
CVLC Three Carrier Corp v Arab Maritime Petroleum Transport Company: The English Commercial Court Provides Guidance on Arbitration Appeals on a Point of Law

MAY 5, 2021

The recent case of *CVLC Three Carrier Corp & Anor v Arab Maritime Petroleum Transport Company* [2021] EWHC 551 (Comm) is a rare example of a successful challenge under section 69 of the Arbitration Act 1996 (Act). Section 69 allows parties to an arbitration seated in England and Wales to appeal to the English courts on a question of law arising out of an arbitral award. The right to appeal under this provision can be waived by the parties and is implicitly excluded by certain institutional rules, including the LCIA and ICC Rules.¹ Even where the parties have not contracted out of it, the right to appeal is subject to strict conditions, with applicants requiring the Court's express permission to proceed. The English Commercial Court's decision in *CVLC* ([available here](#)) includes an insightful discussion of the relevant principles and provides useful guidance on how section 69 is applied in practice.

In summary, the English Commercial Court held that:

- The Court can reformulate the question of law being appealed to ensure that it reflects a point of law decided by the tribunal.
- Once permission to appeal has been granted, the Court will be loath to revisit its earlier decision and will only do so in highly unusual circumstances.
- If the appeal is successful, the Court may overturn an arbitral award without remitting the decision to the tribunal.

Background

The underlying arbitration arose out of two functionally identical charterparties between CVLC Three Carrier Corp and CVLC Four Carrier Corp (Owners) and Al-Iraqia Shipping Services and Oil Trading (Charterer). By letters of guarantee given to the Owners, Arab Maritime Petroleum Transport Company (AMPTC) had guaranteed the punctual performance of the Charterer's payment obligations as primary obligor.

Following alleged breaches by the Charterer, the Owners commenced arbitration proceedings against AMPTC and sought to arrest a vessel owned by AMPTC as security for their claims under

the guarantees. AMPTC filed an urgent application to the sole arbitrator, requesting a declaration that the guarantees included an implied term that the Owners would not seek “additional security” in respect of the matters covered by the guarantees. This implied term, AMPTC contended, prevented the Owners from arresting AMPTC’s vessel under the guarantees. The arbitrator found that there was such an implied term and declared that the Owners were in breach of the same.

In light of the urgent nature of the application, there had been no opportunity for evidence to be adduced or challenged, leaving the arbitrator unable to make any findings of fact. Instead, he based his conclusion that a term needed to be implied primarily on the language of the guarantees. In particular, the arbitrator noted that the letters of guarantee had been provided “in consideration of” the charterparty contracts. He held that this wording gave rise to an “obvious inference” that the Owners must have considered the letters of guarantee to provide adequate security because otherwise the charterparties would not have been concluded. The arbitrator therefore issued two awards making the requested declaration and holding the Owners liable for damages, interest and costs.

Permission to Appeal

In September 2020, the Owners applied to the English Commercial Court for permission to appeal the awards pursuant to section 69 of the Act. In their claim form, the Owners identified two questions of law which they submitted had been wrongly answered by the arbitrator:

1. "Is there to be implied into contracts of guarantee and indemnity which guarantee the performance of another contract an implied term that the creditors would not seek security over and above that provided by the contracts of guarantee and indemnity?"
2. If so, are creditors in breach of such implied term by arresting assets of the guarantor after the guarantor is, or is alleged to be, in breach of the contract of guarantee and indemnity?"

Among other reasons, AMPTC resisted the application on the basis that the questions raised on appeal had never been addressed by the arbitrator. Section 69(3)(b) of the Act provides that leave to appeal may only be given if the court is satisfied that the question of law which forms the basis of the appeal is “one which the tribunal was asked to determine.” In contrast to the general points of law listed in the claim form, AMPTC argued that the arbitrator had been asked to decide a narrower question tied to the specific guarantees given to the Owners.

The judge accepted AMPTC’s argument that the questions identified for the purposes of the appeal had not been put to the arbitrator in those terms. However, she found that the arbitrator had been asked to determine a point of law akin to the one set out in the claim form. On that basis, the judge granted permission to appeal in respect of a reformulated question:

"Is there to be implied into contracts of guarantee and indemnity which (i) guarantee the performance of another contract and (ii) are expressly given in consideration of the beneficiary entering into that other contract, an implied term that the creditors would not seek security over and above that provided by the contracts of guarantee and indemnity where the guarantor is, or is alleged to be, in breach of the contract of guarantee and indemnity?"

The Substantive Decision of the English Commercial Court

Cockerill J, who had already decided the permission to appeal application, went on to hear the substantive appeal. She noted at the outset that it is unusual for the same judge to hear both stages of an application under section 69 of the Act, but that in this case, circumstances required her to do so.

The first issue that fell to be determined at the main hearing was the question that had been at the heart of the permission application: whether the judge had correctly identified the relevant question of law. On AMPTC's case, the question as reformulated by the judge had not been considered by the arbitrator. For this reason, AMPTC contended that the statutory requirement under section 69(3)(b) was not satisfied and that Cockerill J had erred in granting permission. Moreover, AMPTC submitted that the court's decision at the permission stage was merely provisional and could be revisited at the substantive hearing.

