

Appeals of Issues of Foreign Law under the English Arbitration Act 1996 – a Matter of Fact

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‘The Judge has not organs to know and to deal with the text of the foreign law.’

Lord Brougham, *Sussex Peerage Case*, (1844), 11 CI & F 115

Introduction

It is historically difficult to appeal arbitral awards before the English courts. The starting point for the Bench is that the parties to an arbitration agreement have chosen to resolve their disputes by way of arbitration, with limited court intervention. In this regard, in the authors’ experience, Britain is one of the least interventionist jurisdictions in the world.¹ This ethos is reflected in the Arbitration Act 1996 (the ‘Act’), which promotes the ability of parties

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1 The authors are not aware of any reliable statistics in this regard. However, we agree with Matthew Parish who noted in 2010 that anecdotal evidence suggests that, since the enactment of the Act, while appeals to the High Court from arbitral awards are common, they are rarely successful (Matthew Parish, ‘The proper law of an arbitration agreement’ (2010) *Arbitration* 76(4): 661–679). Further, a review of Lloyd’s Law Reports for 1986–1988 (three-year period under the 1979 Act) and for 2003–2005 (three-year period under the 1996 Act) showed that whereas 50 appeals from arbitrators were reported in the former, there were only 19 in the latter (Bruce Harris, ‘The Arbitration Act 1996–10 Years On, Preliminary Observations of a Major Survey of Users’ Views on the Act’, paper presented at the BIICL conference (15 November 2006)). Moreover, only in very few cases was the award overturned permanently (Holmes and O’Reilly, ‘Appeals from Arbitral Awards’ (2003) 69 *Arbitration* 1).

to resolve their disputes through arbitration, with judicial intervention only in limited circumstances. The scope for judicial review of arbitral awards is much narrower under the Act than under the arbitration regimes of several other jurisdictions (for example, Russia and India, which permit appeals on the potentially very broad ground of public policy).

The Act affords a right of appeal to the courts from an arbitration award in certain cases, namely where:

- the arbitral tribunal lacks substantive jurisdiction (section 67);
- there has been a case of serious procedural irregularity (section 68); or
- there is a manifest error of law (section 69).

Under section 46(1) of the Act, an arbitral tribunal shall decide a dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute.

This article explores the different treatment of arbitrations that determine matters of English law as opposed to arbitrations that apply a law other than that of England and Wales (which we refer to as ‘foreign law’). We first examine section 69 of the Act and the rationale for treating English law and foreign law differently within the context of section 69. We then conduct an analysis of case law where parties have sought to appeal arbitration awards on the basis of an error of foreign law by the tribunal. We turn to consider the impact that excluding appeals for errors of foreign law has for parties choosing to arbitrate in the UK. Lastly, we consider whether parties can agree to appeal an arbitration award rendered in the UK to the English court based on an error of foreign law.

In 2012, the issue of the governing law of the arbitration agreement has been the subject of discussion in English court decisions such as *Arsanovia Ltd & Ors v Cruz City*² and *Sulamerica CIA v Enesa*.³ This demonstrates not only that the question of whether the applicable law is English or foreign law may not be clear cut but that the consequences of this choice are significant for arbitrating parties. As discussed below, the question of the governing law can have an importance beyond what parties might ordinarily expect, and this is equally true of the choice of the seat of the arbitration.

Reflecting on the Act in 2012, one of its architects, Lord Saville of Newdigate noted that the limited right of appeal on questions of English law was one of the distinguishing features of the Act as distinct from the UNCITRAL Model Law on International Commercial Arbitration, and that he has no doubt that the decision not to adopt the Model Law was the correct one.⁴ The Trust Law Committee has recently called for reform of

2 [2012] EWHC 3702 (Comm).

3 [2012] EWCA Civ 638.

4 Timothy Cooke, ‘Interview with Lord Mark Saville’ (August 2012) *The Resolver*: 12–14.

the Act to permit the arbitration of trust disputes.⁵ Perhaps it is also time to revisit the sections of the Act dealing with appeals on questions of law.

