wider powers to over an award. These are principally concerned with the tribunal's jurisdiction to make that award, the process by which it came to be made and the legal principles on which it is based.

3. Jurisdictional challenges to an award

A party to arbitral proceedings may apply to the court on notice to the other parties and the tribunal, AA1996, s. 67, challenging an award as to the tribunal's substantive jurisdiction; or for an order declaring an award made by the tribunal on the merits to be of no effect in whole or in part because the tribunal did not have substantive jurisdiction. Where the jurisdictional dispute has been raised before the tribunal and determined by it in an award on jurisdiction, the court my by order confirm the award, vary the award or set aside the award in whole or in part. For an example, see Peterson Farms v. C&M Farming [2004] 1 Lloyd's Rep 603.[38]

[38] **Peterson**: Tribunal, seat in England, applied the group of companies doctrine (arbitration agreement signed by one party in a group of companies may entitle and bind the others if circumstances show this

The remedies differ depending on whether the award being disputed is as to the tribunal's substantive jurisdiction, s. 67(1)(a), or an award on the merits, s. 67(1)(b). In the former case the court can confirm, vary or set aside the award in whole or in part. In the latter case the court declares it to be of no effect in whole or in part because the tribunal did not have jurisdiction.

- The categorisation of an award can be difficult and may differ depending on whether the tribunal concludes it did or did not have jurisdiction. In the latter case the award can never be on the merits, in the former case it may be. Contrast the awards considered in #LG Caltex Gas Co Ltd v. China National Petroleum Corp [2001] 2 All ER (comm) 97 (CA) (tribunal concluded it did not have jurisdiction) with #Aoot Kalmneft v. Glencore International AG [2002] 1 Lloyd's Rep 128.[39]

- There is no difference in principle or effect between a declaration that an award is of no effect and an order setting aside an award. The tribunal is no longer functus officio as regards the matters decided by that award; Hussman (Europe) Ltd v. Ahmed Pharam [2003] EWCA (civ) 266.[40]

The right to have the jurisdictional question re-heard is unfettered other than by operation of AA1996, ss. 70(2), 70(3) and the statutory waiver, ss. 73. Consider #Azov Shipping Co v. Baltic Shipping Co [1999] 1 Lloyd's Rep 68;[41] #Athletic Union v. NBA [2002] 1 Lloyd's Rep 305.[42]

---

was the parties' intention) to hold that it had jurisdiction to award damages in favour of claimant who had not signed the arbitration agreement/contract. The English court set aside its award against that party under s. 67 for want of jurisdiction, as proper law of the contract (Arkansas, USA) did not recognise this doctrine), also unknown in the law of England. The tribunal appears to have considered the Group of Companies doctrine to be a general principle of the lex *mercatoria* of international arbitration.

39 If the tribunal rules that it does not have jurisdiction, its award is an award as to its substantive jurisdiction, since the tribunal is precluded for dealing with any aspect of the merits of the parties' dispute. If the tribunal rules that it has jurisdiction, its award will be an award on the merits since, in reaching its conclusion, it will have determined the related substantive issue concerning whether the parties contracted at all.

40 **Haussman**: The tribunal's earlier award was set aside in previous proceedings, not declared to be of no effect In either case, the tribunal is no longer *functus officio* as regards the matters decided in the invalid award, and the arbitration continues or revives as necessary. The revival of the tribunal's jurisdiction is not dependent on the invalid award being remitted to it for reconsideration.

41 **Azov**: A consideration of the different ways to resolve jurisdictional questions. Where no complex issues of fact, s. 31 could be appropriate. But appeal under s. 67 unfettered, takes effect as rehearing of fact and law as court should not be in a weaker position that arbitrator when considering challenge. Alternatives are to ask court to determine preliminary question of jurisdiction under AA1996, s. 32, or for party to stand back from the proceedings and seek a declaration under s. 72.

42 **Athletic**: The effect of s. 73 was that a party challenging an award on jurisdiction could not dispute jurisdiction on grounds not argued

4. Challenging an award for serious irregularity

A party to arbitral proceedings may apply to the court on notice to the other parties and the tribunal, AA1996, s. 68, challenging an award on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

Serious irregularity is defined by reference to a closed list of kinds of irregularity[43] and by the requirement that the category relied on has caused or will cause substantial injustice. The requirement imposes a high threshold; London Underground v. Citylink [2007] BLR 391 (TCC).

- AA1996, s. 68(2)(a): Failure by the arbitrator to comply with its general duty under s. 33. For example, an award that determines matters on a basis that was not pleaded or argued by the parties could be open to challenge on this ground; #ONO Northern Shipping v. Remolcadores [2007] 2 Lloyd's Rep 302 (Comm Ct) (tribunal made award on basis of representation point when case before it had proceeded on the basis that the point was no longer pursued).[44]

  But, by analogy with the old cases on misconduct, a tribunal does not breach its general duty by making an error of fact or law, Moran v. Lloyd's [1983] QB 542.[45]

  As regards the exercise of powers the test is whether the tribunal arrived at a conclusion that no reasonable arbitrator could have arrived at having regard to his s. 33 duties; #Aoot Kalmneft v. Glencore [2002] 1 Lloyd's Rep 128. As regards a challenge under this head for want of impartiality, see ASM Shipping v. TTMI Ltd [2006] 1 Lloyd's Rep 375 (Comm).[46] Note ABB v. Hochtief Airport [2006] EWHC 388 (Comm);[47] [2006] 2 Lloyd's Rep 1 (inadequacies in reasoning given in support of the rejection of a party's case on an issue not, of

---

before the tribunal.

