Judicial review under the UK and US Arbitration Acts: Is arbitration a better substitute for litigation?

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It is common ground that parties usually prefer to arbitrate rather than litigate largely because arbitration facilitates resolution of their disagreements in a neutral forum and by persons who have expertise in the relevant areas of law[1]. By selecting arbitration, they also wish to settle the conflicts in an inexpensive and swift manner. With these purposes in mind, parties insert arbitration agreements into their contracts with the expectation that there will be no delays in obtaining an award, nor any obligation to fight all the way to the highest appellate level court for a binding award. In this context, a "full scale litigation"[2], where the judicial review of the arbitration award is made is usually viewed as running counter to what the parties have bargained for.

Nonetheless, it is also true to say that in order to ensure that arbitration is not tainted by undue process, parties should also be given the chance of challenging the arbitration award. While this step may be necessary in order to safeguard that arbitration procedure is carried out properly, asking the national courts to vacate or modify the award may be costly and time-consuming. In this respect, it is common ground that the likelihood of a delay in the finalisation of an arbitration award is principally embedded in the laws of the country or state wherein the award is made[3]. Premising on the fact that swiftness, cost and efficiency of arbitration is usually dependent on this matter, it is not surprising to see well-advised parties exercising a great amount of caution in selecting the seat of arbitration, whilst entering into an international commercial contract.

Having accepted the importance of the seat of arbitration and the arbitration regime adopted in different jurisdictions, particular inquiry needs to be made so as to find the answer to a number of key questions: Do the respective laws of the countries envisage judicial review when the courts are asked to confirm, vacate or modify the award? If so to what extent? Recognition of judicial review has significance for parties inasmuch as judicial review procedures may not only cause serious delays in obtaining a binding award, but also increase the costs of obtaining the same. Another disadvantage lies under the fact that, with the agreement to arbitrate, the parties seek to bypass litigation, due to the well-grounded belief that in many countries this process takes longer than arbitration. For this very reason, when the national courts retain the right to review the award, parties' chances of circumventing the long litigation procedures become rather low, and the underlying purpose of selecting arbitration may be frustrated considerably.

Against this background, this paper will examine and analyse the respective arbitration acts of England and the U.S. with a view to determining which one of the jurisdictions provides a better system for confirmation, vacation and modification of arbitration awards. In order to attain this objective, the central issues will be whether judicial review is adopted in any of these jurisdictions, and if so, whether this adversely affects the speed and costs of arbitration. Consequently, in the first section, the US Federal Arbitration Act will be examined in order to determine the answer to the

[1] Margaret L. Moses, "The principles and practice of international commercial arbitration", (Cambridge University Press 2008), 1

[2] *Ibid,* 4

[3] For American law, see 9 U.S.C. § 9, for English law, see section 2 of the Arbitration Act, 1996

former question. In this respect, particular attention will be paid to the recent Supreme Court decision in Hall Street Associates v. Mattel Inc[4], inasmuch as the ruling has made a drastic impact on this matter. In this section, it will be concluded that the U.S. law does not recognise judicial review for error of law, and the U.S court's reliance on the "manifest disregard of law" as a ground for the vacation of an award has now considerably reduced with the highlighted decision.

In the second section, the legal position under English law will be examined in light of the UK Arbitration Act. As a consequence, the paper will reveal the fact that the English approach pertaining to this issue is strikingly different from that in the U.S. law, as the English courts still retain the right to review the award for error of law. After setting forth the parties' positions in both jurisdictions, which jurisdiction is favourable for the parties seeking to arbitrate with less costs and delays will be discussed.

SECTION 1 - IS JUDICIAL REVIEW OF ARBITRATION AWARDS PERMISSIBLE IN THE US LAW?

The explanations made in this section will underpin the argument that, in light of the Federal Arbitration Act, the U.S. courts are not principally conferred with the right to re-consider and decide on the legal points which have already been determined in arbitration[5]. Nor is there an appeal mechanism for error of law. Rather, the act envisages "strictly limited" grounds for judicial review in order to render the arbitration mechanism "efficient and cost-effective"[6]. At the heart of this approach lies the *"strong presumption … in favour of enforcing arbitration awards"*[7]. In particular, this peculiarity has been intensified with the Supreme Court decision in *Hall Street Associates v. Mattel Inc,* which raised two key suggestions that have gained wide acceptance across the U.S. courts. As a starting point, suffice it to say that review of arbitration awards is very limited in order not to frustrate the foremost goals of arbitration, namely effective settlement of disputes, inexpensive and swift arbitration[8].

