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THE FUNCTION OF THE APPEALS MECHANISM IN ARBITRATION AND THE LAW COMMISSION'S ARBITRATION LAW REFORM PROJECT

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The function of the appeals mechanism in arbitration and the Law Commission's arbitration law reform project

Dr Kyriaki Noussia[*]

ABSTRACT

This paper examines the mechanism of appeals in arbitration and the way it is being deployed by parties in different sectors. Section 69 of the Arbitration Act 1996 permits appeals on points of law under strict requirements, ensuring the intervention of courts only in limited cases to preserve and guarantee the finality of arbitral awards. The observation of a representative body of case law reveals a tendency to misuse appeals and present questions of fact as questions of law. In this paper, the discussion focuses on appeals in the maritime and reinsurance sectors, where different attitudes established by the practice and by custom and where also parties have different approaches towards arbitration and different expectation towards appeals in arbitration. This paper then assesses the reform project of the Law Commission of England and Wales and its stance towards appeals in arbitration and attempts an overall critical evaluation of the purpose of appeals in arbitration given that s 69 on appeals on points of law was not reformed and remains the same in the Arbitration Act 2025. The paper also discusses the recently completed consultation on arbitration law in Singapore, regarding the potential to reform the International Arbitration Act 1995 and the position in relation to appeals on points of law. The paper finally proposes what else could be done to further exemplify the function of appeals in arbitration on points of law.

Keywords: arbitration, appeals, maritime arbitration appeals, reinsurance arbitration appeals, Arbitration Act 1996, Law Commission, Arbitration Act 2025, Singapore arbitration.

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1 Introduction

This paper examines the principles and practice followed by the courts concerning the application of s 69 of the Arbitration Act 1996 and highlights cases of abuse by applicants and by the courts in exercising their rights and obligations under the Act. It examines maritime and reinsurance disputes. In the former, the custom in the sector and the expectations of the parties raise a high probability of resort to appeal. In the latter case, arbitration is the standard and entrenched method of dispute resolution in the sector, and parties are less prone to resort to appeal. The paper also examines the arbitration law reform project undertaken by the Law Commission of England and Wales, which resulted in the Arbitration Act 2025,[1] and the consultation recently completed by the Ministry of Law in Singapore with the aim of a potential reform of the International Arbitration Act 1995.[2] The paper reaches conclusions concerning the appeals mechanism and more generally in relation to the reform processes, and provides a forum for recommendations as to the further development of the law in relation to arbitration appeals.

2 Setting the scene

2.1 The Arbitration Act 1979

In an article published in 1980 in *The International Lawyer*, Lord Hackman stated that the House of Commons had 'moved with great alacrity' in 1979 to pass the Arbitration Bill, which became the Arbitration Act 1979,[3] for it bettered the stance of arbitration as a dispute resolution mechanism and the position of England as a forum supportive of arbitration.[4] This legislative attempt to reform the pre-existing Arbitration Act 1950[5] and the stated case procedure and intervention of the courts through judicial review of arbitral decisions had

1 C 4. Sections 16-18 came into force on 14 February 2025, and the rest of the Act will come into force 'on such day as the Secretary of State may by regulations appoint': s 17(2).

2 <https://www.mlaw.gov.sg/public-consultation-on-the-international-arbitration-act-1994-of-singapore/>. The consultation period opened on 21 March and ended on 2 May 2025.

3 C 42.

4 Lord Hacking, 'The "Stated Case" Abolished: The United Kingdom Arbitration Act of 1979' (1980) 14 Int'l L (ABA) 95, 95-96.

5 C 27.

already been considered as a 'good step'[6], a view which he had also maintained and which received broad support. Effectively, the enactment of the Arbitration Act 1979 was the first attempt to establish and widely acknowledge the finality of arbitrations and arbitral decisions. The Act received considerable scrutiny and was considered a piece of legislation in which significant progress had been made concerning its two chief objectives. The first was to reform the procedure for judicial review of awards, both domestic and international. The second was to put an end to cases of abuse where delays were fabricated, deployed by unmeritorious defendants,[7] enabling parties to contract out of any judicial review of arbitration proceedings.[8] To the same end, Lord Diplock in March 1978, in a lecture, 'The Use and Abuse of the Case Stated',[9] called for reform of the procedure to eliminate such abuses. This view was supported by the Report of the Commercial Court Committee, addressed to the Lord Chancellor,[10] to prevent the parties from abusing the system and avoiding their commitments using procedural devices available to them by law.[11]

Hence, the Arbitration Act 1979 abolished the 'stated case' procedure, which had been established by the Arbitration Act 1950. It prohibited the right of the court to set aside an arbitral award on the grounds of errors of fact or law,[12] and, instead, replaced this option with a new appeal procedure based solely on a point of law.[13] In addition to the Arbitration Act 1979, the House of Lords in *The Nema*[14] provided important guidelines for appeals on a point of law, later reaffirmed in *The Antaios*.[15] In *The Nema*,[16] the House of Lords emphasised that a question of fact is the sole responsibility of the arbitral tribunal to define and interpret. It went on to state that it is not to be reopened by the court,[17] and that a delicate balance

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6 Mark Littman QC, 'England Reconsiders the Stated Case' (1979) 13 Int'l L 253, 258. For an analytical review of the historical developments in the law on s 69 challenges to arbitration awards under the Arbitration Act 1996, see Duncan Matthews QC, 'Sections 68 and 69 of the Arbitration Act 1996' [2021] JBL 259-272, 259, where it is argued that s 5 of the Common Law Procedure Act 1854 formalized the previous practice where a tribunal was empowered to state a special case for the court's opinion on a question of law.

7 Ibid, 256.

8 Lord Hacking (n 4), 96.

9 The Alexander Lecture delivered to the Institute of Arbitrators in February 1978: 'The Case Stated – its Use and Abuse', (1978) 14 Arbitration 107, 116.

