

CHALLENGES TO THE ARBITRATION AWARD: LEGAL PERSPECTIVES FROM THE UK CONSTRUCTION DISPUTE CASES

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Abstract

The Arbitration has always been the favourite choice for dissenting parties to resolve their conflicts in construction disputations. Policies legislated under the Arbitration Act 1996 often emphasised the concept of fair resolution to ensure that the arbitrator’s award, which is a binding decision after the arbitration, would achieve the proper and fair settlement for the parties in dispute. Nevertheless, there are still many persisting cases reported to the courts that disagreeing parties have to challenge the arbitrator’s award due to the inherent controversies arising from the arbitration proceedings. In this paper, it was discovered that the disputed cases can only be brought to the courts through three main provisions under the Arbitration Act 1996, the first provision is on the ground to challenge the arbitrator’s jurisdiction (section 67 of the 1996 Act), the second is for challenges on the serious irregularities (section 68 of the 1996 Act) and the third provision allows appeal against the questions of law (section 69 of the 1996 Act). Based on the above findings it was decided to conduct a further analysis. A thorough research and compilation of relevant cases was carried out which identified 29 court cases specifically referring only to the UK construction disputations. The lengthy analyses on these court cases, disclosed the legal principles applied by the courts to dispense the appropriate settlements. Further studies indicated that about 58 percents of the various categories of challenging the awards were rejected by the courts. The courts are greatly impacted by the strict rules regulating the 1996 Act, which require them accept challenges only under extreme circumstances. Perhaps unfortunately, such restrictions, have in a way, constrained the discretionary power of the courts to intervene in the arbitration awards.

Keywords

arbitration award, challenges, jurisdiction, serious irregularities, questions of law

1. Introduction

In construction industry, arbitration is a notable approach that is normally preferred as a means of dispute resolution. It is well known for being speedy in resolving a dispute, for avoiding cumbersome court proceedings and for the cost saving in settling a dispute as well as for the finality of the decision made by the third party (Dedezade, 2006). According to Lennehan (2006), construction disputes that are being adjudicated through arbitration are more related, in nature, to contractual problems such as variations, extensions of time, losses and expenses, design and workmanship conflicts, and the like. Arbitration is

known to be a quasi-judicial process whereby the impartial third party referred to as the arbitrator is engaged to settle conflicts.

As the arbitrator is the decision maker in the arbitration proceeding, the need for a high qualification is not the sole prerequisite to become an arbitrator. This impartial person must also have specialised knowledge and competency in the relevant fields relating to the issues referred to him (Celik, 2009). Therefore, it would be more advantageous if an arbitrator has a considerable amount of knowledge and expertise in the construction fields to resolve conflicts related to construction technicalities.

In the UK (England, Wales and Northern Ireland), arbitration has been practised for more than 300 years ago. Today, the current Act, known as the Arbitration Act 1996, governs arbitration commencing on and after 31 January 1997. Stephenson (2001) states that the statutory framework in this Act has blended the existing statutes and common law principles into a clearer perspective. It was introduced to give a fresh guideline based on the consolidated and standardised provisions from the previous Acts' policies. As an alternative to a court, Netherway (1997); Harris *et al.* (2007); Toulmin (2009) agree that the 1996 Act's policies have promoted the efficiencies of the arbitral proceeding especially on party autonomy, which is to enhance the "fair resolution" concept during the arbitration proceedings.

2. Challenges to the Arbitration Award

The decision made by the arbitrator, commonly known as the "arbitration award" is binding and must be accepted by the disputing parties. Nevertheless, the utmost care and consideration must be ensured so that the award is reliably enforced and able to resist future challenges. Although the 1996 Act has been widely applied as the current legislation to resolve various conflict issues in construction law, maritime and other commercial arbitrations, there have been many cases over recent years that have involved hearings through litigations on the arbitration awards. This has happened when the aggrieved parties in the arbitration have disagreed with the award determined by the arbitrator, and have consequently challenged it in the courts. It must be understood that the courts have the power to interfere with arbitration awards that contain ambiguities.

Hence, there are three sections introduced in the 1996 Act that allow any disagreeing party to challenge the award in litigations. The first, which is section 67, concerns the issue of the substantive jurisdiction of the arbitrator. The second part in section 68 deals with the challenges on the grounds of "serious irregularity". The final section, which is described in section 69, provides the grounds to appeal against the award on the question of law.