43 Unlike s. 22 AA 1950 the court does not have an unfettered power to remit for procedural mishap, reversing King v. Thomas McKenna Ltd [1991] 1 All ER 653.

44 See also Interbulk Ltd v. Aiden Shipping Co Ltd [1984] 2 Lloyd's Rep 66 (CA).

45 To arrive at decision on no evidence is not misconduct, it is an error of law, Citland Ltd v. Aanchan Oil etc [1980] 2 Lloyd's Rep 275. An arbitrator erroneously admitting evidence, such as without prejudice correspondence is not misconduct. But reliance on such evidence in making an award might provide grounds for a successful challenge to that award, K/S A/S Bill Baikh v. Hyundai Corporation [1988] 1 Lloyd's Rep 187.

46 **ASM**: This is a ground for challenge under s. 68(2)(a) as impartiality a requirement of ss. 1 and 33. The test is "a real possibility of bias", not real danger, Magill v. Porter. If this test is satisfied, that it, in itself, a species of serous irregularity which has caused substantial injustice to the applicant, no need for a separate enquiry about this.

47 **ABB**: Arbitrators had directed that IBA Rules of evidence apply, and adopted the principles in those Rules in rejecting the disclosure application. Tomlinson J considered that giving clearly expressed reasons responsive to the issues debated would avoid time consuming and costly challenges.

itself a serous irregularity, nor was rejection of an application for disclosure on grounds of lack of sufficient relevance or materiality).

- AA1996, s. 68(2)(b): The tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction). Ordinarily, an error of law or fact is not an excess of jurisdiction;[48] #Lesotho Highlands v. Impreglio [2005] 2 Lloyd's Rep 310 (HL).[49]

- AA1996, s. 68(2)(c): Failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties.

- AA1996, s. 68(2)(d): Failure by the tribunal to deal with all the issues put to it.[50] This does mean that the tribunal need set out each step by which it reached its conclusions or that it must deal with each point made by a party, #Petroships v. Pytech Trading [2001] 2 Lloyd's Rep 348. But if a central point is not dealt with, this will be a serious irregularity, Ascot Commodities v. Olan [2002] CLC 3277 (Comm). An issues must be an important or fundamental issue that was put to the tribunal. There is a difference between failing to deal with such an issue and failure to provide any or any sufficient reasons for a decision, #Fidelity Management v. Myriad International [2005] 2 Lloyd's Rep 508 (Comm). The latter can be dealt with under s. 70(4); Van der Giessen v. Imtech Marine [2008] EWHC 2904 (Comm); [2009] 1 Lloyd's Rep 273.

---

48 Compagnie Europeenne v. Tradax [1986] 2 Lloyd's Rep 301.

49 **Lesotho**: Contract governed by the law of Lesotho, provided for payment in Maloti (Lesotho currency). Arbitration agreement, ad hoc, provided for ICC arbitration under the Arbitration Act 1996. The tribunal concluded that questions of currency and interest were procedural matters governed by ss. 48 and 49. It ordered payment in various European Currencies and the payment of interest on a commercial rate. HL accepted that, in regard to the currency of damages, the tribunal had erred in law in deciding that it had discretion under s. 48 to disregard the substantive law in relation to the currency of damages, but that the wrong use of an available discretion was not an excess of jurisdiction. It held that, on the assumption that the tribunal erred in law in exercising its discretion over interest the way it did, this was at most an error of law, and not an excess of jurisdiction, and there was, in any case, no substantial injustice caused by this error. The implication is that only if the tribunal exercises a power that it does not have, will there be an excess of jurisdiction.

50 **Interbulk v. Aiden Shipping Co** [2004] 2 Lloyd's Rep 66 (CA): Ackner LJ "The essential feature of an arbitrator, or indeed, a Judge is to resolve the issues raised by the parties. The pleading record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues still remain live issues. If an arbitrator considers that the parties or their experts have missed the real point ... then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness, or, as it is sometimes described, as a matter of natural justice to put the point to them so that they have an opportunity of considering it." Approved, Bandwidth Shipping Corp. v. Intaari [2007] EWCA Civ 998 [2008] 1 Lloyd's Law Rep 7 (where the court held that there was not such unfairness if the arbitrators had not appreciated that counsel, particularly highly experienced counsel who shows a detailed knowledge of the case, had missed the point.

Ronly Holdings v. JSC Zestafoni [2004] BLR 323 (Comm)[51] (reserving a question for determination by a third party, is a failure to deal with all the issues).

