Legal Error Appeals : The First Shoot Appears

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Finality is one of the underlying reasons why arbitration is often preferred to litigation as a means of dispute resolution. The arbitrator or tribunal of arbitrators is chosen with care as it is expected that their views will be final. The advantage of finality is that for better or worse a line can be drawn under the dispute and parties can move on against that background without the uncertainty that a continuing dispute can bring. That advantage comes with a price. The price is the absence of the quality control present through the review of a court. Where an award has been made without the tribunal having jurisdiction or following unfair or irregular procedure by the tribunal, it has always been acknowledged that the price for finality is too high. Parties would not have confidence in a process which allowed such errors to be made without review. What of the position regarding errors by the tribunal in choosing and applying the law to the merits of the dispute ? Should finality override quality in those situations ?

Across the world different arbitral regimes have adopted different solutions. In Scotland, prior to the Arbitration (Scotland) Act 2010, the stated case procedure under the Administration of Justice (Scotland) Act 1972 in practice allowed full review of errors of law in relation to the merits of awards. By contrast, the UNCITRAL Model Law on International Commercial Arbitration allowed no such control. In England and Wales, the Arbitration Act 1996 followed a middle way, allowing a challenge to a tribunal's award on the grounds of the erroneous application of the law to the merits in certain limited circumstances (1996 Act, s. 69). That practice had been reviewed by an English Commercial Court Users Standing Committee which reported in 2006 and found it to be satisfactory with no great demand for either exclusion or widening of legal error challenges.

The 2010 Act decided to follow the English experience in Rules 69 and 70 of the Scottish Arbitration Rules contained in schedule 1 to the 2010 Act. Parties are given the power to opt out of such challenges under these rules and the exclusion of the state case procedure is deemed to be such an opt out. The recent case **Arbitration Application No. 3 of 2011** 2012 S.L.T. 150; [2011] CSOH 164 available on www.scotcourts.gov.uk, provides an example of a challenge under these rules.

The dispute arose out of a building contract. The employer claimed against the contractor for repayment of money paid under interim assessments. The contractor counterclaimed for payment of additional sums. The arbitrator was asked to decide a number of preliminary issues. He decided these in a part award. There is some uncertainty about the terms of the part award. It may have been a declaratory award, given that Lord Glennie comments that "the result of the decision cannot presently be expressed in monetary terms". Presumably as part of the reasons for the award, the arbitrator held (1) that the onus lay on the

employer to prove that less was due than had been paid, but that the onus lay on the contractor to prove that more was due; and (2) that the employer's averments about a tender from another contractor were irrelevant to the issue in dispute.

The employer challenged the award claiming that the arbitrator had erred in law on the two issues. Rule 70(2) allows a challenge to an award by means of a legal error appeal only with the leave of the Outer House of the Court of Session unless the other side agrees. In this case the employer had to seek leave. The appeal had to be made by means of a petition to the Court of Session combined with a motion for leave to appeal being made at the same time.

In order to grant leave to appeal the Outer House has to be satisfied that –

(a) deciding the point will substantially affect a party's rights

(b) the tribunal was asked to decide the point

(c) that on the basis of the findings in fact (including any facts treated as established for the purpose of deciding the point), the tribunal's decision on the point –

(i) was obviously wrong, or

(ii) where the court considers the point to be of general importance, is open to serious doubt.

These conditions are very similar to those in section 69 (3) of the 1996 Act.

In deciding whether the point of law will "substantially affect a party's rights", English case law indicates that the rights in question are the rights under the award being challenged. Thus the point of law must by itself have the effect of substantially changing the terms of the award. The whole aim is to ensure that points of law are raised only in relation to significant rights determined in the award which hinge on the point of law.

On the first ground of challenge, the court found that the point of law regarding the onus "is likely to have a significant impact on the whole conduct of the arbitration and might well affect the final result" and therefore "substantially affected a party's rights". This seems to miss the aim of condition (a). The court does not disclose even in general terms what the award was, and so it is impossible to assess the extent to which the issue of onus affected the terms of the award. Generally speaking onus rarely affects the terms of an award although it is possible that onus could affect such rights in an award after a debate without evidence being led. However the reasoning of the court suggests that the court has not properly applied condition (a). This has the risk that challenges to awards could be allowed on points of law which would have no substantial effect on the award being challenged. That was not the intention of Rule 70 (3) (a).

Turning to condition (c), namely that the tribunal's decision was "obviously wrong", or if a point of general importance, open to "serious doubt", the court found that given that the parties had contracted under a standard form of building

contract, the point of whether the employer had the onus of proving that he paid more than he was required was one of general importance on which the court had serious doubt as to the correctness of the tribunal's decision. The doubt rested on the provisional nature of the assessments under which the employer had paid and a "possible mismatch" between the onus being placed on the employer to prove that the sum due was lower and the onus being placed on contractor to justify its claims to additional sums by proving that the overall sum due, (inclusive of sums challenged by the employer) was higher. Here the court's treatment is in line with the control anticipated by the 2010 Act.

By contrast the court found that the second ground of challenge did not involve an error of law at all. The second ground was that the arbitrator erred in law in refusing to allow the employer to lead evidence about that tender at a subsequent hearing despite that evidence being legally relevant. The court found that even if the arbitrator had erred, this did not involve an error of law for the purposes of a legal error appeal under Rule 69. It observed that under Rule 28 (1) (b) the relevance and materiality of any evidence was a matter for the tribunal to determine and that the tribunal's decision on this was not an error of law in the sense contemplated by Rule 69. This is undoubtedly correct. Firstly there is some doubt whether a decision to exclude averments of fact (in effect evidence) can be covered by the terms of award as opposed to a procedural direction or order or reasons for an award, none of which are challengeable. Secondly, if a tribunal makes such a direction under Rule 28 (1) (b) then the only conceivable remedy lies in a serious irregularity appeal under Rule 68 against the eventual award on the basis of the tribunal causing substantial injustice to a party by not giving a party a reasonable opportunity to put its case in terms of Rule 24 or perhaps not dealing with all of the issues that were put to it. Any remedy for the employer therefore lay in the future, in a possible serious irregularity appeal against the award to which the excluded averments and evidence would relate. It was therefore apt for the court to remind the employer that it was still open for him to try to persuade the tribunal of the relevance of that evidence.

Arbitration Application No. 3 of 2011 provides an interesting illustration of the concept of a legal error appeal. The differing treatment of the two grounds of challenge shows that a legal error appeal is limited to an error in the law used to decide the merits of the award and that other points of law must be brought, if possible under the heads of a serious irregularity or jurisdictional appeal. It also provides valuable guidance on the practice to be followed in making applications for leave and appeals generally and indicates that even if leave is allowed, the aim of the court is to dispose of the appeal within weeks. In the interests of finality, that is strongly to be welcomed.

Postscript

The legal error appeal was in the event refused on its merits (**SGL Carbon Fibres Ltd v. RBG Ltd** [2012] CSOH 19). Why the identities of the parties were revealed is not disclosed in the judgment.