Section 69 of the Act

Pursuant to section 69 of the Act, it is permissible for parties to an English arbitration to appeal an arbitral decision where there has been ‘a manifest error of law’ on the part of the tribunal, unless this right is waived in the relevant arbitration agreement or by the rules under which the arbitration is conducted.⁶ There are many hurdles to overcome as set out in subparagraphs (2) and (3) of section 69 and section 70. For example, under section 70(3), an appeal must be filed within 28 days of the date of the award, and section 69(2) provides that an appeal may only be made with the consent of all parties or with the leave of the court. Under section 69(3), leave to appeal will only be granted by the court if all of the following requirements are satisfied:

- determination of the question will substantially affect the rights of one or more of the parties;
- the question of law is one that the tribunal was asked to determine;
- on the basis of the findings of fact in the award, the decision of the tribunal is obviously wrong; or the question is one of general public importance and the tribunal’s decision is open to serious doubt; and
- despite the agreement of the parties to resolve the matter by arbitration, it is just and proper for the court to determine the question.

The courts typically apply these requirements strictly. Consequently, successful appeals under section 69 of the Act are rare.

However, for a party wishing to appeal an award that was determined in accordance with a law other than that of England and Wales, no right of appeal exists. Section 82(1) provides that a ‘question of law’ means, for a court in England and Wales, a question of the law of England and Wales, and, for a court in Northern Ireland, a question of the law of Northern Ireland. A ‘question of law’ under the Act therefore does not include a question of foreign law, effectively precluding any appeal on an issue of foreign law.

Consequently, parties to an international arbitration seated in London but governed by a law other than that of England and Wales have fewer

5 Trust Law Committee, ‘Arbitration of trust disputes’ (May 2012) *Trusts & Trustees* 18, 4: 296–306.

6 Notably the ICC Rules (Article 28.6) and LCIA rules (Article 26.9) provide for a waiver of the right of appeal. The English courts give effect to such waivers, for example in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43. However, it should be noted that the UNCITRAL Arbitration Rules do not exclude any right of a party to appeal an Award in the national courts.

avenues of appeal than those to a London-seated international arbitration governed by English law. In practice, appeals on questions of the law of England and Wales are in any event difficult. For foreign law arbitrations seated in the UK, they are impossible.

Why are appeals on issues of foreign law excluded under the Act?

The departmental advisory committee that advised on the Act, chaired by Lord Saville, commented as follows on section 69 of what was then the Arbitration Bill in February 1996:

‘We received a number of responses calling for the abolition of any right of appeal on the substantive issues in the arbitration... This proposition is accepted in many countries. We have considered it carefully, but we are not persuaded that we should recommend that the right of appeal should be abolished. It seems to us, that with the safeguards we propose, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example, many arbitration agreements contain an express choice of the law to govern the rights and obligations arising out of the bargain made subject to that agreement. It can be said with force that in such circumstances, the parties have agreed that that law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fail to do this, it is not reaching the result contemplated by the arbitration agreement’.⁷

The report rightly points out why a limited right of appeal on points of law should exist. But why should this be so for issues of English law and not foreign law? A manifest error of law could just as easily occur in relation to a question of foreign law as to a question of English law. It appears odd that a developed system of arbitration law does not provide a party with some means of redress if an obvious error were made by the tribunal in applying the applicable law chosen by the parties.

The answer lies in the traditional approach of the English courts to issues of foreign law: foreign law is an issue of fact, to be decided upon the submission of evidence, whereas English law is a matter of law. On appeal from an arbitration award, it is a well-established principle under English law that a court would be loath to interfere with any finding of fact:

‘The arbitrators are the masters of the facts. On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be

⁷ The Departmental Advisory Committee on Arbitration (DAC) Report on the Arbitration Bill 1996 at <http://arbitration.practicallaw.com>, last accessed 1 April 2013.

right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be.’

*Geogas SA v Trammo Gas Ltd (The ‘Balears’)*⁸ (Steyn LJ)

Case law analysis

Notwithstanding the clear and unambiguous provisions of sections 82 and 69 of the Act, several appeals have been sought before the English courts based on errors of foreign law.