The first point to be made is that, under the Federal Arbitration Act, the parties are not compelled to resort to the courts for confirmation of the arbitration award. Rather, such obligation arises only where they stipulate in the arbitration agreement that the award will be final and binding insofar as it is confirmed by the court wherein the award is made or by any other court chosen by the parties[9]. It is clear in the U.S. law that the court so selected will confirm the award where the application for an order confirming the award is made within one year after the award is made, unless it is vacated, modified or corrected pursuant to sections 10 and 11 of the Act[10]. The U.S courts are also guided by these particular sections when one party institutes an action to require vacation, modification or correction of the arbitration award.

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[4] 128 S.C.t 1396 (2008)

[5] *India v. Cargill Inc,* 867 F.2d 130, 133, (2d Cir. 1989)

[6] *Positive Software Solutions, Inc. v. New Century Mortg. Corp.,* 476 F.3d 278, 280 (5th Cir. 2007); *Bowen v. Amoco Pipeline Co.,* 254 F.3d 925, 931 (10th Cir. 2001)

[7] *Brentwood Medical Associates v. United Mine Workers,* 396 F.3d 237, 241 (3d Cir. 2005)

[8] *Telenor Mobile Communications AS v. Storm LLC,* 584 F.3d 396, 405, (2d Cir. 2009)

[9] See 9 U.S.C §9

[10] *Ibid.* See also, *Global Reinsurance Corporation of America v. Argonaut Insurance Company,* 634 F.Supp. 2d 342, 348, (S.D.N.Y. 2009)

In a suit to vacate an award, the U.S. courts consider section 10 of the Federal Arbitration Act, which envisages the grounds for vacating the award. In pursuant thereof, the courts will vacate the award *inter alia* in cases where it is made by corruption, fraud or any other undue means[11] or where there is an obvious impartiality or corruption on the part of any one of the arbitrators[12]. Another decisive factor leading to the vacation of the award is the decisions of arbitrators which prejudice the rights of parties by conducting an improper behaviour, such as rejecting to delay the hearing despite a sufficient reason to do so being shown, or refusing to admit evidence which is relevant for the resolution of the dispute[13]. Section 10 of the Federal Arbitration Act also provides that the courts may vacate the award *where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made"[14].*

When the defect in the arbitration process does not go so far as to justifying vacation of the award, the Federal Arbitration Act entitles the courts to modify or correct the award. Under section 11 of the Act, the awards which contain *"an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property referred to in the award"* can be modified or corrected upon the application of any party to arbitration[15].

The section also enables modification and rectification of the awards involving decisions over the matters which are not referred to arbitration, provided that these decisions affect the merits of the findings on the issues which are actually submitted to arbitration[16]. Finally, the section makes it possible for an arbitration award to be modified, where it is *"imperfect in matter of form not affecting the merits of the controversy"[17].*

Availability of the test of "manifest disregard of law" under the U.S. law

Due to the pervasive fear that arbitrators may wilfully ignore applying the law, the U.S. case law introduced an additional factor, namely *"manifest disregard of law"* which led to vacation of the award. It is important to note that, in a number of cases, the courts reiterated that this ground only gave rise to vacation of the award but not modification of the same[18]. Being hostile to modification in such cases was predicated on the arbitration regime enshrined in the Federal Arbitration Act, which does not leave room for the U.S. courts to re-consider and decide the legal issues which have already been decided by the arbitrators.

For this very reason, the term "manifest disregard of law" was not crudely defined. In the absence of statutory guidance, only the findings of arbitrators *"which are more than error or misunderstanding of law"* were regarded by case law as falling into this concept[19]. With regard to this issue, the decision in

[11] 9 U.S.C § 10(a) 1

[12] 9 U.S.C § 10(a) 2

[13] 9 U.S.C § 10(a) 3

[14] 9 U.S.C § 10(a) 4

[15] 9 U.S.C § 11(a)

[16] 9 U.S.C § 11(b)

[17] 9 U.S.C § 11(c)

[18] See *NCR Corp. v. Sac-Co, Inc.,* 43 F.3d 1076, 1080 (6th Cir. 1995). See also, H.G. Gharavi, "The International Effectiveness of the Annulment of an Arbitral Award, (Kluwer Law International 2002), 94 and J.G. Merrills, "International Dispute Settlement", (Cambridge University Press 2005), 115, 116.

