No revisiting AA 1996, s 69(3) arguments once permission to appeal granted (CVLC v Arab Maritime Petroleum Transport)

This analysis was first published on Lexis®PSL on 19 March 2021 and can be found here

Arbitration analysis: In a rare example of a successful challenge under section 69 of the Arbitration Act 1996 (AA 1996) to an arbitration award, Mrs Justice Cockerill has provided important practical guidance on two important issues. Firstly, can AA 1996, s 69(3) permission arguments be revisited at the main AA 1996, s 69 hearing, once permission to appeal has been granted? Secondly, how should the court identify the relevant 'question of law' when granting permission under AA 1996, s 69? As to the first, the judge's answer was a resolute no, save for 'highly unusual circumstances'. As to the second, she held that the court can and should reformulate the question of law, if necessary, in order to reflect accurately the true 'macro-question' at issue. She also held that there was no requirement that the relevant question of law must have been put in exactly the same form as it was later posed at the AA 1996, s 69 stage. Written by Colleen Hanley, barrister at Twenty Essex Chambers, London.

CVLC Three Carrier Corp and another company v Arab Maritime Petroleum Transport Co [2021] EWHC 551 (Comm)

What are the practical implications of this case?

The very firmly expressed view of the court was that there must be 'highly unusual' circumstances before it will ever be permissible to ask the court to revisit the component parts of the AA 1996, s 69(3) decision giving permission to appeal.

The judge was also prepared at the permission stage, and did in fact, reformulate the relevant question of law posed. Permission had therefore been given, but only in respect of a reformulated question. Defendants who are unsuccessful at the permission stage are to be strongly discouraged from seeking to reopen any such points again at the substantive hearing. In light of this decision, any such arguments will be seen as attempts to undermine the streamlined two-stage system under AA 1996, s 69 and will meet with a highly unreceptive court. This is likely to render the AA 1996, s 69 appeal process more efficient in respect of both costs and time.

What was the background?

The underlying question of law at issue was whether or not a term should be implied into a contract of guarantee. The arbitrator, in an ad hoc arbitration under the London Maritime Arbitrators Association (LMAA) Terms, had held that it should be so implied and the claimant sought permission to appeal this award. The well-established two-stage regime for appeals against arbitration awards on questions of law under AA 1996, s 69 involves:

- the application for permission to appeal under AA 1996, s 69(3) (usually decided by a judge on paper), and
- if permission is granted, the substantive AA 1996, s 69 appeal itself

Somewhat unusually, the judge who had granted permission at the AA 1996, s 69(3) stage also then heard the substantive AA 1996, s 69 application. As the judge herself recognised, such a situation is usually avoided where possible because, while permission decisions create no estoppel (even where the judge granting permission has expressed the view that the decision is obviously wrong), it can be uncomfortable for a party who was opposed to permission for the same judge to hear the substantive application. This reality notwithstanding, the judge held that unspecified 'circumstances' required her to hear the substantive application, adding that this was made possible because she had 'only expressed the view on permission that the lower of the two merits hurdles (open to serious doubt) was surmounted.'

At the substantive hearing the defendant continued to oppose the judge's earlier decision to grant permission on various grounds, including that the tribunal had not been asked to decide the relevant

question of law upon which she had granted permission. Somewhat awkwardly therefore, the defendant had to argue that the judge herself had erred when she recast or reformulated the question of law and that as a result she had been wrong to grant permission to hear the substantive AA 1996, s 69 application.

What did the court decide?

Unsurprisingly perhaps, the judge disagreed and found she had been right to grant permission at the AA 1996, s 69(3) stage. She also stated categorically that the permission stage is intended to be a qualifying hurdle which is not to be revisited at the substantive hearing. While it may not be impossible to revisit the various component parts of the permission decision, 'there will have to be highly unusual circumstances justifying this course'.

At the permission stage, the judge had held that the question of law in fact addressed in the award was the wrong question, and she therefore reformulated the relevant question which, in her view, had in fact been determined. In doing so she set out a useful summary of the principles to be applied by the court when identifying for the purposes of AA 1996, s 69(3)(b) whether 'the question [of law] is one which the tribunal was asked to determine'. Although the question has to be one arising out of the award and has to be one which the arbitrator was asked to determine, the question does not need to have been asked in exactly the same form in which it is posed at the AA 1996, s 69 stage as; 'were that the case almost no applications for permission would succeed'.

She provided a useful practical test:

> 'What is necessary is that the question of law is inherent in the issues for decision by the tribunal. It is often necessary to strip away the accretions of case specific drafting to arrive at the real issue of law.'

The judge described this as the 'macro question' and stated that this was the truly relevant 'question of law' for the purposes of AA 1996, s 69.

As to whether the arbitrator had answered that relevant question of law correctly, she was equally categorical. He had not. The legal hurdle for implication of a term is a high one which had not been met. The arbitrator was wrong in his approach to the issue before him and was wrong to conclude that the term contended for fell to be implied.

Case details

- Court: Commercial Court (Queen's Bench Division), High Court of Justice
- Judge: Cockerill J DBE
- Date of judgment: 11 March 2021

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