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**Paper by Robert Fisher QC**

## **APPEALS ON QUESTIONS OF LAW**

### **INTRODUCTION**

1. Those involved in arbitrations will have noticed a curious phenomenon. The party who wins invariably turns out to have been a longstanding proponent of party autonomy while the one who loses has always been a firm believer in judicial oversight. It is the unhappy lot of lawyers to disappoint one or the other whenever there is an appeal on a question of law.

2. The tension between autonomy and intervention lies at the heart of most controversial aspects of the law of arbitration. Predictably, it is the principal issue when considering appeals. On the one hand the parties have chosen to have their dispute resolved by the person of their choice, with the corollary that judicial intervention should be limited.<sup>[1]</sup> But on the other hand there will come a point beyond which the parties want to protect themselves against their arbitrators wilder aberrations. For some, the jurisdiction to review adequately meets that requirement.<sup>[2]</sup> Others will want to go further with a right of appeal against errors of law.

3. Striking the right balance between these competing ideals affects (i) the scope of the jurisdiction to appeal, (ii) the threshold for leave to appeal, and (iii) implications for lawyers called upon to draft arbitration clauses and agreements. The aim of this paper is to examine those three matters in turn. Before turning to them it will be necessary to sketch in the legislative background.

### **LEGISLATIVE BACKGROUND**

4. For domestic arbitrations<sup>[3]</sup> parties may, by agreement or with the leave of the High Court, appeal to that court on any question of law arising out of an award unless the parties had contracted out of that jurisdiction.<sup>[4]</sup> Clause 5 of the Second Schedule to the Arbitration Act 1996 materially provides:

#### **5 Appeals on questions of law**

(1) Notwithstanding anything in articles 5 or 34 of the Schedule 1, any party may appeal to the High Court on any question of law arising out of an award

- (a) If the parties have so agreed before the making of that award; or
- (b) With the consent of every other party given after the making of that award; or
- (c) With the leave of the High Court.

(2) The High Court shall not grant leave under subclause (1)(c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties.

5. Contractual provision for appeals on a question of law as of right is a theoretical possibility under cl 5(1)(a) but I have never seen it in practice. Nor have I seen an appeal based on consent to dispense with leave. Parties who win arbitrations are not usually sporting enough to willingly put their awards in jeopardy. In practice appeals on questions of law are available only with leave given under cl 5(1)(c).

6. Clause 5(8) imports into the jurisdiction for an appeal the time limit imposed by Art 34(3) of the First Schedule for applications to set aside an award. An application to set aside may not be made after three months have elapsed from the date on which the party making that application had received the award (Art 34(3)). For the purposes of this time limit, when an appeal is brought requiring leave under cl 5(1)(c) the appeal is brought, and time ceases to run, when the application for leave is filed.[\[5\]](#)

7. The procedure for appeals is prescribed in Rules 891 to 894 of the High Court Rules. The proceedings are commenced by filing an application for leave in the form of an originating application (R 891; Form 109). Within fourteen days (or where a notice of opposition is received, within fourteen days of that notice) the plaintiff must file submissions and authorities in support of leave (R 892(1)). There is a truncated hearing (R 892(3)) following which the court will give its decision without reasons if leave is granted (R 893(1))[\[6\]](#). Where leave is refused, reasons are given (R 894).

8. Although the High Court can consider an application for leave in relation to any question of law arising out of an award (cl 5(1)), any leave will relate solely to the question of law (cl 5(2)). This implies that a specific question has been identified. It is that question which must satisfy the requirements for leave. Since the jurisdiction to hear the appeal is derived from the leave so given, it will not be open to the court later hearing the appeal to consider additional issues.[\[7\]](#)

9. There is a further right of appeal from refusal of leave, or against a determination of the appeal, with leave of the High Court (cl 5(5)). Consideration of an application for leave to appeal to the Court of Appeal is akin to an application for leave under s 67 of the Judicature Act 1908, as distinct from a leave application under cl 5(1) itself.[\[8\]](#)

10. Where the High Court refuses leave to appeal to the Court of Appeal, the latter has the power to give special leave (cl 5(6)). The better view appears to be that on such an application the Court of Appeals role is limited to asking whether the High Courts approach under cl 5(5) was clearly wrong, as distinct from a de novo application of leave principles in the High Court.[\[9\]](#)

11. Yet another appeal, this time to the Supreme Court, is also possible with leave.[\[10\]](#) If matters run their full course the parties can accordingly enjoy three leave applications (four if the High Court and Court of Appeal differ over leave to appeal to the Court of Appeal), and three appellate hearings on questions of law, in addition to the original hearing before the arbitral tribunal.

## JURISDICTION TO APPEAL TO THE HIGH COURT

### Question of law

12. Appeals are limited to questions of law arising out of an award (cl 5). A preliminary point is that there is no right of appeal from legal error in the course of supervising interlocutory procedures or the hearing per se. Only if enshrined in an award does an error become appealable.