[19] *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Bobker,* 808 F.2d 930, 933 (2d Cir. 1986)

the *Duferco International Steel Trading v. T.Klaveness Shipping A/S*[20] was illustrative, as the court therein identified three main conditions to be satisfied in order to hold that there is a manifest disregard of law. Firstly, the law should be clear with regard to the relevant issue. Secondly, the arbitrator should [have] applied the law inappropriately and in a way to reach an erroneous result. Thirdly, there should be evident ignorance on the part of the arbitrator regarding the applicability of the law to the problem.

Vacation of arbitration awards which exhibit manifest disregard of law was sought to be narrowed by the U.S. courts. This was largely because failure to do so would greatly undermine the foremost peculiarity of the arbitration regime under the Federal Arbitration Act, which does not as a principle give the courts the right to review the award for error of law. Therefore application of this rule was restricted to *"those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent"*[21]*.* While different interpretations of the law were not regarded as qualifying for this purpose[22], the intentional refusal of the arbitrator to apply the law appropriately was held to be a manifest disregard in *New York Telephone Co. v. Communications Workers of America Local 1100*[23]*.* The decision of the court was predicated on the fact that the arbitrator therein explicitly demonstrated his intention not to follow the precedent by saying *"perhaps it is time for a new court decision"*[24]*.*

With all this relevant background, Supreme Court decision in *Hall Street Associates v. Mattel Inc,* had no doubt that manifest disregard of law was viewed as a reason for vacating the award, and that this rule was widely recognised. However, this concept was developed under case law and therefore was not one of those grounds listed in section 10 of the Federal Arbitration Act as a ground for vacating the award. This fact cast doubt on the availability of this ground in the wake of the recent decision of the Supreme Court in *Hall Street Associates v. Mattel Inc,* which *inter alia* held that the grounds enlisted under sections 10 and 11 of the Federal Arbitration Act were exclusive[25]. Consequently, inasmuch as no ground other than those stated thereunder could be used to vacate, modify or correct the arbitration awards, a further question, of some difficulty, inevitably arose: Is the non-statutory ground of "manifest disregard of law" still a ground for vacation of arbitration awards?

The Supreme Court in that case seemed to have given an affirmative answer to this question, stating that *"Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe referred to the § 10 grouds collectively, rather than adding to them… Or, as some courts have thought, "manifest disregard" may have been shorthand for §10(a)(3) or §10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers".* This statement, which was then echoed in a great number of cases, has led many circuits to adopt a receptive approach towards the application of this doctrine by treating this term as a *"judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, [and therefore] remains a valid ground for vacating arbitration awards"*[26]. Consequently, in the post-*Hall Street* position, some circuits

[20] 333 F.3d 383, 389-390 (2d Cir. 2003)

[21] *Ibid,* at 389 quoting *India v. Cargill Inc,* 867 F.2d 130, 133, (2d Cir. 1989)

[22] *Westerbece Corp. v. Daihatsu Motor Co. Ltd,* 304 F.3d 200, 214 (2d Cir. 2002)

[23] 256 F.3d 89 (2d Cir. 2001)

[24] *Ibid,* 91

[25] M. Mangan, "With the globalisation of arbitral disputes, is it time for a new Convention", (2008) Int. A.L.R, 137-138.

[26] *Stolt-Nielsen SA v. Animal Feeds International Corp.,* 548 F.3d 85, 94 (2d Cir. 2008), *cert. granted,* 129 S.Ct. 2793 (2009); Telenor Mobile Communications, 584 F.3d 396, 407 (2d Cir. 2009); *Comedy Club, Inc. v. Improv*

re-conceptualised this term, which was previously treated as a non-statutory ground and a "judicially created" addition to the grounds enlisted in the Federal Arbitration Act", in order to keep it effective[27]. By way of contrast, some circuits refused this re-conceptualisation, and viewed the doctrine of *manifest disregard of law* as no longer applicable[28], while others merely raised doubt as to the existence of the rule[29].

