The Application of Section 69 of the English Arbitration Act 1996 in the Shipping Industry

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Abstract

In its recent consultation paper, the English Law Commission made provisional law reform proposals to ensure that the English Arbitration Act 1996 remains state of art. Contrary to the proposition that where appeals have been allowed on questions of law, in many cases an abuse had taken place as often questions of fact were hidden under the guise of questions of law, the Law Commission did not recommend a reform of s. 69 of the Arbitration Act 1996. In light of the above, this article is looking at the manner in which the judiciary scrutinizes the questions brought before it and the various findings, especially in shipping law cases whereby an increased resort to the appeal mechanism of s. 69 is noticed. Also, the rules of maritime and non-maritime arbitration institutions, offering an appeals or "quasi" appeals mechanism, are examined, to allow more conclusive evidence so as to then reach more holistic overall conclusions.

Keywords: arbitration; appeals in arbitration; section 69 Arbitration Act 1996; reform of Arbitration Act 1996; shipping and arbitration; shipping and appeals in arbitration

1. Introduction

The Arbitration Act 1996, (AA 1996) in its position as one of the most prominent pieces of legislation in the UK, has contributed to London being brought and established as the epicenter of international arbitration for more than 25 years. Notwithstanding its proven efficiency, the Law Commission of the United Kingdom assessed that there was some space for specific parts of the Act to be further improved and refined. To this end, approximately in November 2021, it was declared that a re-evaluation of the AA 1996 would take place during the following months. While the Commission has pledged profound reforms to the confidentiality and privacy framework of arbitration, s. 69 of the AA1996 still seems to fulfill its legislative purpose without the need of any refinement. Its longstanding efficacy fuels an interest to investigate the manner in which the appeals mechanism, as enshrined in s. 69, remains in use by the parties, as well as the way in which the most recent case law

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has formed its application. The main argument that derives from previous literature is that where appeals were allowed on questions of law, in many cases an abuse of the choice given to the parties by law had taken place as often questions of fact were hidden under the guise of questions of law. This article investigates the matter from a quite different aspect, i.e., it is looking at the manner in which the judiciary scrutinizes the questions brought before it as well as its findings on different occasions. The shipping industry is being particularly explored, especially due to the increased desire and tendency of the parties involved to seek for awards that correspond to their particular commercial interests. The established practice in the field shows that, exactly driven by this desire, market players have increasingly attempted to rely on s. 69 with the aim of achieving their ends either successfully or unsuccessfully, as the court cases to follow will demonstrate.

In addition to the overview of the case law, our research and findings are complemented by the study and exploring of a handful of maritime and non-maritime arbitration institution rules, offering an appeals or "quasi" appeals mechanism so as to approach the matter macroscopically and comparatively, and offer a complete picture of the issue of appeals in shipping arbitration as has been shaped thus far.

2. Law Commission's thoughts on s.69 and some quantitative data

The Law Commission has published a consultation paper which contains provisional law reform proposals to ensure that the AA 1996 remains state of the art. In relation to appeals and s.69 of the AA1996 it is stated that there have been suggestions on the one hand to repeal s.69 to increase the finality of arbitral awards or adversely or to expand the circumstances in which an appeal under s. 69 can be brought so that the court has more opportunity to consider questions of law. The Law Commission does not propose the reform of s.69 to allow the functions derived by its implementation, i.e., the chance to have errors of law able to be corrected, so that the law is applied consistently and in common to everyone. It was also stated that by not reforming s.69 its function as a defensible compromise is preserved. It justifies its view on the fact that s. 69 is rarely invoked, so that its presence does not cause severe delays, whilst the appeals actually made allow for judicial progress.[1]

The Law Commission has by and large found that since s.69 is assessed as functioning well in practice, there is no point in bringing a change to it. Some observations to be made include firstly, in the instance where s.69 is repealed, as per some authors past suggestions,[2] this could eventually lead to the arbitrators being lax when fulfilling their duties sufficiently, and in particular when adhering to their duty to base their judgement on accurate legal grounds especially considering that, in principle, the judiciary, in

[1] Law Commission, *Review of the Arbitration Act, Summary of the Consultation Paper*, 2022, 12, https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/09/Arbitration-summary-Law-Commission.pdf.