2.1 Arbitrator's Lack of Jurisdiction

According to Carey and Gallagher (2006), when a contention is made by a losing party against the terms in the arbitration agreement then a challenge against section 67 could be raised. Based on the Report on the Arbitration Act 1996 which was produced for the UK Commercial Court Users' Committee in the year 2006, numerous cases against the arbitrator's lack of substantive jurisdiction are normally due to arguments on whether there is any sensible contract entered by parties before or vice versa. Hence, it is important to note that once the contract ceases to exist, the arbitrator will have no jurisdiction, even when the arbitration proceedings have started. Section 67 (1) of the 1996 Act allowed two situations to challenge the award. First, the party can make the application to the court against the arbitrator for his lack of jurisdiction or, secondly, after it has been worked out the award is wrong on its merits.

2.2 Serious Irregularities by the Arbitrator

The grounds of misconduct from the former arbitration Acts have been classified and narrowed into the arbitrator's serious irregularities of section 68 of the 1996 Act. The nine grounds introduced (section 68(2) of the Arbitration Act 1996) are:

- i. Failure of the arbitrator to commit with his impartiality (breach of natural justice or unfairness)
- ii. Exceeding his powers or jurisdiction
- iii. Failure to carry out the pre-agreed procedure (that is, as set up in the preliminary meeting)
- iv. Failure to deal with issues forwarded to him
- v. Exceeding of powers by the other person or institution appointed by the parties
- vi. The award contains ambiguity and uncertainty
- vii. The award contains fraudulent elements or those against the public policy grounds
- viii. The award is formed in faulty ways and against the agreed procedure
- ix. Any irregularity during the proceeding or in the award, which is acknowledged by the arbitrator or other person or institution appointed by the parties.

During the earlier period of implementing the 1996 Act, Varela and Franklin (1997) discovered many commentators welcomed these new regulations. The concept of misconduct has not only lightened the burden on arbitrators, but the grounds to challenge the awards can only be called for justice in "extreme cases" (Davidson, 1997). Dundas (2005) explains that removal of the arbitrator must be the "most serious step... when the arbitrator's misconduct was so serious that he could not be trusted to complete the arbitration fairly and properly..." The Act also identifies the test to prove the irregularity. It must be of a "specified kind" that has induced or will induce "substantial injustice" for the party who believes there is irregularity incurred by the arbitrator. Therefore, the matter of substantial injustice is extremely important to support the challenge in the court. This requirement is not only imposed in section 68 but the courts need to have the proof that the aggrieved party has suffered the evident loss due to the irregularity.

2.3 Errors of Law by the Arbitrator

The challenge to the arbitrator's award under this section constitutes the largest category of cases brought to the courts compared to other grounds of sections 67 and 68 of the 1996 Act (Shackleton, 2003). In section 69.3 of the 1996 Act, the court would only allow the appeal against the award after considering these three main criteria:

- i. The question of law made by the arbitrator will substantially affect the rights of the party,
- ii. The question is the one that the arbitrator was asked to ascertain,
- iii. From the arbitrator's finding of facts, the court discovered the question is "obviously wrong" or in "serious doubt" after the public importance consideration has been determined by the arbitrator.

Once the application to appeal has been forwarded to the court or the grant to appeal has been given by the court, the judge would testify which particular question of law was being argued by the aggrieved party. Then, the court would decide whether it is true that the arbitrator's determination on that particular point (from his findings of fact) is obviously wrong or open to serious doubt. Many impressions in regard to this provision have been discovered. Reid (2004) and Shackleton (2002) claim that the English courts are always concerned that arbitration awards should be decided in accordance with English law. However, Sheppard (2005) claimed that an arbitrator is not a lawyer who has the experience to construe pre-existing cases of law when the dispute concerns the questions of law (i.e; interpretation of the contract term in the conditions of contract). Therefore, it can be noted that there are some difficult areas of understanding between the court's desire and the arbitrator's capabilities when the issue of law is argued from the arbitrator's award. It can be stated that section 69 has developed more tests for such challenges to be heard in the courts.

3. Aim and Objectives

The aim of this paper is to critically analyse the English court cases on issues challenging an arbitrator's award by identifying the legal principles that the courts have practiced in their judgments. This is to investigate the extent to which the courts could really intervene in dealing with such challenges.

4. Methodology

As the main analysis is to identify the common grounds often referred to in the courts and to study the extent to which the courts intervene in dealing with the issues involving challenges, the subjects specifically focus on the court cases that applied to section 67 (jurisdictional challenges), section 68 (serious irregularities) and section 69 (appeals on the questions of law) of the 1996 Act. The case law reports were searched from the LexisNexis and Westlaw websites by using specific terms such as "Arbitration Act 1996", "construction contract", "section 67", "section 68", "section 69", "jurisdiction", "serious irregularity" and "question of law". From the search, there were 29 cases identified and selected for the legal analyses and only confined to UK construction contract disputes.