Since an arbitrator's conduct of manifestly disregarding the law can be described either as acting in excess of his powers or as being guilty of misconduct, there are weightier reasons to suggest that this doctrine should still be applicable. It therefore follows that a sounder approach is to subsume the concept either under §10(a)(3) or under §10(a)(4) of the Federal Arbitration Act. It is important to subsume the concept in one of these subsections given that the grounds for judicial review are accepted as exclusive in the wake of *The Hall Street* decision. Can the concept be more appropriately considered as falling under §10(a)(3) or under §10(a)(4)? It remains to be seen whether the U.S. Courts will give preference to one subsection over the other when seeking to bring the concept within the statutory grounds for judicial review.

Nonetheless, it is evident that, whether the test of manifest disregard of law is still applicable or not, parties may not view all these identified grounds as sufficient to ensure the appropriate flow of the arbitration process. With this in mind, parties may wish to insert additional grounds into their respective arbitration agreements which they think could justify vacation or modification of the award in order to enable the national courts to extend their right to review. In this context, they may add, for instance, arbitrator's misinterpretations on the points of law into the list of grounds for judicial review. Their attempts raise two critical questions: Could the grounds for vacation, modification and correction of the arbitration awards as enunciated under sections 10 and 11 of the Federal Arbitration Act be extended in a way to give relief to the parties disappointed by the merits of the arbitration award? Taking this one step further, could the courts review the award and decide the merits of the dispute in cases where there is an arbitration agreement entitling the courts do so?

After the decision in *Hall Street,* it can scarcely be argued that an affirmative answer could be given to any of the questions, inasmuch as the ruling made it clear that the non-statutory grounds cannot be relied on[30]. The court justified the restrictive reading of the relevant section under the *ejusdem generis rule,* which favours interpretion of the provisions as comprising only those items, which are within scope of the generic provided in the general term[31]. Another justification for the finding was made in light of the underlying history of the Federal Arbitration Act. Consequently, the conclusion was sought to be supported both with purposive and historical interpretations of the relevant sections.

West Associations, 553 F.3d 1277, 1290 (9th Cir. 2009), *cert. denied,* 130 S.Ct. 145 (2009); *Martin Marietta Materials, Inc. v. Bank of Oklahoma,* 304 Fed. Appx. 360, 362, (6th Cir. 2008)

[27] *Ibid.*

[28] *Citigroup Global Markets Inc. v. Bacon,* 562 F.3d 349, 355 (5th Cir. 2009); *Andorra Services Inc. v. Venfleet Ltd,* 2009 WL 4691635, 4 (3d Cir. 2009); *Ramos-Santiago v. United Parcel Services,* 524 F.3d 120, 124, (1st Cir. 2008)

[29] *Grain v. Trinity Health, Mercy Health Services Inc.,* 551 F.3d 374, 380 (6th Cir. 2008)

[30] *The Householder Group v. Thomas Caughran,* 2009 WL 4016450, 1 (5th Cir. 2009)

[31] 128 S.Ct. 1396, 1405 (2008)

Although this approach could be deemed to have been widely recognised, the Supreme Court of California in *Cable Connection Inc. v. Directv Inc.* did not, however, follow this path[32]. The departure from the ruling in *Hall Street* was predicated on the fact that the arbitration award was conducted in California under the California Arbitration Act. Most importantly, the court therein raised the argument that the Federal Arbitration Act does not debar application of other state law grounds for judicial review. Given that the California Arbitration Act enforces the arbitration agreements providing for judicial review for error of law, the court set aside the award for error of law. Accordingly, the court did not ask the parties to adhere to the grounds for challenge under the U.S. Federal Arbitration Act, which does not envisage judicial review for error of law. Hence, in reliance of the California Arbitration Act, the court upheld the parties' arbitration agreement providing for a judicial review for legal errors.

