Challenging Arbitration Awards in England, Northern Ireland and Wales

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In choosing to submit contractual disputes to arbitration rather than litigation, for it to be decided by courts, the main consideration in the minds of the parties to almost any agreement is the finality of arbitration awards where traditionally it has offered the chance to resolve disputed issues with much less expense and faster than normal courts with the advantage of the award being voluntarily ‘binding and final’, in most cases.

But in reality, it is very likely that some losing parties who will feel that the award was not justly rendered or that there are potential valid grounds for them to challenge.

3.1 Challenging the Award:
Recent decisions by the English courts continue to restate that it will do all it can to maintain the “sanctity” of awards and continue to uphold awards where the findings of the tribunal seem to be reasonable and that the arbitrators award might be unimpeachable despite some inaccuracies on the face of it such as in the choice of words.\(^2\)

The 1996 Act provides limited grounds by which awards can be challenged under S.67 and S.68 or appealed on a point of law under S.69.

Sections 67 and 68 are mandatory provisions and cannot be contractually excluded by the parties.

However, the courts’ power to hear appeals under S.69 are not mandatory and parties may contract out of it.

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\(^1\) Mohamed Raffa; Comparative Study: Challenging Awards in Egypt and England, Robert Gordon University, 2011

In *Zermalt Holdings SA v. Nu-Life Repairs Ltd*³ where Bingham J. expressed a general guidance of how courts should view arbitration and awards:

“...as a matter of general approach the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it, the approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found within it.”

As evidenced by recent amendments of Arbitration Laws, there was a trend in favour of limiting court involvement in arbitration. The court can intervene when:

- there is a provision in The Act; and
- in exceptional circumstances to prevent a substantial injustice.⁴

These provisions seem justified due to the fact that the collective opinion of the parties to arbitration in their agreement was a conscious decision to clearly exclude court protracted battles in favour of the expediency and finality of arbitration.

In this spirit, the view in England after the Arbitration Act 1996 is that if arbitration can easily be challenged; there is a high risk of it becoming a pre-litigation warm-up and a tactic of delay to put financial pressure on the aggrieved party as well as being contrary to parties’ objectives of speedy dispute resolution.⁵

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⁴ The Arbitration Act 1996 S.42-45
⁵ Jonathan Sacher and David Parker, *Sanctity of English Arbitration Awards*, Berwin, Leighton Paisner, 18th March 2011
It is inevitable that a litigant who lost the arbitration will feel that the arbitrator/s was not correct and he was a victim of a misjudgement. A feeling that is usually strengthened by hopeful legal advisors, whom upon their advice, the losing party will pursue correction of assumed misjudgement in appeal.

It is very unlikely that judges or arbitrators are foolproof and challenges to arbitration awards should always be given the consideration and scrutiny it deserves with all the additional costs and inevitable delays that it will suffer.

Presently and within The Arbitration Act 1996, English Courts are quite supportive of the arbitral process and they will look for evidence of injustice or prejudice to the appellant’s benefit in cases decided on the merits and any procedural matters are discounted.

However, The Act aims to preclude spurious applications to the courts that may delay and increase costs of the proceedings before and after the award.\(^6\)

Courts will also respond with adverse costs orders if they consider that there were frequent unfounded applications in order to frustrate or delay proceedings.\(^7\)

The ability to appeal on the merits is less recognisable and there are considerable limitations for litigants to appeal on these grounds.\(^8\)

Arbitration is a private process and for that very reason it is placed outside the sphere of Judicial Review.\(^9\)

However, leave to appeal is required in respect of litigations but not to challenge an arbitral award. Leave is required to challenge the court’s decision in respect of the challenge.\(^10\)

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\(^6\) The Arbitration Act S. 79(1), S. 70(2)(a)

\(^7\) Rustal Trading Ltd. v. Gill and Dufus (2000) 1 Lloyd’s Rep. 14

\(^8\) Austin Hall Building Ltd. v. Buckland Securities Ltd. (2001) EWHC TCC 434

\(^9\) O’Reilly v. Mackman (1983) 2 AC 237
It was held, until recently, that the Court of Appeal cannot interfere with a Court’s decision on whether or not to grant leave to appeal on a point of law.\textsuperscript{11}