In closely considering the legal principles that the courts have applied, the reading of the case law reports had to be done thoroughly. This was to ensure that the key points, such as the facts, the Act's provisions, the issues raised in the courts and the courts' approaches in dealing with such issues as well as the courts' decisions (whether to allow or disallow the challenges) were properly and reliably understood. From the various grounds for challenges, the identified issues raised in the courts concerning the arbitrators' awards were investigated. In-depth examinations of the legal principles applied by the courts were carried out to understand how the courts arrived at the decisions in their judgments. Consistency with the underlying provisions in the Arbitration Act was also a prime concern to determine the legal principles in each case.

5. Legal Analysis from the Court Cases

Findings from the one-by-one analysis of the 29 construction cases have been extracted and examined. This is to determine the legal principles that the courts have practised for issues to do with challenging arbitration awards.

5.1 Jurisdictional Challenges

Under this provision, five cases have been analysed and there are some guidelines introduced by the courts to support the findings under the jurisdictional challenges of section 67.

Amec Civil Engineering Ltd v Secretary of State for Transport [2005] EWCA Civ 291 is the only case out of the five that deals with the issue of whether there is a dispute occurring after the defendant has made the quantum claims. May, L.J. derived a reliable principle, namely that regardless of whether there is a dispute or not, it must be referred according to the facts in each case. In a quantum claim, valid disputes can arise after the second party has rejected the claim and after a reasonable time has been given to that party to consider and accept the claim. Only when a dispute has been established, would the arbitrator be able to set his jurisdiction to work out the solution for the parties. The court would have no power to challenge the arbitrator when there is a valid dispute.

In *JT Mackley & Co Ltd v Gosport Marina Ltd* [2002] EWHC 1315, H.H.J. Richard Seymour determined that the arbitrator could have a jurisdiction if the Engineer's decision has been made prior to the arbitration. Somehow, this principle is only applicable where the standard form of contract between the disputable parties has expressly stated this obligation, i.e; in the ICE Conditions of contract.

Basically, two cases namely, *Michael John Construction Ltd v St Peter's Rugby Football Club* [2007] EWHC 1857 and *Lafarge (Aggregates) Limited v London Borough of Newham* [2005] EWHC 1337 that resolved their disputes earlier through adjudication. The adjudicator's decision in *Michael John Construction Ltd v St Peter's Rugby Football Club* [2007] EWHC 1857 was made enforceable by the earlier court under part 24 of the Civil Rules Procedure (CRP). The arbitration proceeding could not be treated as undergoing the valid procedures once the enforcement matter had been resolved earlier in adjudication. Besides, in that case, the issue of the wrong party had also been raised in arbitration. The court will not accept the arbitration as valid, when the party's name in the arbitration is different from the one in its earlier adjudication proceeding. This observation is different in the *Lafarge (Aggregates) Limited v London Borough of Newham* [2005] EWHC 1337, as the adjudicator's decision was temporarily binding and it was ordered that the dispute should obtain a final determination through arbitration. In this situation, the Notice of Arbitration must be served to the other party and the arbitrator within the period stipulated in the contract. If the contract had stated the said notice must be issued within three months after the adjudicator's decision, any late service of the notice (later than three months) would cause the arbitrator to lose the jurisdiction. There was a strict rule imposed by Justice Cooke when he interpreted the contract terms (particularly in section G43(10)(b) of the main contract).

In dealing with the parties who argue the award was wrong on its merit (*Claire & Co Ltd v Thames Water Utilities Ltd* [2005] EWHC 1022), the court will only permit such challenges if the arbitrator fails to deal with the parties' submission during the proceeding. The court would normally apply a test on whether the arbitrator had fairly weighted all evidence submitted to him. Judge Jackson decided the arbitrator obtained his jurisdiction at the time he was giving directions in the proceedings and the award was determined based on all evidence available to the arbitrator at that time. From these findings, it can be summarised that six different categories of challenges have emerged from the above cases (Table 5.1).