[2] David, S.J. Sutton, Judith Gill, Matthew Gearing, *Russell on Arbitration* (24th ed 1979), 428.

annulment proceedings, hardly ever impugn on questions of law raised during the arbitral procedure.[3] Such a consequence - although farfetched - may come as a result since arbitrators may feel safe hiding behind the absence of an appeals device – that constitutes a variant of past practices which arbitrators wishing to avoid their decisions' annulment deployed, by not providing any reasons for their awards at all.[4] Further, another downside that needs to be considered when arguing in favor of appealing s. 69, is that development of law through cases, as has been happening until now,[5] will cease since the courts will be alienated from reviewing arbitral awards. Conversely, if s.69 was rendered mandatory, that would possibly infer a policy decision that could most probably undermine arbitration. Were the parties to be considered as unable to opt-out from the appellate device, this could imply that inherently there are slight doubts about the arbitrator's judgement, which are to be dispersed by the judiciary's review.

Before turning to the analysis of recent court decisions, it is important to note that according to statistical information on the award challenges during the last decade, indeed, the vast majority of appeals by virtue of s.69 was shipping cases due to a well-established practice of resorting to courts on questions of law. However, successful recourse under s.69 is subject to qualifications; namely that the parties did not exclude the right of appeal and that the court granted a leave to appeal. Those two preconditions constitute the first gateway, or put differently, the first filter which probably explains why the successful challenges to awards are approximately 30%.[6] Irrespective of the low rates of success, however, there was an increase in the reliance on s.69 of the AA1996, despite the general downward trend over the ten-year period regarding the rest of the sections of the Act. This upward trend could probably serve as one of the justifications why the Commission does not express any disquiet over the functioning of s.69.

3. Overview of recent case law (applications made on the basis of s.69 of theAA 1996)

3.01.CH Offshore Ltd v Internaves Consorcio Naviero SA and Others – QBD

[3] Vladimir Pavic, (2010) "Annulment of Arbitral Awards in International Commercial Arbitration", In C. Knahr, C. Koller, W. Rechberger, A.Reinisch, eds, *Investment and Commercial Arbitration Similarities and Divergences*, 136.

[4] Lord Diplock, "The Alexander Lecture: The Case Stated – Its Use and Abuse" (1978) 44(3) Arbitration 107, 108; Justice Steyn, "Arbitration and the English Courts" (1982) 47(3) Arbitration 162, 165; Commercial Court Committee Report on Arbitration (1975) Cmnd 7284, paras 6 to 7 and 25 to 31.

[5] Taner Dedezade, "Are You In or Are You Out? An Analysis of Section, 69 of the English Arbitration Act 1996: Appeals on a Question of Law", 2 Intl. Arb. L.J. 56 (2006) available at http://corbett.co.uk/wp-content/uploads/Taner-s-69-article.pdf .

[6] Greg Fullove, Artem Dudko, *Arbitration in Court : Observations on over a decade of arbitration-related cases in the English courts*, Osborne Clarke, 2021, 8., https://www.osborneclarke.com/system/files/documents/21/11/10/Arbitration%20in%20Court%20%20report%20-%20FINAL%28113485318.1%29.pdf See also_Commercial Court User Group Meetings, Commercial Court 125, November Meeting Minutes, https://www.judiciary.uk/wp-content/uploads/2020/12/CCUG-Minutes-November-2020-0112.pdf, 8.