Egmatra v Marco Trading Corp

In *Egmatra v Marco Trading Corp*,⁹ Egmatra was the unsuccessful party to an arbitration under the rules of the London Metal Exchange, in which the two arbitrators interpreted the sale contract in dispute in accordance with the laws of Switzerland. Egmatra applied to the English court for leave to appeal under section 69 of the Act, on the ground that the arbitrators’ construction of the contract, as one that required the supply of blocks with a 97 per cent aluminium content, was wrong and that, in accepting that the goods had been rejected in time, the arbitrators had failed to apply articles 38 and 39 of the Vienna Convention. Egmatra applied in the alternative for permission to appeal pursuant to section 68 of the Act on the basis that there was a serious irregularity in the conduct of the arbitration because the arbitrators refused to allow Egmatra to submit expert evidence, and because they failed properly to deal with the Vienna Convention issues.

Section 68 of the Act provides that a challenge to an award may be raised on the ground of serious irregularity affecting the tribunal, the proceedings or the award, serious irregularity being defined in section 68(2) as an irregularity of one or more of the following kinds that will cause substantial injustice to the applicant:

- ‘a. failure by the tribunal to comply with section 33 (general duty of tribunal);
- b. the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
- c. failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- d. failure by the tribunal to deal with all the issues that were put to it;
- e. any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- f. uncertainty or ambiguity as to the effect of the award;

⁸ [1993] 1 Lloyd’s Rep 215 at 228, CA.

⁹ [1999] Lloyd’s Rep 862.

- g. the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- h. failure to comply with the requirements as to the form of the award; or
- i. any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.'

The application for permission to appeal was refused on both grounds.

In relation to permission to appeal under section 69, Tuckey J held:

'The test to be applied is clear. It is not enough to say maybe they were wrong or even that there is only a possibility that they were right. The Court has to be satisfied that the arbitrators were obviously wrong on a question of law. I do not think that the arbitrators' decision on the contract point was obviously wrong. There was obviously material from which they could reach the conclusion they did, and I would certainly not give leave to appeal on this point...

'But does the rejection point raise a question of law to which the 1996 Act applies at all? This contract was subject to Swiss law. Its construction and the application of the provisions of the Vienna Convention were therefore matters of Swiss law for the arbitrators to determine. Swiss law is foreign law. It seems to me that in their application of that foreign law the arbitrators were not dealing with a question of the law of England and Wales. Section 69 only permits appeals on questions of law. These are defined by section 2(1) of the Act¹⁰ as a question of the law of England and Wales. The rejection point raises no such questions. So I think that this is a complete answer to this part of the application...'

It is noteworthy that the appellant had tendered authorities in the case to show that, when deciding questions of foreign law in relation to the construction of a contract or the construction of a statute or convention, the Court is making findings of law rather than findings of fact, even though the existence and the terms of the foreign law may be questions of fact. Notwithstanding these authorities, Tuckey J held that 'the Judge may be deciding questions of law but he would obviously not be deciding questions of the law of England and Wales' and so the requirements for an appeal under section 69 were not met.

In dismissing permission to appeal under section 68, Tuckey J commented: 'As to the complaint about the arbitrators not having dealt with the issues, that is wrapped up with the appeal on the rejection point. They dealt with the points which they had to deal with under the Vienna Convention. The fact that they did not deal with them in the way which

¹⁰ It is assumed that Tuckey J intended to refer to s82(1) of the Act here.

Egmatra would have liked is a different matter. If there was anything in this point it would justify giving leave to appeal. As there is not, for the reasons I have given, it does not get Egmatra anywhere under section 68 of the Act either.’¹¹

Sanghi Polyesters Ltd (India) v The International Investor KCFC (Kuwait)

Egmatra was followed in *Sanghi Polyesters Ltd (India) v The International Investor KCFC (Kuwait)*,¹² a decision of David Mackie QC sitting as a Deputy Judge of the High Court. In *Sanghi Polyesters*, an appeal was sought on the basis of sections 68 and 69 of the Act in relation to an arbitration award where the disputed contract was governed by English law ‘except to the extent that it may conflict with Islamic Shari’a which shall prevail’.

