



"I am delighted to welcome you to the summer edition of Serle Quarterly, which concentrates on developments in relation to the area of arbitration (a field in which I and many other members of these chambers specialise). The interrelation between the courts and the arbitral process often results in interesting questions of policy and principle. This issue of the newsletter explores a number of such questions.

On this page Khawar Qureshi reviews two recent authorities on the extension of time limits to challenge an arbitral award. In the Legal Notebook, Richard Southwell QC and Peter McMaster investigate the limits upon when such an award may be challenged and James Corbett QC relates certain practical limitations on the control that may be exercised over parties. The back page examines confidentiality in arbitration proceedings."

Patrick Neill QC, Head of Chambers

challenging an arbitration award – extension of time limits

Since the introduction of the Arbitration Act 1996 ("the 1996 Act"), the restrictive approach adopted by the High Court in reviewing the arbitral process has been confirmed in the very limited number of cases which have been presented by parties thus far. The rationale of the 1996 Act is to firmly place at the core of any review of the arbitral process the overriding objective to give effect to party choice (arbitration as opposed to Court), and the need for finality. Accordingly, the circumstances in which the jurisdiction of the English Court can be invoked are very clearly and restrictively circumscribed by the 1996 Act.

In this outline we will consider an issue which engages many practitioners in this area, and which illustrates the difficult balancing exercise which the Court is required to engage in: what are the principles governing an application to seek an extension of time to challenge an arbitration award? We shall examine this with reference to two cases: *Aoot Kalmneft and Glencore International AG and another* ("Aoot") (unreported decision of Coleman J, 27th July 2001) and *Westminster Oil & Gas Ltd and Barmico Shipping Limited* ("Westminster") (unreported decision of Tomlinson J, 10th March 2003.)

The 1996 Act contains strict time limits for applications to Court. Section 70 of the 1996 Act stipulates that a challenge under section 67 (substantive jurisdiction), Section 68 (serious irregularity) and section 69 (point of law) must be brought within 28 days of the date of delivery of an arbitral award. There is jurisdiction for the Court to grant an extension of time, as provided for by Section 80(5) of the 1996 Act and CPR 3.1.2. The approach of the Commercial Court to applications for an extension of time has been illustrated by the two cases referred to:

The Aoot case

Coleman J was asked to grant an extension of time to enable challenges to be made to an award on jurisdiction. The award had been made between two foreign parties in the context of an agreement for the supply of crude oil. Applications were made to the Court pursuant to Sections 67 and 68 between 11 and 14 weeks respectively after the expiry of the 28 day time limit. Coleman J. conducted a full review of the principles to be applied by the Court when considering whether to grant an extension of time.

His Lordship set out the factors which the Court should consider when faced with an application for an extension of time (at paragraph 59 of the Judgment). This included, the length and cause of the delay, the balance of prejudice caused by the delay and/or the refusal to grant an extension of time, and the strength of the underlying application. The Applicants had delayed for almost 3 months before commencing their applications. The delay was asserted to be due to ignorance of time limits, which in turn was attributable to their failure to take English legal advice. Coleman J considered this to be "totally unreasonable". Moreover, the challenges being made were bound to fail. The applications for extensions of time were refused accordingly.

The Westminster case

This case concerned a claim for monies allegedly due under the terms of a charterparty. A challenge was brought to the award of the sole arbitrator five weeks after the expiration of the 28 day time limit, on the basis of Sections 67 and 69. The Applicant contended that the arbitrator had no jurisdiction to consider the issues placed before him, because

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any claims arising under the charterparty had been the subject of a novation. The Applicant contended that this had the result, *inter alia*, that the arbitration provision could not be invoked against it. Tomlinson J considered the issues in the context of the approach set out in the *Aoot* case. The delay of five weeks was considered to be “totally inexcusable”. Nevertheless, the Applicant was granted permission to challenge the award on the basis of lack of substantive jurisdiction (Section 68) and error of law (Section 69) on terms. In the *Westminster* case, the Court was satisfied that the basis for the challenges had been made out with sufficient strength to merit consideration at a full hearing.

From a practical standpoint, a comparison of the Court’s approach in the *Aoot* and *Westminster* cases shows considerable consistency. The key factors are the length or delay and its reasons, the merits of the substantive application and the balance of prejudice to the parties.

