Section 69 – Of Chablis, Smoked Salmon and Trifles

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1. Introduction

In the first two months of 2013 twelve cases were reported that dealt with Arbitration Act 1996 ("AA") issues. Of these twelve cases, a quarter involved applications for leave to appeal under s.69(3) AA 1996 and a further quarter dealt with applications under s.68 (serious irregularities). The statistics are not surprising. The AA 1996 has now been in force for a little over 16 years and a substantial body of case law exists. However, when a party loses a case it may feel that it has no option but to challenge the award. There are often commercial reasons for this and/or the unsuccessful party may also feel genuinely aggrieved by the award. The recent case law dealing with leave to appeal has, however, shown that challenging an award under s.69 AA 1996 is no easy option.

This article considers the grounds on which leave to appeal an arbitrator's award will be granted. The courts, when considering an application for leave to appeal, place high hurdles for any applicant to overcome. Leave to appeal under s.69(3) was not granted in any of the reported cases on Bailii[1] up to 1 March 2013 this year. However, it is evident from the reported cases that some applications for leave to appeal are successful, especially where the issue relates to matters of general public importance: *Dalmare SpA v Union Maritime Ltd & Anor*.[2]

2. The Legal Provisions for Challenging - Section 69(3)

A challenge to an arbitrator's award on a point of law is permissible with the agreement of all parties[3] (s.69(2)(a) AA 1996) or with the leave of the court (s.69(2)(b) AA 1996). There are some standard forms of contract which permit the parties to appeal and also the parties may include a term providing for this in their arbitration agreements.[4] If there is no agreement by the parties then the leave of the court is required. The courts will only grant leave if the application meets the combined requirements of s.69(3)(a) to (d). There is now a substantial body of case law dealing with when leave will be granted.

Section 69 of the AA 1996 provides as follows:

> "(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

[1] British and Irish Information Institute available at http://www.bailii.org/

[2] [2012] EWHC 3537. See also, by way of example, *Polestar Maritime Ltd v YHM Shipping Co Ltd & Anor (Rev 1)* [2012] EWCA Civ 153; *Greatship (India) Ltd v Oceanografia SA de CV* [2012] EWHC 3468; and *Bunge SA v Kyla Shipping Company Ltd* [2012] EWHC 3522

[3] Examples where contracts or parties have agreed that an appeal to the courts can be made include*: Royal & Sun Alliance Insurance plc v BAE Systems (Operations) Ltd and Others* [2008] 743 (Comm); *Guangzhou Dockyards Co Ltd v ENE Aegiali I* [2010] EWHC 2826

[4] For example the DOM\2 form of sub-contract; and the JCT Intermediate Form of Building Contract.

…

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

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

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

2.1 That the determination of the question will substantially affect the rights of one or more of the parties (S. 69(3)(a))

There is a maxim that the law does not concern itself with trifles (*de minimis non curat lex)*. This is reflected in s.69(3)(a) of the AA 1996, which is designed to ensure that leave to appeal will not be given in relation to issues that have no substantial impact on a party's rights. 'Rights' means the rights of the party in the arbitration.[5] In *London Underground Ltd v Citylink Telecommunications Ltd Rev 1*[6] Citylink was unable to show that the determination of the question of law would substantially affect its rights. The difficulty arose because the arbitrator held that Citylink had not proved its pleaded global case on causation, although it had succeeded in proving that there had been some delay to the works. Ramsey J concluded that he was not convinced "that any question of law would substantially affect the rights of the parties."[7]

However, overcoming the hurdle of s.69(3)(a) is not a difficult one. Most of the applications that have been made under s.69 have satisfied this requirement. For example, where an award requires a party to pay substantial damages, this will substantially affect that party's rights.[8] Where however the damages are low or nominal, for example where they total in aggregate

[5] *CMA CGM S.A. v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' & Ors* [2002] EWCA Civ 1878
[6] [2007] EWHC 1749 at para 17
[7] *Ibid* at para 336
[8] *Coal Authority v Trustees of the Nostell Trust & Ors* [2005] EWHC 154

£410, the requirements of s.69(3)(a) will not be satisfied.[9] Equally where a large claim is unsuccessful then this will substantially affect a party's rights.[10] A decision as to costs may also substantially affect the rights of a party.[11]

2.2 The question is one that the arbitrators were asked to determine (S.69(3)(b))

It is rare for leave to appeal to be refused on the ground that the requirements of s.69(3)(b) have not been met. However, "The point of law must be one that was raised before the tribunal."[12] Leave to appeal will not be granted where an error appears on the face of the award but was not raised before the tribunal. In *CMA CGM S.A. v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' & Ors*[13]the Court of Appeal examined the requirements of s.69(3)(b). The court recognised that s.69(3)(b) was an additional requirement to *The Nema* guidelines, resolving a difference of view between the Commercial Court and the Court of Appeal in *Petraco (Bermuda) Ltd v Petromed* [1988] 2 Lloyd's Rep 357. The Court of Appeal stated that if the point of law had been raised, albeit only casually, then the requirements of s.69(3)(b) had been met.