Claims included in the parties' case statements should be dealt with unless expressly abandoned, even if not supported by evidence or submissions; Cobelfret NV v. Cyclades Shipping Corp Ltd [1994] 1 Lloyd's Rep 28. But claims encompassed by a Notice to Concur are deemed abandoned, and need not be dealt with, if they are not referred to in the parties' case statements; Excomm Ltd v. Guan Guan Shipping (Pte) Ltd [1987] 1 Lloyd's Rep 330. Note also Bandwidth Shipping v. Intarri [2007] EWCA (Civ) 998; [2008] 1 Lloyd's Rep 7 (arbitrators did not act unfairly in not checking with counsel understood what was being said by the other side in circumstances where they did not appreciate that he had missed a point. If had appreciated this should have raised the point so it could be dealt with. There is a high hurdle in the way of a party seeking to challenge an Award under s. 68, in particular by reference to s. 33).

A failure to consider specific documents or evidence on an issue or to attach sufficient weight to such documents, is not a failure to deal with an issue, nor is a mistake in findings of primary fact or in drawing inferences from such facts; #World Trade Corp. v. Czarnikow Sugar [2005] 1 Lloyd's Rep 422 (Comm).

- AA1996, s. 68(2)(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.

- AA1996, s. 68(2)(f): Uncertainty or ambiguity as to the effect of the award.

- AA1996, s. 68(2)(g): The award being obtained by fraud or the award, or the way in which it was procured, being contrary to public policy. To succeed on this ground the applicant must show that some form of reprehensible, some unconscionable conduct, on its opponent's part contributed in a substantial way to obtaining an award in the latter's favour; #Profilati Italia v. Paine Webber [2001] 1 Lloyds' Rep 715; Cuflet Chartering v. Carousel [2001] 1 Lloyd's Rep 707.[52] See also Thyssen Canada v. Marina Maritime [2005] 1 Lloyd's Rep 641

---

[51] **Ronly**: Tribunal held that a sum of $16,083,834.57 was outstanding to Ronly, but ordered a lesser sum to be paid, because of credits originally offered by JCSZ on other contracts, but then withdrawn. Held: Tribunal should have ordered payment of the shortfall. Court considered this to be a failure to deal with all the issues rather than an excess of jurisdiction.

[52] **Profilati**: Attempt to remit under s. 68(2)(g) on grounds part procured in a way contrary to public policy. Documents wrongfully withheld, tribunal misled. Deliberate withholding of an important document could satisfy this test, but not innocent withholding, otherwise would expand s. 68 categories. The way parties had dealt with disclosure meant no breach of duty to disclose, since party seeking disclosure had, under the procedure, to identify in a general way the documents it was seeking. **Cuflet Chartering v. Carousel** [2001] 1 Lloyd's Rep 707 to succeed on the public policy ground must

(Com Ct)[53] (allegation that award had been obtained on basis of perjured evidenced, and that evidence had been deliberately destroyed). See also #Elektrim SA v. Vivendi Universal [2007] 1 Lloyd's LR 693 (Com Ct). The court said, obiter, that a causative link between the deliberate concealment of the document or the fraudulent failure to produce it, the perjured evidence, and the conclusions in the award must be shown (another hurdle in the way of successfully arguing this ground).

- AA1996, s. 68(2)(h): Failure to comply with the requirements as to the form of the award.

- AA1996, s. 68(2)(i): Any irregularity in the conduct of the proceedings or in the award that 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.

The mere fact that such an irregularity has occurred is not enough; Groundshire v. VHE Construction [2001] BLR 395, Petroships v. Pytech Trading [2001] 2 Lloyd's Rep 348.[54]

- ONO Northern Shipping v. Remolcadores [2007] 2 Lloyd's Rep 302 (Comm Ct) (there is substantial injustice where a party deprived, by breach of s. 33, of opportunity to advance submissions which were "at least reasonably arguable" or even "something better than hopeless", it is not for the court to second guess the arbitrators).

- #London Underground v. Citylink [2007] BLR 391 (TCC). The issue is whether the arbitrator has come by impropriate means to one conclusion whereas had appropriate means been adopted he might realistically have reached a conclusion favourable to the applicant. It does not require the court to try the issue so as to determine, based on the outcome, whether substantial injustice has been caused. #Van der Giessen v. Imtech Marine [2008] EWHC 2904 (Comm);

---

show unconscionable conduct by the party being criticised. Inadvertent misleading of one party by another (ie that the arbitration would be suspended), not sufficient.

53 **Thyssen**: Whichever limb of s. 68(2)(g) of the Act is relied on, it must be shown that the defendants acted in such a way as to obtain the award by fraud or procure it in a way that was reprehensible or involved unconscionable conduct. If challenged on basis of false evidence, this can only be done where the defendant can fairly be blamed for the adducing of that evidence and the deception of the tribunal; that it is responsible for the fabrication of the perjured evidence. This necessitates a trial where the evidence put forward is tested, a hearing of those witnesses. It is not sufficient merely to produce cogent evidence; the allegation of fraud must be proved.

