



**THE SOCIETY OF CONSTRUCTION ARBITRATORS**

**LONDON**

**8<sup>th</sup> OCTOBER 2008**

**HER MAJESTY'S JUDGES:  
FRIEND OR FOE?**

**Richard Fernyhough QC  
Keating Chambers**

## 1. **Introduction**

It is now 12 years since the Arbitration Act 1996 came into force and certain patterns have emerged as to the attitude of Courts when their supervising powers have been invoked by disappointed parties.

The purpose of this paper is to consider whether or not the English courts can be seen to be supportive of arbitration by reference to their decisions in some recent reported cases.

One of the principal indicators, apart from the sentiments expressed in judgments, is the extent to which challenges to awards are successful. It is taken as a given that, where the commercial stakes, whether of money or principle, are large enough, a party disappointed by an award may feel inclined to try to challenge it. The existence of such a possibility of itself proves nothing about the supportiveness or otherwise of the legal system for the process of arbitration. It is rather how the judges receive the challenges which come before them and their readiness or otherwise to become engaged in reconsidering the dispute which characterises their attitude as interventionist. Before embarking on examination of the cases it is desirable to consider why it matters whether the judges are interventionist or non-interventionist in dealing with the arbitration process.

## 2. **Why the intervention/non-intervention issue is significant to arbitration**

- Commercial desirability of respecting intentions of the parties: court should uphold the bargain formed and give effect to party autonomy.
- Avoidance of unnecessary cost and delay through duplication of dispute resolution processes.
- Undermining of certainty of parties in finality of award.
- Undermining confidence in competence of arbitrators.
- Competition between arbitration centres; economic importance of international arbitration to London.

### 3. Challenges under section 68 Arbitration Act 1996

#### *Section 68 – Challenging the award: serious irregularity*

*(1) A party to arbitral proceedings may...apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.*

...

*(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—*

*(a) failure by the tribunal to comply with section 33 (general duty of tribunal);*

*(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);*

*(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;*

*(d) failure by the tribunal to deal with all the issues that were put to it;*

*(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;*

*(f) uncertainty or ambiguity as to the effect of the award;*

*(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;*

*(h) failure to comply with the requirements as to the form of the award; or*

*(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.*

*JD Wetherspoon plc v Jay Mar Estates [2007] 113 Con LR 101 TCC*

The applicant pub chain sought to challenge an award on a rent review. In performing the review, two licensed premises were presented to the arbitrator as comparables. However, the arbitrator found that the premises were not good comparables, and made

his own inspection. Wetherspoon claimed that the arbitrator was in error in disregarding submissions and relying on his own methods of assessment without giving the parties opportunities for further comment on them.

The court held that: *“The arbitrator is fully entitled to make use of his own experience in reaching his conclusions, provided it is of a kind and in the range of knowledge that one would reasonably expect the arbitrator to have, and providing he uses it to evaluate the evidence called and not to introduce new and different evidence”* (para. 10). Moreover, the arbitrator could deploy evidence given in a case in a way that was materially different from the way in which the parties' valuers deployed that evidence, provided that the point had been brought into the arena by the valuers themselves or that they had had an opportunity to address it. The court found that nothing in the arbitrator's conduct could be said to have made a real difference to the outcome of the case, and therefore could not be said to constitute serious irregularity within s.68 of the Arbitration Act 1996.

*Bandwidth Shipping Corp v Intaari (The Magdalena Oldenorff)* [2007] EWCA Civ 998, CA

A dispute over who was at fault because an ice-breaker had to be wintered in the Antarctic went to arbitration. The owners sought to challenge the arbitrator's award in favour of the charterers under s.68 and s. 33(1) (tribunal must give each party a reasonable opportunity to put its case and respond to its opponent's case). They argued that they had not been given a fair opportunity to deal with what turned out to be a pivotal submission by the defendant at arbitration, as the arbitrators must have been aware that their counsel had failed to deal with the point, and should have drawn his attention to this fact.

The Court of Appeal dismissed the application. They applied *Lesotho Highlands* and held that ss. 68 and 33(1) set very high hurdles and should not be used as a 'back door' for appealing arbitration decisions: *“In my view the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an award or its remission by reference to section 68 and in particular by reference to section 33.”* (para. 38, per Waller LJ).

The tests should be approached by reference to the conduct of the arbitrators and whether they acted unfairly and not by reference to the general conduct of proceedings. It would place an unfair burden on the tribunal, where they did not appreciate that a point was being missed, to check whether a party understood what was being said.