However, later authorities have indicated that the point of law must be *"fairly and squarely before the Arbitrator whether or not it was actually articulated as a question of law"* per Lewison J in *Safeway Stores v Legal and General Assurance Society*.[14] This approach was approved by Smith J in *House of Fraser Ltd v Scottish Widows Plc*.[15] However, it is of note that *The Northern Pioneer* was not cited to the court in *The House of Fraser Case* and it must be questionable whether this more restrictive interpretation is correct.

2.3 The Section 69(3)(c) Requirements

Section 69(3)(c) sets out two distinct grounds and an applicant for leave to appeal must prove that one or other applies before leave to appeal will be granted. The first ground relates to the tribunal being obviously wrong and the second relates to a question of general public importance where the decision of the tribunal is at least open to serious doubt. There is now a substantial body of case law dealing with each ground and in this article we consider some the most recent decisions of the courts.

2.3.1 The decision of the tribunal on the question is obviously wrong (s.69(3)(c)(i)

In the case of *AMEC v Secretary State for Defence*[16] the court considered s.69(3)(c) of the AA 1996. Coulson J first looked at the question of when an arbitrator is obviously wrong. Coulson J considered *The Nema*[17] which stated that if on a mere perusal of the reasoned

[9] *Shaw & Anor v MFP Foundations and Pilings Ltd* [2010] EWHC 1839
[10] *Atkins Ltd v Secretary of State for Transport* [2013] EWHC 139 (TCC)
[11] *President of India v Jabranska Slobodna Plovidba* [1992] 2 Lloyd's Rep 274
[12] Depatmental Advisory Committee (DAC) Report, February 1996, at para 286(ii)
[13] [2002] EWCA Civ 1878
[14] [2005] 1 P & CR 9 at paragraph 8.
[15] [2011] EWHC 2800
[16] [2013] EWHC 110
[17] *Pioneer Shipping Ltd v B C P Tioxide Ltd (The "Nema"* [1982] AC 724

award the judge found that it was obviously wrong then leave should be granted; however, if on reflection the judge concluded that the arbitrator might be right, despite the judge's initial view, then leave should not be granted. This means that the error is one which can be grasped simply by a study of the award itself.[18] Other authorities have described the test as the arbitrator being "plainly wrong"[19] and that overcoming the test is a "high hurdle."[20] In the case of the *The Kelaniya* Lord Donaldson stressed that:[21]

> "This is not however to say that, even in a one-off case, an arbitrator is to be allowed to cavort about the market carrying a small palm tree and doing whatever he thinks appropriate by way of settling the dispute. What it does amount to is that the courts will normally leave him to his own devices and leave the parties to the consequences of their choice. They will only intervene if it can be demonstrated quickly and easily that the arbitrator was plainly wrong"

In *AMEC v Secretary State for Defence*[22] Coulson J referred to a lecture by Colman J (as he then was) who observed: [23]

> "What is obviously wrong? Is the obviousness something which one arrives at…on first reading over a good bottle of Chablis and some pleasant smoked salmon, or is 'obviously wrong' the conclusion one reaches at the twelfth reading of the clauses and with great difficulty where it is finely balanced. I think it is obviously not the latter."

Coulson J then looked briefly at how the arbitrators arrived at their decision. He concluded that the majority approach to the construction of the contract was correct and that its approach made commercial common-sense. On the facts, Coulson J concluded[24] that the tribunal's decision was not 'obviously wrong' and likely to be plainly right. The Court of Appeal has also recently considered the meaning of 'obviously wrong' in *HMV UK v Propinvest Friar Limited Partnership*[25]and held that "the alleged error must be transparent. It must also, at the least, be clear."[26] The Court of Appeal cited with approval Akenhead J's phrase - "a major intellectual aberration"[27] as a useful way of construing an 'obviously wrong' error of law. Arden LJ[28] stressed the importance of the word "obvious" and warned the courts against whittling away "the restriction on the rights of appeal in subsection (c)(i) by being over generous in their determination of the clarity of the wrong."