54 **Petroships**: Section 68 is only available where the tribunal has gone so wrong it its conduct, in one of the listed respects that justice calls out for it to be corrected. It should not be used to circumvent the restrictions on the court's power to intervene in arbitral proceedings. Purpose of serous irregularity test is to support arbitral proceedings, not interference. A similar view was expressed by the HL in Losotho.

© Aeberli/Kings College Centre of Construction Law 2009

Web site: www.aeberli.com
www.3paper.co.uk

[2009] 1 Lloyd's Rep 273 (the court is not required to decide what would have happened if there had been no irregularity. Provided that the point was one where the tribunal might well have reached a different view the court should enquire no further)

- But note ASM Shipping v. TTMI Ltd [2006] 1 Lloyd's Rep 375 (Comm):[55] Where apparent bias is shown, this is, itself a species of serious irregularity causing substantial injustice. There is no need for a separate enquiry about this (this view has been criticised).

5. Appealing an award on a point of law

Unless otherwise agreed by the parties, a party may (on notice to the other parties and the tribunal) appeal to the court on a question of law arising out of an award, AA1996, s. 69. An agreement to dispense with reasons is sufficient to exclude the court's jurisdiction to consider such an appeal, AA1996, s. 69(1). This right is somewhat controversial. See, for example, R Holmes, M O'Reilly, *Appeals from Arbitral Awards. Should Section 69 be Repealed?* (2003) 69 Arbitration 1.

- Sumukan v. Commonwealth Secretariat [2007] EWCA Civ 243; [2007] 2 Lloyd's Rep 87 (CA) (such an agreement, provided it was voluntary, did not infringe human rights, eg Article 6 of the ECHR).

- An arbitration agreement which provides that the award will be final and binding, is not an exclusions agreement for the purpose of s. 69; Essex CC v. Premier Recycling Ltd [2007] BLR 233 (TCC).

An appeal can only be brought with the agreement of the other parties to the proceedings or with the leave of the court. In addition to these fetters, the right to appeal is subject to the AA1996, s. 70(2) and 70(3) restrictions; AA1996, s. 69(2). There were no special requirements for how an agreement that an appeal might be brought should be worded, Royal & Sun Alliance v. BAE Systems [2008] EWHC 743; [2008] 1 Lloyd's Rep 712.[56]

If leave to appeal is required it will 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 parties;

- that the question is one which the tribunal was asked to determine;

- that on the basis of the findings of fact in the award the decision of the tribunal 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.[57] See CMA v. Beteiligungs etc. [2003] 1 Lloyd's Rep 212 (CA);[58]

---

55 **ASM**: The judge disagreed with comments in Groundshire, to the contrary,

56 **Royal**: "Any party to the Dispute may appeal to the court on a question of law" is sufficient.

57 These tests preserve a presumption of finality. But note comments in CMA v. Beteiligungs etc. [2002] EWCA (Civ) 1878 that these are closer to the broader guidelines in Antaios Compania SA v Salen AB [1985] AC

- 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 Note Icon Navigation v. Snochem [2003] 1 All ER (Comm) 405 (on s. 69(3)(d)).[59] In Essex CC v. Premier Recycling [2007] BLR 233 (TCC) the judge considered that the provision in the arbitration agreement that awards were to be final and binding, the appointment of an expert as arbitrator, and the use of written submissions to archive a quick procedure were of great weight in considering the s. 69(3)(d) discretion.

- In deciding whether to give leave, the courts try to uphold arbitral awards, reading them in a reasonable and commercial way expecting that there will be no substantial fault with them, and bearing in mind that the parties chose an autonomous process under which they agree to be bound by the facts as found by the arbitrators; #London Underground v. Citylink [2007] BLR 391 (TCC).

- If the respondent wishes to contend that the award should be upheld for reasons not expressed or fully expressed in the Award, he should state those reasons when opposing leave; Vitol SA v. Norelf Ltd [1996] AC 800, 814 (CPR PD 62, para 12.3(3). Such reasons much be questions of law and, if not pronounced on by the tribunal, the court will reach its own view, if pronounced on by the tribunal the statutory tests for error of law apply, see #CTI Group v. Tarnsclear (No 2) [2007] EWHC 2340 (Comm); [2008] 1 All ER 203.

An application for leave to appeal will ordinarily be determined without a hearing, AA1996, s. 69(4). Unlike under the old law, brief reasons for a refusal to give leave

---

191 than the narrower requirements in Pioneer Shipping Ltd v. BTP Toxide Ltd, the Nema [1982] AC 724.

58 **CMA**: Open to serous doubt test, more generous than the old Nema/ Antios "probably wrong" test. Issue concerned the interpretation and application of a war clause in a charter party. CA concluded that judge was correct to refuse leave to appeal to the Commercial Court. Although tribunal's finding open to serious doubt, the determination of the question as to its construction and whether had to be exercised in a reasonable time did not substantially affect the rights of one or more of the parties. Because of the delay in exercising cancellation rights, these rights would, either under an implied term of exercise in a reasonable time, or under the doctrine of waver/estoppel or election have been lost (the tribunal had adopted the implied term analysis). Had it not been for s. 69(3)(a), leave would have been given since, unlike under the old law, a difference in view on this point, here by the arbitrators, sufficient to suggest serous doubt.

