Litigation & Arbitration Group

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Client Alert

Arbitration Update: Streamlined Appeals on Questions of Law

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Challenges to arbitral awards on questions of law rarely succeed in the English courts.[1] The recent case of CVLC3 & CVLC4 v AMPTC[2] is, therefore, unusual. Importantly, in this case, the Court clarified the position in relation to the two-step appeal process under section 69 of the Arbitration Act 1996 (the "**Act**"). The Court's decision narrowed the scope for parties to argue points in the substantive appeal that were dismissed at the permission to appeal stage under section 69, emphasising the importance of the streamlined two-step process and noting that "*highly unusual circumstances*"[3] would be required to revisit such issues once permission to appeal had been granted. Notably, the Court not only granted the appeal under section 69 of the Act, finding that the arbitrator's decision was incorrect, but it also refused to remit the matter back to the arbitrator to reconsider the issue on the facts.

Background

CVLC3 and CVLC4 (together, the "**Owners**") had entered into guarantee agreements with AMPTC, under which AMPTC promised to guarantee (as primary obligor) the performance of a charterer in relation to two charterparties. The Owners terminated the charterparties following alleged breaches by the charterer and began arbitration proceedings, including against AMPTC under the guarantees. The Owners also obtained an order from an Angolan Court for the arrest of AMPTC's vessel as security for their claims under the guarantees. AMPTC sought a declaration from the arbitrator that there was an implied term in the guarantees that the Owners would not seek additional security in respect of matters covered by the

[1] The November 2020 minutes of the Commercial Court User Group meeting recorded that, in respect of applications for permission to appeal under section 69, the figures suggest the success rate "*hovers*" around 30%, while in respect of successful appeals, the figure for 2018-2019 was 3 out of 51 (equating to about 5%) (https://www.judiciary.uk/wp-content/uploads/2020/12/CCUG-Minutes-November-2020-0112.pdf).
[2] CVLC Three Carrier Corp and CVLC Four Carrier Corp v Arab Maritime Petroleum Transport Company [2021] EWHC 551 (Comm).
[3] CVLC at [34].

guarantees (the "**Additional Security Term**"). The arbitrator issued an award granting that declaration, and made a supplementary award finding that the Owners were in breach of the implied Additional Security Term.

Permission to appeal

To challenge an arbitral award on a question of law, unless the parties agree, the challenger must first obtain permission to appeal. Only if the Court finds that certain jurisdictional hurdles are met, will permission be granted, thereby avoiding the time and expense of a full challenge in circumstances where it would be unlikely to succeed.

The Owners sought permission from the Court to appeal the two awards under section 69 of the Act, on the grounds that the Additional Security Term should not have been implied. AMPTC argued that permission should not be granted because (among other things) the question of law, as phrased by the Owners in their section 69 application, was not one that the arbitrator had been asked to determine (as is required under section 69(3)(b) of the Act).

Cockerill J took a broad approach to section 69(3)(b) and held that, while the particular question identified by the Owners (which was a question of law applicable to guarantees generally) did not reflect the term sought to be implied in the guarantees by AMPTC (which was more fact-specific), "*a question of law akin to that identified can be identified and was asked*".[4] The Judge therefore granted permission to appeal, on the basis of a reformulated question of law.

The substantive appeal

Revisiting the hurdles for permission

At the substantive appeal stage, AMPTC challenged the jurisdiction of the Court by reference to the same issue that had been determined at the permission stage. AMPTC submitted that "*the judge's decision on all matters at the permission stage is provisional and can be revisited at the main hearing with the benefit of the "Socratic dialogue" provided by oral argument*".[5]

The Court rejected AMPTC's contention in this regard, noting that its argument for revisiting the point was a "*novel one*" but was "*not reflected in the way in which appeals have been conducted…for the last 25 years*."[6] The Court held that, while it may not be impossible to revisit parts of the qualifying hurdles from the permission stage, there must be "*highly unusual circumstances*" [7] to justify doing so, and there was no reason to suppose that those circumstances existed in the case at hand. The Judge reasoned that to hold otherwise would be inconsistent with the policy of the Act and the overriding objective under the Civil Procedure Rules because appeals would become "*much longer and more expensive*" as parties would seek to relitigate all or most issues.[8]

However, despite holding that AMPTC was not entitled to raise the argument again, the Court nevertheless did in fact go on to consider whether the question of law was one arising out of the award and which the

[4] Ibid at [15].
[5] Ibid at [33].
[6] Ibid.
[7] Ibid at [34].
[8] Ibid.

arbitrator had been asked to determine. The Court found "*unhesitatingly*"[9] that this jurisdictional hurdle had been passed. Cockerill J noted that:

1. it is not necessary for the question of law to be asked of the arbitrator in exactly the same form as it is posed on appeal, but it must be "*inherent in the issues for decision*" by the arbitral tribunal;[10]
2. case-specific drafting will often need to be stripped away to reach the relevant issue of law for appeal; and
3. questions of mixed law and fact are capable of being appealed under section 69 of the Act.

Should the Additional Security Term have been implied?

Having considered the high legal hurdle required to imply terms into contracts, the Court held that the Additional Security Term should not have been implied. The Court also refused to remit the matter back to the arbitrator to reconsider the legal question with the benefit of the facts, as is the default position under section 69(7) of the Act. The Court held that it would be inappropriate to do so in this case because the arbitrator did not make findings of fact at the time of the award due to the expedited nature of the reference to arbitration. Therefore, the Court substituted its view for that of the arbitrator, finding that there was no implied term in the guarantees that the Owners would not seek security over and above that provided by the guarantees.

[9] Ibid at [35].
[10] Ibid at [36].

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