This view was reversed by the Court of Appeal’s decision in \textit{North Range Shipping} where the Court envisaged that “it could have a residual jurisdiction to intervene where the judge had in truth never reached a decision at all on the grant of refusal of leave but had reached his conclusion through bias, chance, whimsy or personal interest”.\textsuperscript{12}

An appeal from the decision of a court to the Court of Appeal can be made only with the permission of the court of the first instance. However in real practice this permission is rarely granted for the same reason that courts are discouraging challenges to arbitral awards and allowing very restricted channels for it.\textsuperscript{13}

### 3.2 Grounds for Challenging Arbitral Awards:

The Arbitration Act 1996 imposed three grounds for challenging arbitration awards rendered in England:

1. Lack of Substantive Jurisdiction – S.67
2. Serious Irregularity – S.68
3. Error on a Point of Law – S.69

Rules on the enforcement of International Arbitral Awards are set out in S.100, 101, 102 1nd 103 of the Act.

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\textsuperscript{10} The Arbitration Act 1996, S.67 (4), 68(4) & 69(2).

\textsuperscript{11} \textit{Aden Refinery Co. Ltd. v. Ugland Management Co. Ltd. (1987) QB 650}

\textsuperscript{12} \textit{North Range Shipping v. Seatrans Corp (2002) EWCA Civ405}; see also Tweeddale, \textit{Arbitration of Commercial Disputes (2007), Ch.28.49 pp.816}

\textsuperscript{13} \textit{Henry Boot Construction (UK) Ltd. v. Malmaison Hotel (Manchester) Ltd. (2000) 3 WLR 1824}
There are no supplements in common law for these rules and challenges are not considered unless based on these rules and the procedures prescribed thereof in the Act.¹⁴

There are further sections which are common to s.67, 68 and 69 that are mandatory and cannot be excluded by parties’ agreement:

S.70 (3): include a restriction that an appeal or challenges have to be presented within 28 days from the date of the award or if the agreement stipulates that other challenging processes must be followed before applying to the court, the 28 days limitation will run from the date the parties are informed of the end of the arbitral procedures.

S.70 (4) the Arbitrator may be requested to present to the court additional reasons for his award.

Also the court may require from the losing party (the appellant in this case) to pay the full amount of the award or a security to be paid, pending the court’s decision. The court will not proceed without the appellant complying with these requirements.

S.73 a party may lose its right to challenge a decision of the Arbitration Tribunal if it is found to be responsible of unreasonable delays throughout the arbitration. This provision applies to S.67, 68 but not to S.69 (appeals on of point of law).

These points confirm the limitations the Act has placed on courts to intervene in arbitration processes as well as restrictions on parties to try to get courts to do so.¹⁵

**S.67 Challenge for lack of Substantive Jurisdiction:**

An Arbitrator’s authority arises from the parties’ agreement and specifically from the arbitration provision in an agreement.

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¹⁴ *Novasen S.A. v. Alimenta S.A. (2011) EWHC 49 (Com.)*

¹⁵ *Harbour & General Ltd. v. Environment Agency (2000) 1 WLR 950*
Should an Arbitrator assumes jurisdiction to decide upon a dispute which is beyond the scope of the agreement or in the absence of consent of the parties, express or implied on the appointment of the Arbitrator or to the jurisdiction of the tribunal over an aspect of the dispute, the courts may find a challenge to the award successful.\textsuperscript{16}

Challenging an award on jurisdictional basis is provided for in S.67 of The Act although it does not define or regulate the mechanism for the determining jurisdiction (this is left to s.30 – 32) by the courts or the tribunal.

The Act now recognises the doctrine of “Kompetenz-Kompetenz” (la compétence - la compétence) by virtue of S.30:

“...unless agreed by the parties, the arbitral tribunal may rule on its own jurisdiction ...”\textsuperscript{17}

The doctrine allows Arbitrators to be questioned directly by any of the parties on their jurisdiction.

Traditionally English Law did not adopt the doctrine and usually took the approach that whatever the Arbitrator’s decision was, it was provisional on the parties’ acceptance.

That caused parties to refer questions of jurisdiction to court which encouraged interference by courts in arbitral processes thus slowing it down and increased costs of proceedings.