10 *Report of the Commercial Court Committee* (Cm 7284, 1978).

11 Littman (n 6), 256.

12 Arbitration Act 1979, s 1(1).

13 Lord Hacking (n 4), 100.

14 *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 (HL).

15 *Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191 (HL).

16 Above, n 14.

17 Ibid, 753.

between the need to preserve the finality of the arbitral award and the need to guarantee the option to review the merits and the existence of a point of law in need of re-examination, lies with the courts when deciding whether to grant a leave to appeal or not.[18] This view, expressed in *The Nema*,[19] is also aligned with the predominant view established since the enactment of the Arbitration Act 1979, which mirrored the parliamentary intention to support the principle of finality of arbitration awards and to allow the option of judicial review subject to strict requirements.[20]

According to the Arbitration Act 1979, an appeal on a point of law may be brought either by the consent of all the parties to the arbitration or with the permission of the High Court.[21] In granting the requested leave, the court would consider whether the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement.[22] The court also had the discretion to impose conditions for the grant of leave to appeal where the applicant's argument was found to be fragile.[23]

However, the Arbitration Act 1979 was far from perfect. One pertinent disadvantage that characterised the Act was that it lacked a precise determination of what constituted a point of law, an ambiguity which – to a certain extent – has continued in the Arbitration Act 1996, even if the latter narrowed the scope for judicial review of an arbitration award.

The ambiguity and vagueness as to the exact extent which was permissible for the exercise of the judges' discretion on whether to grant leave to appeal on a point of law under the Arbitration Act 1979 had led to divergent practices, notwithstanding the guidelines which had been provided in *The Nema*[24] and which were later reaffirmed in *The Antaios*.[25] Although the guidelines had been issued in line with that Act in an effort to limit the scope of the exercise of the right to appeal, the main disadvantage was that they provided no solid guarantee as to their adherence by the parties or by the courts, as they were not embodied in the legislation.

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18 Ibid, 743.
19 *The Nema* (n 14).
20 Ibid, 739-40.
21 Arbitration Act 1979, s 1(3)(a) and (b).
22 Ibid, s 1(4).
23 Ibid, s 1(4); *The Nema* (n 14), 739.
24 *The Nema*, ibid.
25 *The Antaios* (n 15).

As a result, the discussion of legislative reform was instigated, and many of them were codified in s 69 of the Arbitration Act 1996.[26]

2.2 The Arbitration Act 1996

Section 69 of the Arbitration Act 1996[27] imposes four conditions before the court grants leave on a question of law. Firstly, the error of law must substantially affect the rights of one or more of the parties (s 69(3)(a)). Secondly, the question of law must be one that the tribunal was asked to determine (s 69(3)(b)). Thirdly, on the basis of the findings of fact in the award, the following criteria must apply: (i) the decision of the arbitrators on the question is obviously wrong; or (ii) the question is one of general public importance, and the decision of the tribunal on the question is at least open to serious doubt (s 69(3)(c)(i) and (ii)). Lastly, the court must satisfy itself that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all circumstances for the court to determine the question (s 69(3)(d)). The Act further provides in s 69(8) that no appeal from the decision of the High Court lies without leave, which must not be granted unless the question of law is one of 'general public importance', or is one which for some other special reason should be considered by the Court of Appeal. Moreover, when considering an appeal on a question of law, s 69(7) provides that the court has the discretion to either confirm the award, vary the award, remit the award to the tribunal, in whole or in part, for reconsideration in light of the court's determination, or set aside the award in whole or in part, which will not be exercised unless the court is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

The Act maintains the limited right of appeal described above because the Departmental Advisory Committee (DAC)[28] considered that parties generally contemplate that the law will be properly applied by the arbitrators in resolving their disputes. However, appeals are a viable option, and parties resort to seeking leave to appeal in arbitration, depending on the

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[26] Departmental Advisory Committee Report (DAC) on the Arbitration Bill, February 1996 ('DAC Report') [286(iv)]–[287].

[27] Generally, see Clare Ambrose, Karen Maxwell, Michael Collett, *London Maritime Arbitration* (4th edn, Informa Law from Routledge 2017) [22.3] et seq; Matthews (n 6), 259; David Foxton et al, *Mustill & Boyd: Commercial and Investor State Arbitration* (3rd edn, LexisNexis 2024) [14.124] et seq.

[28] DAC Report (n 26), [285].

sector of the dispute and the expectations of the parties. An examination of the body of case law from the date of the enactment of the Act, 1 January 1997, leads to the conclusion that around 70 per cent of appeals under s 69 of the Act relate to maritime disputes. There are many reasons for this: firstly, because maritime disputes involve complex issues and often raise a higher number of questions of contract law; secondly, because rules such as the London Maritime Arbitrators Association (LMAA) Terms do not exclude the right of appeal;[29] and thirdly because, as the discussion will further demonstrate, parties in different sectors resort to arbitration with different expectations.[30]

The high threshold for invoking the appeals mechanism is, firstly, reflected in the requirement under s 69(3) of the Act, for leave to appeal to be obtained – unless the parties have already agreed to allow such appeals[31] – and secondly, the requirement that any appealing party must succeed at a substantive appeal hearing. The existence of a right to appeal under s 69 of the Act also safeguards the axiom that the basis of the parties' expectations of an award is that it is correct on the law and that an agreement on an appeal is an exception to the general rule, namely, to enable the rectification of an error of law in the award and not to allow the parties to seek the conferment of jurisdiction by the court of appeal on questions of fact.[32] A further guarantee is the requirement that a question of law must arise from the award, and cannot be made during the arbitral proceedings. Invariably, courts will not usually look beyond the award in assessing whether an error of law exists.[33] The courts will also not succumb to the reopening of the facts in cases where parties have disguised and cloaked them as questions of law. In *The Baleares*,[34] Steyn LJ suggested that an appeal on such grounds would constitute

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[29] Under para 14 of the LMAA Intermediate Claims Procedure (2017) there is express agreement that there will be a right of appeal where the tribunal certifies that the dispute involves a question of law of general interest, or importance to the trade or industry in question.