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serious irregularity of arbitrator

Arbitrators acting under the English Arbitration Act 1996 owe a “general duty” (*inter alia*) to act fairly and impartially as between the parties (s.33). An award can be challenged on the ground of “serious irregularity” (s.68) provided that the irregularity has caused or will cause “serious injustice” to the applicant, and that the irregularity is of one or more of the kinds set out in s.68(2)(a)-(i). Failure to comply with the general duty is one such kind (s.68(1) and (2)(a)).

The right to challenge may be lost:

- (1) if the application is not made within 28 days of the date of the award, or if there is an arbitral appeal or review, of the date when the applicant is told of the result (s.70(3)), or
- (2) if the applicant continues to take part in the arbitration once he knows or could with reasonable diligence have discovered the grounds for the challenge, unless he has made the objection forthwith or within the appropriate time (s.73(1)).

The applicant must show that he has been or will be caused “serious injustice”. This means injustice in the conduct of an arbitration, not what might have happened if the case were in court. Such “serious injustice” will be held to have occurred only if what has happened simply cannot on any view be defended as an acceptable consequence of the choice of arbitration (see the Departmental Advisory Committee Report preceding the 1996 Act at para.280).

Despite the limitations on the right of challenge, especially the need to show “serious injustice”, there has been a surprising number of attempted challenges. The cases include *Warborough Investments v S Robinson & Sons* [2003] EWCA Civ 751; *Checkpoint v Strathclyde Pension* [2003] EWCA Civ 84; *Guardcliffe Properties v City & St James Property* [2003] All ER(D) 53 Ch. Div.; *Ascot Commodities v Olam International* (8 Nov 2001, Com Ct); *Profilati v Paine Webber* [2001] 1 Lloyds R 715 (Comm Ct); *Hussman v Al Ameen* [2000] 2 Lloyds R 83 (Comm Ct); *Pacol v Joint Stock* [2000] 1 Lloyds R 109 (Comm Ct); *Egmatra v Marco Trading* [1999] 1 Lloyds R 862 (Comm Ct); *Gbangbola v Smith & Sherriff* [1998] 3 All ER 730.

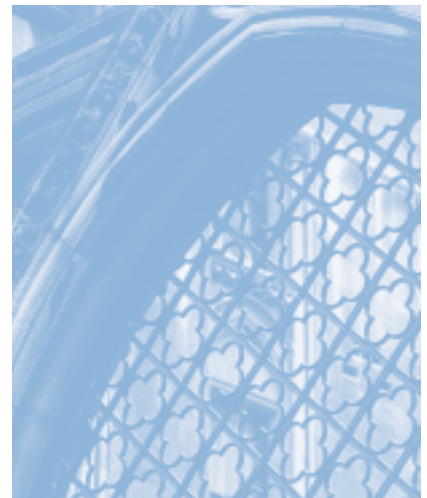
The challenges succeeded in *Gbangbola* (failure to allow party to make submissions on major costs issue raised by the arbitrator, and reopening of issue already decided finally by interim award), *Pacol* (liability having been admitted, the arbitrator improperly reopened the admission without this having been raised by the party admitting or the other party

having had the opportunity to object), *Ascot* (failure of GAFTA Board of Appeal to deal with central issue raised by respondent), and *Guardcliffe* (allowance for rent-free period without permitting the parties first to comment) in which “serious injustice” was held to have been proved.

In all the other cases the alleged irregularity was held not to be “serious” because “serious injustice” had not been caused, e.g. refusal to allow the parties to submit expert reports by arbitrators themselves expert in LME matters (*Egmatra*); the arbitrators appointing an expert in Saudi law without reference to the parties and holding a private meeting with such expert to discuss his draft report (*Hussman*); failure to disclose relevant documents, even if failure was deliberate (*Profilati*); reliance on the arbitrator’s own knowledge and experience without first asking for the parties’ comments (*Checkpoint*); the arbitrator adopting an approach to valuation not deployed by either party, and with which the losing party had had no opportunity to deal (*Warborough*).

These selected cases show that the threshold for establishing “serious irregularity” is relatively high, and to succeed, an obvious injustice has to be shown.