The court rejected permission to appeal under section 69 on the basis that the court’s jurisdiction under section 69 was only to determine questions of English law by virtue of section 82. Additionally, the Court held that under section 69(3)(c)(i), the Court had to be satisfied that the arbitrator’s decision was obviously wrong, but the decision ‘...was a clear and full evaluation of the issues which has all the appearance of being right’,¹³ so that the section 69 application would be dismissed on this ground as well.

In relation to section 68, the appellant argued that the arbitrator was in breach of his general duties under section 33(1) and section 33(2) to act fairly and impartially and to give each party a reasonable opportunity to put his case and deal with that of his opponent. Leave to appeal under section 68 was refused on the basis that ‘no coherent case ha[d] been advanced’¹⁴ as to the serious irregularities alleged, and Mr David Mackie QC was ‘wholly convinced that there has been no injustice’¹⁵ in the case, stating that the test for ‘substantial injustice’ is ‘a high one’. He cited a passage from the report of the Departmental Advisory Committee on the Arbitration Bill 1996 (1556–1557), which had also been cited with approval by Tuckey J in *Egmatra*:

‘The test of “substantial injustice” is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not

¹¹ Final paragraph of judgment.

¹² [2001] CLC 748.

¹³ Paragraph 18 of the judgment.

¹⁴ Paragraph 30 of the judgment.

¹⁵ Paragraph 31 of the judgment.

litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, Clause 68 [which is now s68] is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.’¹⁶

Reliance Industries Ltd v Enron Oil and Gas India Ltd and ONGC

In *Reliance Industries Ltd v Enron Oil and Gas India Ltd and ONGC*,¹⁷ the Court considered both *Egmatra* and *Sanghi*. In *Reliance*, a dispute had arisen between Reliance and Enron in relation to certain Joint Operating Agreements (JOAs), which provided that Enron, the operator of two oil and gas fields on India’s continental shelf, and Reliance, non-operator, were to share expenditure. The JOAs were substantively governed by Indian law, while the arbitration agreement was governed by the laws of England and Wales. Essentially, the parties disagreed in relation to cash calls made by Enron between 1996 and 2001. The disputes were referred to arbitration, and partial arbitral awards were issued in June 2001 in the two arbitrations between Reliance and Enron. Reliance applied under section 69 of the Act for leave to appeal.

At the arbitration hearing, the parties agreed that the principles of construction of contracts in Indian law were the same as in English law. Further, the parties agreed that English law principles of construction were as set out by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,¹⁸ as expanded in *Bank of Credit & Commerce International SA v Ali & Ors*.¹⁹ Mr Justice Aikens noted that this case raised the ‘interesting’²⁰ and ‘unusual’²¹ threshold question of whether the applicant could apply for permission to appeal on a question of law arising out of an award made in the proceedings under section 69(1) of the Act. At the hearing, none of the parties adduced any evidence or argument concerning Indian law and the parties and tribunal ‘proceeded on the express basis that for all practical purposes English law, being the same as Indian law, should be applied’.²²

This case is perhaps the clearest example of the court’s unwillingness to allow appeals under section 69 of the Act where the contract is even just notionally governed by foreign law. Notwithstanding the parties’

16 Paragraph 20 of the judgment.

17 [2002] 1 Lloyd’s Rep 645.

18 [1998] 1 WLR 896.

19 [2001] 1 All ER 961.

20 Paragraph 2 of the judgment.

21 Paragraph 4 of the judgment.

22 Paragraph 22 of the judgment.

agreement that Indian law on the construction of contracts was the same as English law, no appeal was allowed under section 69. The parties did not vary the proper law of the contracts and so, even though in practical terms the tribunal actually applied English law to construe the JOAs, the court still characterised the legal questions involved as questions of foreign law.