Table 5.1: The Different Categories of Jurisdictional Challenges

ITEM	CATEGORY OF CHALLENGES	CASE	APPROVED (BY THE COURT)	DISAPPROVED (BY THE COURT)
1	No Dispute in Arbitration	<i>Amec Civil Engineering Ltd v Secretary of State for Transport</i> [2005] EWCA Civ 291		1 case
2	The Notice of Arbitration was Invalid	<i>JT Mackley & Co Ltd v Gosport Marina Ltd</i> [2002] EWHC 1315	1 case	
3	Dispute has Already Decided After Adjudication	<i>Michael John Construction Ltd v St Peter's Rugby Football Club</i> [2007] EWHC 1857	1 case	
4	Wrong Party in Arbitration	<i>Michael John Construction Ltd v St Peter's Rugby Football Club</i> [2007] EWHC 1857	1 case	
5	Late Service of Notice to Arbitration	<i>Lafarge (Aggregates) Limited v London Borough of Newham</i> [2005] EWHC 1337	1 case	
6	The Award Wrong on Its Merit	<i>Claire & Co Ltd v Thames Water Utilities Ltd</i> [2005] EWHC 1022		1 case
Total :			4	2

5.2 Challenges on the Grounds of Serious Irregularities

From the nine grounds of serious irregularity, as legislated in section 68 of the 1996 Act, four main grounds have been found where the claimant parties had challenged the award in the courts. They are:

- i. Failing to comply with General Duty of Section 68 (2)(a) : 3 cases
- ii. Failing to comply with General Duty and the Award Contained Ambiguities of Section 68 2(a) and (f): 1 case
- iii. Acting Fraudulently or the Award Contrary to the Public Policy of Section 68 (2)(g) : 1 case
- iv. Failing to deal with issues brought by the Parties of Section 68 (2)(d) : 2 cases

Seven construction contract cases have been identified where the courts have to examine closely whether any serious irregularity had really existed, and causing a substantial injustice to that party.

For all claims that were challenged under the section 68(2)(a) of the 1996 Act, *RC Pillar & Sons v Edwards and another* [2001] ALL ER (D) 232 and *Gbangbola and another v Smith & Sherriff Ltd* [1998] 3 All ER 730 are the only cases that sufficed the two requirements having met the principle elaborated in *Groundshire v VHE Construction* [2001] EWHC 8 that the courts could not intervene with the award even when they tend to disagree with some of the facts brought by the applicant. The court would only have the power to allow the challenge, after the breach of justice has been and will be substantially affected by the right of the party in dispute. In the other ground, the aggrieved party's contention under this section should not be brought to the courts unless the award was made as the final award, as discussed in *J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] EWHC 1262. As no injustice was found, Judge Jackson decided to dismiss the claimant's application.

There are occasions when unfairness (section 68 (2)(a)) might actually exist as Judge Thonton QC discovered in *RC Pillar & Sons v Edwards and another* [2001] ALL ER (D) 232. First, when the winning party had given an impression leading the second party to believe he would get payments or remedies from the award made by the arbitrator; however, the payment to the other party was more than the awarded costs. Secondly, the arbitrator failed to consider the party's cross-claim during the period of correcting the award (In pursuant to section 57 of the 1996) and finally when the corrected award was issued beyond the stipulated time (after 28 days after the application under section 57). These occasions are the points-of-issue where the challenges in the court could be allowed.

When it comes to challenging an award for containing ambiguities (section 68 (2)(f)), the court would allow the challenge in the event that the arbitrator had relied on erroneous evidence, thus causing the award to become ambiguous. A gross injustice must also be proven, and if the awarded amount was much less than the actual loss, a substantial injustice could be established. This interesting discovery developed when H.H.J. Humprey QC allowed the application under the section 57 to be waived. The author holds the view that the application can be waived when the award had actually contained a severe ambiguity, as in *Gbangbola and another v Smith & Sherriff Ltd* [1998] 3 All ER 730.

For other cases such as *L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2008] EWHC 817, the author agrees with Judge Akenhead's decision that the accusation saying the arbitrator had perjured was too extreme. This type of challenge (section 68 (2)(g)) could not be allowed when the arbitrator has disclosed some evidence in the second arbitration that was not revealed in the first. If the evidence was disclosed before the award on the first arbitration is published, no fraud can be established.

In *Home of Homes Ltd v Hammersmith and Fulham London Borough Council and another* [2003] All ER (D) 202 and *McLean Homes South East Limited v Blackdale Limited*, Unreported, QBD, 2 November 2001, the courts deal with allegations that the arbitrator fails to decide the issues dispatched by the parties

under the section 68(2)(d). One allegation said the arbitrator should not limit the recoverable costs, but must decide the award based on the party's claim. The other issue occurred after the arbitrator revoked the application for the correction of award. Judge Forbes in *Home of Homes Ltd v Hammersmith and Fulham London Borough Council and another* [2003] All ER (D) 202 and H.H.J. Humprey Lloyd QC in the latter case finds no irregularity since the arbitrator has the wide discretionary power to deal with all issues forwarded to him (for example, the arbitrator can refer the legal advisor to assist him to determine the recoverable costs, as in *Home of Homes Ltd v Hammersmith and Fulham London Borough Council and another* [2003] All ER (D) 202).