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[18] See *HMV UK v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708 at para 7 per Arden LJ
[19] *Seaworld Ocean Line Co. S.A. v Catseye Maritime Co. Ltd*, (*The Kelaniya)* 1989 WL 650380
[20] *Hyundai Merchant Marine Co. Ltd v Americas Bulk Transport Ltd (Re: PACIFIC CHAMP)* [2013] EWHC 470
[21] *Seaworld Ocean Line Co. S.A. v Catseye Maritime Co. Ltd*, (*The Kelaniya)* 1989 WL 650380 at para 5
[22] [2013] EWHC 110
[23] Colman J. Arbitration and Judges – How much interference should we tolerate? London, 14/03/06
[24] [2013] EWHC 110 at paras 34-41
[25] [2011] EWCA Civ 1708
[26] *Ibid* at para 5
[27] *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] 1 Lloyds Rep 608 at para 31
[28] *HMV UK v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708 at para 5

Dissenting Opinions

The courts have considered the significance of dissenting opinions on the question of whether something is "obviously wrong". In the case of *The Northern Pioneer*[29] Lord Phillips stated that:

> "The difference of view between the experienced arbitrators in this case provides, of itself, ground for contending that the decision of the majority is 'at least open to serious doubt'."

In *F Ltd v M Ltd*[30], Coulson J stated:

> "…a comment or observation in a dissenting opinion, to the effect that an important point has been decided by the majority without reference to the parties, will be a factor to which the court will attach weight in dealing with an application under Section 68. Depending on the circumstances, such an observation may have considerable weight, although it is unlikely that it could, on its own, prove determinative."

In *AMEC Group Ltd v Secretary of State for Defence*[31] the court looked at these authorities and concluded that the fact that there is a dissenting opinion may be of assistance to the court on the question of whether something is 'obviously wrong' or 'open to serious doubt'. However, with respect to the court, this does not logically follow. An arbitrator may be wrong and sometimes is 'obviously wrong'. Where there are three arbitrators, however, it should be less common to find that the majority are 'obviously wrong'. If the test for being 'obviously wrong' includes an intellectual aberration then it is less probable that the two majority arbitrators will share that intellectual aberration. It is true that a dissenting opinion must cast doubt on the majority decision but this is a far cry from saying the majority decision is 'obviously wrong'.

2.3.2 The question is one of general public importance and the decision of the tribunal is at least open to serious doubt (69(3)(c)(ii))

Section 69(3)(c)(ii) of the AA 1996 had its genesis in the test laid down by Lord Diplock in *The Nema*"[32]:

> "For reasons already sufficiently discussed, rather less strict criteria are in my view appropriate where questions of construction of contracts in standard terms are concerned. That there should be as high a degree of legal certainty as is practicable to obtain as to how such terms apply upon the occurrence of events of a kind that it is not unlikely may reproduce themselves in similar

[29] *CMA CGM SA v Beteiligungs – Kommanditgesellschaft "The Northern Pioneer* [2002] EWCA Civ 1878 at para 64
[30] [2009] EWHC 275 at para 16
[31] [2013] EWHC 110
[32] [1982] AC 724 at page 742-3

> transactions between other parties engaged in the same trade, is a public interest that is recognised by the Arbitration Act 1979 particularly in section 4. So, if the decision of the question of construction in the circumstances of the particular case would add significantly to the clarity and certainty of English Commercial Law, it would be proper to give leave in a case sufficiently substantial to escape the ban imposed by the first part of section 1(4) bearing in mind always that a superabundance of citable judicial decisions arising out of slightly different facts is calculated to hinder rather than to promote clarity in settled principles of commercial law. But leave should not be given even in such a case unless the judge considered that a strong prima facie case had been made out that the Arbitrator had been wrong in his construction; and when the events to which the standard clause fell to be applied in the particular arbitration were themselves 'one off' events, stricter criteria should be applied on the same lines as those that I have suggested as appropriate to 'one off' clauses."

In *The Northern Pioneer*[33] the Court of Appeal considered s.69(3)(c)(ii) and its relationship with *The Nema* test. Lord Phillips MR,[34] expressed the view that the test imposed by s.69(3)(c)(ii) of the AA 1996, namely, that the decision of the Arbitrator should be at least open to serious doubt, was broader than Lord Diplock's requirements in *The Nema* that permission to appeal should not be given "unless the judge considered that a strong prima facie case had been made out that the Arbitrator had been wrong in his construction."