The judge inferred that the parties appreciated the effect of the Act when agreeing to arbitration in London with English law as the applicable procedural law, holding:

‘The parties agreed that the contracts were to be governed by Indian law as their proper law. The parties also agreed that disputes should be determined by arbitration in London. The parties were careful to ensure that English law would be the procedural law applicable to arbitration proceedings that arose as a result of disputes arising out of JOAs. The distinction between the proper law of the JOAs and the procedural law was also well in the minds of the arbitrators as they drew particular attention to it in par 26 of their partial awards. The effect of those contractual provisions is, as the arbitrators also recognized, that all procedural matters were to be governed by English law as laid down in Part 1 of the 1996 Act. The parties must be taken to have appreciated that fact also.’²³

The judge decided that the arbitrators were applying Indian law to construe the JOAs and so no question of English law arose. Therefore, leave to appeal under section 69 of the Act was refused.

This decision seems particularly strident in light of the fact that English law operates on the assumption that if an English court is seised of a dispute and a point of foreign law arises, that law is assumed to be the same as English law unless the contrary is demonstrated by evidence of fact. The case of *Hussman (Europe) Ltd v Al Ameen Development & Trade Co*²⁴ confirmed that this assumption applies to arbitrators.

B v A

B v A is worthy of mention because, although it did not involve an appeal under section 69, the case concerned an appeal relating to an error in the application of foreign law.

In *B v A*,²⁵ A (a company involved in computer-aided design), B and C were Spanish companies. B owned all of the shares in C, a developer and manufacturer of equipment for computer-aided design. A entered

²³ Paragraph 27 of the judgment.

²⁴ [2000] 2 Lloyd's Rep 83.

²⁵ [2010] EWHC 1626 (Comm).

into a Share Purchase Agreement (SPA) to acquire all of the shares in C. The SPA was written in English, governed by Spanish law and provided for disputes to be referred to arbitration in London in accordance with the ICC Rules. Post-purchase, A commenced arbitration proceedings against B for fraud and breach of the SPA, alleging that some of C's turnover came from fraudulent transactions and that C had participated in tax fraud. The tribunal heard expert evidence in relation to Spanish law. The majority award ordered B to indemnify A pursuant to the SPA. The dissenting arbitrator criticised the majority opinion, saying that the other arbitrators had ignored the parties' agreement to submit the SPA to Spanish law.

B sought to challenge the award under section 67 (substantive jurisdiction) and section 68(2) (b) (the tribunal exceeding its powers), arguing that the lack of jurisdiction or serious irregularity arose as a consequence of the arbitral tribunal failing to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute, as required by section 46 of the Act. Whether the material disclosed by B disclosed a case with a realistic prospect of success for the challenge of the award under section 67 or 68 was determined as a preliminary issue. It is worth noting that, leaving aside the fact that an appeal under section 69 would not be available for an error of foreign law (based on the Act and the cases discussed in this article), it would in any event be precluded in this case by Article 28.6 of the ICC Rules of Arbitration, which provides that the parties waive their right to any form of recourse in so far as such waiver can validly be made, yet a right to appeal under sections 67 and 68 remained available.

Mr Justice Tomlinson held that for a challenge under section 46 to have any prospect of success 'a *conscious disregard* of the provisions of the chosen law is a necessary but not a sufficient requirement' [emphasis added].²⁶ Any suggestion of conscious disregard was unsustainable in this case. At most, the arbitrators would be shown to have made an error of law in relation to which the judge held, relying on the decision of the House of Lords in *Lesotho Highlands Development Authority v Impregilo SpA*:²⁷

'making an error as to the application of the applicable law can involve no excess of power under section 68(2) (b) since... the concept of a failure by the tribunal to reach the "correct decision" as affording a ground for challenge under section 68 is wholly inimical to the scheme and purpose of the Act... I would add that it would be odd indeed if an error in the application of foreign law could give rise to the possibility of an unconstrained challenge under section 68 bearing in mind that a challenge based upon an alleged error in the application of English

²⁶ Paragraph 25 of the judgment.

²⁷ [2005] 2 CLC 1; [2006] 1 AC 221.

law is subject to the filter requirement imposed by section 69 that, save with the agreement of the parties, no such challenge may be pursued without the leave of the court. Furthermore leave will only be granted if the statutory criteria spelled out in section 69 are satisfied.’²⁸

As for the appeal on the basis of section 67 (the tribunal lacking substantive jurisdiction), Tomlinson J held as follows:

‘... it is plain that section 67 cannot here be invoked. Section 67 is concerned with challenges based on substantive jurisdiction. Section 82 of the Act provides that:

“Substantive jurisdiction”, in relation to an arbitral tribunal, refers to the matter specified in section 30(1) (a) to (c), and references to the tribunal exceeding its substantive jurisdiction shall be construed accordingly.’