This section was intended to reflect the DAC recommendations that courts in England should adapt the internationally accepted view of being able to correct serious failures in complying with due process in arbitral proceedings.\textsuperscript{18}

\textsuperscript{16} X ltd v. Y. Ltd (2005) EWHC 769
\textsuperscript{17} S.30(1) of The Arbitration Act 1996
\textsuperscript{18} The Departmental Advisory Committee on Arbitration (DAC) produced two reports: i) a pre Act substantial report on the Arbitration Bill, in Feb. 1996; ii) a supplementary report on The Arbitration Act 1996 dated Jan 1997. Both reports are used by courts in
The statutory recognition of Kometenz-Kompetenz is a clear move bringing the English Law in line with the Model Law.\textsuperscript{19} The process now is that a party may raise their objection as to the substantive jurisdiction of the Arbitrator with the Tribunal directly and the Arbitrator may rule on the question through an interim award or in the final award as per S.31 of the Act. Should the party decides to have another jurisdiction on the question of jurisdiction through a third party, then upon notice to the other party and with leave from the Arbitrator an application may be made to the court under S.32 of the Act to determine a preliminary point of jurisdiction.\textsuperscript{20} Remedies for the Court: Upon a successful jurisdictional challenge application under S.67, the court may confirm, vary or set aside the award\textsuperscript{21}. S.66(3) provides an earlier ground for any of the parties to object on the ground of ‘absence of jurisdiction’ but by doing so at the early stages, that party will forfeit its right to use the same challenge under s.67 in the event that the award eventually goes against them.\textsuperscript{22}

**Grounds for challenging jurisdiction of an Arbitrator:**

1. **Capacity:** If one of the parties or both are entities, the action should be taken by or against the correct party. This may happen in cases of amalgamation, takeovers or contract assignment.\textsuperscript{23}

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\textsuperscript{19} UNCITRAL Model Law, A. 16: Competence of arbitral tribunal to rule on its jurisdiction.
\textsuperscript{20} Deko Scotland v. Edinburgh Royal Joint Venture (2003) SctCS 113
\textsuperscript{21} Birse Constructions Ltd. v. St. David Ltd. (2000)
\textsuperscript{22} S.66(3) and S.73 of the Arbitration Act
\textsuperscript{23} Stansell Ltd. v. Co-Op Group Ltd. (2005) EWHC
An Arbitrator whose mandate has expired by either expiry of date or by accomplishment of purpose may also be declared void of office (Functus Officio).  

2. Invalidity of the Agreement:
There are grounds for challenging the jurisdiction of the Arbitrator if a party is not part of the Arbitration agreement or has not entered into a contract of which there is no separation of an arbitration provision (S.7). Thus ascertaining that the there is no contract can be grounds to challenge the arbitration where in ‘Primetrade’ the appellant challenged the existence of a contract in a dispute concerning the liability on a bill of lading where the admissibility of new evidence in support of new or different arguments the judge Mr. Justice Aikens indicated that “… there is no statutory limitation on adducing new evidence or any restrictions in the Civil Procedure Rules ("CPR") and that this did not stop the court from exercising control over what evidence to admit on an s.67 appeal, as the appeal is a re-hearing rather than a completely fresh start.” The footnotes of the judgment confirmed the requirements for a objection to Arbitrator’s lack of Substantive Jurisdiction and that “… if a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this part, any objection that the tribunal lacks substantive jurisdiction, in this case by virtue of becoming the holder of the bill of lading or, as the case may be, the person to whom delivery is to be made have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract”.

24 Haussmann Ltd v. Pharaon (2003) EWCA
25 Primetrade AG v Ythan Ltd. (2005) EWHC
3. **Illegality of main Contract:**
Jurisdiction may be challenged on the grounds that the underlying contract is unlawful thus unenforceable.\(^{26}\)

4. **Defective appointment of Arbitrator:**
A party may claim a failure of the mechanism of appointing the Arbitrator especially with regard to consent of parties to the appointment.\(^{27}\)

**Summary:**
Challenge to jurisdiction S.67 involves questions of law and fact and it is not possible for the court to review the arbitration without conducting a full review of the factual basis surrounding questions such as whether the parties had agreed to give jurisdiction of all or part of the dispute or if they had the capacity. Courts cannot be limited to factual findings and questions of law, no challenging process will work. The Court of Appeal stated that “A court cannot be in a worse position when determining a challenge than where the Arbitrator was when determining the award”.\(^{28}\)