*Suen Wah Ling v China Harbour Engineering Co.* [2007] BLR 435 HK CA

The Hong Kong Court of Appeal dismissed on appeal from an application to set aside an award on the grounds of the arbitrator's apparent bias. The arbitrator had advised the appellant in conference on the matter some six years previously, and three years before the arbitration began. However, both appellant and arbitrator had forgotten about the advice completely. The court found that because the arbitrator was ignorant of the previous advice, the fair minded observer could not conclude that there was any danger or bias, or of subconscious bias. The court also found that the arbitrator was not obliged to check his files and was entitled to assume that both parties considered him suitable to act.

*Sumukan v Commonwealth Secretariat* [2008] 116 Con LR 17 CA

Sumukan's predecessor in title had entered into a contract with the respondent to create a prototype website for the government of Namibia. The contract included a term providing for disputes to be referred to the Commonwealth Secretariat Arbitral Tribunal for settlement by arbitration in accordance with the tribunal's statute, which formed part of the contract. A dispute arose as to whether title to the prototype website had passed to the secretariat or had remained in Sumukan's predecessor. The dispute was referred to the tribunal, headed by the president of the tribunal, who made an award in favour of the secretariat. It was accepted that the President had not been appointed as a member of the panel or as president in accordance with the appointment procedure in the relevant statute which required consultation with the member states.

The judge held that the President's appointment as a member and president was nevertheless effective by virtue of art.IV(7) of the statute, which provided for the

president to hold office until a successor was appointed. The secretariat and tribunal submitted that the procedural failure was of a kind that did not lead to an invalid appointment, or had been cured or was something that S was precluded from relying on by the Arbitration Act 1996 s.73 .

The Court of Appeal allowed the challenge to the panel's decision. The arbitration clause in the contract between Sumukan and the Commonwealth Secretariat in effect gave the latter the right to appoint the tribunal and this one-sided provision, although not struck down, appears to have influenced the court's hard line on failure by the Secretariat to observe its procedure properly: *"In my view Sumukan are entitled to say that even if they must be taken to have agreed to a tribunal appointed without any input from them, and with a major influence of the party with whom they were contracting, they were at least entitled to rely on compliance with any measure that might protect even to a small degree the independence of the panel or President."* (para. 30, per Waller LJ).

The court found that the Secretariat had not appointed the tribunal in accordance with its prescribed procedure and so the appointment and the award was invalid. Sumukan could not with reasonable diligence have discovered the defects in the process for the purposes of s.73 and so did not lose their right of action.

*Norbrook Laboratories Ltd v A Tank* [2006] BLR 412 Commercial Court

In order to resolve a dispute which arose between Norbrook and the second respondent, a small privately-owned company, in relation to a contract for the sale of pharmaceutical equipment, both parties agreed, pursuant to the contract, for an arbitration in accordance with the Arbitration Rules of the Institution of Chemical Engineers and a chartered engineer (Tank), was duly appointed as arbitrator. At the outset, it was agreed that the arbitration would be conducted in accordance with the short procedure laid down in the rules. Norbrook's solicitors informed Tank that they were terminating the short procedure and requiring an oral hearing. The arbitrator awarded costs to the other party, and Norbrook applied to have the arbitrator removed as (1) his impartiality was doubtful because: he should not have contacted the witnesses without informing the parties and disclosing what was said; his dislike of the solicitors brought a risk of bias towards his

treatment of Norbrook; and his permission of the use of expert evidence from one of the other party's employees demonstrated a preference towards that party, and (2) the decisions should be set aside as his conduct amounted to a serious irregularity and caused substantial injustice to Norbrook as the arbitrator failed to deal adequately with the letter serving notice to terminate the short procedure.

The applicants succeeded in obtaining the order removing the arbitrator and setting aside the award. The court held that the fact the arbitrator had initiated direct and unilateral contact with the parties, specifically one of the parties (not its legal representative) and had also made direct and unilateral contact with three witnesses was a failure to conduct proceedings fairly and properly, and was a procedural irregularity. While the I Chem E Arbitration Rules allowed the arbitrator to take the initiative in ascertaining facts, this was subject to the requirement of fairness. In particular, great care was required to ensure that the parties had an opportunity to know what was said by the witnesses contacted, even if they refused to give evidence.