Section 30(1) provides:

‘Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

- (a) whether there is a valid arbitration agreement,
- (b) whether the tribunal is properly constituted, and
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.’

It is plain that an error in the application of the chosen law does not involve a lack of substantive jurisdiction as it is defined in the Act. If demonstrated, which here it is not, a breach of section 46 can as I see it be addressed only under section 68(2) (b).’²⁹

Schwebel v Schwebel

*Schwebel v Schwebel*³⁰ concerned an application for permission to appeal under both sections 68 and 69 of the Act against an award made by the Beth Din, the rabbinical court to which people of the Jewish faith can have access for the resolution of certain types of dispute. Following their father’s death, two brothers had fallen out and there arose a dispute over certain family properties that had been transferred to the brothers. The dispute was transferred to the Beth Din and resolved in accordance with Jewish law. Parties who use the Beth Din can sign an arbitration agreement to which the Act applies. In this case, the parties signed an agreement that provided that the Beth Din ‘shall decide the matter under Jewish law, or incorporating such other laws as Jewish law deems appropriate’. The Beth

²⁸ Paragraphs 26 and 27 of the judgment.

²⁹ Paragraph 28.

³⁰ [2010] EWHC 3280 (TCC) (QB); [2012] Bus LR Digest.

Din's award was largely in favour of the respondent.

Applying *Reliance*, Akenhead J held that the court could not entertain an appeal under the Act on a question of law because the law being applied by the arbitration was not the law of England and Wales, adding:

'There is a good policy reason why the English courts will not entertain appeals in relation to foreign law. That is because the English courts dispense English law and could only rule on foreign laws on the basis of evidence advanced before the court'.³¹

The three arbitrators (or 'Dayanim') had applied Jewish law in deciding the dispute essentially in the respondent's favour. The court found it would not be possible for it to determine whether the Beth Din was wrong as a matter of Jewish law. Even if the arbitrators were wrong, there was no serious irregularity for the purposes of section 68 as the court found there was no evidence to suggest that the tribunal failed to conduct proceedings fairly:

'In my judgment, it is simply impossible to say either that the Dayanim were wrong to conclude as they did... or that, even if they were arguably wrong, there has been any serious irregularity'.³²

The judge held that the applicant had argued a case on the basis of section 68 in effect because he was upset with the factual findings.

With regard to the test to be applied in relation to section 68, Akenhead J cited the passage from the Departmental Advisory Committee on the Arbitration Bill, which states that section 68 'is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected'.³³ He also set out five points of guidance in relation to appeals under clause 68, including that 'it is wrong for the court to allow a party to use section 68 to challenge the decision on a question of fact'.

Based on *A v B* and *Schwebel v Schwebel*, the position under English law seems to be that for an error of foreign law to found an appeal under the Act, there would have to be not just an error in the application of the foreign law but a complete disregard of the applicable law chosen by the parties, and the avenue of appeal on this ground would be section 68(2)(b).

What impact does the lack of an avenue of appeal on an error of foreign law have in practice?

In the Indian case of *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc*,³⁴ the Indian Supreme Court overruled the previous case of

³¹ Paragraph 14 of the judgment.

³² Paragraph 25 of the judgment.

³³ See citation above in the *Sanghi Polyesters* judgment.

³⁴ Civil Appeal no 7019 of 2005.

*Bhatia International v Bulk Trading SA*³⁵ in finding that Part 1 of the Indian Arbitration Act 1996 did not apply to arbitrations seated outside India. One of the powers afforded to the Indian courts under Part 1 of the Indian Arbitration Act is the power to set aside awards. Following the *Bhatia* case, it was held that this power could be exercised in relation to arbitrations seated outside India – a decision that had prompted a catalogue of applications to set aside foreign seated arbitration awards.