The recent case of *CH Offshore Ltd v Internaves Consorcio Naviero SA and Others v QBD*[7] is a time charter case which was granted a leave to appeal by the Commercial Court on three questions of law that were ultimately dismissed by the High Court. The first question raised before the Court was whether there was a principal/agent relationship in the current dispute. However, this was clearly a question of facts dressed as a question of law which is against the requirement of s. 69 of the AA 1996 that questions of fact must not be reviewed. The Judge pointed out[8] the tribunal's passage 115 of the award, stating that "*this being essentially a factual question which turned on the role [claimants] had played in the negotiations*".[9] In addition, this question is not one of general public importance as required under s. 69 AA 1996 because the principles of agency are well settled by the authorities. The Court[10] confirmed as the most relevant authority the case of *The Mercedes Envoy*[11] and reasoned that the relationship was governed by Venezuelan law whereby such foreign law findings are findings of fact.[12] Therefore, the first question must be rejected being giving a leave to appeal under s.69 of the AA1996.

The second question of law of whether the brokage's commissions were secret is also in reality a question of fact because the answer, as the Court provides,[13] depends on the finding of facts by the tribunal in its award. Therefore, the second question is also an abuse of s. 69 AA for allowing a question of fact to be addressed as a question of law.

The answer of the third question of law is well settled by the authoritative case law and thus must not be granted a leave to appeal. As the Court concludes,[14] the authorities do not support the prevention of commissions unless the payment of hire was not paid, and the parties entered into another different contract. However, from the finding of facts by the tribunal, it is clear that the settlement agreements were not a different contract from the principal contract but a supplement agreement which replaced the original contract. Therefore, the third question of law is not a crucial question that needs the Court's intervention. In fact, the tribunal as well as the Court dismissed the third question. Therefore, it is proper to conclude that the Court abused its discretion power on interpreting s.69 AA 1996 and allowing the present appeal on points of law.

3.02.CVLC Three Carrier Corp v Arab Maritime Petroleum Transport Company

[7] *CH Offshore Ltd v Internaves Consorcio Naviero SA and Others* – QBD [2020] EWHC 1710 (Comm)
[8] *Ibid*, at para [54].
[9] *Ibid.*
[10] *Ibid*, at para [68].
[11] *The Mercedes Envoy* [1995] 2 Lloyd's Rep 559.
[12] *CH Offshore Ltd v Internaves Consorcio Naviero SA and Others*, QBD [2020] EWHC 1710, at para [78].
[13] *Ibid*, at para [101].
[14] Ibid, at paras [118] to [124].

One of the few instances where application under s.69 was successful is the *CVLC Three Carrier Corp v Arab Maritime Petroleum Transport Company* case.[15] The owners, namely CVLC Three Carrier Corp and CVLC Four Carrier Corp entered into two charterparties with the charterer, Al-Iraqia Shipping Services and Oil Trading. The latter, by way of guaranteeing its proper performance of payments, provided the owners with letters of guarantee. Due to alleged breaches on behalf of the charterer, the owners commenced arbitration proceedings against it and arrested a vessel, belonging in the charter's property, as a form of security for their payment claims. The charterer filed an urgent application and the question raised before the Tribunal was whether an implied term had been embodied in the letters of guarantee that prevented the owners from seeking 'additional security' to that provided through the letters of guarantee. The Tribunal indeed decided in favor of the respondent by concluding that there was such an inferred term when looking at the wording of the letters. Given that they had been provided 'in consideration of' the charterparties, they offered adequate security to the owners. Hence, the owners were declared to be in breach of the guarantees.

Later on, in September 2020, the case went all the way to the English Commercial Court for permission to appeal the aforementioned arbitral award under s.69. The two questions of law identified by the owners were a) whether it is 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? and if so; b) whether 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

In response to the charterer's argument that the questions raised on appeal were never put before the Tribunal, the Court agreed. However, since the questions submitted by the owners were very similar to the one determined by the arbitrators, the Judge reformulated them and adjusted them to fit into what the Tribunal had decided. The final form of the question was whether it is 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, that 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.