59 **Icon**: Claim for freight and counterclaim by charterer for short delivery. One issue relevant to the counterclaim concerned whether charterer in breach of cause 31. Issue first emerged in closing submissions, charterer objected, but nothing turned on this since tribunal held, on construction of clause 31, no breach. Owner appealed. Court had to consider how charterer could raise allegation of serous irregularity if appeal allowed. Court considered that it would not be appropriate to issue a protective cross application under s. 68. Rather, the issue should be raised to resist application for leave on ground that it was not just and proper to determine the question. If a hearing desired, party should ask for one.

© Aeberli/Kings College Centre of Construction Law 2009

Web site: www.aeberli.com
www.3paper.co.uk

should be given; North Range Shipping v. Seatrans [2002] EWCA Civ 405; [2002] 1WLR 2397[60] (CA) overruling Mousaka v. Golden Seagull [2001] 2 Lloyd's Rep 657, on this point. Note comments on procedure in #CMA v. Beteiligungs [2002] EWCA Civ 1878; [2003] 1 Lloyd's Rep 212 (CA).[61]

On hearing an appeal the court will simply decide whether, on its view of the facts found by the arbitrator, the arbitrator was correct in law.[62]

The proper subject appeal on law

There are three stages in the arbitral process. (i) The arbitrator ascertains the facts; (ii) the arbitrator ascertains the law, including the identification of all material rules of statute and common law and the identification and interpretation of relevant parts of the contract, and the identification of those facts that must be taken into account when the decision is reached; (iii) in the light of the facts and law so ascertained, the arbitrator reaches his conclusion. It is the second stage that is the proper subject of an appeal. In some cases the error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It may also possible to infer an error of law in those cases were a correct application of the law to the facts found would inevitably let to one answer whereas the arbitrator has arrived at another This can be so even if the arbitrator has stated the law in an manner which appears to be correct. The Chrysalis [1983] 1 Lloyd's Rep 503, Mustill J.

Some examples:

- The law in question must be that of England and Wales (or Northern Ireland), AA1996, s. 81(1); Athletic Union v. NBA [2002] 1 Lloyd's Rep 305.

- A question of law may concern the determination and application of legal principles to the facts or to the exercise of a judicial discretion, such as the discretion to allocate costs. It may concern the construction of documents.[63] But note, #CTI Group v. Transclear SA [2007] EWHC 2340 (Comm); [2008] 1 Lloyd's Rep 250, in the case of mixed findings of act and law, there is only an error of law if the tribunal misdirected itself or no tribunal properly instructed as to the relevant law could come to the determination reached. To decide *de novo* a question of mixed fact and law decided by the tribunal would be to act contrary to the clear policy of the Act.

- The question of whether there is insufficient evidence to support a particular finding is not a question of law; Demco v. SE Banken Forsakring [2005] 2 Lloyd's

---

60 **North Range**: Having regard to article 6 of HRC, court had to give sufficient reasons when refusing leave to enable the loosing party to understand why the judge had reached his decision.

61 **CMA**: CA castigated length and complexity of submissions on the application for leave. Should be such as a judge could read and digest in half an hour. Also the giving of reasons should not be used as an opportunity for further submissions before the order drawn.

62 Pioneer Shipping Ltd v. BTP Toxide Ltd [1982] AC 724, Gill & Duffus SA v. Societe pur l'Exploration etc. [1986] 1 Lloyd's rep 322.

63 President of India v. Jadranska Slobodna Plovidba [1992] 2 Lloyd's Rep 274; Everglade Maritime v. Schiffahrtsgesellshaft etc [1992] QB 780.

Rep 650 (Comm) There is some doubt about whether the question of whether there is no evidence to support a finding question is a question of law.[64]

- The exercise by the tribunal of a power may give rise to questions of law, Fence Gate v. NEL Construction (2002) CILL 1817 (the power to allocate costs).[65]

The requirement to act judicially

Concerns with natural justice were, under the 1950 Act, encompassed in the notion that the tribunal should act judicially. This meant that arbitration was, like litigation, an essentially adversarial process and the tribunal had to apply similar principles to a court in exercising its powers. It is unclear whether this principle still applies under the AA1996. Contrast Wicketts v. Brine Builders (2001) CILL 1805[66] with Fence Gate v. NEL (2002) CILL 1817.[67]

6. Relief available on a challenge or appeal

Where an award is successfully challenged on grounds of serious irregularity the court may remit the award to the tribunal in whole or part, for reconsideration, set the award aside in whole or in part, or declare the award to be of no effect in whole or in part, AA1996, s. 68(3).

Where an award is appealed, the court may confirm the award, vary it, remit it to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or set it aside in whole or in part, AA1996, s. 69(7).

The court should not set aside an award or declare it to be of no effect, in whole or in part, unless satisfied that remission of the matters in question to the arbitrator is inappropriate, AA1996, ss 68(3), 69(7); Groundshire v. VHE Construction [2001] BLR 395.[68]

---

64 Consider Mondial Trading Co GmbH v. Gill & Duffus etc. [1980] 2 Lloyd's Rep 376, Universal Petroleum Co Ltd v. Handels und Transport GmBH [1987] 1 WLR 1178.