[30] *The Nema* (n 14), 739.

[31] The agreement would need to be in writing: *Poseidon Schiffahrt GmbH v Nomadic Navigation Co Ltd (The Trade Nomad)* [1998]1 Lloyd's Rep 57.

[32] *Guangzhou Dockyards Co v ENE Aegiali I* [2010] EWHC 2826 (Comm), [2011] Lloyd's Rep 30; *Enterprise Insurance Co Plc v U-Drive Solutions (Gibraltar) Ltd* [2016] EWHC 1301 (QB).

[33] Questions as to the proper construction of a contract are usually treated as pure questions of law. Often, such questions are fact specific, and will depend on the relevant factual matrix, including market practice and what was known to the parties; therefore, judges are often more likely to give weight to the tribunal's market experience, and will only reverse the decision, if satisfied that the tribunal has come to the wrong answer. Hence, in practice, in highly fact specific questions of construction, the court will be more likely to refuse permission to appeal, on grounds that the tribunal was not obviously wrong. See *London Maritime Arbitration* (n 26) [22.14].

[34] *Geogas SA v Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215 (CA), 228-232.

a way to abolish the conclusiveness of the findings of the arbitral tribunal, and this was reaffirmed in *Demco Investments & Commercial SA v SE Banken Forsakring Holding AB*.[35]

3 Questions of fact versus questions of law

Section 69 of the Act restricts appeals to questions of law. Questions of law must be distinguished from questions of substantive jurisdiction (s 67) and questions of procedure (s 68). However, the task of distinguishing between questions of law and questions of fact is a difficult one. There is a variant approach observed in the body of the case law as to what exactly the courts determine as a question of fact as opposed to a question of law. In *Trustees of Edmond Stern Settlement v Levy*, [36] His Honour Judge Peter Coulson QC stated that questions of construction were often a matter of impression.[37] In *Cottonex Anstalt v Patriot Spinning Mills Ltd*,[38] Hamblen J took the view that although the factual background may mean there were matters of fact that are possibly relevant to the proper construction of a contract, they do not alter the legal nature or characterisation of the exercise.[39] Prior to the Act, Mustill J in *The Chrysalis*[40] analysed the distinction by identifying three stages in the arbitral process: firstly, the stage where the arbitrator ascertains the facts and hence makes findings on any facts which are in dispute; secondly, the stage where the arbitrator ascertains the law; and thirdly, the stage where the arbitrator reaches his decision, which is predominantly a purely mechanical stage .

As factual matters are purely for the arbitrators and the application of the law to the facts cannot be the subject of an appeal, s 69 of the Act is concerned with the ascertainment of the law. Before permission to appeal can be given, the court must be persuaded, at the very least, that the principle of law relied on in the award is open to serious doubt, if not that it is obviously wrong (s 69(3)(c) of the Act). In *Majorboom Ltd v National House Building Council,*[41]

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35 [2005] EWHC 1398 (Comm), [2005] 2 Lloyd's Rep 650.
36 *Trustees of Edmond Stern Settlement v Levy* [2007] EWHC 1187 (TCC), 113 Con LR 92.
37 Ibid, [13].
38 [2014] EWHC 236 (Comm), [2014] 1 Lloyd's Rep 615.
39 Ibid, [45].
40 *Finelvet AG v Vinava Shipping Co Ltd (The Chrysalis)* [1983] 1 WLR 1469, 1475.
41 [2008] EWHC 2672 (TCC).

Coulson J correctly pointed out that s 69 of the Act requires the identification of 'clear, crisp questions of law'.[42]

The definition of questions of law, in the context of an arbitration appeal, is equally not an easy task.[43] However, the courts, on granting leave for errors of law, have developed many classifications of questions of law. Firstly, the construction of an arbitration agreement is classified as a question of law.[44] Questions of law often relate to the construction of commercial terms, which are to be found either in standard forms or charterparties.[45] In *The Global Santosh*,[46] leave was granted for a question of law, which related to the meaning and effect of an off-hire clause.[47] In *The Lowlands Orchid*,[48] where the issue concerned the correct interpretation of a term in the fixture, and the arbitrators had rejected the claim of the owners and had accepted the claim of charterers for dispatch money, on appeal from the owners of the arbitrators' award, the appeal was dismissed and it was held that there was no clear and irreconcilable conflict between the two provisions. Furthermore, a point of law may consist of a question of the correct interpretation of a legal instrument. In *The CMA Djakarta*,[49] the question was whether the charterer was entitled to limit its liability, pursuant to the Convention on Limitation of Liability for Maritime Claims 1976 (LLMC 76).[50] A question of law may also arise from the facts of the case,[51] and may be linked to rules and tests which

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42 Ibid, [14].

43 *Fence Gate Ltd v NEL Construction Ltd* (TCC, 5 December 2001), [38] (Thornton J).

44 *The Nema* (n 14), 736 (Lord Diplock).

45 *The Antaios* (n 15), 241.

46 *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)* [2013] EWHC 30 (Comm), [2013] 1 Lloyd's Rep 455.

47 Later reversed in *NYK Bulkship (Atlantic) NV v Cargill International SA (The Global Santosh)* [2016] UKSC 20, [2016] 1 WLR 1853.

48 *Cobelfret Bulk Carriers NV v Swissmarine Services SA (The Lowlands Orchid)* [2009] EWHC 2883 (Comm), [2010] 1 Lloyd's Rep 317.