13. The main limitation on the scope of the jurisdiction lies in the words question of law. Most lawyers would have little difficulty in treating the process of subsuming legal principles of general application from legislation and judicial decisions as a question of law. Unfortunately the expression has been freighted with so many additional connotations<sup>[11]</sup> that its meaning now depends heavily upon the context in which it is used.<sup>[12]</sup>

14. The difficulties have their origin in use of the expression question of law, or its equivalent, error of law, to circumscribe the jurisdiction of diverse appellate or reviewing bodies. Error of law is accordingly one of the justifications for judicially reviewing persons or bodies with a statutory power of decision, and forms the statutory basis for informant appeals by way of case stated from inferior courts and appeals from specialist tribunals such as the Environment Court and the Employment Court. In those contexts the Courts have often succumbed to pressure to expand a question of law jurisdiction in order to remedy perceived injustices. Similar pressures have come from an anxiety to withdraw complex questions from juries using the rationalisation that a question of law is involved. The construction of documents is probably an example of the latter.

15. Quite different considerations may apply, however, where the parties have freely chosen to refer their dispute to an arbitral tribunal of their own choice. Here, it is usually reasonable to start from the assumption that if the parties had wanted a judicial resolution of their dispute they would have brought it to the courts in the first place. Consequently what constitutes a question of law in a judicial review case will not necessarily be a question of law in the field of consensual arbitrations.<sup>[13]</sup> Two pseudo questions of law worth considering are (i) perverse findings of fact and (ii) the construction of documents.

#### **(i) Perverse findings of fact**

16. In most contexts a positive factual finding for which there is no supporting evidence will be treated as an error of law.<sup>[14]</sup> Also falling within this category are cases in which only one reasonable inference could be drawn from unchallenged primary facts.<sup>[15]</sup> For this purpose perverse findings of fact therefore include any findings of fact where the tribunal has acted without evidence, or upon a view of the facts which could not reasonably be entertained.<sup>[16]</sup>

17. The better view appears to be that in New Zealand a perverse finding of fact in that sense does not qualify as an error of law for the purpose of appeals against arbitration awards. Although there has been no definitive ruling to that effect, there are strong indications that that view would be taken if and when the point is squarely raised before the Court of

Appeal.<sup>[17]</sup> To hold otherwise would be contrary to the general principle that the arbitrator is master of the facts.<sup>[18]</sup> It would also be contrary to the legislative aims of promoting finality in arbitral awards and limiting judicial intervention.<sup>[19]</sup> As a leading commentator has pointed out:<sup>[20]</sup>

Whilst it is appropriate in domestic arbitrations to allow limited appeals on points of law in the absence of agreement to the contrary, to incorporate a rebuttable presumption that appeals on findings of fact are permissible would open up the arbitral process to a level of judicial scrutiny wholly inconsistent with the rest of the Act.

18. For those reasons the Law Commission has recommended that the Arbitration Act be amended to state expressly that perverse findings of fact do not constitute errors of law for the purposes of cl 5(1)(c) of the Second Schedule to the Act.

19. At first sight the provision in R 887(2)(a) of the High Court Rules for obtaining a record of the evidence given in the arbitration would be consistent with recognition of perverse findings of fact as questions of law. An alternative interpretation, however, is that a procedure is provided in case, as a matter of law, the courts were to decide that such findings do qualify. Nor could the proper interpretation of the Arbitration Act be driven by procedural rules of practice made by the Rules Committee.

## **(ii) Construction of contracts**

20. Contractual construction turns the intention of the contracting parties derived from the words they used and the facts which must have been within their mutual contemplation at the time.<sup>[21]</sup> The uninitiated might think that this is a question of fact. The law is normally of universal application. Legal principles can normally be defined in the abstract. The intentions of parties to a particular contract is not a matter of law in that sense. Knowledge of customs within an industry is also the traditional province of arbitrators. Perhaps for those reasons, when it came to the construction of contracts Lord Denning's view was that the arbitrator is just as likely to be right as the Judge probably more likely.<sup>[22]</sup>

21. However, the notion that contractual construction should be treated as a question of law for appeal purposes would now seem to be too deeply embedded to allow realistic argument to the contrary.<sup>[23]</sup> For leave purposes the distinction between one-off and standard contracts presupposes that contractual construction is a question of law.<sup>[24]</sup> It is also the case that judicial interpretations of standard contracts can be useful for the commercial community as a whole. The possibility of excluding contractual construction was not even raised with, or by, the Law Commission when it recommended the exclusion of perverse findings of fact from error of law for appeal purposes.<sup>[25]</sup>

22. It is therefore safe to conclude that the construction of contracts will be treated as a question of law for present purposes. All that can usefully be added is that it would be open to the parties to include in their arbitration clause or agreement an express exclusion of contractual construction from the right of appeal. Whether or not this would be effective as a matter of jurisdiction, a court would almost certainly treat it as decisive in the exercise of its discretion on the leave application.