Richard Southwell QC practises in commercial law and frequently acts as arbitrator in international and domestic arbitrations.



controlling misbehaviour in arbitration

At first it may seem odd that parties who have entered into an agreement to submit disputes to arbitration should then misbehave in the proceedings. They have, after all, agreed to that means of dispute resolution. “Misbehaviour” in this context does not mean simply being slow in complying with or failing to observe the precise terms of orders by the arbitrator (or even refusing to participate in the arbitral process at all, leaving the arbitrator to exercise his default and summary powers). It means the disruption of the arbitration. The events described below are based upon a real case. The background to the case was a large number of arbitration proceedings brought by various franchisees against a franchisor company, which had run into financial difficulty. A central figure in the various proceedings was a former franchisee (not a lawyer) who, having negotiated his own settlement, commenced trading as a provider of arbitration services and represented a high proportion of the franchisees. His tactical arsenal included writing large numbers of highly abusive emails to the arbitrator and the company, publicising details of the proceedings on a website, refusal to comply with orders he

did not like, physical threats to opposing advocates at hearings, the random service of statutory demands, reports to the police and regulatory bodies, etc. There was no obvious coherent theme to these activities other than to make life as unpleasant as possible for the company.

The challenge for the arbitrator was to move the arbitrations forward in accordance with the general principles set out in s. 1 of the 1996 Act (“the fair resolution of disputes... without unnecessary delay or expense”) without loss of impartiality in the face of extreme provocation. In such circumstances, the limitations of the Act’s provisions become clear. The procedural powers under s. 34 were of no assistance. The default powers under s. 41 did not help because the claimant’s representative always attended the hearings. The power to make and enforce peremptory orders under s. 42 did not assist because there was always some compliance with orders. The claimants seemed impervious to costs sanctions. A possible (but unexplored) route might have been to fashion some specific means of control out of the claimant’s general duty under s. 40 (“(1)The parties shall do all

things necessary for the proper and expeditious conduct of the arbitral proceedings.”), but that too did not seem very promising. The various claims were eventually brought to an end by a combination of settlement and insolvency.

The facts described are extreme but not unlikely to be replicated in some degree in disputes with high-octane emotional overtones. The lessons, perhaps, are these. Arbitration, even with its flexibility and confidentiality, is not always to be preferred to litigation. Claimants may resent not only the respondent but the process. That resentment can take the form of warfare which, if it does not do much to advance the claimants’ cases, may yet do much to harm the respondent but which the arbitrator can do very little to control. The respondent in such a case would do well to consider encouraging the claimant to commence litigation or, if commenced, to be very selective about applying for a stay under s. 9. At least the courts have powers to control those who may appear as advocate or conduct litigation and to deal with contempts.

James Corbett QC practises in commercial law and frequently acts as an arbitrator.

widening a crack

English commercial law prizes finality in arbitral awards. That is reflected in a set of rules that severely limit the grounds on which a dissatisfied party may appeal to the High Court against an award. The Court of Appeal in a recent decision (Lord Phillips MR, Rix and Dyson LJ) likened the position to a door that had been left open just a crack (*CMA CGM S.A. v. Pioneer’ Schiffartgesellschaft mbH & Co* [2002 EWCA Civ 1878]). What is noteworthy about the decision is the Court’s conclusion that the crack had been widened by the Arbitration Act 1996 (“the Act”).

Appeals against the decisions of arbitral tribunals are confined to points of law and even then cannot be brought without permission (or consent). Permission is sparingly granted. If the point of law does not raise a question of general public importance, permission is denied unless the decision is “obviously wrong”. Even points of law raising questions of general public importance will not receive permission unless the decision of the arbitral tribunal “is at least open to serious doubt”: a statutory test found at s 69(3) of the Act (“the serious doubt test”). Before the Act, applications for permission to

appeal on a point of law of general public importance were decided in accordance with guidance given by Lord Diplock in two well known cases: *The Nema* [1982] A.C. 724 and *The Antaios* [1985] A.C. 191, which contain guidance on the test to be applied on an application for permission to appeal involving questions of construction of often-used contracts in standard terms. The rule was: “permission should not be given 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”. One of the issues in *CMA v. Pioneer* was whether the new statutory test – the serious doubt test – was broader (i.e. more easily satisfied) than the test in the *Nema* and *Antaios*. The Court of Appeal decided it was.

The editors of leading works on the law of arbitration had thought otherwise. Russell on Arbitration (22nd Edition, 2003) opined at page 398 that the serious doubt test was simply another way of stating the strong prima facie case test and that the guidelines in the *Nema* and *Antaios* had been enacted as a statutory test. Similarly Mustill and Boyd’s 2000

Companion (357-8) expresses the view that the *Nema* guidelines are now set out in the act itself and that any changes to the law effected in this area were “inspired by a general tendency against intervention in the decision of chosen tribunal” (i.e. were aimed at making appeals harder not easier).