49 *CMA CGM SA v Classica Shipping Company Ltd (The CMA Djakarta)* [2003] EWHC 641 (Comm), [2003] 2 Lloyd's Rep 50. Reversed in part in *CMA CGM SA v Classica Shipping Co Ltd (The CMA Djakarta)* [2004] EWCA Civ 114, [2004] 1 Lloyd's Rep 460. Cf *MSC Mediterranean Shipping Co SA v Conti 11 Container Schiffahrts-GmbH & Co KG MS (The MSC Flaminia)* [2025] UKSC 14, [2025] 1 WLR 1835.

50 Ibid, [8]. The LLMC is given the force of law in the Merchant Shipping Act 1995, c 21, s 185(1).

51 *Glencore International AG v PT Tera Logistic Indonesia* [2016] EWHC 82 (Comm), [2016] 1 Lloyd's Rep 527. In this case the question of law was framed in these terms ([1]): 'In circumstances where a claim and a counterclaim arise from a single set of facts giving rise to a balance of accounts or netting-off, does a reference to "claims" or, alternatively, to "all disputes arising under the contract", in a notice of appointment of an arbitrator, suffice to interrupt the running of time in respect of a counterclaim for the purposes of s 14(4) Arbitration Act 1996?'.

ought to be applied to determine the legal consequences of given facts or words,[52] such as the burden of proof and the rules applicable for damages recovery. It follows that there exists no comprehensive definition of a question of law. On the other hand, questions of fact relate to the particular facts and circumstances giving rise to the dispute.

Errors of fact of arbitral awards cannot be reviewed pursuant to s 69 of the Act.[53] The arbitrators are the sole adjudicators on factual issues. Pursuant to s 69 (3)(c) of the Act, the court must rule on a question of law, on the basis of the finding of facts by the arbitrators, and it is not within the authority of the court to examine the validity of the facts that were presented to the arbitral tribunal.[54] It follows from the above that the main issue is to decide what the question of law is and distinguish it from a fact (or facts). It is notable, however, that *obiter* judgments, such as *Fence Gate Ltd v NEL Construction Ltd*,[55] *Guardcliffe Properties Ltd v City & St James*[56] and *Benaim (UK) Ltd v Davies, Middleton & Davies Ltd*,[57] have held that the finding of facts on an arbitral award, with an absence of evidence, can potentially constitute an error of law. Such *obiter* judgments are twisting the law.[58] They depart from established authorities, such as *The Baleares*,[59] and have been rejected by other authorities, such as *Demco Investments* [60] and nullify the view that errors of fact cannot be reviewed.[61] Not least, they are also against the fundamental principle of finality of arbitration, which is inherent in the Act, as well as being against the principle that it is for the tribunal to decide all procedural and evidential matters.[62] The sole purpose of s 69 of the Act is to allow for

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52 *The Chrysalis* [(n 40); *Guangzhou Dockyards Co* (n 32); *London Underground Ltd v Citylink Telecommunications Ltd* [2007] EWHC 1749 (TCC), [2007] 2 All ER (Comm) 694.

53 *Fence Gate Ltd* (n 43); *Hallamshire Construction plc v South Holland DC* [2003] EWHC 8 (TCC), 93 Con LR 103; *Milan Nigeria Ltd v Angeliki B Maritime Co* [2011] EWHC 892 (Comm), [2011] Arb LR 24; *Latvian Shipping Co v Russian People's Insurance Co (ROSNO) Open Ended Joint Stock Co (The Ojars Vacietis)* [2012] EWHC 1412 (Comm), [2012] 2 Lloyd's Rep 181.

54 *The Baleares* (n 34), 227–8 (Steyn LJ).

55 Above, n 53.

56 [2003] EWHC 215 (Ch), [2003] 2 EGLR 16.

57 [2005] EWHC 1370 (TCC), 102 Con LR 1. See also *Newfield Construction Ltd v Tomlinson* [2004] EWHC 3051 (TCC), 97 Con LR 148.

58 Robert Merkin and Louis Flannery, *Merkin and Flannery on the Arbitration Act 1996* (6th edn, Informa law from Routledge 2020) 736 et seq.

59 Above, n 34.

60 *Demco Investments* (n 35).

61 *The Nema* (n 14), 753; *Hallamshire Construction plc* (n 46); *Torch Offshore LLC v Cable Shipping Inc* [2004] EWHC 787 (Comm), [2004] 2 Lloyd's Rep 446, [54]–[60] (Cooke J); *Mowlem plc v Phi Group Ltd* [2004] BLR 421; *Milan Nigeria Ltd* (n 53); *Latvian Shipping Co* (n 53).

62 Unless, of course, the parties expressly agreed otherwise. Section 34(1) of the AA 1996 and s 34(2)(f) of the AA 1996 provide that all of the admissibility, relevance or weight of any evidence sought to be tendered on

appeals on points of law and any attempt by the parties to cloak questions of fact as questions of law constitutes a abuse of the purpose of s 69 of the Act and contravenes the parliamentary reasoning for enacting s 69(3) of the Act, to stop the reformulation of questions of fact into questions of law.[63]

4 The requirements under section 69(3) and its treatment in the case law

Section 69(3) of the Act, sets certain requirements for granting leave to appeal on points of law: firstly, s 69(3)(a) of the Act, requires that the determination of the question must substantially affect the rights of one or more of the parties; secondly, s 69(3)(b) of the Arbitration Act 1996, requires that the question must be one which the tribunal was asked to determine. These requirements reinforce the trust placed by parties in the institution of arbitration and in the issuance of arbitral awards. Thirdly, a further requirement is set out in s 69(3)(c) of the Act. This requires that, on the basis of finding facts on the awards: (i) the tribunal's decision on the question is obviously wrong; or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt. With regard to this later requirement, parties need to prove one of two high threshold tests and provide reasons for their choice. In practice, the parties more often choose the second test under s 69(3)(c) (ii) as they consider it easier to reason and prove.

