

FACT MASQUERADING AS LAW

The DAC Report on the Arbitration Bill 1996 (DAC Report) at page 286 provides:

“There have been attempts, both before and after the enactment of the Arbitration Act 1979, to dress up questions of fact as questions of law and by that means to seek an appeal on the Tribunal’s decision on the facts. Generally, these attempts have been resisted by the Courts but to make the position clear, we propose to state expressly that consideration by the Court of the suggested question of law is made on the basis of the finding of fact in the award.”

Section 69 of the Arbitration Act 1996 (the Act) permits a party pursuant to Section 70 to appeal to the Court to review an arbitrator’s award on a question of law. However, the TCC remains tasked at the outset of any appeal of separating questions of law from fact, the latter rarely if ever allowed.

In ***Penwith DC v VP Developments Ltd [2007] EWHC 2672 (TCC)*** Akenhead J explained as to when an application under Section 69 of the Act should be made when he said this:

“Applications for leave to appeal on question of law must not be dressed up as questions of law when they are, on proper analysis, criticisms of the Arbitrator’s findings of primary and secondary fact.”

A body of case law makes no bones about it ‘the Court will not review the facts upon which the arbitrator has ascertained’. The Court may only review an error of law based upon the facts set out in the award. As to whether a complete lack of evidence to support the facts ascertained and relied upon by the tribunal is a question of law has seen a bit of a roller coaster ride over the last number of years. Although in the cases of ***Demco Investments Commercial SA & Ors v SE Banken Foreskring Holding Aktiebolag [2005] EWHC 1398 (Comm) [2005 Lloyds Rep. 650*** and ***London Underground Ltd v Citylink Telecommunications Ltd [2007] EWHC 1749 (TCC)*** the judges followed Section 34(2)(f) of the Act, which states:

“It shall be for the tribunal to decide all procedural and evidential matters,

Procedural and evidential matters include-

whether to apply strict rules of evidence (or any other rules) as to admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time manner and form in which such material should be exchanged and presented.”

This supports the sentiment of the DAC Report at page 170:

“Clause 34(2)(f) helps to put an end to any arguments that it is a question of law whether there is material to support a fact.”

In the latest case Peter Smith J reviewed the authorities in the case of ***House of Fraser Ltd v Scottish Widows Plc [2011] EWHC 2800 (Ch)*** and approved Ramsey J approach in ***London Underground***.

Mustill J in the Case of ***Vinava Shipping Co Ltd v Finelvet AG (The Chrysalis) [1983] 2 All E.R. 658*** (in summary) stated that the arbitrator’s approach to a decision should be in three (3) stages insofar as the tribunal should;

1. Ascertain the facts
2. Determine the relevant law
3. Apply the relevant law to the ascertained facts

Stage three (3) often involves an element of judgment by the tribunal. Such judgment often falls within a range whereby there is often more than one answer based upon ascertained facts. A judgment within such a range cannot be held to be in error. The court will not substitute the tribunal’s award based on the facts the arbitrator ascertained with a decision of its own had it been the tribunal.

The court only has jurisdiction to review the second (2nd) stage of the arbitrator’s award. As Mustill J explained, in some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is also possible to infer an error of law in those cases where a correct application of the law to the facts ascertained would lead inevitably to one answer and the arbitrator has arrived at another. This can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct, in these circumstances the court is then driven to assume that the arbitrator did not properly understand the principles which he had stated.

In ***Kershaw Mechanical Services Ltd v Kendrick Construction Ltd [2006] EWHC 727 (TCC)***

Jackson J defined four (4) issues¹ when considering an appeal under Section 69:

1. What evidence can the court consider in determining an appeal under the Act?
2. Is there a philosophy of non-intervention which should influence the court
3. What degree of deference should be shown to the arbitrator's decisions on questions of law
4. How should the court identify any question of law arising out of an award.

HHJ Thornton Q.C in ***HOK Sport Ltd v Aintree Racecourse Co Ltd [2002] EWHC 3094 (TCC)***

explained that except in exceptional circumstances the court will only look at the award as evidence in determining an appeal unless other documents expressed therein are required to interpret the award.

Jackson J in ***Kershaw*** explained that there was no philosophy of non-interventionism by the courts in relation to an appeal pursuant to Section 69.

A court may exercise a degree of deference to an arbitrator's award if the arbitrator is practically experienced in the industry which the award was the subject matter. However, Sir John Donaldson M.R. in the case of ***Gill & Duffus SA v Societe Pour L'exportation Des Sucres SA [1986] 1 Lloyd's Rep 322*** reversed a trade tribunal's award because the issue was a matter of contract construction and there was no reason why the arbitrator was in a better position than the court was to come to a decision in this case.

In identifying a question of law the courts have consistently expressed that a question of law must be clear and succinctly stated absent of questions of fact. In ***Penwith*** Akenhead J explained:

"It is not good enough to say on an application for leave to appeal on a question of law that the Arbitrator made findings of fact which no reasonable Arbitrator could or should have made. It is not for the Court to substitute its own view of the facts for that of the Arbitrators. Whilst one can understand the frustration of a party against whom an Arbitrator has made

¹ Andrew and Karen Tweeddale and Natasha Nguyen addressed these issues in their article; Arbitration Volume 80 Number 2.

a conventional finding of fact, that frustration does not justify an application to the court for leave to appeal on a question of law.”

Although there are circumstances in which the court may draw an inference from the facts. In the case of ***Pioneer Shipping v BTP Tioxide (the Nema) [1982] AC 724 at 742*** Lord Diplock explained that:

“...it may be that the facts found are such that no reasonable person acting judicially and properly instructed as to the relevant law could have made the determination under appeal. In these circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of law that has been responsible for the determination.”

Lord Diplock’s edict was recently followed in the case of ***MRI Trading AG v Erdent Mining Corp LLC [2012] EWHC 1988 [[2013] 1 All ER (Comm) 1***. In this case Eder J allowed the appeal explaining in summary that no reasonable tribunal correctly applying the relevant legal principles could have reached a conclusion in the way the tribunal did. Tomlinson L.J in the Court of Appeal upheld Justice Eder’s decision. Similarly in ***(1) Wuhan Ocean Economic & Technical Company Ltd and (2) Nantong huigang Shipping Co Ltd v Schiffahrts-Gesellschaft “Hans Murcia” MBH & Co KG [2012] EWHC 3104 (Comm) [2013] 1 All ER (Comm) 127*** Cooke J had concluded that although the arbitrators had set out the correct test for repudiatory breach they had not applied it correctly and the decision that the tribunal had reached was one no reasonable arbitrator could have reached by applying the correct test to the facts of the case.

In both of these cases the court was prepared to intervene on the premise that the issues were a question of law and not fact the former being a question of interpreting contract documents and the latter being a strict application of the law to the facts.

Summary

As one can tell by the many cases before and after the Act the prospects of appealing an arbitrator’s award are slim and the evidence is likely to be limited to the award itself unless further documents are critical to interpret the legal issue in question. The court may entertain an appeal on mixed fact and law, although a court is unlikely to find that a question of law arises where there is allegedly no evidence to support the fact. If the decision is based upon the

experience of the tribunal within which he is a professional the court will often, but not always, defer to the tribunal's experience.

In any event the court will not intervene in a tribunal's decision if that decision falls within a range of decisions a tribunal could have reached. Although the court is ready to infer an error of law if no reasonable tribunal could have reached such a decision had it applied the test correctly.

In order for an appeal, against an arbitrator's award, to succeed the question of law must be clear and succinct and on the face of the award wrong.