From this line of cases, the courts will not allow the challenges on the arbitrator's award when no issue of fraud has incurred from the award made by the arbitrator (*L Brown & Sons Ltd v Crosby Homes (North West) Ltd* [2008] EWHC 817). There is an expressed provision that gives a discretionary power (as allocated under section 65) to the arbitrator to decide the recoverable costs for the award depending on the complexities of the dispute (as in *Home of Homes Ltd v Hammersmith and Fulham London Borough Council and another* [2003] All ER (D) 202) and there is a 'reasonable circumstance' for the arbitrator to remedy the ambiguities contained in his earlier award, thus he can revoke the claimant's application under section 57 (*McLean Homes South East Limited v Blackdale Limited*, Unreported, QBD, 2 November 2001). From these findings, it can be therefore summarised that five different categories of challenges have emerged from the above analyses (refer to Table 5.2).

Table 5.2: The Different Categories of Serious Irregularities by the Arbitrator

ITEM	CATEGORY OF CHALLENGES	CASE	APPROVED (BY THE COURT)	DISAPPROVED (BY THE COURT)
1	Unfairness (breach of natural justice)	- <i>RC Pillar & Sons v Edwards and another</i> [2001] ALL ER (D) 232, - <i>Gbangbola and another v Smith & Sherriff Ltd</i> [1998] 3 All ER 730, - <i>Groundshire v VHE Construction</i> [2001] EWHC 8, - <i>J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd</i> [2007] EWHC 1262	2 cases	2 cases
2	The Award contained Ambiguities	<i>Gbangbola and another v Smith & Sherriff Ltd</i> [1998] 3 All ER 730,	1 case	
3	Failed to Deal with Issue (on Recoverable Cost)	<i>Home of Homes Ltd v Hammersmith and Fulham London Borough Council and another</i> [2003] All ER (D) 202		1 case
4	Failed to Deal with Issue (Correction of Award)	<i>McLean Homes South East Limited v Blackdale Limited</i> , Unreported, QBD, 2 November 2001		1 case
5	Fraud for Non-Disclosure of Document / Evidence	<i>L Brown & Sons Ltd v Crosby Homes (North West) Ltd</i> [2008] EWHC 817		1 case
Total :			3	5

5.3 Errors in the Questions of Law

The applications under the section 69 of this 1996 Act comprise the largest number of complaints in the courts after the findings of fact made by the arbitrator contain the issues of law. It is observed that the

applications to appeal any provision in section 69 will seek the court's order whether the question of law made by the arbitrator had caused the award into an error of law.

From the 17 analysed cases, there is one part where the analysis on whether the mixed findings of law and fact will cause the award into an error of law. The court could only allow the appeal in the event where there is no admissible evidence in the mixed findings made by the arbitrator. No admissible evidence means there is no any proof of how the arbitrator determined the award (i.e. no evidence to disregard the offers of settlement negotiated by the parties before the arbitration). H.H.J. Thornton in *Fence Gate Limited v NEL Construction Limited* [2001] WL 1743254 had created the opening for the court to intervene in the award after applying the above principle.

For the issue on what would amount to admissible evidence, the courts treat the arbitrator's award and the documents attached to the award as admissible evidence in order to identify the question of law arising from the award. H.H.J. Peter Coulson in *The Council of the City of Plymouth v D R Jones (Yeovil) Ltd* [2005] EWHC 2356 and Judge Jackson in *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] 4 All ER 79 applied the principle that such documents attached to the award can become the agreement to form the contract and also the submission for the quantum claims such as the Variation work's claim. While in *Surefire Systems Limited v Guardian ECL Limited* [2005] EWHC 1860, Judge Jackson had widened the approach. In this case, he agreed that the oral hearing with the parties' witnesses and the expressed provisions in the contract document are permissible evidence in the court. Thus, the questions of law would unlikely establish the errors of law, and the court will not intervene in the arbitrator's award when this evidence is relied on by the arbitrator.