## LEAVE REQUIREMENTS

23. It will be recalled that in the absence of agreement to the contrary, a party may appeal to the High Court on a question of law with the leave of the High Court (cl 5(1)). Much mental effort has been brought to bear upon the way in which the discretion to grant or refuse leave should be exercised.

### Changing attitudes to intervention

24. It is trite to say that over the years the courts have lost the appetite they once had for intervening in arbitrations. The original French position was the refreshingly simple one that all arbitrations were void. The ground given was hard to argue with:

One cannot find with arbitrators the qualities which one is sure to find with judges - integrity, impartiality, ability, and scrupulousness of feelings necessary to render judgments.<sup>[26]</sup>

What contemporary French arbitrators thought of judges is not recorded.

25. In England, consensual attempts to exclude judicial scrutiny of arbitrations were still being overruled as late as 1922.<sup>[27]</sup> It was increasingly recognised, however, that the interventionist attitude of the English courts reduced London's competitiveness as a centre for international arbitration. With this in mind the English Arbitration Act 1979 abolished the jurisdiction to set aside or remit on the grounds of errors of fact or law on the face of the award. In its place came a circumscribed right of appeal on a question of law. A broadly similar right of appeal was carried through into the current English and New Zealand Arbitration Acts.

26. The modern legislative approach to arbitration was strengthened by judicial guidelines which limited the circumstances in which leave to appeal would be granted.<sup>[28]</sup> The resultant *Nema-Antaios* guidelines in England formed the starting point for the equivalent *Gold Resources* guidelines in New Zealand<sup>[29]</sup> although it may be noted that even before the New Zealand Arbitration Act 1996, the judicial tide had well and truly turned against judicial intervention.<sup>[30]</sup>

### The current tests

27. Under cl 5(1) the threshold requirement for leave is that the applicant must show that the determination of the question of law concerned could substantially affect the rights of one or more of the parties.<sup>[31]</sup> In other words leave will be denied unless it appears that the alleged legal error would have been material. If the leave application survives that test, it faces a series of further hurdles posed by the New Zealand Court of Appeals *Gold Resources* guidelines. In general it can be said that leave will be refused unless the application satisfies the first of the following requirements, and most of the others as well. For convenience I have rephrased them as requirements which must generally be satisfied if leave is to be secured.

**(a) The alleged error of law is strongly arguable (where of precedential value) or very strongly arguable (where stand-alone case).**

28. This consideration is regarded as the most important of the eight cited by the Court.<sup>[32]</sup> It has its origins in the *Nema-Antaios* guidelines and, with slightly different wording, is now incorporated in the terms of the English statute itself.<sup>[33]</sup> The distinction between strongly arguable and very strongly arguable is intended to reflect the fact that in the one-off case, the statutory policy of holding people to their choice of arbitration is not to any extent offset by the countervailing public interest in establishing useful precedents. <sup>[34]</sup>

**(b) The legal question had not been foreseeably central to the arbitration**

29. The *Gold Resources* reasoning is that if a legal issue emerged as crucial to the decision only after the arbitrator had been appointed, the parties could not be taken to have chosen their arbitrator in the knowledge that he or she would need to decide the point. Conversely, if the parties had chosen their arbitrator with full knowledge that the dispute centred on a given question of law, it must be assumed that they were content to have it determined by that arbitrator.<sup>[35]</sup>

30. A related point, albeit not one referred to in *Gold Resources*, is that leave would seem to be less justifiable if the legal question was not canvassed before the arbitrator. Indeed, s 69(3)(b) of the English 1996 Act provides that leave will be given only if the court is satisfied that the question is one which the tribunal was asked to determine. There is no jurisdictional bar of that nature in the New Zealand legislation, which permits an appeal based on *any* question of law arising out of the award.<sup>[36]</sup> Nevertheless the fact that the point was not argued before the arbitrator will probably count against the grant of leave because of unfairness to the other party. If argued, the point may have been satisfactorily resolved by the arbitrator. And if failure to argue meant that all the necessary facts were not found, it will almost certainly be fatal to leave.<sup>[37]</sup>

**(c) The arbitrator was not a lawyer.**

31. The fact that an arbitrator may be an eminent lawyer does not lessen the courts duty to give proper consideration to the question whether leave to appeal should be granted since the difference between arbitrator and judge is not one of competence or experience, but of function. <sup>[38]</sup> However if the chosen arbitrator is a lawyer, and the problem is purely one of law, the parties must be assumed to have had good reason for relying on that lawyers expertise.<sup>[39]</sup> Indeed, when the Law Commission changed its original view that New Zealand should follow the UNCITRAL Model Law excluding appeals<sup>[40]</sup> its prime reason for doing so appears to have been to cater for non-lawyer arbitrators, not legally qualified ones.<sup>[41]</sup>

**(d) The dispute is very important to the parties.**

32. The stated reason for recognising this as a ground for leave is that the effect on them [the parties] of an incorrect ruling will be all the greater.<sup>[42]</sup> Another way of putting the point could be that where the outcome has great impact on the parties, the cost and delay of the judicial process will be easier to justify on a cost-benefit basis.