A challenge under S.67 to an arbitrator’s own jurisdiction should have a re-hearing and not just a review as stated by Gross M.J. in Electrosteel.\(^{29}\)

It is worth noting that an appeal against the determination of an award is possible only with leave of the court making that determination and if such leave is refused, it is not possible to appeal such refusal as The Court of Appeal has no jurisdiction to review such decision.\(^{30}\)

**S.68 Challenge for Serious Irregularity:**

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\(^{26}\) *JSC Zestafoni v. Ronly Holdings Ltd.* (2004) EWHC 245
\(^{27}\) *Tracomin SA v. Gibbs Nathaniel (Canada) Ltd & George Jacob Bridge [1985] 1 Lloyd’s Rep 586.*
\(^{28}\) *Azov v. Baltic (1999)*
\(^{29}\) *Electrosteel v. Scan-Trans Shipping (2002)*
A party has the right to challenge an arbitral award on the basis of misconduct on the part of the arbitrator with notice to the other party and the tribunal but no consent required. This is a remedy available for a number of complaints particularly where the arbitrator failed to act fairly and impartially.\(^{31}\) S.68 (2) provides a wide a definitive list of the conducts amounting to serious irregularities. As M J Tuckey stated in ‘Egmatra v. Marco’ that the irregularity must only be present but it must have “...caused or will cause ‘substantial’ injustice to the applicant.” Also where the tribunal failed to follow the parties’ agreement on procedure, or as in ‘Walsall v. Beechdale’\(^{32}\) it was emphasized that an irregularity arose out of applying the wrong test of evaluation. Challenge under S.68 are not to provide the possibility for a second detailed enquiry, unlike S.67, into the manner in which the Arbitrator conducted the arbitration and considered the various issues in order to reach the right conclusion.

The remedies available for the court under S. 68, if it is shown that there is a serious irregularity affecting the Arbitrator, the proceedings or the award, the court can:

a) remit the award to the tribunal in whole or in part for reconsideration; or

b) set the award aside in whole or in part; or

c) if the court is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration it can declare the award ineffective in whole or in part.

\(^{31}\) Egmatra v. Marco (1999) 1 Lloyd’s Rep 862

Grounds for Challenging for Serious Irregularity:

Serious irregularity means one or more of the following examples, as per S.68 (2) of the Act, where the courts will consider having caused or will cause substantial injustice to one or more of the parties:

1. **Natural Justice**: The three concepts that come under this heading are regarding decisions on: procedure matters, evidence and the exercise of arbitral power.\(^{33}\)

2. **Impartiality**:
   In *Claire v. Thames Water*,\(^{34}\) the appellant claimed impartiality on the part of the Arbitrator for assessing loss of claimant at less than what claimant believed it should be. MJ Jackson stated that “...whilst the court took into account the distress and size of loss suffered by the claimant and caused by the defendant’s utilities, the court found no evidence that the Arbitrator failed to fulfil his duties under S.33 of the Arbitration Act 1996. The Arbitrator had taken into account all the evidence and reached a decision, to which he was both entitled and indeed required to do.”

When faced with challenges of impartiality, Courts are to determine whether or not an arbitral decision has been tainted by biasness or relative impartiality on the part of the tribunal.\(^{35}\)

They view objectively findings on liabilities and equally consider assessments of quantum and even opportunity loss on expected income. It is important for the court to distinguish between all these

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\(^{33}\) *Wicketts v. Brine Builders & Siederer* (2001)

\(^{34}\) *Claire & Co. Ltd v. Thames Water Utilities Ltd.* (2005) EWHC 1022

\(^{35}\) *Brian Andrews v. Bradshaw* (1999)
points and see to it that “justice must not only be done, but must be seen to be done.”

The test for bias is expressed by LJ Simon Brown, in *R v. Inner West London (1994)*, defined ‘bias’ as “...being pre-disposed or prejudiced against one party’s case for reasons unconnected with the merits of the issue.”

This principal was upheld by The House of Lords in *Laval v. Northern Spirit (2003)* where a QC who acted as a judge in an Employment Appeal Tribunal should not have acted as a counsel for a party at the same tribunal for apparent impartiality.

3. **Reasonable opportunities for parties to present their cases:**

A key factor in this point is whether the party has been afforded an opportunity not the format of offering an opportunity. The operative words here are “Reasonable Opportunities”. Each case reflects its circumstances and meanings of reasonable opportunities.