65 **Fence Gate**: The tribunal should act in accordance with its powers. It should not take into account matters which the law or the power preclude it from considering and must give effect to matters that the law and the power require it to consider. In addition the overall discretionary exercise must not be perverse, nor one that a reasonable tribunal properly conducting itself could not have rendered (a test similar to Wednesbury reasonableness.

66 **Wicketts**: The arbitrator had to apply same principles as a court when ordering security for costs and could only do so on the basis of evidence provided by the parties.

67 **Fence Gate**: The requirement to act judicially is no longer relevant to a tribunal allocating costs The applicable principles are to be found in the Arbitration Act and any agreed rules.

68 **Groundshire:** Only remove where there are reasons for loss of confidence in the arbitrator, despite similarities of wording with s. 68. Policy of the Act is to remit in preference to setting aside or declaring it to be of no effect or removing the arbitrator. Sections. 24 and 68 apply where substantial injustice has been or will be (not may be) caused. Substantial means having a real existence, not just more than de *minimus*. Since the applicant had not exhausted its resources under s. 57 (did not ask the arbitrator for clarification and to explain his reasons) court had no alternative but to refuse the application, see s. 70(2)(b).

© Aeberli/Kings College Centre of Construction Law 2009

Web site: www.aeberli.com
www.3paper.co.uk

Ancillary court powers concerning successful challenges

By AA1996, s. 13, the court may order the period of an arbitration to be disregarded for the purposes of the Limitation Acts when an award is set aside or declared to be of no effect, AA1996, s. 13. Although, unlike under the old law, the court can no longer set aside an arbitration agreement (see AA1950, ss. 24, 25, now repealed) this may be necessary if a tribunal is found, after an award is made, to have lacked substantive jurisdiction.

If the court set asides an award or declares it to be of no effect, it may order that any provision that an award is to be a condition precedent to the bringing of legal proceedings is of no effect as regards the award or as the case may be the relevant part of it, AA1996, s. 71(4). It is unclear what purpose this serves since the court cannot set aside the arbitration agreement itself.

7. Supplementary provisions relating to challenges and appeals

There are two preconditions to bringing an application or appeal from an award.

- Any available arbitral process of appeal or review and any available recourse to the tribunal to correct its award or make an additional award must have been exhausted, AA1996, s. 70(2). Consider Groundshire v. VHE Construction [2001] BLR 395;[69] #Torch Offshore v. Cable Shipping [2004] 2 Lloyd's Rep 446 (Comm).[70]

- The application or appeal must be brought[71] within 28 days of the date of the award or if there has been an arbitral process of appeal or review within 28 days of the date when the applicant or appellant was notified of the result of that process, AA1996, s. 70(3).[72] In the case of corrections, it has been held that the 28 day

---

69 **Groundshire**: In respect of one complaint, concerning the arbitrator's method of valuation, the court held that since the applicant had not exhausted its recourse under s. 57 (did not ask the arbitrator for clarification and to explain his reasons) court had no alternative but to refuse the application, see s. 70(2)(b).

70 **Torch**: Arbitration concerning alleged misrepresentations inducing a charterparty. Torch challenged award under s. 68 on grounds that Tribunal had failed to address the question of whether the second misrepresentation induced it to enter into the contract. Court held that s. 57(3)(a) could have been used by Torch to seek clarification from the tribunal as to whether it has decided against it on the issue of inducement, an issue on which the Award was silent. It failure to do so was, by operation of s. 70(2) an insurmountable bar to its s. 68 application.

71 The 28 day period will not be complied with unless the Arbitration Claim Form relating to the application or appeal has been issued, and all the affidavits or witness statements in support have been filed, by the expiry of that period, Arbitration Practice Direction, paragraph 22.1. See AA1996, s. 80(4).

72 It is unclear whether the application to the tribunal to correct its award will be regarded as an arbitral process of review, such that the 28 day time limit for challenging the initial award in court will, if the tribunal dismisses the application, run from the date on which the application is notified of that decision. This is because recourse to AA1996, s. 57 is expressly distinguished from "an available process of

period runs from the date of publication of the corrected award, Al Hadha Trading v. Tradigrain [2002] 2 Lloyd's Rep 512.[73]

- This 28-day period may be extended by the court, AA1996, s. 80(5), CPR Parts 3.1.3 and 62.9; Aoot Kalmneft v. Glencore [2002] 1 Lloyd's Rep[74] 128. Colman J suggested the following factors to consider:

> (i) Length of delay; (ii) whether the applicant was acting reasonably in permitting time limit to expire and the subsequent delay to occur; (iii) whether the respondent or the arbitrator caused or contributed to the delay; (iv) whether the respondent would, by reason of the delay, suffer irredeemable prejudice in addition to the mere loss of time if the applicant were permitted to proceed; (v) whether the arbitration had continued during he period of the delay and, if so, what impact determining the application might would have on its progress or costs incurred; (vi) the strength of the application; (vii) whether in the broadest sense it would be unfair to the applicant if denied a determination of the application.