The conditions contained in the first requirement that the decision of the tribunal is obviously wrong were originally introduced by Lord Diplock in *The Nema*,[64] as he held that leave should not normally be granted unless the decision of the tribunal was 'obviously wrong'. What was established is that if the judge is persuaded that the arbitrator might be right, the leave should not be given, because the parties 'for better or for worse' primarily chose arbitration as their means of dispute resolution and not litigation.[65] In addition, the error must be 'an obvious

any matters of fact or opinion are within the scope of the tribunal's power. The DAC Report clearly states that 'Clause 34 (2)(f) helps put an end to any arguments that it is a question of law whether there is material to support a finding of fact': above, n 26, [170].

63 This issue was also referred to by the DAC: ibid, [286](iii).

64 *The Nema* (n 14), 742.

65 Ibid, 742–3.

one'.[66] *The Mass Glory*[67] elaborates the rationale and syllogism of the court in deciding whether the decision of the tribunal on the question was obviously wrong. Moore-Bick J held that there was a more fundamental error in the reasoning of the majority arbitrators on the first question, and that they were wrong in answering the second question. This constituted enough evidence of a decision which was plainly wrong.[68]

The second requirement set by s 69(3)(c) of the Act established a double set of requirements which must be cumulatively satisfied. In the first part of s 69(3)(c) (ii) of the Arbitration Act 1996, the law states that the question needs to be one of general public importance. Coulson J, in *AMEC Group Ltd v Secretary of State for Defence*,[69] affirmed an important principle that the authorities demonstrate, namely, that it can be very difficult – 'an uphill task' – to persuade a court that the question is one of general public importance.[70] Questions of law which are of general public importance usually relate to the construction of commercial clauses, especially in the field of maritime disputes. A point of law should not be important to the public, even if the event is widely used in commercial transactions, if the legal principles are already well settled under English law. In *The Western Triumph*,[71] the Court of Appeal held that the first question of law was not one of general public importance because the arbitrators applied the correct principle, which had been settled in *The Afovos*.[72] However, if the point of law has no direct authority, then the question of law should be one of general public importance. In *The Reborn*, [73] where the applicant raised a question regarding the consequences of the non-existence of an express warranty, concerning the safety of the vessel reaching a berth to unload,[74] Aikens J noted that there was no direct authority on this

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66 *HMV UK v Propinvest Friar Limited Partnership* [2011] EWCA Civ 1708, [2012] 1 Lloyd's Rep 416, [8] (Arden LJ).

67 *Glencore Grain Ltd v Goldbeam Shipping Inc (The Mass Glory)* [2002] EWHC 27 (Comm), [2002] 2 Lloyd's Rep 244.

68 Ibid, [36]-[37].

69 [2013] EWHC 110, 146 Con LR 152.

70 Ibid, [24].

71 *North Range Shipping Ltd v Seatrans Shipping Corp (The Western Triumph)* [2002] EWCA Civ 405, [2002] 1 WLR 2397.

72 *Afovos Shipping Co SA v R Pagnan and F Lii (The Afovos)* [1980] 2 Lloyd's Rep 469.

73 *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc (The Reborn)* [2008] EWHC 1875 (Comm), [2008] 2 Lloyd's Rep 628.

74 Ibid, [8].

issue, and held that the question could be of interest and perhaps also of importance to the shipping industry.[75]

The second cumulative requirement under s 69(3)(c)(ii) of the Act for granting leave to appeal, is that the decision of the tribunal must be at least open to serious doubt. In the Court of Appeal in *The Ville de Capella*,[76] Lord Phillips MR, held that the test which the House of Lords had established in *The Nema,*[77] that the decision of the tribunal in the question of general public importance must have been probably wrong, had been replaced by the new test under s69(3)(c)(ii) of the Act, which required that the decision of the question of general public importance must at least be open to serious doubt.[78] This view suggests that the current test is less strict than the test established and adopted in *The Nema.*[79] This view reinforces uncertainty and therefore it is submitted that this approach should be abandoned. *The Nema*[80] developed a reasonable and practical test which provided that appeal should not be granted even if the question was one of general public importance, unless the judge considered that a strong *prima facie* case had been made out that the arbitrator had been wrong in its construction. Another proposition in the judgment in that case concerns the replacement of the strict test in *The Nema*[81] with a broad test. Again, this is not good law. Such views, expressed in *The Ville de Capella*,[82] and by Coulson J in *AMEC Group Ltd*,[83] have suggested that the different views of the experienced arbitrators, on a question of law, are a ground for the argument that the decision of the majority arbitrators is at least open to serious doubt. Such an approach falls short of credibility, as there are many arbitral awards which contain different views of experienced arbitrators. Such an approach could also result in opening the floodgates for petitions for the granting of leave to appeal under s 69(3)(c)(ii) of the Act. This would unnecessarily overburden the courts, jeopardise the characteristic of finality of arbitral awards and render ineffective the arbitration institution as a dispute

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75 Ibid, [9]. See also *P v A* [2008] EWHC 1361 (Comm), [2008] 2 Lloyd's Rep 415.

76 *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS 'Northern Pioneer' SchiffahrtgesellschaftmbH & Co (The Ville de Capella, Ville de Libra, Ville de Sagitta, Ville de Vela)* [2002] EWCA Civ 1878, [2003] 1 WLR 1015.

77 *The Nema* (n 14); *AMEC Group Ltd* (n 69).

78 *The Ville de Capella* (n 76), [60].

79 *The Nema* (n 14); *AMEC Group Ltd* (n 69).

80 Ibid.

81 Ibid.

82 Above, n 76, [64].

83 *AMEC Group Ltd* (n 69), [26].

resolution mechanism, against the established parliamentary view to recognise the Act widely and to uphold the principle of finality of arbitration.