In another line of cases, it is discovered that the courts would not treat the issues concerning interpretation of the contract term could raise a question of law. For example, when the contract has expressed the obligation that Architect will be responsible for the design liability on the constructed building, the arbitrator could not be wrong if he decided the failure in the design was the Architect's fault (*Sinclair and another v Woods of Winchester Ltd (No 2)* [2006] EWHC 3003). However, there was a case (*Mayhaven Healthcare Limited v David Bothma (t/a DAB Builders)* [2009] EWHC 2634) where the court found that the arbitrator had erred in law after he failed to follow with the contract's provision that the disputed party should carry out works in accordance to the contract drawings.

If there is a question of law raised from the same issue as above, the courts will not treat it as an error of law when there is exceptional reason for the arbitrator to apply his own skill, thus interpreting the term differently from the provisions of the contract; for example, if the Liquidated Ascertained Damages (LAD) rate in the contract failed to generate the genuine estimate for the delays caused by the other party outside the contract (*Braes of Doune Wind Farm (Scotland) Limited v Alfred McAlpine Business Services Limited* [2008] EWHC 426). This kind of approach is permissible by the courts, and even if it raised the findings of law, no obvious wrong could be subjected to the arbitrator. H.H.J. David Wilcox agreed with this approach in *Taylor Woodrow Holdings Limited, George Wimpey (Southern) Limited v Barnes & Elliott Limited* [2004] EWHC 3319 for the LAD issues on Partial Possession.

As illustrated in *Galliford (UK) Ltd v Aldi Stores Ltd* [2000] ALL ER (D) 302 (the 'nil' rate issue) and *Chattan Developments Limited v Reigill Civil Engineering Contractors Limited* [2007] EWHC 305 (the cancellation of LAD rate in the contract), the courts will only decide the arbitrator is wrong in law if he has wrongly interpreted the term of the contract and no admissible evidence has been attached in the arbitrator's findings. Therefore, in the author's view many construction cases that appealed under section 69 of the 1996 Act have sought for the courts to challenge the arbitrator for wrongly interpreting the contract term. However, the courts would only allow the appeal if there is an obvious wrong or serious doubt in the findings made by the arbitrator. The situations where the courts found no wrong and thus rejected the appeals were when:

- There is insufficient evidence supplied by the parties at the time the arbitrator made the decision, for instance on the discrepancies between the Employer's Requirements and the Contractor's Proposal for a Design and Build project (*CJ Pearce Developments Ltd v Oakbridge St Mellion Building Ltd* [2002] All ER (D) 68).
- The arbitrator agrees with the Architect's instruction on the issue of withdrawing the notice to warn the contractor for the dispute on the termination of employment. The Architect has the expressed obligation as the Employer's representative under the contract (*Robin Ellis Ltd v Vinexsa International Ltd* [2003] EWHC 1352)

Table 5.3: The Different Categories of Challenges for Appeals Against the Questions of Law

ITEM	CATEGORY OF CHALLENGES	CASE	APPROVED (BY THE COURT)	DISAPPROVED (BY THE COURT)
1	Wrong Interpretation between the Employer's Requirements and the Contractor's Proposal	<i>C J Pearce Developments Ltd v Oakbridge St Mellion Building Ltd</i> [2002] All ER (D) 68	1 case	
2	Wrong Interpretation in the Architect Instruction (Formation of Contract)	<i>Hallamshire Construction Plc v South Holland District Council</i> [2004] EWHC 8		1 case
3	Wrong Interpretation of the LAD rate	- <i>Skanska Construction (Regions) Ltd v Anglo-Amsterdam Corporation Ltd</i> [2002] All ER (D) 172, <i>Chattan Developments Limited v Reigill Civil Engineering Contractors Limited</i> [2007] EWHC 305, - <i>Braes of Doune Wind Farm (Scotland) Limited v Alfred McAlpine Business Services Limited</i> [2008] EWHC 426	1 case	2 cases
4	Wrong Interpretation for valuing the Variations	<i>Galliford (UK) Ltd v Aldi Stores Ltd</i> [2000] ALL ER (D) 302	1 case	
5	Wrong Interpretation for the Final Payment	- <i>Cantrell and another v Wright & Fuller Ltd</i> [2003] EWCA Civ 1565, - <i>Henry Boot Construction Ltd v Alstom Combined Cycles Ltd</i> [2005] EWCA Civ 814	1 case	1 case
6	Wrong Interpretation for the Extension of Time	<i>Henry Boot Construction v Malmaison Hotel (Manchester) Ltd</i> [2001] QB 388		1 case
7	Wrong Qualification for Variation work	- <i>Surefire Systems Limited v Guardian ECL Limited</i> [2005] EWHC 1860, - <i>Kershaw Mechanical Services Ltd v Kendrick Construction Ltd</i> [2006] 4 All ER 79		2 cases
8	Wrong Qualification for Liquidated Damages	<i>Taylor Woodrow Holdings Limited, George Wimpey (Southern) Limited v Barnes & Elliott Limited</i> [2004] EWHC 3319		1 case
9	Wrong Qualification for Loss and / or Expense	<i>Fence Gate Limited v NEL Construction Limited</i> [2001] WL 1743254	1 case	
10	Wrong Default Notice of Termination	<i>Robin Ellis Ltd v Vinexsa International Ltd</i> [2003] EWHC 1352		1 case