It was held that the Tribunal had erred in approaching the arisen issue before it. Particularly, instead of attempting to decide whether seeking for further security was prohibited by the parties, it asked whether the parties assumed an entitlement to further security. Therefore, the Court held that the award was relied upon errors of law, and subsequently that the owners had a right to further security against AMPTC.

The lessons to be learned from this case regarding the powers of the Court are the following, i.e., that the Court has the power to adjust the question of law identified by the

[15] *CVLC Three Carrier Corp v Arab Maritime Petroleum Transport Company* [2021] EWHC 551 (Comm)

appellant so as to reflect the one determined by the Tribunal. Further, once the appeal is successful, the Court may reverse the award without remitting the ruling to the tribunal.

3.03. Navision Shipping A/S v Precious Pearls Ltd and Conti Lines Shipping NV v Navision Shipping A/S

Another important example is *Navision Shipping A/S v Precious Pearls Ltd and Conti Lines Shipping NV v Navision Shipping A/S* case.[16] On December the 15th, 2018, MV Mookda Noree, a vessel chartered by Precious Pearls Ltd (*hereinafter* Precious Pearls) to Navision Shipping A/S (*hereinafter* Navision), sub-chartered from Navision to Conti Lines Shipping NV (*hereinafter* Conti Lines), and sub-sub-chartered from Conti Lines to Cerealis, got arrested by a creditor of Cerealis as a security for a claim against it concerning short delivery of cargo on a different vessel. As a result, the vessel remained on arrest for almost a month, until 12 January 2019. Some key aspects of the head and the sub charterparty to be considered are Clause 47, contained in both contracts, and Clause 86, contained only in the head charterparty. Particularly, pursuant to Clause 47, the vessel would be off hire when detained or arrested *unless [the] arrest [etc] [was] occasioned by any personal act or omission or default of the charterers or their agents*. Moreover, pursuant to Clause 86 of the head charterparty, when trading to West African ports Charterers to accept responsibility for cargo claims from third parties in these countries (except those arising from unseaworthiness of vessel) including putting up security, if necessary, to prevent arrest/detention of the vessel or to release the vessel from arrest or detention and vessel to remain on hire.

In the arbitration proceedings conducted in February 2020, the Tribunal issued two awards accompanied by the same reasons. The arbitrators, particularly, held that the vessel was not off hire during the period under scrutiny since its detention was a result of Cerealis' failure to deal with its creditor's claim and procure the vessel's release. [17] Further, by applying Clause 86, the vessel never went off hire. Hence, the Tribunal found that Navision was liable in damages to Precious Pearls.

The Court of Appeal, on the one hand, dismissed Conti's appeal, but on the other hand, reversed the award in favor of Navision. Navision's appeal was based on that the arbitrators were misplaced to find that Clause 86 applied. "Cargo claims" as enshrined in the said Clause were limited to claims connected with cargo carried under the head charter or other contract of carriage entered into pursuant to the head charter. Navision further enhanced its argument by supporting that the term "cargo claims" was also used in Clause 43 of the charterparty having the above meaning. Pursuant to Clause 43, "cargo claims" should be considered to be the responsibility of Precious Pearls, and given that it was relied

[16] *Navision Shipping A/S v Precious Pearls Ltd and Conti Lines Shipping NV v Navision Shipping A/S* [2021] EWHC 558 (Comm).
[17] It should be noted that for the purposes of Clause 47, Cerealis was considered as sub-charterer.

upon Clause 43, Clause 86 should have been construed under this light. The Court concluded that the creditor's claim against Cerealis could not be classified as "cargo claim" because it did not concern Mookda Naree's West African trading pursuant to that charter but a different ship altogether as was also aforementioned. It followed that the vessel was off hire from 17 December 2018, and thus Navision could not be held liable for damages for breach of Clause 86.

What should be particularly pointed out is that the reasoning of the Court sheds light on that the construction of contractual provisions constitute points of law which can be appealed pursuant to s.69. Overall, this case is an example of the respect English Courts attribute to the Tribunal's findings, as well as the willingness of the judiciary to intervene when the arbitrators have erred in law.