**(e) A substantial amount of money is involved.**

33. Although separately listed in the *Gold Resources* guidelines, this would appear to be largely a rewording of the same point.

**(f) The delay will not be disproportionate to the amount in dispute.**

34. Again, this would seem to be largely a rewording of the same point. It does, however, draw attention to the need to consider the urgency of obtaining a resolution of the particular dispute.[\[43\]](#)

**(g) Absence of any final and binding clause in the arbitration agreement.**

35. Although not decisive, a contractual provision that the arbitral award is to be final and binding will count heavily against leave since it indicates that the parties did not contemplate becoming involved in litigation over the award.[\[44\]](#)

**(h) The arbitration is an international one.**

36. In an international arbitration an application for leave under cl 5 will not even reach the court unless the parties had expressly contracted into the appeals jurisdiction under s 6(2)(a). In the view of the Court of Appeal if they do opt in, then it is clear that they *did* intend the possibility of recourse to the court in the event of an error by the arbitrator on a question of law.[\[45\]](#)

37. At a theoretical level there is a circularity in the Court of Appeals reasoning. At least until *Gold Resources*, where parties to an international arbitration opted into the provisions of the Second Schedule they were also opting into the restrictive approach to leave established by authorities on cl 5 and its equivalents. In a self-fulfilling prophesy, *Gold Resources* ensures that they are now opting into the gloss which *Gold Resources* places upon their act of opting in.

38. That is not to say that the Court of Appeals approach lacks common sense. It is, with respect, an insightful commentary upon the inertia of default provisions.[\[46\]](#) If someone has gone to the trouble of changing the legal status quo, it is entirely reasonable to conclude that they wanted it to have practical consequences.

**Other considerations**

39. As the Court of Appeal indicated in its decision, the *Gold Resources* guidelines are neither prescriptive nor exhaustive.[\[47\]](#) Other relevant considerations could include, for example, the fact that the leave application had already been preceded by a long, tortuous, and expensive, procedural history.[\[48\]](#)

40. In general it can be seen that the courts will be reluctant to second-guess arbitrators on legal matters unless (i) the error is clear and material, (ii) the point will have precedential value or is strongly arguable, and (iii) the application can survive a gauntlet of other potentially disqualifying factors.

**SHOULD CLIENTS BE ADVISED TO CONTRACT OUT OF APPEALS?**

## **The opportunity to contract out**

41. Although the jurisdiction and leave requirements for arbitration appeals have occupied the minds of the highest courts in the Western world, the parties can dictate the approach they want in their case at one stroke. All they have to do is say what they want at the outset. An arbitration clause or agreement can provide that appeals on questions of law are to be available without leave,<sup>[49]</sup> available only with leave,<sup>[50]</sup> or excluded altogether.<sup>[51]</sup> But the choice must be made in the original arbitration clause or agreement. Once an award is given, it will be too late to secure the co-operation of other parties.

42. It is sometimes argued in support of leave to appeal that if the parties had not wanted an appeal right, they would have excluded it by agreement under s 6(2)(b). The point is immediately diminished by the circularity that in leaving the provision for appeals intact, the parties must be taken to have also been aware of the restrictive approach the Courts would take to any application for leave.

43. More importantly, however, one suspects that when arbitration clauses or agreements are drafted the subject of appeal rights does not occur to most lawyers, still less their clients. Experience in other fields of law suggests that the statutory default position is likely to be king. Section 21 of the Property (Relationships) Act 1976 (property rights of spouses and partners) and s 105 of the Property Law Act 1952 (statutory monthly tenancies) are examples. Inertia constantly emerges as the most powerful force in human affairs.

44. There would seem to be considerable inertia in the default position that in domestic arbitrations in New Zealand, appeals are presumptively available. But if the point were drawn to clients attention before they signed the agreement would they really want it? Much will no doubt turn on the advice they receive from their lawyers. What should lawyers advise?

## **Appeal rights are an optional extra**

45. A useful place to start may be the fact that New Zealand is in a minority in having a presumptive appeals jurisdiction. A right to review akin to Arts 34 and 36 of the UNCITRAL model is virtually universal but not so provision for appeals. Only a handful of countries have followed the English default appeals jurisdiction model.<sup>[52]</sup> The majority,<sup>[53]</sup> and the Model Law itself, get by perfectly well without it. The same is invariably true of international arbitrations notwithstanding the magnitude of the sums and issues typically at stake.<sup>[54]</sup>

46. The Law Commission had originally intended to exclude appeals too.<sup>[55]</sup> Its change of mind appears to have been at least primarily motivated by the need to cater for non-lawyer arbitrators:

We note that there are many instances where an arbitral tribunal appropriately comprises non-legal arbitrators. We believe it would be wrong for non-legal specialists to endeavour to deal definitively with the law. There should always be a right of appeal on points of law except where a party is happy to opt out of a right of appeal on legal grounds.<sup>[56]</sup>

47. The arguments for and against affording a right of appeal on a question of law have been expressed elsewhere in a variety of ways but seem to come down to broadly three for and three against. The same arguments seem worth canvassing as a prelude to advising clients on the point.