11	Wrong Qualification for the Design Liability after Defects	<i>Sinclair and another v Woods of Winchester Ltd (No 2)</i> [2006] EWHC 3003		1 case
12	Wrong Documents to Form the Contract	<i>The Council of the City of Plymouth v D R Jones (Yeovil) Ltd</i> [2005] EWHC 2356		1 case
13	No reference from the contract drawings	<i>Mayhaven Healthcare Limited v David Bothma (t/a DAB Builders)</i> [2009] EWHC 2634	1 case	
Total :			6	11

- There is no express term in the contract to show that offer and acceptance had been agreed to establish the contract. However, when the arbitrator decided the contract can be established after the parties attended negotiations agreed on the contract rates, this could formalise the contract between parties (*Hallamshire Construction Plc v South Holland District Council* [2004] EWHC 8).

The consequence that the court will have the jurisdiction to allow the appeal can be established in the event that the arbitrator's award has substantially affected the right of the aggrieved party, as in *Skanska Construction (Regions) Ltd v Anglo-Amsterdam Corporation Ltd* [2002] All ER (D) 172. Judge Anthony Thornton discovered the arbitrator misconstrued two clauses, namely the Practical Completion and the Partial Possession.

All cases above seek to challenge the awards for the findings of law made in the arbitrator's award within the provisions of section 69(1) until 69(7) of the 1996 Act. Section 69(8) of the 1996 Act is a separate provision where the responding party can apply for a further hearing in the Court of Appeal.

The Court of Appeal accepts a few situations where further appeal could not be heard in the court, particularly after the leave to further appeal is not granted earlier by the High Court (*Henry Boot Construction v Malmaison Hotel (Manchester) Ltd* [2001] QB 388 and *Cantrell and another v Wright & Fuller Ltd* [2003] EWCA Civ 1565). In order for the High Court to grant the further leave, 'the permission test' would be conducted. In the author's view H.H.J. Thornton in *Fence Gate Limited v NEL Construction Limited* [2001] WL 1743254 chose to allow the further appeal after the arbitrator was found to be unfair to consider the Offers of settlement by both parties. And in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814, the lateness of issuing the Final Certificate by the Engineer had raised the general public importance. The court could only allow further appeal when there is a special reason to support the appeal in the higher court. It is stated in *Cantrell and another v Wright & Fuller Ltd* [2003] EWCA Civ 1565 that the Court of Appeal has given the assurance that the court will have jurisdiction to challenge the High Court's decision when it can be proved the judge in the earlier court has breached his duty during proceeding. From these findings, it can be therefore summarised that thirteen different categories of challenges have emerged from the above analyses (refer to Table 5.3).

5.4 Analysis from the Different Categories of Challenges

Table 5.1, 5.2 and 5.3 have summarised the different categories of challenges as derived from the 29 analysed court cases. The findings are established after conducting the study on the legal principles. It can be concluded that the majority of complaints referred to the courts had failed. Except for the jurisdictional challenges, more of the complaints were approved than rejected. Overall, only 42 percent (13 complaints) of the challenges were approved in the courts. It can therefore be concluded that 58 percent of the complaints from different categories of challenges failed after the courts gave their jurisdiction. This finding proved that the courts have significantly restricted their discretion to entertain the various challenges of construction contract disputes in the UK construction industry.

6. Conclusion

From the legal analysis on the jurisdictional challenges (section 67 of the 1996 Act), an interesting finding is that the arbitrator will have jurisdiction when there is a valid arbitration proceeding. Most of the issues compiled from the case studies were concerned with challenges on matters regarding the Notice of Arbitration and there was only one concerning a complaint about the award's merit.