If in a case a party ignores the arbitration procedures and then tries to introduce a counter claim at the last minute, the court may dismiss their claim for lack of opportunity and the Arbitrators were found not to be challengeable when they refused to accept the new material.

4. **Adoption of unfair procedures:**

Methods used to evaluate a claim or adopt evidences may be called into question especially in the absence of an agreement.

In *ABB v. Hochtief*, Mr. Justice Tomlinson sums it up in his statement by saying that “…whilst the court will never dictate to arbitrators how their

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36 *Dimes v. Grand Junction Canal (1852) 3 HL*
37 *Margulead v. Exide (2004)*
38 *Sealand v. Siemens AG (2002)*
conclusions should be expressed, it must be obvious that the giving of clearly expressed reasons responsive to the issues as they were debated before the arbitrators will reduce the scope for the making of unmeritorious challenges...  

5. Failure by the Tribunal to deal with all issues put to it:
A Tribunal is not discharged until all issues before it are dealt with and settled.  
Nevertheless, failing to do so frequently leads to challenges based on failure to deal with a side issue or to take certain matters into account beside the central issue.

6. Award induced by fraud or contrary to public policy:
It may not be surprising that claims of this sort are quite difficult to prove and if they are, it might be too late where the appellant should have disputed that evidence before the tribunal.

7. Uncertainty or ambiguity of Award:
An award which does not comply with the basic requirements of the Arbitration Act 1996 regarding the effect of the award or the basic formatting, signature, etc..., will be unenforceable.
Certain breaches may be addressed as per S.57 where the court may remit the award to the tribunal for further clarification.

8. Any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

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41 Torch Offshore v. Cable Shipping Inc. (2004) EWHC 787
43 Thyssen Canada Ltd. v. Mariana Maritime SA (2005) EWHC 219
44 Protech Projects v. Mohammad Abdul-Mohsin Al-Kharafi (2005) EWHC 2165
45 Fox v. Welfair (1981) 2 Lloyd's Law Reports
S. 68 (4) states that: “The leave of the court is required for any appeal from a decision of the court under this section.”

**Conclusion:**
Applications under S.68 are used in reality in certain cases to disguise an appeal against a point of law or a conclusion of fact. This happens in particular when the right of appeal is denied by the court or that an agreement excluding appeal on a point of law is in place.\(^{46}\) The approach adopted now is that an appellant will have an application made under S.69 while at the same time serving another under S.68. We may question whether the legislator had these manoeuvres in mind when the Act was set, but it is also for the courts to judge.\(^{47}\)

**S.69: Appeal on a question of Law:**
The right to appeal on a question of law is a distinctive feature of the English Law (The Model Law does not envisage such appeal). It operates on default although it might seem to conflict with the principle of finality. This is because the parties contemplate that the resolution of their dispute will be properly dealt with and within the law they agreed to. As *MJ Thornton* said in *Fence Gate Ltd.* that: “It is never easy to define what is meant by a question of law in the context of an arbitration appeal.”\(^{48}\)

It must arise from an arbitration award; also it may not be the same as a question of law in a case of judicial review.\(^{49}\)

The Act, however, gives effect to agreements to exclude appeal on the grounds on error of law.

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\(^{46}\) *Hawk Shipping Ltd. v. Cron Navigation Ltd.* (2003) EWHC 1828
\(^{48}\) *Fence Gate Ltd. v. NEL Construction Ltd.* (2001) All ER (D) 214
\(^{49}\) *Geogas SA v. Trammo Gas Ltd. (The Baleares)* (1993)
Nevertheless if the parties agree to dispense of such right, it shall be considered an agreement to exclude the court’s jurisdiction under this section and that all parties agree to dispense with reasons and not by merely that the award is final and binding.\textsuperscript{50} Such dispense will incur with it, that there will be no right of appeal against a question of foreign law as well (S. 82 (1) Arbitration Act 1996).

Rights of appeal on a point of law are strictly limited to that a party may not appeal under S.69 unless it has exhausted all available arbitral procedures and available recourse procedures for the correction of the award.

An appeal will not be brought under this section unless with the agreement of all other parties and with the consent of the court. Again there is the 28 days time limit provided by S.70 (3) for making an application for appeal (subject to court’s approval of an extension of time as per S.80 (5).