#### **4. Challenges under section 69 of the Arbitration Act 1996**

##### *Section 69 – Appeal on point of law*

*(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.*

*An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.*

##### *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd [2006] CILL 2359 TCC*

The appellant subcontractor had been engaged by the respondent main contractor to supply and install mechanical services in a new hospital building. The subcontract comprised a modified version of the JCT standard form of subcontract supplemented by correspondence between the parties which included a "qualification" providing that the subcontract costing would be adjusted if the final design information supplied to the

subcontractor differed from that which had been originally supplied. There was an arbitration over what sums were due to the subcontractor on its final account. The appellant argued that the arbitrator had erred in his interpretation of the qualification and as a result had erroneously rejected a number of variation items and had awarded too small an amount in respect of others. The court considered the correct approach to an appeal under s.69.

The court dismissed the appellant's arguments, but discussed the philosophy underpinning judicial interpretation of the provisions in the Arbitration Act governing challenges to awards. The court rejected the idea of a philosophy of outright non-intervention and distinguished between s.69 challenges (as in this case) and s.68 serious irregularity challenges as in the *Lesotho Highlands* case. The court agreed with the submissions of the respondent that *Lesotho Highlands* was "irrelevant" to s.69 cases. In discussing the deference that should be given to an arbitrator's decision on points of law, the court held that the arbitral award should be read "as a whole in a fair and reasonable way", and should not be subjected to "minute textual analysis" (para. 57). Moreover, the court should accord some deference to the arbitrator's decision when she has used her own experience. However, despite quoting judicial *dicta* to the effect that tribunals should be very slow to differ from an arbitrator's decision, Jackson J did not himself emphasise this principle among his conclusions, perhaps suggesting a preference for a more interventionist approach.

*Essex CC v Premier Recycling* [2006] EWHC 3594

The appellant local authority sought permission to appeal an arbitrator's award under s.69. The arbitration agreement between the parties stated that they would jointly appoint an expert to provide a "final and binding" decision. The respondent sought to argue that the terms of the arbitrator's appointment and the wording of the contract excluded any appeal of the award to the courts, or, in the alternative, the agreed wording was a persuasive matter to be taken into account when considering whether to allow an appeal.

The court held that:



*“the use of the words "final and binding", in terms of reference of the arbitration are insufficient to amount to an exclusion of appeal. Such a phrase is just as appropriate...to mean final and binding subject to the provisions of the Arbitration Act 1996”* (para. 22).

The words had to be considered in the context of the other circumstances of the arbitration. The court held clear wording was necessary to amount to an agreement to preclude the right of appeal under s.69(1), although an express reference to s.69(1) was not necessary. However, the wording, the reference to an expert and the requirement of a quick procedure were matters of great weight in deciding whether it was just and proper for the court to decide the question. In the circumstances, they were sufficient to preclude the grant of leave to appeal.

*Michael John Construction v St Peters RFC* [2008] 115 Con LR 134

The appellant construction company (MJC) appealed against a decision of an arbitrator that he had jurisdiction to conduct a hearing in an arbitration brought in the name of the respondent rugby club. There were problems with the payments from the club to the constructors and adjudication was commenced. The adjudicator made an award against a member of the club, Mr Matthews, as signatory to the contract and the club’s trustees. To enforce the adjudication, the court held the construction company could pursue either the trustees or Mr Matthews. The construction company pursued the trustees. The club subsequently served a notice of arbitration on MJC in the name of the club represented by Mr Matthews. MJC disputed the club's entitlement to commence arbitration proceedings and argued that arbitration had to be initiated in the name of the trustees. It was the club's case that the enforcement proceedings were not binding on the arbitrator. On a preliminary issue, the arbitrator held he had jurisdiction and ruled that the employer under the contract was Mr Matthews on behalf of all the members of the club.

MJC submitted that the question concerning the parties to the contract had already been decided and that Mr Matthew’s submissions did not justify an inference that he had been given the express authority of the club's members to sign on their behalf. The club submitted that he had been given such express authority.

The court allowed the appeal. The arbitrator erred in law by permitting the club to impugn the finding of the court in the enforcement proceedings as to the parties to the contract and, therefore, to the arbitration contained in the contract; *“It can only be in the most exceptional circumstances that a party may be permitted to bring forward further material relevant to the issue already decided by a court, in subsequent proceedings”* (para 38, per HHJ David Wilcox). By permitting the club to adduce further evidence the arbitrator had failed to consider whether it was material which could not by reasonable diligence have been adduced in the earlier proceedings. The material the club had sought to adduce was clearly material which could have been adduced earlier.