The first issue concerning the validity of the dispute was questioned by the aggrieved party. In considering this issue, the court looked at the overall facts as presented in the cases, then decided the dispute as valid once the other party had rejected the claim (within the reasonable time given to him). Under the ICE Conditions of Contract, if the arbitrator had determined the award before the Engineer had resolved the dispute, the court would treat the award as flawed. Under this contract, it is a condition precedent that the Engineer's decision must be decided prior to arbitration. For the issue concerning the wrong party in the said notice, the court imposed a strict rule when the arbitrator conducted the proceeding where the party presented a different name than in the earlier adjudication proceeding. This challenge was allowed and the arbitrator lost jurisdiction in the arbitration proceeding. If the enforcement of the adjudicator's award (through the summary of judgment in part 24 of the CRP) had been obtained before arbitration, the court would have decided that the arbitrator had no jurisdiction when the dispute continued in the arbitration. The court also regarded the late service of Notice of Arbitration (to the other party and to the arbitrator) from the stipulated period in the contract as one of the permissible grounds for the jurisdictional challenge. No challenge on the award's merit can be allowed when the arbitrator has fairly weighed all evidence submitted to him.

From the series of analyses on the procedural irregularities (section 68), seven cases were examined. Some principles were identified and the courts applied two tests, one to establish whether there was any irregularity and another one to establish whether any injustice had been induced from that irregularity. A glaring case of unfairness on the part of the arbitrator's happened when a party who won the award was asked to pay the loser a specific amount from the award, much larger than the amount already decided. In another situation, the failure to deal with the party's cross-applications and the issuing of the amended award later than the stipulated period in the Act were permissible under section 68(2)(a). In another discovery, the court considered the irregularity was induced when the arbitrator referred to erroneous evidence, thus leading to ambiguities in the award. In this occasion, the court did not consider any application for the correction of the award (section 57) was necessary as the challenge could be brought directly under section 68(2)(f). Then, the arbitrator's interim award decided before the final award was given, could not be considered as the arbitrator's breach of natural justice under the section 68(2)(a). The court will not treat the failure of non-disclosure of documents which is not "reprehensible" as permissible under section 68(2)(g). Apparently, the court has really restricted its power for applications under section 68(2)(d) where the express provision in the Act allows the arbitrator to limit the award's cost by using his or her wide discretionary power to deal with issues forwarded by the parties.

Under the appeals on questions of law (through the various procedures in section 69), many principles have been derived. Significantly, the issue of admissible evidence has become the most disputable complaint in litigations. It has been discussed that the court will consider the award and the appended documents as the main evidence in the courts. In some occasions, the wider approach will be allowed, especially when insufficient evidence is available. For this occasion, the terms in the contract can be permissible as the main source to be referred to in the court. Nevertheless, the court would never allow the misinterpretation of the contract's term as a correct approach. Besides, an award that was made without making any reference from the contract's term could also cause the award becoming defective especially when the arbitrator had made his finding based on unreliable sources.

In another observation, even the issue of interpreting the contract's term could become a finding of law (especially when there are exceptional circumstances where the arbitrator has to make the term unenforceable), the test for being obviously wrong (that is, the finding of law) will have to be conducted. This is to decide whether the arbitrator has arrived at the correct decision in his award. When the award made by the arbitrator is obviously wrong and has substantially affected the right of the aggrieved party (that is, due to the misinterpretation of the contract's term, the party has to pay a huge amount to the other party), then the court will intervene and act justly. In another line of observations, the further appeal to the higher court (that is, to the Court of Appeal), can only be given after two factors have been conceded. First, the leave for the further appeal has been granted earlier by the lower court and, secondly, there must be a "special reason" (that is, the arbitrator's unfairness has affected both parties during the proceeding) for the further appeal to be heard in the superior court.

It can be concluded that more than half of the complaints, consisting of different backgrounds, facts and issues in challenging the arbitrator's award, failed to win their cases in the courts. It is proven that the scope of the courts' jurisdictions on the arbitrator's conduct is strictly limited to extreme circumstances, and when it reached to that extent, litigations must be referred to resolve the dispute.

7. Recommendations

The UK is well-known for its English arbitration system which is also used in some parts of the world. Besides, many international cases of arbitration also prefer to be seated in the UK. As such, it can be recommended that further research can be conducted by taking account of international arbitration practices in the same way as it has been researched in this paper. It is believed many advantages can be gained if this idea materialises.

Furthermore, cases of dissatisfaction which commonly occur during the determination of awards and after they have been granted by the arbitrator are discussed. It comes with the expectation of gaining positive recognition not only among the participants in the construction industry but also the legal advisors involved in solving the post-arbitration issues and conflicts in future. It is also hoped that this research will be acknowledged for overview by the policy makers who are either directly or indirectly involved in legislating the Arbitration Act. It is for them to address the implications of the growing challenges to arbitrators' awards that have happened over the years.

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