The CA in #Nagusina Naviera v. Allied Maritime [2002] EWCA Civ 1147 identified (i) and (iii) as the primary factors. It said that factor (iv) was not an essential precondition, and that factor (v) was relatively minor. As for factor (vi) this was expressed as whether the claim could be regarded as so strong that it would obviously be a hardship for them not to be able to pursue it. As for factor (vii) it was said that this must be viewed in the context that Parliament and the courts have emphasised the importance of finality and time limits for any court intervention in the arbitral process.

- The right to dispute an award under ss. 67 and s. 68 may be lost by operation of the statutory waiver, AA1996, s. 73. Consider Athletic Union v. NBA [2002] 1 Lloyd's Rep 305;[75] #Thyssen Canada v. Marina Maritime [2005] 1 Lloyd's Rep 641 (Comm).[76] In respect of appeals, a similar principle is found in s. 69(3)(b).

---

appeal or review, see AA1996, s. 70(2) and it is only that latter this is stated to affect the time limit in AA1996, s. 70(3).

73 **Al Hadha**: This conclusion reached on construction of s. 70(3).

74 **Aoot**: The broad discretionary approach to applications to extend time in CPR Part 3.1.2 applies. A broader discretion than the substantial injustice test under s. 79. In this case, the court principally asked whether the applicant acted reasonably in allowing the time limit to elapse. Failure of a foreign party to instruct English solicitors to advise when aware of the urgency, was not a reasonable excuse for its non compliance with the time scales.

In Thyssen v. Mariana [2005] 1 Lloyd's Rep 640, the court noted Nagusina v. Allied Maritime [2002] EWCA Civ 1147 (CA), where CA said that length of delay, reasonableness of action of party who allowed time limit to expire, and extent to which defendant or arbitrators had caused or contributed to the delay were the most important, and that prejudice to the defendant was not a prerequisite to refusal. Court also took account of the s. 73(1) question in deciding, despite the seriousness of the allegations, not to allow an extension of time, of some months.

75 **Athletic**: AA1996, s. 73(1) prevents the parties raising arguments

On any application or appeal, the court my order the tribunal to state the reasons for its award in sufficient detail to enable the application or appeal to be considered, either if the award contains no reasons or the reasons given are not in sufficient detail, s. 70(4). The court can also make orders for security for costs and for the securing of any money payable under the award, AA1996, ss. 70(6), 70(7). But note comments on this power in Margulead v. Exide Technologies [2005] 1 Lloyd's Rep 324 (Comm).[77]

- On security for costs, see Azov Shipping Co v. Baltic Shipping Co (No 2) [1999] 2 Lloyd's Rep 39.[78]

- On securing money payable, see Peterson Farms v. C&M Farming [2004] 1 Lloyd's Rep 603.[79]

---

before the court to challenge an award on jurisdiction that were not argued before the tribunal. Before the tribunal it was accepted that there was an apparent agreement to arbitrate but argued that it should not, for various reasons, be enforced. Before the court an attempt was made to argue that there was no arbitration agreement.

76 **Thyssen**: Claimant were found to have known of the allegations of perjury at a time when (between about late November 2003 and late May 2004) they participated in the arbitration by collecting the award and making submission to the tribunal about the award, about the admission of fresh evidence, and on the issue of costs.

77 **Margulead**: A failure to give reasons is not the same as a failure to deal with an issue. The latter concerns a tribunal's failure to reach a conclusion on a specific claim or defence, not merely a failure to give reasons for the Tribunal's conclusion on such as claim or defence.

78 **Azov**: Court considered power to order security for costs on challenge or appeal under AA1996, s. 70(6). Discretion unfettered, other than that no order could be made simply because a corporation incorporated outside the UK. But had to have regard to the principle in s. 1(3) the object of arbitration, thus orders would be rare if the applicant had sufficient assets to meet order for costs and those assets available to satisfy any such order, the merits of the decision being challenged less important but may be relevant if no cogent reason for suggestion it is wrong. In this case, no readily available assets to satisfy an any order for costs, also Azov was simply having a second bite of the cherry, so security ordered.

79 **Peterson**: Should the court order amount of award to be secured pending a challenge under s. 67. Judge stated that he could well understand why such an order would be appropriate on a s. 68 challenge since parties had chosen arbitration and would not necessarily have the same formalities and safeguards as proceedings in court, less clear why if leave to appeal a question of law given, such an order would be appropriate since court has already accepted that the award is open to serious doubt. As for challenges under s. 67, there is an anomaly in that this power is only available if the jurisdictional issue comes to the court under s. 67, not if under s. 32 or s. 72, and reason for the route adopted may be fortuitous, and this may be a relevant circumstance. But a circumstance that must weigh heavily with the court in deciding whether an order under s 70(7) is appropriate is whether the challenge to the award appears to have any substance. In most cases it seems likely that a threshold requirement for such an order will be that the challenge is flimsy or otherwise lacks substance. That threshold is not crossed in this case.