It has also been argued that the test under s 69(3)(c)(ii) of the Act should be less strict if the situation involves a question of law that is one of general public importance, but the issue has not been recognised so far by any direct authority. Aikens J, in *The Reborn*,[84] and David Steel J in *P v A*,[85] were faced with the same issue and decided to grant leave under s 69(3)(c)(ii) of the Act. The rationale for this approach is that the absence of any direct authority on the question in issue causes uncertainty and undermines justice, requiring court intervention to restore legal accuracy on a question that substantially affects the rights of the parties. However, such views have been heavily criticised and do not merit wide approval by the judiciary and the legal world.

Finally, s 69(3)(d) of the Act states that leave to appeal must be given only if the court is satisfied that, despite the agreement of the parties to resolve a matter by arbitration, it is just and proper in all the circumstances for the court to determine the question. It seems that this test was adopted to emphasise the point that the threshold of the leave to appeal under s 69 of the Act, in general, as well as under s 69(3)(c)(ii), should be strict. This condition is a reminder to the court that parliamentary intention prevails concerning the finality of arbitration over the legal accuracy of a question of law. As this requirement has affirmed, the parties initially chose to solve their dispute through arbitration rather than litigation.

The strict approach that English judges have adopted towards s 69 of the Act means that they will not easily nullify the gist of a decision of an arbitral tribunal for reasons that are not strictly legal. The judges have so far respected the arbitral tribunal's discretion and jurisdiction to determine awards and have followed the narrow scope of the action, as indicated in s 69 of the Act. Case law examination reveals that rights of appeal from an arbitral award are severely restricted, and what is needed is not just a doubtful error on a point of law or a different decision by the judge hearing the appeal.[86] A further threshold is the finding from the

[84] Above, n 73.
[85] Above, n 75.
[86] *HMV UK Ltd v Propinvest Friar LP* [2011] EWCA Civ 1708, [2012] 1 Lloyd's Rep 416, [5].

examination of the body of case law that even where leave to appeal is granted, the superior court often dismisses the appeal for lack of proof of error of law.[87]

5 The different operation of the mechanism of appeals in different sectors

There is a variable operation of the mechanism for appeals provided in s 69 of the Act. This is justified for different reasons. In the maritime sector, for example, parties go to arbitration with a view to appealing or even litigating if they are not satisfied with the outcome. The examination of some representative case law leads to the conclusion that there have been cases of abuse of the appeals mechanism. Most abuses occur concerning s 69(3)(c)(ii) of the Act , which requires a combination of the test of the general public importance of the question, as well as the test that the decision of the tribunal must at least be open to serious doubt. In *The Atlantic Tonjer*,[88] where the appeal concerned a question of the interpretation of a payment clause, the court abused the appeals mechanism by permitting leave to appeal on an issue already decided previously. In *The Caravos Liberty*,[89] the appeal was dismissed on the basis that the tribunal's decision was given by two eminent maritime arbitrators.[90] In *The Coral Seas*,[91] the grant of leave to appeal was a misuse of the court's discretion under s 69(3)(c)(ii) of the Act, because the principle relating to the question of law, namely, the breach of the performance warranty, was already well settled judicially. In *The Posidon*,[92] where the applicant attempted to present a seaworthiness clause and its interpretation, as a question of law, leave to appeal should have never been granted, as this was a question of fact already examined by the body of case law in *The Arianna*[93] and earlier in *The Afovos*.[94]

In reinsurance, there is an appetite for arbitration. For reasons pertaining to tradition and custom, as well as the need for expert adjudication, reinsurance disputes are primarily

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87 *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] EWHC 727 (TCC), [2006] 2 All ER (Comm) 81; *PEC Ltd v Thai Maparn Trading Co Ltd* [2011] EWHC 3306 (Comm), [2012] 1 Lloyd's Rep 295.

88 *Boskalis Offshore Contracting BV v Atlantic Marine and Aviation LLP (The Atlantic Tonjer)* [2019] EWHC 1213 (Comm), [2020] 1 Lloyd's Rep 171.

89 *Quiana Navigation SA v Pacific Gulf Shipping (Singapore) Pte Ltd (The Caravos Liberty)* [2019] EWHC 3171 (Comm), [2020] 2 Lloyd's Rep 53.

90 Ibid, [32].

91 *Imperator I Maritime Co v Bunge SA (The Coral Seas)* [2016] EWHC 1506 (Comm), [2016] 2 Lloyd's Rep 293.

92 *China Offshore Oil (Singapore) International Pte Ltd v Giant Shipping Ltd (The Posidon)* [2000] EWHC 229 (Comm), [2001] 1 Lloyd's Rep 697.

93 *Athenian Tankers Management SA v Pyrena Shipping Inc (The Arianna)* [1987] 2 Lloyd's Rep 376.

94 Above, n 72.

arbitrated or settled and less litigated. In addition, parties do not renounce the right to appeal but are less prone to appeal arbitral awards. Resultantly, parties in reinsurance arbitration will not abuse the tool of the appeals mechanism and will only resort to it when there is a strong indication of error in law. In *CGU International Insurance Plc v AstraZeneca Insurance Co Ltd*,[95] the Court of Appeal had to consider the refusal of permission to appeal given by Cresswell J,[96] and refused to do, stating a lack of jurisdiction to hear an appeal against refusal of permission to appeal under s 69(8) of the Act, subject to a residual jurisdiction in respect of unfairness.[97] In *Sun Life Assurance Co of Canada v Lincoln National Life Insurance Co*,[98] where in two related arbitrations, the arbitrators departed in the second arbitration from the findings in the first arbitration, the appeal was allowed, and the court upheld the award. In *Unipolsai Assicurazioni SpA v Covéa Insurance plc*[99] and in *Markel International Insurance Company Ltd v General Reinsurance AG*,[100] petitions concerning connected appeals and where the judge had found in favour of the reinsureds, the appeals were dismissed as no misapplication of the legal principle had been substantiated.[101] In *Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*,[102] on reinsurance claims from mesothelioma, leave to appeal was granted and the appeal was allowed as one involving issues of general public importance. It follows from the above that parties to reinsurance arbitrations do not exclude their option to resort to the mechanism of appeal, but will predominantly use that option only for questions of law which are well established and obvious. Hence, we note a tendency not to abuse the meaning of appeals in arbitration in this sector.