## 5. Challenges to Jurisdiction

*Section 67 – Challenging the award: substantive jurisdiction*

*(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—*

*(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or*

*(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.*

*Fiona Trust & Holding Corporation v Privalov* [2007] 114 Con LR 69 and BLM Vol.25 No.1 HL

The owners of a ship alleged that a number of charter parties in shipping transactions had been procured by bribery. The charterers had sought to enforce their rights in arbitration under the arbitration agreement, but were met with an application to restrain arbitration proceedings on the ground that the contract, and therefore the arbitration agreement, had been rescinded for fraud.

The Court of Appeal rejected the arguments advanced in favour of restraining the arbitration. The arbitrator was entitled to consider the bribery issue in relation to rescission; the argument that this was beyond the scope of the arbitration agreement

failed. Equally unsuccessful was the contention that the arbitration clause fell with the contract, if it had been validly rescinded. The Court of Appeal held that “*the arbitration clause is a separate (and unrescinded) agreement unimpeached by the claim to set aside the charter parties and wide enough to determine whether the charter parties can indeed be set aside*”. In the result, it was the claim to rescission in litigation which should be stayed and the application to stay the arbitration dismissed. The attention paid to the international perception of the decision was very clear from the court’s concern that failure to stay the litigation proceedings would be inconsistent “with this country’s obligations under the New York Convention”. More generally, the Court of Appeal was at pains to emphasise that “any jurisdiction or arbitration clause in an international commercial contract should be liberally construed”, supporting “the presumption in favour of one-stop arbitration”.

The House of Lords upheld the Court of Appeal’s decision. Lord Hoffmann’s analysis of the requirements of the parties to a commercial agreement clearly influence the court’s robust attitude to the legalistic arguments urged by the appellants: “*The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction*”. Lord Hoffmann quoted with approval the approach of German law (Bundesgerichtshof’s Decision 27/10/70). “There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals”. This case not only supports the independence of the arbitration clause and its severability from the principal contract, but also the broad interpretation of it to cover all disputes.

*Braes of Doune Wind Farm v Alfred McAlpine* [2008] BLR 321 TCC

The applicant employer under an EPC contract for works in connection with the provision of wind turbine generators at a site near Stirling in Scotland applied for leave to challenge an arbitration award on a point of law. The contract was under English law and the CIMAR regime, with the arbitration seat in Glasgow. The contractor argued that the English court had no jurisdiction to hear the application.

Akenhead J in the TCC rejected this argument. He found that the parties had agreed to 'exclusive' jurisdiction for the English courts. The "*agreement that the 'seat' of arbitration was to be Glasgow, Scotland must relate to the place in which the parties agreed that the hearings should take place. However, by all other reference the parties were agreeing that the curial law or law which governed the arbitral proceedings was that of England and Wales...where in substance the parties agree that the laws of one country will govern and control a given arbitration, the place where the arbitration is to be heard will not dictate what the governing or controlling law will be*" (para. 17(f)).

*C v D* [2008] 116 Con LR 230 CA

The 'Bermuda Form' of insurance contract states that it is governed by New York law but that the seat of the arbitration should be London. The liability insurer sought to challenge a London arbitration award in the US Federal Courts under New York arbitration law. The respondent company sought to uphold an anti-suit injunction from the lower court, submitting that the judge was correct to decide that, once it was clear that England was the seat of the arbitration and that English law was, therefore, the curial law of the arbitration, it followed that the parties intended that the award could only be challenged in ways which were permissible under English law and not by attacks permitted by other laws, including those permitted either by the proper law of the underlying insurance contract or by the proper law of the arbitration agreement, if different.

The Court of Appeal held that, by choosing London as the seat of arbitration, the parties impliedly agreed that the arbitration would be governed by English law. The Court

clarified the position: “*a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award*” (para 17, per Longmore LJ). As a matter of construction of the insurance contract, the parties incorporated the framework of the Arbitration Act 1996. The parties' agreement on the seat and the curial law necessarily meant that any challenges to any award had to be only those permitted by that Act. An agreement as to the seat of an arbitration was analogous to an exclusive jurisdiction clause and any challenge to the award was to be made only in the courts of the place designated as the seat.