The judge firmly rejected that argument. While it may not be impossible to reconsider the decision to grant permission, Cockerill J noted that this would only be done in "highly unusual circumstances," and no such circumstances existed in the present case. AMPTC's suggestion that the Court's earlier decision could readily be revisited at the substantive hearing was therefore a "novel one, and one which is not reflected in the way in which appeals have been conducted in this Court for the last 25 years."

Having found that there was no reason to re-open the permission stage, Cockerill J nevertheless proceeded to consider AMPTC's jurisdictional objection in detail. The judge affirmed her earlier decision that the question as put in the section 69 claim form differed from the question which the arbitrator had faced. This disjunction between the two questions required the judge to reformulate the point of law to be decided on appeal. Cockerill J noted that while the question of law considered by the court need not be "in exactly the form" in which it was posed to the tribunal, the question must be "inherent in the issues" which the arbitrator was asked to decide. In this context, the judge remarked that it is "often necessary to strip away the accretions of case specific drafting to arrive at the real issue of law." The Court concluded that the question as reformulated had been put to the arbitrator, and that AMPTC's jurisdictional challenge was therefore unsuccessful.

Cockerill J then turned to the substantive appeal and considered whether the arbitrator had been correct to imply a prohibition on further security. As a starting point, the judge examined whether the arbitrator had applied the right legal test. Noting the lack of authorities referred to in the award, the Court expressed doubt as to whether the arbitrator had fully appreciated the high threshold that needs to be overcome for a term to be implied. In any event, regardless of whether the correct test had been borne in mind, Cockerill J reached the "clear view" that the arbitrator had arrived at the wrong conclusion.

First, the judge observed that the Owners had a right to seek additional security – including by way of arrest – against the Charterer. Since AMPTC's had guaranteed the Charterer's performance under the contracts as primary obligor, the Court held that the same right must be available against AMPTC. Second, Cockerill J found that the arbitrator had given undue weight to the fact that the

guarantees were given “in consideration of” the charterparties. Describing the wording as “boilerplate” language found in many standard contracts, the Court concluded that it provided no basis for the implication of terms. Given the prevalence of similar expressions in generic guarantee agreements, the arbitrator’s decision would require the same term to be implied into myriad other contracts.

Finally, the judge found that the arbitrator had inadvertently reversed the burden of proof. By asking whether the parties would have assumed an *entitlement* to further security, the arbitrator had turned the relevant question on its head: the correct approach was to ask whether the parties would have assumed a *prohibition* on obtaining further security. For all these reasons, the Court held that the awards were based on errors of law and declared that the Owners had a right to seek additional security against AMPTC.

Implications

Appeals under section 69 tend to have limited prospects of success. Court statistics show that, in a typical year, permission to appeal is only granted in about 30 percent of applications.² Moreover, at the substantive hearing, applicants face an even higher hurdle to establish that the tribunal erred on a point of law. In the most recent court year for which data is available, only three out of 51 challenges were ultimately successful.³ The decision in *CVLC* explores a range of procedural and substantive aspects of the Court’s approach to section 69 appeals. As a rare instance of a successful application, the case also illustrates the high standard of review applied by the Court.

Cockerill J’s judgment is noteworthy for her detailed discussion of the process for granting permission. In particular, the Court gave valuable guidance on how to identify the relevant question of law. While the question must be “one arising out of the award and ... one which the arbitrator was asked to determine,” the judge clarified that applicants have some latitude in framing the precise point of law. Cockerill J also confirmed that applications under section 69 are not confined to pure questions of law: questions of contractual interpretation, for example, can also be appealed, despite being closely linked to the factual matrix. Further, the decision demonstrates the Court’s power to reformulate the question at the permission stage, with Cockerill J noting that “the recasting of questions of law is by no means unheard of by judges considering applications for permission.”

The decision also establishes that, once permission has been granted, the respondent will not generally be able to challenge the Court’s jurisdiction. Absent “highly unusual circumstances,” judges are reluctant to reconsider at the substantive hearing whether the appeal should have been permitted to proceed. Moreover, the judgment indicates that the Court will only allow an appeal if it is apparent that the tribunal has reached an unambiguously wrong conclusion. Cockerill J found that the award evidenced numerous errors of law and logic, including a dearth of authorities cited in support of the arbitrator’s reasoning. In its thorough analysis of the tribunal’s decision, the judgment provides valuable insights into how the Court reviews arbitral awards under section 69.

Finally, the judgment discusses the consequences of a successful section 69 application. Having concluded that the awards were based on an error of law, Cockerill J declined to remit the matter to the arbitrator. While acknowledging that remission is the default position under section 69(7), the

judge held that it would not be appropriate for the arbitrator to reconsider whether a term should be implied based on evidence that had not previously been available. Since the arbitrator did not have the benefit of factual evidence at the time he rendered the awards, Cockerill J could answer the issue on appeal as a pure question of law. On that basis, the Court substituted its conclusion – that no term was to be implied – for that of the arbitrator. The case thus demonstrates that an appeal under section 69 can lead to an arbitral award being overturned in its entirety, with no further recourse to the tribunal.

¹ See LCIA Arbitration Rules 2020, Articles 26.8 and 29.2; ICC Arbitration Rules 2021, Article 35.6.

² See the minutes of the Commercial Court User Group Meeting held on 25 November 2020, at para. 10: <https://www.judiciary.uk/wp-content/uploads/2020/12/CCUG-Minutes-November-2020-0112.pdf>.

³ *Ibid.*

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