Consequently, it remains to be seen whether other state courts will try to give some flexibility to the rule in the *Hall Street.* It is evident that the rule in some way restricts parties' freedom of contract in order to ensure expeditious and cost effective arbitration by limiting the hurdles against enforcement of the awards. However, this fact itself makes it difficult to support the rigidity, when the parties wish to compromise those identified objectives and prefer to ensure that the merits of the award is in accordance with the law applicable to the dispute In this respect, this peculiarity also raises the question of whether the U.S. arbitration regime is an effective substitute for litigation. In light of the explanations made thus far, it can be stated that the U.S. approach enables the parties to have effective, inexpensive and swift arbitration procedure. However, whether these peculiarities could render the arbitration regime adopted under the U.S. law as such will be discussed in the conclusion.
The suggestion made in the above paragraph is supported by the fact that the Federal Arbitration Act permits judicial review only in the restricted circumstances, and the parties are principally not allowed to contract around this limitation. The only possibility of having a relief for the errors of law in the award arises in cases where the error rises to the level of manifest disregard of law, i.e. where it is not a mere error in law. Since a number of circuits recognise application of this concept even after the decision in *Hall Street*, it cannot be argued that the U.S. courts do not in any case interfere with the merits of the award. However, such cases become relevant in highly unusual circumstances and this fact therefore does not break the general pattern.

Having analysed the U.S. law governing this issue, in the next section, this issue will be examined in light of the UK Arbitration Act.

SECTION 2 - POSSIBILITY OF JUDICIAL REVIEW UNDER THE UK ARBITRATION ACT

This section will reveal that the English arbitration regime is rather different from that of the United States. The reason is mainly that the English Arbitration Act allows parties to appeal for error of law. For judicial review of arbitration awards for error of law, parties do not need an express provision in their arbitration agreement to that effect. This is in sharp contrast with the position under the U.S. law, where the grounds of appeal under the Federal Arbitration Act are treated as exclusive and cannot be increased by contract. The explanations above will support the proposition that this mechanism has adverse effects on the duration and cost of arbitration. Nonetheless, a number of suggestions will be raised in the last section in order for the parties to minimise these effects.

To start with, it is necessary to note that the English Arbitration Act allows the parties to contract out the right to appeal for the errors of law.[33]Nonetheless, the act does not allow them to opt out the

[32] 44 Cal. 4th 1334, 190 P.3d 586

[33] s.69(1) of the Arbitration Act 1996.

provisions on the challenge of arbitration awards based on the procedural defects, namely want of jurisdiction and serious irregularity[34]. Another point to be made is that the grounds for challenge of an award and the appeal mechanism are available where the seat of arbitration is in England, Wales or in Northern Ireland. Where this is the case, the act envisages three main grounds for the challenge of an award, namely, want of jurisdiction[35], serious irregularity[36] and error of law[37]. In order for a party to challenge the award on any of these grounds, there are three certain criteria that need to be satisfied. Firstly, under section 70(2)(a) of the act, the applicant is under an obligation to exhaust all the internal remedies within the arbitration process. Secondly, under section 70(2)(b) of the act, the applicants should also have exhausted their rights to demand rectification of the award due to any clerical error or ambiguity under section 57 of the act. Thirdly, there is a 28-day time bar to raise any challenge, and this starts from the date of the award or of the date when the applicant was informed about the outcome of the internal arbitral appeal or review. Having analysed the general requirements of challenging the awards as per the UK Arbitration Act, the identified grounds will now be examined and treated separately.

Lack of Jurisdiction

For a party to set aside an award on this ground, they need to establish that arbitrators do not have the substantial jurisdiction to hear the case. In determining whether the arbitrators possess jurisdiction, the courts are guided by section 30 of the Act, which identifies three conditions to be met: Firstly, there should be a valid arbitration agreement. Secondly, there should be an appropriate constitution of the tribunal. Thirdly, all the conflicting issues should be submitted to arbitration in accordance with parties' agreement.

It is striking that the restrictions on challenging the arbitration awards for want of jurisdiction manifests the intention not to allow parties to delay in reaching the final and binding award. In order to protect the arbitration process against undue judicial intervention and delays, section 67(2) of the act permits the tribunal to continue the arbitral proceedings and make further rulings when the issue as to jurisdiction is pending. This intention of the legislator was also made explicit in paragraph 277 of the DAC report, which reads: *"to avoid possibility of challenges to the jurisdiction causing unnecessary delay, the rights given by this clause are subject to qualifications…"*

Serious Irregularity

As has been highlighted in the DAC report, it may in some cases be difficult to draw a line between the grounds of serious irregularity and lack of jurisdiction, inasmuch as lack of jurisdiction usually renders the procedure defective. Nonetheless, the act contains individual provisions for these grounds largely because the test of "substantial injustice" was sought to be made exclusively available to the challenges on the basis of serious irregularity. Accordingly, presence of any one or more of the following issues will be deemed to have given rise to "serious irregularity" within the meaning of the act, provided that they cause "substantial injustice" to the applicant[38]:

(1) Tribunal's failure to act fairly and impartially, not giving both parties reasonable opportunity to put their respective cases
(2) Tribunal's failure to adopt appropriate procedures which prevent unnecessary delays or costs

[34] See paras 276 and 283 of the Departmental Advisory Committee Report (hereinafter "DAC Report")

[35] s. 67

[36] s. 68

[37] s. 69

[38] s. 68 of the act

(3) Failure on the part of the tribunal or any other institution, or person to act within the authority given by the parties or by this act in relation to the proceedings or the award
(4) Failure by the tribunal to carry out the arbitration proceedings pursuant to the procedure stipulated in the parties' arbitration agreement
(5) Failure by the tribunal to consider all the issues brought thereto[39]
(6) Effect of the arbitration award being ambiguous or uncertain
(7) Presence of fraud or violation of public policy in the way the award is obtained
(8) Tribunal's failure to observe the requirements with regard to the form of award or any irregularity in the proceedings or in the award which is admitted by the tribunal, or by any other institution or person authorised by the parties regarding the proceedings or the award

While the grounds as spelled out thereunder cannot be extended by the courts, the wording of the provision, namely *one or more of the following kinds,* suggests that the section does not give an exhaustive list of grounds of serious irregularity. Nonetheless, it calls for interpretation under the *ejusdem generis rule.* Most importantly, when deciding whether these irregularities have caused the applicant "substantial injustice", the courts are not allowed to take into account what would have happened to the applicant, had the dispute been litigated[40]. Instead, the court is required to reach a conclusion by considering what could reasonably be expected of the arbitration process[41]. There follows that when the conclusion reached in arbitration is different from what would have been decided in litigation, the courts are not allowed to interfere with the ruling of the tribunal as long as it is *"an acceptable consequence of that choice".* This approach underlines the legislator's efforts to protect arbitration procedures against undue judicial intervention, since the agreement to arbitrate attests the parties' intention to resolve their conflicts by arbitration. When arbitration is tainted with serious irregularity within the meaning of the act, the court may remit the award or set aside the same. As an alternative to these two options, the court may decide that the award is of no effect.

With respect to the right to challenge an award on lack of jurisdiction and serious irregularity, the Act 1996 introduces a statutory waiver mechanism[42]. Accordingly, there are two ways of losing the right to make a challenge on these grounds. These include being involved in the arbitration process without raising any objections to lack of jurisdiction or serious irregularity[43]. Such is the strictness of this rule that it finds room for application, unless the parties establish that at the time they were involved in the process they did not know and could not reasonably have known the reasons for the objection[44]. In addition, parties will lose the right to challenge pursuant to section 67 or 68 of the English arbitration act, where they fail to exhaust the arbitral process which is available for objection to the tribunal's decision on jurisdiction or where they do not challenge the award within the period allowed either in the arbitration agreement or in the act[45].

[39] See *London Underground Ltd. v. City Link Telecommunications Ltd,* [2007] EWHC 1749, which provides that this assessment requires an analysis of the *substance of arbitration and its conduct viewed as a whole".* Most importantly, the mere fact that the arbitrator has made factual decisions which are different from what the parties contented is not sufficient for the court to hold in favour of "serious irregularity".

[40] See para 280 of the DAC Report on the Arbitration Bill

[41] *Ibid.*

[42] s. 67

[43] s. 73(1)

[44] *Ibid.*

[45] s. 73(2)

Appeal on point of law

While the grounds identified thus far are similar to those adopted under the U.S. law, it is clear that this ground creates the major difference between the arbitration regimes in these jurisdictions. In contrast to the U.S Federal Arbitration Act, which does not allow the courts to review the award on the point of law, unless there is a *manifest disregard of law*[46], the English Arbitration Act 1996 recognises judicial review for error of law.

In the drafting process, there has been a number of discussions as to the adoption of judicial review for error of law[47]. In this context, it was suggested that whether the court would reach a different conclusion should be regarded as irrelevant whilst deciding as to the finality of the award, since arbitration agreements demonstrate parties' intention to observe the decision of the tribunal[48]. Nonetheless, the legislator found it necessary to retain this ground in order to ensure that arbitrators correctly apply English law. Consequently, when the law applicable to the dispute is not English law, parties cannot appeal to English courts for error of law.