General Public Importance

The issue of what is of "general public importance" was considered in the Northern Irish case of *Boots The Chemist Ltd v Westfield Shopping Towns Ltd*.[35] Coghlin J, cited with approval "Russell on Arbitration" which referred to examples of contracts which gave rise to issues of general public importance. The authors referred to the Lloyds form of insurance policies, various forms of building contracts and charter parties. Coghlin J stated[36]: "It does not seem to me that leases in the Castle Court Shopping Centre, even if 'widely used' in that centre, fall easily within this class of document." However, the mere fact that the underlying contract is one which is often used does not automatically mean that the question will be of general public importance. In *White Young Green Consulting v Brooke House Sixth Form College*[37] the parties contracted on the General Conditions for the Appointment of Consultants PC/WORKS/5 (1998). Ramsey J noted that these conditions of contract were generally used in the industry but then went on to state[38]: "However that, in itself, is not sufficient to show that the question of law which the arbitrator considered was a question of law of general public importance. Obviously, in many cases, it will be possible to point to some previous

[33] [2002] EWCA Civ 1878
[34] *Ibid* at paragraph 60
[35] [2003] NIQB 14
[36] *Ibid* at paragraph 6
[37] [2007] EWHC 2018
[38] *Ibid* at paragraph 27

uncertainty, either in publications or elsewhere, which indicates that this is not just a matter of importance because it arises under a commonly used clause, but it is a matter of general public importance. I do not consider that the evidence in this case shows that the questions of law raise matters of general public importance. The test therefore that I should apply is whether or not the decision of the tribunal is obviously wrong. ..."

Numerous cases, reported recently, reveal that applicants for leave to appeal commonly fail to overcome the hurdle of showing that the question raised is one of general public importance. In *Hyundai Merchant Marine Co. Ltd v Americas Bulk Transport Ltd (Re: PACIFIC CHAMP)*[39], Eder J[40] stated that "none of the questions posed can, in my judgment, properly be said to be of "general public importance" because they were "one-off" questions of law.[41] Similar statements were made in *HMV UK v Propinvest Friar Ltd Partnership*[42]; *AMEC Group Ltd v Secretary of State for Defence*[43] and in *Reliant Building Contractors Ltd v BRB (Residuary) Ltd*[44] where Akenhead J concluded[45] "Although overage or clawback provisions are relatively common in agreements for the sale of land, the terms used here are very much of the "one-off" type and certainly not in any standard or usual form."

An example of where the courts have found that a question is of general public importance arises is *Coal Authority v Trustees of the Nostell Trust & Ors*[46]. Here the claims arose under the Coal Mining Subsidence Act 1991. The court found that numerous claims were made each year under this Act and therefore questions relating to its interpretation gave rise to issues of general public importance. Similarly, in *Dalmare SpA v Union Maritime Ltd & Anor*[47] it was held to be of general public importance to decide a question of whether the Sale of Goods Act implied terms into a form of contract often used for the purchase of vessels. Further, it has been held that general public importance does not mean national importance. A local issue which affects thousands of households will also be of general public importance.[48]

Open to Serious Doubt

The test of 'open to serious doubt' is broader than the test laid down by Lord Diplock in *The Nema*[49] that there should be "a strong prima facie case … that the arbitrator had been wrong in his construction." In the *Northern Pioneer*[50] the Court of Appeal emphasised this

[39] [2013] EWHC 470
[40] *Ibid* at paragraph 71
[41] See also *Watergate Properties (Ellesmere) Ltd v Securicor Cash Services Ltd* [2005] EWHC 3438
[42] [2011] EWCA Civ 1708
[43] [2013] EWHC 110
[44] [2011] EWHC 1439
[45] *Ibid* at paragraph 11
[46] [2005] EWHC 154
[47] [2012] EWHC 3537
[48] *Dulwich Estate v Baptiste* [2007] EWHC 410 (Ch)
[49] [1982] AC 724 at pp. 742-3
[50] [2002] EWCA Civ 1878

distinction, citing *dicta* of Sir John Donaldson MR in the *Antaios*[51]. His lordship had stated[52] that the correct approach to the meaning of 'open to serious doubt' was as follows:

> "… if there are known to be differing schools of thought, each claiming their adherents among the judiciary, and the Court of Appeal, given the chance, might support either the school of thought to which the Judge belongs or another school of thought. In such a case leave to appeal to the High Court should be given, provided that the resolution of the issue would substantially affect the rights of the parties (s.1(4) of the 1979 Act) *and* the case qualified for leave to appeal to the Court of Appeal under s.1(7) of the 1979 Act as no doubt it usually would. I add this additional qualification because there is no point in the judge giving leave when he has little doubt that the arbitrator is right and that, despite adversarial argument, he will affirm the award, unless he is also prepared to enable the Court of Appeal to resolve the conflict to judicial opinion."