3.04.DHL Project & Chartering Ltd v Gemini Ocean Shipping Co Ltd (Newcastle Express) [18]

This case established an important point on the court's thinking when deciding on errors of law pursuant to s.69, while reminding the meaning of subjects as pre-conditions in charterparties. According to the parties' contract, a fixture had been expressed as being subject to the shippers'/receivers' approval. The shippers approved the fixture only after a RightShip inspection was concluded. This led to the Charterers releasing the vessel, informing the owners that they would not be lifting subjects, as the agreement had fallen through.

The Tribunal decided in favour of the owners, awarding them damages, while finding that the charterers were in repudiatory breach of the charter. It ruled that the 'subjects' clause of the contract was qualified by another provision of the charter, which stipulated that the shippers/receivers' approval was not to be unreasonably withheld. Further, the owners did not have the obligation to provide the RightShip inspection results before the vessel sailed, and thus the said approval had been unreasonably withheld when the charterers released the vessel before the intended sailing.

Then the case went to appeal on a twofold basis; the charterers challenged the award under s.67 and s.69 of the Act. They, firstly, alleged that the Tribunal did not have jurisdiction to issue the award, and on the alternative, its decision was misplaced in law. Their argument focused on the fact that until the subjects were lifted, no binding contract, and subsequently no binding arbitration agreement, could exist between them and the owners.

The Court reversed the award pursuant to s.67 of the Act, which in principle meant that there was no need to consider s.69, namely the Tribunal's error in law. However, having assessed that the arisen issue – the link between a 'subject' clause in a charterparty recap and the provisions of a proforma charter – constituted a matter of general public importance, the Court commented on the issues of law that were brought before it. Particularly, the

[18] *DHL Project & Chartering Ltd v. Gemini Ocean Shipping Co Ltd (Newcastle Express)* [2022] EWHC 181 (Comm).

subject fixture would bind the parties only if and after the owners lifted the subjects. The underlying commercial rationale was the following, i.e., that it is in the commercial interest of the charterer to enter into a binding contract, only after both the shipper and receiver had approved the vessel that the charterer would deploy. Thus, it was completely reasonable for the charterer to reserve its position until such time.

3.05.MUR Shipping BV v RTI Ltd [19]

This was a ruling of major significance in the field of *Force Majeure* clauses. In 2016, the owners entered into a contract with the charterers for the carriage of bauxite from Guinea to Ukraine on a monthly basis. Pursuant to the *force majeure* clause included in the contract, none of the parties would be held liable for loss, delay or failure in performance due to a force majeure event defined as an incident fulfilling the following criteria: a) It is outside the immediate control of the Party giving the Force Majeure Notice; b) It prevents or delays the loading of the cargo at the loading port and/or the discharge of the cargo at the discharging port; c) It is caused by one or more acts of God, extreme weather conditions, any rules or regulations of governments or any interference or acts or directions of governments, the restraint of princes, restrictions on monetary transfers and exchanges; d) It cannot be overcome by reasonable endeavors from the Party affected.

In 2018, after US sanctions were imposed to the parent company of the charterer, the owners got concerned for their ability to load and discharge of cargo considering that payments in US dollars - as was contractually agreed - might have been restricted. The owners declined payments to be made in Euros and refused nominating ships under the contract, by bringing forth *force majeure*. As a result, the charterers had to incur additional expenses by obtaining alternative tonnage, which led to arbitration proceedings being commenced by them.

The Tribunal held that the owners could not rely upon *force majeure* since the incident could have been overcome by reasonable endeavours from the Party affected, if the owners had accepted the charterers suggestion for payments to be made in Euros.