Most importantly, for a party to obtain permission to appeal, certain criteria need to be met. First of all, the court needs to be satisfied that the decision of the arbitrator on a legal point is evidently wrong[49]. In this context, in a recent case, it was highlighted that the test is not based on the probable conclusion of a court but on the expected ruling of a reasonable arbitrator[50]. This finding has its roots in the House of Lords decision in *The Nema* which suggests that the court should accept the ruling of the arbitrator where unless it is established that the arbitrator *"misdirected himself in point of law",* or the decision is contrary to the possible finding of a reasonable arbitrator[51]. Moreover, for the purposes of finding whether there is actually an evident error of law, the error needs to be established swiftly and without any need for long explanations on the point of law[52].

When the issue has general public importance, the applicant's burden is alleviated in that merely showing that the award is open to serious doubt is agreed to be sufficient[53]. The historic reason for recognition of this proposition can also be traced back to the House of Lords decision in *The Nema* where one of the foremost questions of law was interpretation of a non-standard clause in a contract[54]. The House of Lords therein suggested that where the legal question concerns with interpretation of a standard contract or a clause and where the legal position with respect to this issue is not clear and certain, there is a public interest in clarifying the law in order to promote certainty in

[46] However it is doubtful whether this test is still applicable after the decision in the *Hall Street Associates v. Mattel Inc,* see section (1) hereof.

[47] Para 284 of the DAC Report on the Arbitration Bill

[48] *Ibid.*

[49] s. 69(3)(c)(i) of the act

[50] *London Underground Ltd. v. City Link Telecommunications Ltd,* [2007] EWHC 1749

[51] [1982] A.C. 724, 739-740

[52] *Garden Co. Ltd. v. Onn Lee General Contractors* [1996] ADRJ 71 quoted in Robert Merkin, "Arbitration Law", (LLP 2004) para 21.43

[53] s. 69(3)(c)(ii) of the act

[54] [1982] A.C. 724

commerce[55]. Accordingly, the court adopted the view that there is a public importance in elucidating the law as to the interpretation of a particular standard contract which is heavily used and relied on by the parties in trade. Most importantly, in order to obtain a permission for appeal, the House of Lords held that *"leave should not be given, unless the judge considered that a strong prima facie case had been made out that the arbitrator had been wrong in his construction"[56].*

While observing the *strong prima facie case* rule, the courts rejected to formulate the answer to the question of how strong the case should be. Rather, it was accepted that the degree of strength depends on the factual circumstances of each case and there is no fixed method to employ[57].

After the 1996 Act entering into force, English courts have not entirely departed from the rules established under the identified cases, inasmuch as most of these principles were reflected in the statute. Nonetheless, predicating on the fact that the right to appeal now lies with the 1996 Act, the courts suggested giving more weight to the provisions of the act. Consequently, the Court of Appeal in *The Northern Pioneer*[58] supported the argument that English courts should no longer merely adhere to the rules in *The Nema*[59] and *The Antaios*[60], since they now need to be mainly guided by the statutory criteria under section 69 of the English Arbitration Act[61]. Taking this one step further, the court therein observed that the reference to "open to serious doubt" under the act is wider than the requirement of "strong prima facie case" established in *The Nema,* and therefore it leaves more room for the courts to grant permission to appeal[62].

Another criterion that needs to be met is that not only should the legal question referred to the court be one of those issues submitted to arbitration[63], but also it needs to "substantially affect" at least one of the parties' rights[64]. Nonetheless, difficulties arise in understanding the practical reason for the legislator to require this last condition, since what is just and proper requires a subjective and fact-driven analysis. The English case law demonstrates that this criterion is for the courts to use their discretion in deciding whether a permission to appeal should be granted by considering what the parties sought to attain with the arbitration agreement. When it is obvious that parties wish to have a quick arbitration process, the courts will be not be inclined to allow appeal. Nor will there be a tendency on the part of the courts to grant permission where the applicant's intention to delay the procedures is evident.