Given that the Court of Appeal used the appeal as an opportunity to loosen slightly the restrictions on appeals on points of law, one senses that it was with tongue slightly in cheek that the court delivered this mild rebuke to the trial judge (Tomlinson J). “We detect that he hoped that this Court might find a way to ease the rigorous restriction that the [Nema] criteria impose on review by the Commercial Court of important issues of law arising in arbitrations. Lord Diplock would not, we think, have approved the grant of permission to appeal for such a motive and nor do we.”

While these are not open floodgates, a real loosening with practical consequences has been effected.

Peter McMaster appears frequently in commercial and other arbitrations.

confidentiality in arbitration proceedings

The main advantages of arbitration as perceived by the parties resorting to this process are speed, informality, finality and privacy and confidentiality. When parties assemble for the arbitration hearing, it has been the accepted practice for hundreds of years that the process takes place in private (see the comments of Coleman J. in this regard in the case of *Hassneh Insurance v. Mew* [1993] 2 Lloyd's Rep. 243).

Likewise, it has been a generally held view that all parties to the arbitral process (including the arbitrators, Counsel and witnesses) are bound by a duty of confidentiality not to disclose information which comes into their possession as a result of the arbitration process. Three broad exceptions to this principle which permit disclosure of such information arise in the following circumstances; (1) with the express or implied consent of the party who originally produced the material; (2) by order of the Court, to the extent that it may be necessary for the establishment or protection of a party's legal right's vis-à-vis a third party, or otherwise in the interests of justice; (3) in the case of material deployed before the Court in proceedings concerning the arbitration.

In the case of *Associated Electric and Gas Insurance Service Ltd ("Aegis") v. European Reinsurance Co of Zurich ("Euro")* [2003] 1 WLR 1041 (29th January 2003), the Privy Council considered an appeal by Aegis from a decision of the Court of Appeal in Bermuda. The appeal raised the issue of whether an express confidentiality agreement relating to an earlier arbitration between two parties had the effect of preventing one of those parties referring to the earlier award, in a later arbitration between them. The Court of Appeal of Bermuda had discharged an injunction obtained by Aegis to prevent Euro

from relying upon or referring to the earlier award. The two disputes between the parties which were the subject of the arbitrations concerned the obligation of Euro to indemnify Aegis pursuant to a reinsurance agreement.

Aegis relied upon the common law (as reflected in the decision of the Court of Appeal in the case of *Dolling-Baker v. Merret* [1990] 1 WLR 1205) and an express confidentiality agreement in the earlier arbitration to contend that Euro could not rely upon or refer to the earlier award.

Lord Hobhouse delivered the judgment of their Lordships and considered the rationale for the duty of confidentiality, as well as the essential purpose of arbitration, namely to determine disputes between parties to the arbitration in a manner which did not entail the actual or potential disclosure of information to persons with interests adverse to the parties.

In that regard their Lordships held that the legitimate use of the earlier award in a later private arbitration between the same parties would not raise the mischief against which the express confidentiality provision, upon its true and proper construction, was directed. That was the risk of valuable information reaching third parties with interests adverse to one of the arbitrating parties.

Furthermore, their Lordships held that to prohibit any disclosure of the award would frustrate a fundamental purpose of the arbitration, by preventing the winner enforcing the rights declared in its favour. That in turn would also constitute a breach of the loser's duty to perform the award by recognising and respecting those rights. Moreover, in enforcing such an award, the winner could properly rely upon the earlier award to invoke the doctrine of issue estoppel in a later arbitration between the same parties.

When the Departmental Advisory Committee on arbitration produced its report (which in turn led to the Arbitration Act 1996), it considered that the scope and extent of the principle of confidentiality in the context of arbitration should be left to the Courts to work out, in response to practical problems. The decision of the Privy Council plainly vindicates this approach.

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chambers news

Members of Chambers act extensively as both arbitrators and Counsel in domestic and international commercial arbitrations. Our website (www.serlecourt.co.uk) gives additional information about fields of work undertaken by contributors to the newsletter. Go to "barristers" and click on the name to find out more. The website also gives details of our members who act as arbitrators and the further arbitrators who accept appointments through Chambers.

We continue to expand at all levels and we are delighted to announce that our pupil Dakis Hagen has accepted an invitation to start practice with us in October this year. In addition, Ruth Holtham returns from her Fox Scholarship in Canada in early 2004 to start practice.

If anyone would like copies of the papers for Khawar Qureshi's recent seminar "*The Arbitration Act 1996, Mediation and ADR – An Update*", please contact Charlie Leppington on 020 7242 6105.



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