### **Generating precedents**

48. The first of the arguments in favour of an appeal right is the precedent value of the court decisions that result. The objective here is the development of commercial norms to guide businessmen in planning future transactions.<sup>[57]</sup> This consideration is regarded as the first, and most important, of the *Nema Antaios* and *Gold Resources* guidelines<sup>[58]</sup> and is the reason for lowering the threshold for leave where the decision is expected to have precedent value.<sup>[59]</sup> This service to the wider community is often seen as the price which parties ought to pay in return for having their privately obtained awards enforced through the public process.

49. At least in England, there is some debate whether the appeal jurisdiction has,<sup>[60]</sup> or has not,<sup>[61]</sup> produced significantly useful precedents in practice. But whichever be the case, a lawyers duty is first and foremost to the client, not the law library. One suspects that if the matter were explained to them, few clients would be willing to exchange the benefits of speed, finality and confidentiality for the satisfaction of becoming a precedent for the edification of the wider community. There is an irony, then, in the fact that the Courts strongest single policy reason for facilitating appeals will cut no ice with the persons most affected.

### **Refined levels of legality**

50. The second argument usually advanced in support a right of appeal is that it will vindicate the parties pre-contract expectations of legality. The implicit assumption is that if anyone had asked the parties at the time of their agreement, they would have insisted upon an outcome in accordance with the law of the land, if necessary established through the courts. The contrary view is that even if the point had been drawn to their attention, the parties would not have wanted a right of appeal if they had appreciated the cost in time, money, uncertainty, and loss of confidentiality, it would entail.<sup>[62]</sup>

51. My own view is that however much faith one might have in the choice of arbitrator, a right of appeal does spread the risk of aberrant decisions. It is difficult to deny the adage that the individual is foolish and the species wise.<sup>[63]</sup> However for reasons I will shortly come to, the price to be paid for more refined levels of justice is a heavy one.

52. The value the parties place upon refined levels of legality will differ according to the magnitude and nature of the dispute and their faith in the arbitrator or arbitrators in contemplation. But the short answer would seem to be that there is no need to guess what the parties would have wanted. If they are specifically asked whether they want appeal rights at the outset, the choice will be theirs rather than that of the professional drafter of the agreement. And clients can hardly be expected to make the choice if they do not know it exists.

### **Psychological effects on arbitrator**

53. A third argument in support a right of appeal is that an awareness of appeal rights has an important psychological effect upon an arbitrator. The counter-argument is that the typical

arbitrator in practice today is highly trained and rigorously professional and strives to do his or her duty to apply the law, with the consequence that appeal rights will have little, or no, psychological effect.<sup>[64]</sup>

54. Again my own view is that the psychological effect of an appeal right is not to be underestimated. It is not that there are arbitrators out there who, cut loose from the leavening influence of appeal rights, would run amok. It is simply that there is likely to be a stronger subconscious desire to get things right if an arbitrator is aware that one day his or her efforts may come under legal scrutiny. Again the value that the parties place on this factor will differ according to the nature of the dispute and the particular arbitrator or arbitrators in contemplation.

### **Party autonomy**

55. Those appear to be the main arguments in support of appeal rights. Others point the other way. Usually the first to be expressed is respect for party autonomy. It is often pointed out that had the parties intended that their dispute would ultimately be determined by a court, they could have saved themselves a good deal of trouble by taking it there in the first place. All else being equal, the parties decision to choose arbitration over court litigation implies that the courts should not intervene in the absence of compelling reasons for doing so.<sup>[65]</sup>

56. This alone does not help to answer the question whether, in drafting their agreement, the parties should retain an appeal right. Either way, the choice itself will be an exercise in party autonomy. The parties can not complain that the availability of an appeal right represents a loss of autonomy per se. However choosing to retain appeal rights does bring with it loss of autonomy at a secondary level. Once the matter enters the High Court door, the parties lose control over both the way in which their dispute will be processed and the identity of those who will decide it. The parties can dictate arbitration procedure (Art 19) but appeals are governed by the Act and High Court Rules. Arbitrators are chosen; judges imposed. For some, these considerations will be a reason for excluding appeal rights.