2.4 That it is Just and Proper in All the Circumstances (S. 69(3)(d))

The reason for the inclusion of s.69(3)(d) in the AA 1996 was set out in the Departmental Advisory Committee on Arbitration's (DAC) report on the Arbitration Bill, February, 1996:

> "289. We propose a further test, namely, whether 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.
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> 290. We have been asked why we suggest this addition. The reason is that we think it desirable that this factor should be specifically addressed by the court when it is considering an application. It seems to us to be the basis on which the House of Lords acted as it did in *The Nema*. The court should be satisfied that justice dictates that there should be an appeal and in considering what justice requires the fact that the parties have agreed to arbitrate rather than litigate is an important and powerful factor."[53]

A party which is able to satisfy the requirements of s.69(3)(a) to (c) will still need to show that it is just and proper in all the circumstances for the court to determine the question. There can be a number of circumstances which might persuade a court that even though the threshold criteria in s.69(3)(c) have been met it is not just and proper for the court to determine the matter.

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[51] *Antaios Compania SA v Salen AB (the 'Antaios')* [1983] 1WLR 1362

[52] *Ibid* at at pp.1369-70

[53] Referenced in Tweeddale and Tweeddale: *Arbitration of Commercial Disputes International and English Law and Practice* (2005) OUP at p.1060

In *Keydon Estates Ltd v Western Power (South Wales) Ltd*[54] Lloyd J (as he then was) looked at the choice of arbitrator as a factor to take into account when considering whether to permit an appeal. His lordship stated:[55]

> "that it is not just and proper for the court to determine the question. It seems to me that the parties, having chosen their experienced and learned arbitrator, should be left with his decision and not have the opportunity to challenge it by way of an appeal to the court."

However, Akenhead J in the *Braes of Doune* case[56] doubted whether this was invariably correct. His lordship indicated[57] that if there had been a major intellectual aberration of a highly respected arbitrator then it would be unjust not to correct that wrong decision. In *HMV UK v Propinvest Friar Limited Partnership*[58] Arden LJ mentioned other factors which the court could take into account. These might include the fact that the decision was no longer of any practical importance to the parties. Arden LJ then considered the differing approaches of Akenhead J in *Braes of Doune* and Lloyd J in *Keydon Estates* and concluded that she favoured Akenhead J's approach.

In the case of *Essex County Council v Premier Recycling Ltd*[59] Ramsey J had to consider when the court ought to refuse leave to appeal under s.69(3)(d). His lordship stated[60] "I consider that whilst the use of the words 'final and binding,' the reference to an expert and the requirement of a quick procedure limited to written submissions, are not sufficient to exclude an appeal, they are matters of great weight in deciding whether it is just and proper for the court to decide the question." The following year Ramsey J had to consider the issue again. In *London Underground Ltd v Citylink Telecommunications Ltd Rev 1*[61] Ramsey J referred to the DAC report (*see supra)* and then went on to consider the "just and proper" test. London Underground Ltd had argued that there were three factors which should be considered as to why it was not just and proper to grant leave to appeal. First, that the dispute resolution provisions were structured so that disputes went to management, adjudication and then arbitration without any reference to the courts to resolve the dispute. Secondly, the arbitrator was expressly nominated and a distinguished construction silk. Thirdly, the contract made express provision to the award being final and binding. Ramsey J stated[62] that there was much in those arguments and that he would need "compelling reasons to grant leave in the light of those considerations." Ramsey J then went on to consider the grounds of appeal and concluded[63] "such questions of law as are raised do not satisfy the test under s. 69(3)(d) because I do not consider that it would be just and proper in all the circumstances for the Court to determine those questions of law."

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[54] [2004] EWHC 996 (Ch)
[55] *Ibid* at para 25
[56] *Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd* [2008] 1 Lloyds Rep 608
[57] *Ibid at para* 31
[58] [2011] EWCA Civ 1708 at para 35
[59] [2006] EWHC 3594
[60] *Ibid* at para 28
[61] [2007] EWHC 1749
[62] *Ibid* at para 234
[63] *Ibid* at para 336

3. Conclusion

It is only possible to obtain leave to appeal under s.69 of the AA 1996 if the parties agree or in exceptional circumstances where the conditions of s.69(3) are met. This is because the courts are reluctant to interfere with the parties' agreement to resolve their dispute by arbitration. Speedy decisions, party autonomy and minimal court interference are fundamental principles of arbitration under s.1 of the AA 1996. The benefit of arbitration is that if the parties want a final and binding decision this is what they will usually get. This is the clear message from the court but in these difficult economic times, despite numerous reported cases where applications for leave to appeal have been refused, many losing parties seem not to be easily deterred.