\textbf{Question of Law:}

The threshold is where the distinction between a point of fact and a question of law lies. Hence for the Court to initially decide which of the overriding issues the appeal is built on and which is admissible in the appeal.\textsuperscript{51}

This represents a general public importance as there is a wide interest in such cases especially in uncertainties as to the distinction between a question of fact and a question of law and what evidence can the court receive in an appeal under S.69.

An appeal may fail for presenting the court with inadmissible pleadings whereas for evidence to be admissible it has to be directed to the award.

\textsuperscript{50} Al Hadha Trading Co. v. Tradigrain SA (2002) 2 Lloyd’s rep. 512

\textsuperscript{51} Kershaw Mechanical Services Ltd. v. Kendrick Construction Ltd. (2006) EWHC 727
itself and on a question of the law of England and Wales and Northern Island (S. 82 (1)).

In Sangi v. Intl. Investor\textsuperscript{52} where an agreement that is subject to English Law, was in conflict with Muslim Sharia’ Law. The Court held that an error of law arises in respect of legal principle rather than application of legal principle to fact and as to what may constitute a dispute on a question of law.

**Permission to appeal:**
A party applying for leave to appeal an arbitral award on a question of law must meet the following conditions in S.69 (3):

Either (c) (i): on the basis of finding of facts in the award the tribunal’s decision is wrong on the question of law in the award; or

(c) (ii): on the basis of finding of facts in the award, the question of law is of general importance and the tribunal’s decision is open to questions of doubt.

The Court of Appeal commented in *Norther Pioneer* in relation to the manner in which the statutory criteria in S.69 can be applied for granting leave to appeal that:

“...the guidelines are no longer judge made, they are statutory criteria. There is no scope for amplifying or adapting them in light of the changing practices.”\textsuperscript{53}

In a country of Common Law, it remains to be seen.

**Substantiality:**
The court must be satisfied that the point of law substantially affects the rights of the parties. It is not sufficient that the appellant merely identifies the point of law to be challenged; the appellant has to satisfy the courts as to why the Arbitrator erred in this point.

\textsuperscript{52} Sanghi Polyesters Ltd. v. The International Investor (KCFC) (2000) 1 Lloyd’s Rep. 480

\textsuperscript{53} HJ Tomlison in CMA CGM S.A. v Beteiligungs-Kommanditgesellschaft MS ‘Northern Pioneer’ [2002] APP.L.R. 12/18
In *Demco Inv. v. SE Banken*, MJ Cooke stated that “...there can be no appeal of facts under S.69 – only an appeal of law.”

**Tribunal determination on point of law:**

The court must be satisfied that the point of law was one of which the tribunal was asked to determine and failed or omitted to do so during the course of the arbitration. This requirement is an introduction of The Act 1996 which reversed previous case law. Its introduction was to bring to an end appeals brought up by losing parties going through the awards nitpicking for reasons to appeal.

Judge Lloyd QC comments on this case as he rejected submission from the counter party on the points that were not argued before arbitrator, said that “submission should be on a question of law that has to arise out of the award.”

**Review based on fact in award:**

However there were further cases that may have revealed that under S.69 the principal document is the Arbitrator’s award, in addition the court may or may not allow any additional document referred to in the award and which the court may need to read in order to determine the question of law arising out of the award.

In Foleys Ltd. v. East London, the leave to appeal was rejected where the court stated clearly that “On such an application, only the arbitrator’s award should be put before the court, supplemented possibly by brief evidence.”

This is a clear case that the court is concerned only with what came in the award and no other evidence or new findings may be added.

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54 *Demco Investments SA v. SE Banken Farsakring Holding Aktiebolag* (2005) EWHC 1398
55 *Gbngbola v. Smith & Sheriff Ltd* (1998) 3 All ER 730
56 *Hok Sport Ltd. v. Aintree Racecourse Co. Ltd.* (2003) BLR 155 HHJ Thornton
57 *Foleys Ltd. v. East London Family & Community Services* (1997) ADRLJ 401
The question of law may be considered only against findings of facts in the award. 58

S.70 (4) provides for the courts to order the tribunal to state reasons for its award in sufficient detail to enable the court decide the point of law raised in a consideration of an appeal.