*Taylor Woodrow Construction v RMD Kwikform* [2008] All ER (D) 274

Following the collapse of scaffolding provided by the defendant, the claimant contractor's solicitors sent a letter noting that the contract contained provision for arbitration and asking whether the defendant would rely on that or would agree to participate in litigation. The claimant then obtained unilateral appointment of an arbitrator by the President of the Chartered Institute of Arbitrators. The claimant submitted that the letter contained an agreement as to when arbitral proceedings were deemed to be commenced for the purposes of s.14(1) of the 1996 Act, namely when one party gave to the other party "notice in writing of such dispute question or difference". The defendant disputed this in the absence of any express words to enable a court to hold when commencement of the arbitration was to be regarded as taking place.

The court accepted the defendant's contention that there had been no valid reference and so no commencement of the arbitration: “[the letter] *does not make it objectively clear that TWC was referring the dispute to arbitration or that, by implication or otherwise, TWC was requesting RMD to commence the process of agreement of an arbitrator*” (para 38, per Ramsey J). The arbitrator was thus not validly appointed.

## 6. Injunctions

*Cubbitt Building v Richardson* [2008] CILL 2585 TCC

The claimant engaged the defendant as roofing subcontractors and sought to deduct liquidated damages for an alleged delay in completing the works. The claimant sought a declaration that arbitration proceedings should be stayed pending adjudication.

In refusing the claimant's application for a stay of arbitration pending adjudication, the court emphasised that whether there should be a stay during the arbitration was entirely a matter for the arbitrator's discretion. There was no obligation under the terms incorporated into the contract to refer a dispute to adjudication, but a party was able to do so at any time. If the parties were involved in arbitration, application would be made for relief which could be built into the arbitration timetable if the arbitrator thought fit, because, applying the overriding objective, it involves a prospect of resolution. However, an order for a stay should not be granted if it would prevent expeditious resolution by arbitration (or litigation) already commenced.

*J Jarvis & Sons Ltd v Blue Circle Dartford Estates Ltd* [2007] BLR 439 TCC

The applicant main contractor sought to discontinue arbitration through an injunction or challenging the interim award of the arbitrator.

The court considered the conditions under which it could restrain continuance of an arbitrator. The court held that the power under s.37 Supreme Court Act 1981 to grant injunctions does include a power to prevent an arbitration from proceeding. However, in light of the principles of the Arbitration Act 1996 "*its exercise will now be even more sparing than before*" (para 39, per Jackson J). That power can be exercised if two conditions are satisfied:

- i) the injunction does not cause injustice to the claimant in the arbitration and
- ii) the continuation of arbitration would be oppressive, vexatious, unconscionable or an abuse of process.

Further, the court found that the prospect of concurrent proceedings is not of itself enough to make an arbitration vexatious, unconscionable or an abuse of process.

*A v B* [2006] EWHC 2006, All ER (Comm) 591

Two brothers carried on a business trading through companies in London and the Bahamas. They fell out and appointed a solicitor to determine their differences. The arbitration commenced in Switzerland, but one brother (A) issued proceedings in the Bahamas and London, in the latter claiming that the arbitration agreement was void and unenforceable. The other brother (B) submitted that the claim should be stayed and the issue decided by the arbitrator, on review by the Swiss courts. A claimed that the arbitration exception under Regulation 44/2001 did not apply to the claim and no stay should be granted.

The court stayed the claims against B as they fell within the arbitration exclusion in Regulation 44/2001, or were inextricably bound up with claims that did fall within the exclusion. The court found also that it “retains an inherent jurisdiction to stay English proceedings in favour of arbitration in a case where there is an issue whether the parties entered into a binding agreement to arbitrate or whether the subject matter of the action was within the scope of the arbitration” (para. 107, per Colman J); there had to be strong cause or reasons in the interests of justice for the court to retain jurisdiction and to restrain a foreign tribunal in circumstances where the foreign courts had been agreed to be exclusively vested with that function.

*West Tankers Inc. v RAS Riunione Adriatica di Sicurtà SpA* [2007] Con LJ Vol. 23 No. 6 458 HL

The appellant insurers (RAS) appealed against an order granting an injunction restraining them from proceeding with an action that they had commenced against the respondent shipowner (West) in Italy. A vessel owned by W and chartered to an Italian oil refinery company (Erg) had collided with a jetty owned by Erg. The charterparty was expressed to be governed by English law and contained a clause providing for arbitration in London. Erg claimed under its policies with RAS, which began proceedings against West in Italy to recover the amounts that it had paid to Erg. West later issued the instant proceedings,

asserting that the dispute that was the subject of the proceedings in Italy had arisen out of the charterparty and that RAS were therefore bound by the agreement to refer the dispute to arbitration in London. Accepting West's submissions, the judge had granted an injunction in its favour. The issue was whether a court of a Member State could grant an injunction against a person bound by an arbitration agreement to restrain him from commencing or prosecuting proceedings in breach of the agreement in a court of another Member State that had jurisdiction to entertain the proceedings under Council Regulation 44/2001 .