Despite all the restrictions for allowing appeal on the point of law, it is striking that there is a serious judicial intervention to the arbitration process on the grounds that under section 69(7)(b) of the act, the courts are even vested with the right to vary the award. Even though the parties are entitled to

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[55] *Ibid,* 743

[56] *Ibid*

[57] *Ipswich Borough Council v. Fisons plc,* [1990] 1 All ER 730, 734

[58] [2003] 1 All ER (Comm) 204

[59] 1982] A.C. 724

[60] [1984] 2 Lloyd's Rep. 235

[61] [2003] 1 All ER (Comm) 204, 210

[62] *Ibid.*

[63] s. 69(3)(b)

[64] s. 69(3)(a)

contract out of the appeal mechanism, in light of the rules explained thus far, the default position under the English Arbitration Act surely undermines the efficiency of the arbitration process in terms of cost and duration.

Consequently, in the final section whether the arbitration regime of the UK or that of the U.S. provides a quicker and less costly arbitration process will be discussed.

SECTION 3 - CONCLUSION: WHICH ARBITRATION REGIME IS THE MOST EFFECTIVE SUBSTITUTE FOR LITIGATION?

It is clear that the key provisions of the English Arbitration Act, 1996 and the U.S. Federal Arbitration Act manifest the difference between the intentions of the respective legislators. Accordingly, it is evident that the Federal Arbitration Act attaches more importance to ensure that the route to obtain a final and binding award does not cause parties unbearable costs and delays whereas, the English Arbitration Act demonstrates sensitivity on accuracy of the awards when the dispute is governed by English law. The impact of this dissimilarity between the jurisdictions on the parties is evident: When an arbitration award is subject to judicial review for error of law, parties may struggle in all level courts in order to enforce an award. This surely gives rise to increasing costs and delays. When the position is to the contrary, it becomes easier to obtain a final and binding award.

As this is the case, when parties seek to have a quick arbitration, the arbitration regime adopted in the U.S pursuant to Federal Arbitration Act should be viewed as more attractive, inasmuch as judicial review in the U.S. is significantly restricted. The pre-*Hall Street* position was receptive to judicial review on point of law in highly exceptional circumstances, when there is a manifest disregard of law. However, the post-*Hall Street* position suggests that availability of the test, namely manifest disregard of law, has become doubtful, since many circuits have stood against resorting to this rule even in those unusual cases.

Even though the intention to render arbitration cost and time effective can be justified, it is difficult to understand why the U.S. courts are hostile to judicial review on point of law when this is agreed as a ground in the arbitration agreement. In this respect, it can be argued that the English Arbitration Act is a better substitute for litigation, inasmuch as the parties have the right to contract out of the appeal mechanism.

Nonetheless, the U.S. arbitration regime facilitates speedy and cost effective arbitration process, for it is in principle devoid of an appeal mechanism on the point of law. As will be recalled, following the dicta of the Supreme Court in *Hall Street,* the ground of *"manifest disregard of the law"*, can still find room for application. However, this ground only applies in exceptional circumstances, where the arbitrator goes so far as to intentionally refusing to apply the law. So far as English law is concerned, it is important to note that, despite the adoption of the right to appeal on point of law, the English Arbitration Act also envisages rules to prevent undue delays and increasing costs. These include the strict time bar for application to challenge the award, which is 28 days after the award is made, and not giving permission to appeal when there is merely a suspicion about the accuracy of the award on the point of law.

In terms of assessing whether arbitration is an effective substitute for litigation, the degree of judicial intervention also needs to be considered. It is true to say that by agreeing to arbitrate the parties demonstrate their intention to be bound by the decision of the tribunal. The arbitration acts therefore should not frustrate this intention when there is no public importance in the resolution of the matter by the courts. Consequently, the Federal Arbitration Act envisages a more acceptable regime in two respects: Firstly, mere error of law on the part of the tribunal is not a ground for setting aside an

award. Secondly, the U.S courts do not apply the test of what would the court have decided, had the issue been litigated. Even though the arbitrator's decision is only disturbed in case of evident error or where there is a public importance in clarifying the legal position, it is evident that the English arbitration act gives a considerably wider room for the courts to review the legal issues decided by the arbitrator.

Having discussed the English and U.S. laws on arbitration, the observations above reinforce the argument that Federal Arbitration Act provides a better substitute for litigation. The parties are better positioned in the U.S. law, as there are very strict grounds for judicial review and this fact itself surely gives rise to a swift and inexpensive arbitration process. If speed and cost have heightened importance to parties who wish to choose England as the seat of arbitration, the only way to attain this objective would be to contract out the right to appeal for error of law envisaged under article 69 of the English Arbitration Act.

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