A finding by the tribunal in relation to a point in a foreign law will be treated by court as a finding of fact. 59

**Decision is wrong on a question of public importance:**

In assessing whether the point is one of general public importance a court may well have regard to the significance of the point raised in view of public interest and to what sort of situation it is likely to be raised in. 60

There have been considerable debates in favour and against allowing broader appellate review of arbitration awards by the courts.

**Conclusion:**

It is clear that the choice of law, irrespective of the seat, is challengeable and that the right to challenge before the court can be lost by not exercising the appropriate steps and within the time limits. The ability to challenge at different stages of the arbitration process raises different issues in different jurisdictions while England offers opportunities to allow appeal on the merits, such opportunities are quite limited in practice.

That concept is reinforced by the fact that the arbitration process, along with various statutes and institutional rules, often incorporate commercial


59 *Reliance Industries Ltd. v. Enron Oil & Gas India (ltd) (2002) 1 Lloyd’s Rep. 645*

norms through consideration of trade usage in deciding contract disputes.

In a wider significance, the benefit of having the right to review a seriously doubtful decision is quite obvious for all parties and the general public importance too as no party to an arbitration who have chosen English law as the substantive law of the dispute can wish their arbitrator to make obvious and serious wrong of the law.

In our opinion, the principle is that the parties did not commission the arbitrators to disregard the logic of facts and law, in case of serious error on merits.

An award rendered on that basis does not warrant the principles of enforcement because the arbitrators exceeded their authority.

The parties have chosen arbitration precisely because they perceived it as a universal system and an independent legal order.61

We believe there is a good reason to isolate ordinary rulings on a choice of law and its application from judicial challenge because in the absence of an express choice of law, the arbitrator cannot ascertain the parties’ expectations as to how to treat a choice of law issue.

But is this not, self defeating to the principle that the parties are free to agree to resolve their disputes with the minimum intervention from the courts and in the speediest fashion?

It is viewed that as long as the English jurisdiction to intervene stays within its ‘proper bounds’ and the safeguards contained in the Act where a serious error is clear on the face of the award then no real intervention in the merits of the process will occur.62

62 Sylvia Shipping Ltd. v. Progress Bulk Carriers Ltd (2010) EWHC 542
Would this make the English Arbitration a less attractive option for parties seeking a forum for Arbitration?

In reply, we may look at S.1(c) of the 1996 Act where the courts cannot interfere if the tribunal erred in a question of fact nor can the court order disclosure of documents without at least one of the parties apply for the enforcement of peremptory order requiring disclosure. In addition, the right to appeal on a point of law applies only if the governing law of the dispute is the English Law.63

Also where the parties choose to arbitrate under the rules of any of the institutions for Dispute resolution64, the right of appeal under S.69 is waived by default as confirmed by the House of Lords in Lesotho Highlands.65

The answer here can be in that the right of appeal is limited and restricted and in more ways than one, thus ensuring that only applications with ultimately serious claims on substantive issues will be accepted for appeal, though the granting of leave to appeal is not an indication that the appeal will be successful.66

The Act has been criticised for its provision allowing the Courts under S.68 and S.69 to vary, remit or set aside the award.67

This process may be a threat to the finality of arbitral awards, particularly the ability of the court to remit issues to the tribunal thus undermining the

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63 The Arbitration Act 1996, S.82(1)
64 For example: ICC (A.28.6), LCIA (A.26.9) “Parties agreeing to arbitrate under the respective rules waive their rights to recourse to the courts insofar as such waiver may be validly applied.”
65 In Leso
autonomy of the parties in their choice to avoid courts intervention in the first place.
However we may find the rationale behind these provisions can be in the parties themselves in seeking guarantees in the integrity of the arbitral process and that they will want the substantive law of their dispute to be applied.
In our view, this is what S.68 and S.69 aim to provide.

Referring back to the research question on determining the success of tribunals in resolving disputes without excess intervention of the courts we can answer that The 1996 Act has significantly minimised judicial involvement in the arbitral process while the approach of the English judiciary has been as important as the provisions of the Act.
In civil law and other certain countries, impartiality and independence of courts are prescribed by statutes of law. In England, the test is defined by the courts and its Judges. 68

68 See the comments of Sir John Donaldson in Anataios Compania SA v. Salen AB (1985) AC191 p.203