Lord Hoffmann agreed with Colman J that it is open to the English courts to grant an anti-suit injunction in favour of London arbitration. Regulation 44/2001 provides that when the courts of one European member state become seized of a matter, all other European courts must not allow the same matter to proceed until the court first seized has ruled, even if the first proceedings have allegedly been brought in breach of a jurisdiction agreement. Lord Hoffmann thought that Regulation 44/2001 should not apply to prevent enforcement of an arbitration agreement. Lord Hoffman placed emphasis on the practical reality of arbitration, and the attractiveness of the supervisory court retaining jurisdiction to restrain foreign proceedings promoted legal certainty and reduced the possibility of conflicts. Lord Hoffman also noted the risk that if the Member States of the EC were unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the agreement, there was no shortage of other states outside the EC that would.

However, the House of Lords referred the question to the European Court of Justice (Case Case C-185/07 *Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc*), Advocate-General Kokott's opinion was released on September 4, 2008, and disagrees with the House of Lords' judgment. AG Kokott takes the view that the arbitration exception in Regulation 44/2001 serves only to ensure that the Regulation does not conflict with the New York Convention, and thus the Regulation could apply to anti-suit injunctions, since there was no risk of conflict with the New York Convention here. She also rejects the House of Lords' practical arguments, stating that "aims of a purely economic nature cannot justify infringements of Community law".



It remains to be seen whether the ECJ's judgment will follow the advice of the Advocate-General.

## 7. Conclusion

The Arbitration Act 1996, as everyone here present knows, sought to bolster arbitration and restore its fortunes as the commercial dispute resolution process of choice. One of the perceived evils it sought to address was the continuation of war between the parties after the arbitration award, which had come to be treated by some as merely the first battle, beginning a long campaign in the courts. This was seen as undermining certainty, commercial effectiveness, the sanctity of the parties' bargain, economical decision-making and confidence in the capacity of arbitrators.

Despite this, but unsurprisingly, the legislation preserved the means to challenge awards, principally in sections 67-69 of the Act.

So the legislature had done its bit. The other part of the equation was always going to be how the judiciary dealt with those attempted challenges which came before them. Within the now narrower opportunities for challenge, would their stance be generally interventionist or non-interventionist? If the former, revealing a willingness to engage to a greater or lesser extent in revisiting the dispute, the dangers identified would continue. If the latter, arbitration would receive the blessing which Parliament sought to confer upon it and its users.

As we have seen, the picture is broadly supportive. In major landmark decisions like *Fiona Trust* and *West Tankers*, the House of Lords has come down strongly in favour of supporting the bargain which the parties made and the process which they chose.

However, that is too simplistic as a summary of the current position. There are recent cases where challenges have been upheld. The courts have been determined to restrict their findings, but in cases like *Sumukan*, *Taylor Woodrow*, and *Norbrook v Tank*, there is a consistent theme. It is the protection of the parties from unfairness caused or potentially caused by departure from the proper procedure; not technical errors but ones

of significance to the challenger's rights, in the natural justice sense, i.e., the right of each party to a fair trial of the dispute.

The existence of successful challenges should not, it is submitted, be regarded as automatically harmful to the cause of arbitration. After the *Lesotho Highlands* case, there were suggestions that it was only by preventing challenge that certainty was protected and only thus could the future of London as an international arbitration centre be secured. That is overstated. Parliament reserved rights of challenge for good reason and where they are used for good reason, the courts are not only obliged to act but are right to do so in the interests of the process of arbitration as well as of the aggrieved party.

After all, what might be the effect on the quality of awards or the conduct of arbitrators if the Judges were to adopt a completely "hands off" approach? It is not only bricklayers or decorators whose work benefits from regular supervision!

Perhaps the real cloud on the horizon for those who support arbitration and oppose interventionism is the Opinion of the Advocate-General in the *West Tankers* case. If the European Court of Justice follows it and is going to insist that proceedings in the courts of a European member state may proceed in breach of an arbitration agreement between the parties, that will strike a major blow against the current trend to support arbitration. So if, as this survey shows, Her Majesty's Judges are broadly friendly and supportive towards the process of arbitration, its foes, if they exist at all, are likely to be found elsewhere.