### **Speed, economy and finality**

57. The second argument usually advanced against appeals rights is the delay, cost and uncertainty they entail. Speed, economy and finality were probably the strongest drivers in the original decision to choose arbitration. Commercial parties, in particular, are likely to place a high value upon these considerations. A decision which is prompt and certain allows the parties to channel their time and resources into core commercial activity going forward rather than further litigation looking back. At least one pair of commentators has concluded that the appeal right increases the cost of commerce by requiring the parties to review awards with a view to considering an appeal and, where so advised, to pursue the appeal, without generating any corresponding benefit.<sup>[66]</sup>

58. The time and cost of the appeal structure is undeniable. Most parties would have expected the arbitration award to be the end of the process rather than the beginning. Once the matter reaches the court, the Act and High Court Rules place useful limits upon the application for leave (strict time limits, truncated hearing, absence of reasons if leave given, appeal against refusal only with leave) but when leave is obtained, the substantive hearing must (rightly) take its

place in the queue with all other classes of litigation. There is no cap on the delays and cost which may ensue, particularly when the potential for two further appeals is taken into account.<sup>[67]</sup>

59. Frequently the unkindest thing one can do for litigants is to provide them with further avenues for prolonging the dispute. There must be an initial tie-breaker. Beyond that, the mounting cost of adding tiers of refinement becomes increasingly disproportionate to the benefits. Once the jurisdiction is provided, one can not stop a losing party from exhausting all possible avenues, however lacking in merit. This is certainly true of appeals on questions of law. The majority fail, but often only after a lengthy and expensive parade through the courts.<sup>[68]</sup> That is not to deny that in some cases the exercise will be justified by the magnitude of the sums or issues at stake.

### **Confidentiality**

60. The third argument against retaining appeal rights is the loss of confidentiality likely to result. Protection of commercially sensitive information is undoubtedly one of the drivers of arbitration as a dispute resolution choice. The judicial attitude to confidentiality on appeal or review following arbitration has generally been negative.<sup>[69]</sup> The Law Commission has recently recommended a codification of the judicial discretion involved<sup>[70]</sup> but the recommended criteria are contradictory,<sup>[71]</sup> and the overall intention apparently a rebuttable presumption against confidentiality.<sup>[72]</sup>

### **Cost-benefit analysis**

61. Overall, the question whether to advise clients to retain appeal rights in their agreements will come down to a cost-benefit analysis to be conducted in the particular case. Principal benefits are likely to be vindication of expectations as to legality and the discipline imposed upon arbitrators when they know that their work may be marked by others. The price is likely to be delay, legal cost, uncertainty, loss of confidentiality, loss of control over the process, and loss of choice in the identity of the decision-makers.

62. The way in which that equation is resolved will differ according to the particular case. But given the far-reaching implications for the client, it would not seem to be a decision which should be left to go by default. It could be argued that legal practitioners drafting an arbitration clause or agreement have a duty to discuss the implications with their clients.

## **CONCLUSIONS**

63. The following conclusions can be drawn:

- (a) Although the precise scope of the expression question of law will never be finally closed, for the purpose of arbitration appeals it will include contractual construction but exclude perverse findings of fact.

- (b) The courts are reluctant to second-guess arbitrators on legal matters unless (i) the error is clear and material, (ii) the point will have precedential value or is strongly arguable, and (iii) the leave application can survive a gauntlet of other potentially disqualifying factors.
- (c) One of the key reasons for granting leave to appeal that the case will provide a useful precedent for the edification of the wider community will normally cut no ice with the parties themselves.
- (d) The parties are free to contract out of the jurisdiction to appeal.
- (e) The principal reasons the parties may have for wanting to retain an appeal jurisdiction are (i) to secure the more refined levels of justice that the multi-tiered courts can offer and (ii) to encourage appropriate mental discipline on the arbitrators part.
- (f) However in retaining the jurisdiction the parties will pay a heavy price in (i) delay, cost and uncertainty, (ii) loss of confidentiality, and (iii) loss of control over procedure and choice of decision-makers.
- (g) It could be argued that legal practitioners drafting an arbitration clause or agreement have a duty to discuss the implications of retaining appeal rights with their client.
- (h) Appeal rights are not inevitable. One strongly suspects that in the majority of cases the jurisdiction is retained not because the parties want it but because they were never asked.

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[1] *Downer-Hill Joint Venture v Govt of Fiji* [2005] 1 NZLR 554; *Opotiki Packing and Coolstore Ltd v Opotiki Fruitgrowers Co-op Ltd (In Receivership)* [2003] 1 NZLR 205 at 220 (CA) and see Arbitration Act s 5(a) and (d).

[2] Arts 34 and 36 of the First Schedule to the Arbitration Act 1996

[3] For international arbitrations the effect of s 6(2)(a)(i) in combination with cl 5 of the Second Schedule is that appeals on a question of law are available only if the parties so agree.

[4] Section 6(2)(b); Second Schedule cl 5(1).

[5] *Downer Construction (NZ) Ltd* (Auckland High Court CIV 2005-404-6899, Randerson J, 13 February 2006).