It was submitted in the *Bharat Aluminium* case that to hold that Part 1 did not apply to arbitrations outside India would leave many parties remediless in a number of situations. The case of *Reliance* was cited, where no appeal under section 69 of the English Arbitration Act was permitted because the error of law asserted by the appellant was an error of foreign law.

After setting out a brief summary of the *Reliance Industries* case, the Court held as follows:

‘In our opinion, the aforesaid judgment does not lead to the conclusion that the parties were left without any remedy. Rather the remedy was pursued in England to its logical conclusion. Merely, because the remedy in such circumstances may be more onerous from the view point of one party is not the same as a party being left without a remedy... Once the parties have chosen voluntarily that the seat of the arbitration shall be outside India, they are impliedly also understood to have chosen the necessary incidents and consequences of such choice. We, therefore, do not find any substance in the submissions made by the learned counsel for the appellants, that if applicability of Part I is limited to arbitrations which take place in India, it would leave many parties remediless.’³⁶

This is one viewpoint in relation to the differential treatment of foreign law and English law under section 69, namely that it is presumed that parties are aware of the legal consequences of the seat they have chosen. Indeed, this view was suggested by the court in the *Reliance* judgment itself. But is that really the case?

More often than not, parties choosing to nominate London as an arbitration seat in a contract governed by a law other than English law will not consider this issue. If their legal advisers are not very familiar with the provisions of the Act and the above line of authorities (for example, because they do not practise English law) then they would be unlikely to bring this point to their client’s attention. Parties choosing London as an arbitration seat tend to be focused on issues of convenience, London’s well-established reputation as a seat for arbitration and the UK’s sophisticated legal system and impartial judiciary. It is

³⁵ (2002) 4 SCC 105.

³⁶ Paragraph 167 of the judgment.

unlikely that every contracting party is aware of the combined effect of sections 69 and 82 of the Act when nominating London as an arbitration seat. Indeed, the case law cited above suggests the opposite is true. It can be argued that the English and Indian court's presumption in this regard is giving far too much credit to, and expecting too much of, commercial parties.

To argue the converse, the number of arbitrations in which this issue will have an impact is limited, given the high proportion of arbitrations seated in England and Wales that are under the auspices of the LCIA or ICC rules, thereby precluding an appeal under section 69, whether the contract is governed by foreign law or English law. Further, it must be borne in mind that appeals on questions of the law of England and Wales under section 69 are in any event rare, both in terms of satisfying the requirements to bring an appeal, and succeeding in such an appeal.

Can parties to a foreign law governed arbitration seated in London agree to an appeal on a question of foreign law?

The question arises as to whether parties can provide for an appeal based on an error of foreign law by agreement. This point was examined in *Guangzhou Dockyards Co v ENE Aegiali*.³⁷ It was argued in this case that it was open to the parties to an arbitration agreement to agree under the Act that questions of fact (as well as questions of law) arising out of an arbitration award could be the subject of an appeal to the English court, and that this had been agreed between the parties in this case. The relevant arbitration agreement provided that '[t]he Parties agree that either Party may appeal to the English High Court on any issue arising out of any award'. A dispute arose and an award was issued in favour of the respondent owners following an arbitration in London. The applicant dockyard sought to appeal the award partly on questions of fact, and submitted that the arbitration agreement permitted this. The dockyard argued that the Act was founded on the principle of party autonomy and it was open to the parties to agree, as they had, that there could be appeals on questions of fact.

Blair J recognised that the arbitration clause in question was novel and had 'not been considered previously by any English court'.³⁸ Nonetheless he held, based on the case of *The Balears* (referred to above), that the words of section 69 could not be construed as expanding the jurisdiction of the court to include an appeal to the court on a question of fact on the basis that the parties had agreed to such an appeal. The judge held that section 69 was limited to points of law and that the parties could not by agreement confer jurisdiction under

37 [2010] EWHC 2826 (Comm).

38 Paragraph 5 of the judgment.

section 69 where the statute itself did not provide for jurisdiction.