The functionality of the Act in general, and s 69, in particular, was further examined by the Law Commission of England and Wales in its most recent review of the Act. The UK Government asked the Law Commission to conduct the review to consider what, if any, amendments might be necessary to ensure that the Act remained fit for purpose and

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95 [2006] EWCA Civ 1340, [2007] 1 Lloyd's Rep 142.

96 *CGU International Insurance Plc v AstraZeneca Insurance Co Ltd* [2005] EWHC 2755 (Comm), [2006] Lloyd's Rep IR 409.

97 Above, n 95, [38] (Rix LJ).

98 [2004] EWCA Civ 1660, [2005] 1 Lloyd's Rep 606.

99 [2024] EWCA Civ 1110, [2024] Bus LR 1878.

100 Ibid.

101 Terry O'Neill & Franziska Arnold-Dwyer, *The Law of Reinsurance in England and Bermuda* (6th edn, Sweet and Maxwell 2024) [14-038].

102 [2019] EWCA Civ 718, [2020] QB 418.

continued to promote the UK as a leading forum for commercial arbitration. Following two consultation papers, one in September 2022 and another in March 2023, and a number of responses from consultees, the Law Commission published its report with a number of recommendations containing several major initiatives and a few minor corrections.[103] Some of the main recommendations included: codifying an arbitrator's duty of disclosure; improving the framework for bringing challenges under s 67; and introducing a new rule on the law governing the arbitration agreement.

Ultimately, regarding s 69, the Law Commission considered that reform was unnecessary. In its first consultation paper, the Law Commission considered the need to balance two competing goals – those of enhancing the finality of arbitral awards and efficient dispute resolution, against the need to ensure consistency of legal rights and duties.[104] While the first goal tends towards limiting appeals, the latter tends towards enabling appeals. The Law Commission decided against a reform of s 69 because it already allowed for a compromise between the two goals by permitting the possibility to appeal on a point of law, whilst at the same time promoting the finality of arbitral awards, by allowing the parties to opt out of the section.

Therefore, the Law Commission's report confirmed the premise underlining s 69, that it functions well as an opt-out provision and strikes a good balance between party autonomy and the chance to submit errors of law for review to the courts, promoting the finality of arbitral awards. This provision is rather unique for English arbitration as it is not common to see arbitration rules explicitly providing for a right of appeal. The Law Commission rightly articulated that there was no obvious need to reform something that operated well and provided legal certainty to businesses. Whilst the reform process was ongoing, some voices supported making s 69 an opt-in provision so as to align better with the UNCITRAL Model Law on International Commercial Arbitration[105] and arbitration rules, such as the ICC Arbitration Rules 2021.[106] It was argued that such an alternative would allow those who wished to appeal

[103] *Review of the Arbitration Act 1996: Final Report and Bill* (Law Com No 413, 2023).
[104] *Review of the Arbitration Act 1996: A Consultation Paper* (Law Com Consultation Paper No 257, 2022)
[105] <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> accessed 31 May 2025.
[106] <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/rules-procedure/2021-arbitration-rules/> accessed 31 May 2025. See Shy Jackson & Laura Lintott, 'Sober Modernisation of the Arbitration Act 1996' [2023] 2 Int Arb LR 95, 109.

on a point of law to include the section when they considered it useful, whilst also limiting the right to when the parties expressly agreed to retain it, thus better supporting the finality of the arbitration award.[107] However, this position was not ultimately followed. Overall, the reforms suggested by the Law Commission and those finally adopted pushed in the direction of ensuring that the UK remains an attractive forum for international arbitration. They do not cause a stir and are seen as evolutionary, rather than revolutionary. This was clearly reflected in the final position expressed by the Law Commission, and in the responses received from a majority of the consultees, who were against reform of s 69. The Law Commission also expressed the view that they did 'not wish to unsettle the preferred relationship with section 69 that has been struck by arbitral rules and arbitration clauses'.[108] Therefore, it appeared reasonable to retain the current wording of s 69 as it has been widely agreed that it operated and its opt-out style guaranteed the preservation of the finality of arbitral awards, whilst allowing space to correct errors which were 'obviously wrong' so as to promote access to justice. Although rare, there have been instances where appeals on a point of law have been raised and have been successful, thus proving that s 69 has generally served and will continue to serve as a useful recourse for those who believe that the arbitrator has erred in law. Hence, any threat that s 69 might pose to the finality of an arbitral award of confidentiality of arbitration – which have been the two reasons raised against having an appeals procedure – will be limited, as the provision has been constructed in a narrow manner that sets a high threshold, thus safeguarding the finality of awards. The Law Commission's review and proposal therefore demonstrate that sometimes a reform does not require groundbreaking changes but only fine-tuning of those aspects that may need it.