[6] *Downer Construction* supra at para 26.

[7] *Downer Construction v Silverfield Developments* (Auckland CIV-2005-404-6800 Harrison J 11 May 2006 paras 13, 43 and 44).

[8] *Cooper v Symes (2001) 15 PRNZ 166*; *Casata Ltd v General Distributors Ltd* (Court of Appeal CA 84/04 at para 154 per Chambers J); *The Baleares* [1991] 1 Lloyds Rep 349 (CA). The reformulation in *Patcroft Properties Ltd v Ingram* (2000) 14 PRNZ 524 and *Argon Construction Ltd v Spratt* (2004) 17 PRNZ 133 would not appear to involve any difference of substance.

[9] *Casata* supra at para 159 and 160 per Chambers J cf reservation of the point by the majority at para 107).

- [10] E.g. *Casata Limited v General Distributors Limited* [2006] NZSC 8 (15 March 2006).
- [11] For a review of the different categories of question of law see *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76; see further Holmes & O'Reilly Appeals from Arbitral Awards: Should Section 69 be repealed? (2003) 69 Arbitration 1; *Fencegate Ltd v NEL Construction Ltd* TCC December 5 2001 at para 38; *V Solholt* [1983] 1 Lloyds Rep 605, CA at 608.
- [12] Per Steyn LJ *ibid*.
- [13] Per Steyn LJ in *Geogas SA v Tramno Gas Ltd v Baleares* [1993] 1 Lloyds Re 215 at 231 CA
- [14] *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, 36 (HL); *ACC v Wotherspoon* supra.
- [15] *Edwards v Bairstow* supra; *ACC v Wotherspoon* supra; *CIR v Walker* [1963] NZLR 339 (CA)
- [16] *Edwards v Bairstow* at 29 per Viscount Symonds.
- [17] While the Court of Appeal left the point open in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) expressly left the point open but appeared to recognise the force of the contrary arguments and authorities. See further Mustill and Boyd *Commercial Arbitration* at pp 592 593 and 596; David Williams QC *Arbitration and Dispute Resolution* [2000] NZ Law Review 61 at pp 77 78; *Russell on Arbitration* (21<sup>st</sup> Ed 1977) para 8-057.
- [18] Article 19(2) expressly provides that the power of the arbitral tribunal include the power to determine the admissibility, relevance, materiality, and weight of any evidence
- [19] *Gold Resources Ltd* supra, 335 per Blanchard J.
- [20] DAR Williams QC: *Arbitration and Dispute Resolution* [2002] NZ Law Review 56 57.
- [21] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896; 1 All ER 98 (HL); *Potter v Potter* [2003] 3 NZLR 145 (CA)
- [22] *The Nema* [1980] 2 Lloyds Rep 339 (CA) at 344. For skepticism as whether the right to appeal has achieved any useful purpose see Holmes & O'Reilly Appeals from Arbitral Awards - should s 69 be repealed? (2003) 69 Arbitration 1. After a survey of English cases the authors say very few cases were overturned on appeal. Indeed, measured by the same test, the Judges got it wrong more often than the arbitrator (p 8)
- [23] E.g. *The Nema* [1982] AC 724; *The Antaios* [1985] AC 191; *Gold and Resource Ltd v Doug Hood Ltd* supra
- [24] *Ibid*
- [25] Report 83 *Improving the Arbitration Act 1996* supra
- [26] *Decision of the Cour de Cassation Cass.civ.*, 10 July 1843, S., 1843, 1, p.561 & D., 1843, 1, p.343 holding that all arbitrations were void.
- [27] *Czarnikov v Roth, Schmidt & Co.* [1922] 2 K.B. 478 at 487, 488: There must be no Alsatia in England where the Kings writ does not run per Scrutton LJ
- [28] *The Nema* supra; *The Antaios* supra for useful summaries of which see Holmes & O'Reilly supra and Dundas *Appeals on Questions of Law: s 69 revitalised* (2003) 69 ARBITRATION 172.
- [29] *Gold and Resource v Doug Hood* supra.
- [30] *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZLR 669 (CA) in which, in a gross miscarriage of justice, counsel for the respondent (David Williams QC) persuaded the court that the writers argument favouring a fiercely intrusive judicial approach should be rejected.
- [31] Clause 5(2); *Gold Resources* supra at 333 para 54 once a statutory threshold has been passed.
- [32] *Gold Resources* supra 333 para 54.
- [33] Arbitration Act 1996 (UK) s 69(3).
- [34] *Swire Properties Ltd v Secretary for Justice* ([2003] 2 HK Law Reports and Digest 986; (2003) 6 HK Court of Final Appeal Reports 236 at para 44.
- [35] This is essentially my rephrasing of the reasoning given in *Gold Resources* supra at 334. The point is illustrated in *Kiwi Homes Ltd v Lassen* (HC Auckland CP 829/98 23 June 2000, Fisher J) where leave was refused in a case in which the parties had referred to a registered building surveyor and clerk of the works a dispute bristling with legal issues foreseeably involving the law of contract, issue estoppel, accord and satisfaction, the relationship between a number of forums, novus actus interveniens, causation, remoteness and damages.
- [36] *Swire v Secretary for Justice* supra at para 49 where the same point is made in relation to s 23 of the Hong Kong legislation.
- [37] See the English practice under s 1 of the English 1979 Act discussed in Mustill & Boyd: *The Law into Practice of Commercial Arbitration in England* mmd Ed (1989) at p 609; *Swire v Secretary for Justice* supra paras 49 51.
- [38] Per Robert Goff J in *The Oinoussian Virtue* [1981] 1 Lloyds Rep 533 at 538 approved in *Swire v Secretary for Justice* supra at para 48.
- [39] *Gold Resources* supra at p 334; *Ipswich Borough Council v Fisons plc* [1990] CH 709, 724 (CA).
- [40] LC Preliminary Paper on Arbitration (1988)