© Aeberli/Kings College Centre of Construction Law 2009

Web site: www.aeberli.com
www.3paper.co.uk

8. Procedure

An application or appeal from an award must be made by arbitration claim form in accordance with CPR Part 62 and the related Practice Direction. The application must be made on notice to the other parties and the tribunal.

The material that the court will consider depends on whether the application concerns questions of substantive jurisdiction or serious irregularity, or concerns an appeal on a point of law.

- If the application concerns the tribunal's substantive jurisdiction, the court will consider all the material that is relevant to the jurisdictional question by way of rehearing of that question.

- If the application concerns a challenge for serious irregularity, the court will consider all the material relevant to that application whether or not it is referred to on the face of the award.

- If the application concerns an appeal on a point of law the court will only consider the award and documents accompanying and forming part of the award; for a recent discussion of this and the court's role in determining the appeal see Kershaw Mechanical Services v. Kendrick [2006] EWHC 81 (TCC).[80] See also #Bulk & Metal Transport v. VOC Bulk [2009] EWHC 288 (Comm); [2009] 1 Lloyd's Rep 481, arbitrators referred to part of document in award, court could look at the whole document on an appeal.

- If a "non-speaking" award is given, with confidential reasons issued separately, these may still be admitted by the court in evidence on a s. 68 challenge, if the court considered it right to do so; Tame Shipping v. Easy Navigation [2004] 1 Lloyd's Rep 626 (Comm).

- If an allegation of perjury or fraud is relied on, it may be necessary for the court to hold a hearing at which evidence relevant to those allegations can be tested; Thyssen Canada v. Marina Maritime [2005] 1 Lloyd's Rep 641 (Comm)[81]

9. Appeals to the Court of Appeal

In most instances, the Arbitration Act 1996 expressly provides that the leave of the court is required for an appeal from its decision. The court should give brief reasons if

---

80 **Kershaw**: The court should answer the question of law raised by the appeal correctly, on the basis of the Award and correspondence or documents referred to in it, reading the award in a fair and reasonable way, avoiding minute technical analysis. If arbitration experienced of assistance in determining the question, such as an interpretation of contract documents or correspondence, than some deference should be paid to his decision and only reverse his decision if satisfied that he had come to the wrong answer.

81 **Thyssen**: Application under s. 68(2)(g) of the Act on grounds that witnesses lied and destroyed evidence. This necessitates a trial where the evidence put forward is tested, a hearing of those witnesses. Not sufficient to merely produce cogent evidence, the allegation of fraud must be proved.

it refuses leave, North Range Shipping v. Seatrans Shipping [2002] EWCA (civ) 405[82] (CA). The principles that the first instance court should apply were considered in CMA v. Beteiligungs [2002] EWCA Civ 1878; [2003] 1 Lloyd's Rep 212 (CA).[83]

- The effect of those provisions stating that leave of the court is required (contrast s. 9 AA1996) coupled with AA1996, s. 105(1) is that the Court of Appeal has no power to give itself leave or review a first instance court's refusal to allow leave; Henry Boot Construction v. Malmaison Hotel [2000] 2 All ER (Comm) 960 (CA);[84] Athletic Union v. NBA [2002] 1 Lloyd's Rep 305[85] (CA).

- But note North Range Shipping v. Seatrans Shipping [2002] EWCA (Civ) 405[86] (The CA had an inherent jurisdiction to set aside the first instance court's decision not to grant leave where there was misconduct or unfairness in reaching that decision).

- Where, however, the appeal concerns the first instance court's decision on its jurisdiction, in this case as to whether the parties concluded an agreement excluding its right to hear appeals on law, the CA could give permission to appeal the decision on that question; Sumukan v. Commonwealth Secretariat [2007] EWCA Civ 243; [2007] 2 Lloyd's Rep 87.

---

82 **North Range**: Article 6 of the ECHR applied to the court when considering whether or not to allow leave to appeal, under s. 69(3). Thus brief reasons had to be given. A party was entitled to know why its application for leave had been dismissed.

83 **CMA**: Only give leave if, in his view, the particular case called for some elucidation of the statutory guidelines. Rare since, guidelines are clear, and judge should have courage of conviction in applying them.

84 **Henry Boot**: Where the Act expressly deals with appeals and leave to appeal, eg s. 69(8) leave to appeal can only be given by the High Court or County Court dealing with the matter. The CA cannot give itself leave to appeal or review the judge's refusal to allow leave.

85 **Athletic**: Only the first instance judge can give leave to appeal, the CA has no such jurisdiction under the AA1996.

86 **North Range**: It was argued that such a restriction was a breach of Article 6 of the ECHR. The CA held that it had an inherent jurisdiction(see also CPR 52.10(2)(a)), to set aside the first instance court's decision not to grant leave where misconduct or unfairness in reaching that decision. It seems that the lack of reasons for the first instance judge's decision was regarded as unfair. But having allowed leave to appeal, the appeal was dismissed. Note, where judge gives a fair hearing of the substantive matter and the application for leave to appeal, there is no place for this residual jurisdiction, ASM Shipping v. TTMI Ltd [2007] 1 Lloyd's Rep 136 (CA).