On this point, Professor Robert Merkin, whose text was cited in paragraph 27 of the judgment, notes that:

‘The mere fact that the parties have agreed that there can be an appeal to the court does not mean that there can be an appeal without more: it remains the case that the conditions which apply to an appeal must be satisfied... section 69 applies only to appeals on points of law. It is not, therefore, open to the parties who have agreed that an appeal is to be permitted without the need for the permission of the court to be obtained, to seek to extend that right of appeal to other matters.’³⁹

Professor Merkin also notes the requirement that no appeal can be heard unless the parties have first exhausted any available arbitral process of appeal under section 70(2) of the Act, and also any possible recourse to the arbitrators directly under section 57 of the Act. In addition, Merkin refers to the preconditions that apply to an application for permission to appeal, which do not apply to a consensual appeal. These are set out in section 69(3) and were summarised above. He notes that it was held in the case of *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd*⁴⁰ that the views of the arbitrator have little or no weight in a consensual appeal so that the usual deference to be paid to trade arbitrators in a non-consensual appeal is inapplicable: if the parties have agreed that there should be an appeal, the non-interventionist philosophy that generally underlies the 1996 Act has no real part to play.

Recognising the complexity of the issues raised by this particular appeal, Blair J concluded:

‘I accept the dockyard’s basic point that the court seeks to support the parties’ agreement to arbitrate according to the terms of their agreement. I also accept that the limits of the court’s inherent jurisdiction (in this or any other context) are not always plain, and that the situation in which the court may be called upon to act are not readily foreseeable. The arbitral process, and the court’s role in supporting it, is a dynamic one, responding to the changing needs of international commerce. However, it is clear that under English law (to adopt the phrase used by Mustill J [in *Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis*⁴¹]) it is very doubtful that the court has jurisdiction to hear an appeal from arbitrators on questions of fact, even if the parties were to agree to such an appeal.’⁴²

39 Robert Merkin, *Arbitration Law* (Informa Law 2010) paragraph 21.29.

40 [2006] EWHC 727 (TCC).

41 [1983] 2 All ER 658.

42 Paragraph 30 of the judgment.

The manner in which the dockyard's application to appeal was framed in this case was innovative. The principle of party autonomy is central to English arbitration law and enshrined in section 1(b) of the Act. The idea that the parties' expressed intention to allow appeals on questions of fact should therefore be respected by the courts is compelling. Nonetheless, the court held that English law applies limits to party autonomy in these circumstances.

Conclusion

The effect of the Act is that choosing anywhere in England or Wales as the seat of the arbitration for a dispute to be determined in accordance with law other than English law effectively removes the right to appeal on a point of law under section 69, unless the tribunal displays a 'conscious disregard' for the applicable law. In most cases, as the courts of other countries would generally not have jurisdiction to hear an appeal of an English arbitral award, this leaves the aggrieved party with no remedy. It is therefore an important point to consider when entering into an arbitration agreement, but not necessarily one that is flagged by lawyers advising clients on arbitrations to be seated in London and substantively governed by foreign law.

While the historical and practical reasons for the different treatment of appeals of issues of English law and foreign law are clear, it seems at odds with the UK's reputation as a developed and sophisticated jurisdiction for arbitration that parties could be entirely without recourse in circumstances where their appointed tribunal has made a manifest error of law. Of course, part of the UK's appeal as a jurisdiction for arbitration resides in the courts' non-interventionist stance and the limited appeal rights conferred by the Act. Indeed even English law arbitrations are difficult to appeal on the basis of an error of law. Nonetheless, we expect that many users of arbitration would be surprised to learn that, even if the appointed tribunal makes a blatant and obvious error in applying the law chosen by the parties, there is nothing the aggrieved party can do save where the chosen law is the law of England and Wales.

If the UK is to retain its status as a desirable jurisdiction for arbitration involving parties from across the globe, then a balance must be struck between contracting parties' rights to decide their own disputes without interference from the English courts and the ability to seek redress from an impartial and experienced supervisory Bench where there has been a manifest error of law on the part of the tribunal. It seems that the answer could be permitting parties to agree that appeals on issues of foreign law are permissible. However, the English courts have made it very clear that this would require a revision to section 69 of the Act.