- [41] *Arbitration NZLC R20* paras 93-97 cited Williams *Arbitration* [2000] NZ Law Rev 74
- [42] *Gold Resources* supra at p 334.
- [43] A point expressly made in *Gold Resources* supra at p 334.
- [44] *Gold Resources* supra at p 334.
- [45] *Gold Resources* supra at p 335.
- [46] As to which see paras 43 and 44 infra
- [47] *Ibid* 333 para 54.
- [48] *Kiwi Homes Ltd* supra at para 19.
- [49] Clause 5(1)(a).
- [50] The default provision if nothing is said on the subject; see cl 5(1)(c) and (2).
- [51] Section 6(2)(b).
- [52] Australia, Bermuda, Canada, Hong Kong, Malaysia, Portugal, Singapore, and South Africa
- [53] Examples are the United States, Germany, Ireland, Italy, the Netherlands, Finland, Chile, India, Japan, Mexico, Russia, China, South Korea and United Arab Emirates. Some, such as the United States and Switzerland, offer a range of choices, but only on an opt in rather than opt out basis see further Park, supra, p 597.
- [54] S 6(2)(a) reflects international practice: Park supra
- [55] LC Preliminary Paper on Arbitration (1988)
- [56] *Arbitration NZLC R20* paras 93-97 cited Williams *Arbitration* [2000] NZ Law Rev 74
- [57] William W Park Why Courts Review Arbitral Awards *Law of International Business and Dispute Settlements in the 21<sup>st</sup> Century* 595.
- [58] *Gold Resources* supra at 333.
- [59] *ibid.*
- [60] H R Dundas *Appeals on Questions of Law: Section 69 revitalised* (2003) 69 *Arbitration* 172.
- [61] Holmes & O'Reilly supra at p 8
- [62] Holmes & O'Reilly supra at p 6
- [63] Edmund Burke, English statesman: The individual is foolish; the multitude, for the moment is foolish, when they act without deliberation; but the species is wise, and, when time is given to it, as a species it always acts right. *Speech on Reform of Representation in the House of Commons* (7 May 1782)
- [64] Park supra at 595.
- [65] *Gold Resources* supra at paras 13, 15 pp 322 and 323 inferred from the purposes of the Act and the parliamentary debates which gave rise to it.
- [66] Holmes & O'Reilly supra at pp 8 and 9 opine that the point in issue is not whether these decisions are useful to the commercial community, but whether their value outweighs the cost of the appeals apparatus. Appeals increase the cost of arbitral dispute generally, not just in those cases which are actually appealed. They also point out that, as in New Zealand, a significant number of the reported decisions concern procedural aspects of appeals themselves, e.g. time limits, rights of further appeal, leave principles etc.
- [67] A case like *Casata*, supra, with its multiple hearings before the arbitrator, High Court, Court of Appeal, and Supreme Court, over nothing more than a rent review scarcely encourages the retention of appeal rights.
- [68] A theme developed at greater length at p 19 of David Williams QCs paper *Arbitration as an Autonomous Dispute Resolution System* delivered to this conference.
- [69] *Television New Zealand Ltd v Langley Products Ltd* [2000] 2 NZLR 250; *Pot Hole People v Fulton Hogan* (2003) 16 PRNZ 1023 ; *Cullen Investments Ltd v Lancaster* (27 September 2002, HC, Auckland, M 908-IM01 Chambers J); although *Beattie v Attorney-General* (11 June 2004, HC, Auckland, CIV 2003-404-3166) was more deferential to the presumption of confidentiality in s 14
- [70] Report 83 *Improving the Arbitration Act 1996* (NZLC R 83 February 2003 paras 100 and 101.
- [71] *Ibid* para 101(d) recommending that the court be required to take into account the open justice principle and the desirability of confidentiality in arbitral proceedings
- [72] *Ibid* para 100.