6 The position in Singapore

In Singapore, the International Arbitration Act 1994, as amended,[109] applies to international arbitrations, whose seat is Singapore in accordance with s 5(1) and (2). The Arbitration Act 2001,[110] applies when the seat of the arbitration is in Singapore, and the arbitration is not

[107] Ibid.
[108] Law Commission (n 103) 10.16.
[109] Notably by the International Arbitration (Amendment) Act 2012, No 12 of 2012. See now the International Arbitration Act 1994 (2020 rev ed), incorporating all amendments up to and including 1 December 2021.
[110] (2020 rev ed), incorporating all amendments up to and including 1 December 2021.

international in the sense of s 5 of the International Arbitration Act 1994. It therefore applies to national arbitrations.[111]

The Arbitration Act 2001 allows parties to challenge final arbitral awards by: (i) setting aside the award;[112] and (ii) through the availability of the appeal mechanism on a point of law.[113] The International Arbitration Act 1994 only sets out the rules for setting aside the arbitral award,[114] and appeals on a point of law are not allowed. Section 24 of that Act points to art 34 of the UNCITRAL Model Law on International Commercial Arbitration.[115] The availability of ample case law has helped define the exact boundaries for judicial review of arbitral awards and refers cumulatively to all requests to set aside an arbitral award, based either on s 49 of the Arbitration Act 2001 or s 24 of the International Arbitration Act 1994.[116] The application for setting aside an arbitral award is subject to a three-month limitation period. The court of the seat of arbitration has the exclusive jurisdiction to set aside the arbitral award.[117] There is no ground for a challenge on an error of law,[118] and challenges can only be made on the permitted grounds.[119]

Following the review and reform of the UK Arbitration Act 1996, a potential reform of the International Arbitration Act 1994 was considered through a public consultation originally launched in 2019 and reactivated in late March 2025. This consultation process, which could lead to a reform in the making, has also considered the issue of allowing appeals on points of law. The Ministry of Law has opened this consultation to align Singapore law with the latest international developments and to ensure that Singapore remains at the forefront of developments in international arbitration, continuing to be a significant hub for arbitration and a favourable seat among parties. The contemplated change with regard to appeals on a point of law entails allowing parties to appeal on a question of law arising out of an arbitral

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111 See s 3.
112 Ibid, s 48.
113 Ibid, s 49.
114 Singapore International Arbitration Act 2012, s 24.
115 Above, n 105.
116 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28, [2007] 3 SLR(R) 86, [61]-[62]; *Fisher, Stephen J v JV Sunho Construction Pte Ltd* [2018] SGHC 76, [29].
117 *Twin Advance (M) v Polar Electro Europe* [2013] 7 MLJ 811.
118 *Government of the Republic of the Philippines v Philippines International Air Terminals Co* [2006] SGHC 206, [2007] 1 SLR(R) 278.
119 Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (2nd edn, Informa Law from Routledge 2016) 174.

award, provided that they have agreed to it by opting in to such a possibility.[120] Currently, in Singapore, the ability to challenge an award is limited to jurisdictional, procedural, and public policy issues,[121] and the Singapore courts act as guardians of the arbitration procedure. However, if adopted, such an appeals opt-in mechanism could enhance the role of Singapore as a forum for international arbitration. On the one hand, it would guarantee party autonomy and enhance flexibility, should parties wish to opt in for an appeal process in the state courts to be available to them. On the other hand, it would also contribute to preserving the finality of arbitration[122] whilst also allowing the courts to hear appellate cases challenging awards.

7 Conclusions

English law has a high threshold requirement for an appeal under s 69 of the Arbitration Act 1996, to preserve the final and binding nature of arbitration, with limited appellate review existing merely to allow the rectification of errors of law within arbitral awards. The detailed evaluation of the advantages and disadvantages of s 69 of the Act and the view expressed also in the Law Commission's reform project, as well as the decision not to finally reform s 69 in the new Arbitration Act 2025, leads to the conclusion that s 69 of the Act remains good law. The law reform which the Law Commission undertook was carefully considered to avoid bypassing the finality of arbitral awards whilst at the same time allowing appeals for obvious errors in questions of law, thus enhancing party autonomy and flexibility and aiding the development of arbitration as an institution and as a method of alternative dispute resolution.

Any further revision and revisiting of the functionality of the appeals mechanism under s 69 of the Act could be achieved in future judgments. The courts could assist in the better

[120] Lee Meixian, 'MinLaw mulling over allowing appeal to Courts post arbitration awards' *Business Times* (Singapore, 1 April 2019) <https://www.businesstimes.com.sg/international/minlaw-mulling-over-allowing-appeal-courts-post-arbitration-awards> accessed 15 May 2025; 'Arbitration Notes', 'Singapore Arbitration Update: A potential change for 'opt-in' appeals for errors of law and court confirmation of the correct standards to be met to restrain winding up proceedings where a claim is subject to arbitration' (<https://hsfnotes.com/arbitration/2019/05/09/singapore-arbitration-update-a-potential-change-for-opt-in-appeals-for-errors-of-law-and-court-confirmation-of-the-correct-standard-to-be-met-to-restrain-winding-up-proceedings-where-a-claim-is-s/> accessed 15 May 2025.

[121] *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Ltd* [2018] SGHC 78, [2019] 2 SLR 131; Lee, ibid; Arbitration Notes, ibid.

[122] Ibid.

functionality of the law, as they have always done, if they were to hand down judgments providing detailed guidelines and criteria as to what constitutes and what could be admitted as a question of law. This would guide the parties and enhance the scope of the finality and protection of the arbitral award, save for cases of a manifest error depicted as a question of law in the arbitral award.[123] The development of such detailed criteria would ensure the appeal mechanism for the parties and ensure that the existence and resort to such an appeal mechanism will not be abused and will guarantee that leave to appeal will be granted on the basis of the existence of objective grounds and criteria. Overall, this will allow the continuity of the proper functionality of the right to appeal and that arbitration as an alternative dispute resolution mechanism will continue to be chosen by parties in dispute. This is further reiterated by the latest developments, which have shown that other jurisdictions are considering potential law reform to allow appeals, if parties have contracted or opted in for it. Such a potential law reform will, it is believed, further enhance the functionality and flexibility of arbitration as well as party autonomy.

[123] R Finch, 'London: Still the Cornerstone of International Commercial Arbitration and Commercial Law?' (2004) 70(4) Arbitration 256, 264–266.