The case reached the High Court on appeal. The question of law that the owners based their submission on was if reasonable endeavours could be interpreted to mean acceptance of payment in Euros instead of US dollars, as initially agreed by way of the contract. The Court's reasoning was based on a line of authority showing that if a *force majeure* event entails that a party is left with limited supply, not in a position to perform all of its contractual obligations, there is still *force majeure* to the extent that it allocates available supplies reasonably. In other words, a reasonable decision, in response to a *force majeure* event, does not preclude reliance on *force majeure.* Consequently, the Court allowed the appeal and held that the affected party's obligation to use reasonable endeavours to overcome the force majeure event did not extend to acceptance of (non-contractual) payment in Euros.

[19] *MUR Shipping BV v RTI Ltd* [2022] EWHC 467 (Comm).

3.06. National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor[20]

This is a Gas Sales and Purchase Contract (for a period of 25 years) which was entered into by National Iranian Oil Company (NIOC) and Crescent Petroleum (Crescent). It follows that an arbitral dispute arose between the parties where the tribunal decided that NIOC had been in breach of its contractual obligation to deliver gas to Crescent. NIOC appealed to the High Court on a question of law under s. 69(3)(c)(i) that the Tribunal was "obviously wrong" in applying the relevant legal test and deciding that it was not open to NIOC to run its defence at the Remedies Phase of arbitration rather than at the liability stage on a claim that the sanctions against Iran should be considered by the tribunal in its decision on the amount of quantum for liability against NIOC.

The leave to appeal was granted by the initial judge and the Court ultimately uphold the tribunal's decision and dismissed the appeal. It is arguable that the Court was in abuse of s. 69(3)(c)(i) of the AA 1996 for its permission to appeal on the alleged error of law. The argument is that the appealing threshold under s. 69(3)(c)(i) is very high which requires the Court to be cautious in granting a leave to appeal on the ground that the tribunal must obviously be wrong in its decision on the question of law. The Judge himself at para 59 of his decision clearly acknowledged that "I have reached the clear conclusion that NIOC has not shown that there was anything wrong (still less anything obviously wrong) with the Tribunal's decision, specifically that, when determining the res judicata/abuse of process issues, the Tribunal failed to apply the applicable legal test."[21]

Indeed, as the Court provides at para 35 of its decision,[22] the question of law was stated in the case of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*[23], whereby it was concluded at para [17] that "…the principle first formulated by Wigram V-C in *Henderson v Henderson (*1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones." Therefore, as the Court provides at para [60],[24] where the tribunal applies the correct legal test, it becomes irrelevant the claimant's contention that the tribunal in its award does not refer to Virgin Atlantic case or spell out the test. Hence, for all the reasons stated above, it is arguable that the case of *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor*[25] must have not been granted a leave to appeal to the English

[20] *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor* [2022] EWHC 1645 (Comm) (30 June 2022).
[21] *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor* [2022] EWHC 1645 (Comm) (30 June 2022), at para. 59.
[22] *Ibid*, at para 35.
[23] *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46.
[24] *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor* [2022] EWHC 1645 (Comm) (30 June 2022), at para. 60.
[25] *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor* [2022] EWHC 1645 (Comm).

High Court where the requirement under s. 69(3)(c)(i) has not been met that the tribunal's decision on the question of law must obviously be wrong. This abuse is clearly against the principle of finality of arbitral award which is inherited in the English Arbitration Act and the Court decisions. Bingham Justice, as he then was, stated this principle in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd*,[26] i.e., that the courts do not approach arbitral awards "with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards with the object of upsetting or frustrating the process of arbitration".[27]

4. Rules of Maritime Arbitration Associations providing for Appeals whilst not excluding the Right of Appeal in Courts

The most prominent – if not the most widely used – maritime institutional rules are the London Maritime Arbitration (LMAA) rules. The LMAA rules, unlike institutional rules such as those of the LCIA or ICC, do not exclude the right to appeal, except for cases of Small Claims procedures. Pursuant to Article 15 of the LMAA rules:

> *"The parties are deemed to have agreed that any right of appeal to the courts shall be confined to instances where it is alleged that the award gives rise to an issue (a) of general interest or (b) of importance to the trade or industry in question, and as to (b), no application may be made to the court unless the tribunal certifies that the issue is indeed of importance to such trade or industry. Any right of appeal is otherwise excluded. For the avoidance of doubt this provision does not apply to any ruling by a tribunal in relation to its own jurisdiction."*

Looking at the aforementioned Article, one cannot clearly conclude that for a successful submission of appeals to be filed, there has to be a question of law to be tackled. Nevertheless, we could clearly discern the influence that s.69 of the AA 1996 has exercised to the wording of Art. 15 LMAA. Particularly, such influence is reflected on both the criteria of Article 15, namely the *general interest* and the *importance to the trade or industry*, which are along the lines of the *general public importance* criterion enshrined in s.69(3)(c)(ii) of the AA 1996.

In this regard, Article 26 of the Hong Kong Maritime Arbitration Group Terms 2021 (HKMAG) has been drafted relying on the LMAA Terms. [28] Article 26 HKMAG provides that

> *Unless agreed otherwise, the parties agree to opt into the provisions of Section 4, 5, 6 and 7 of Schedule 2 of the Ordinance*

[26] *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14.
[27] *Ibid*, at para 34.
[28] HKMAG Terms & Procedures, https://www.hkmag.org.hk/resources.

('Challenging arbitral award on ground of serious irregularity', 'Appeal against arbitral award on question of law', 'Application for leave to appeal against arbitral award on question of law', and 'Supplementary provisions on challenge to or appeal against arbitral award')

Section 5 is heavily based on s.69 of the Act considering that it provides for an appeal against arbitral awards on question of law, and the Court must decide *the question of law which is the subject of the appeal on the basis of the findings of fact in the award*. Further, one of the qualifications to which permission to appeal is subject is the arisen question's *general importance,* as exactly is the case with LMAA and s.69 of the AA 1996. An important qualification for filing an appeal, is that in order to benefit from Ordinance 2, the parties should expressly state it in their arbitration agreement, pursuant to section 99 of the Ordinance.[29]

Another one of the few institutions providing for a right to challenge a panel's findings is the Vancouver Maritime Arbitrators Association (VMAA).[30] Pursuant to the VMAA Rules 2016, Section D(16):

Unless the decision of the Contract Referee is appealed within 30 days by one or more of the parties, the findings of fact and decision shall be binding on the parties and any Tribunal. An appeal of the decision of the Contract Referee is accomplished by commencing an arbitration

A new notion appearing in the VMAA Rules is that of the Contract Referee. Pursuant to Section D(14), the contract referee resolves disputes in relation to past or future compliance with the parties' respective obligations. Here, the appeals mechanism works in a rather different fashion than the one explored in this paper until this point; pursuant to the VMAA Rules, any of the parties can appeal the decision of the Contract Referee with regards to factual findings, and not questions of law. Moreover, what could be observed, is that the said challenge constitutes an internal device that the parties can deploy if they disagree with factual assessments made by the Contract Referee.

Moving on to another set of institutional rules that not preclude the right to appeal, pursuant to Article 5.6 of the UNUM (Transport Arbitration) Rules 2018:[31]

By agreeing to arbitration in accordance with these rules, the parties are deemed to have undertaken to comply immediately with an irrevocable award. An arbitral award may not be

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[29] An Ordinance to reform the law relating to arbitration, and to provide for related and consequential matters, [1 June 2011], *L.N. 38 of 2011, (Enacting provision omitted—E.R. 2 of 2014)* https://www.elegislation.gov.hk/hk/cap609!en@2022-06-30T00:00:00?INDEX_CS=N&xpid=ID_1438403520790_001.

[30] Vancouver Maritime Arbitrators Association, Arbitration Rules 2016, https://vmaa.org/wp-content/uploads/2019/01/VMAA-Rules-2016.pdf.

[31] UNUM (Transport Arbitration) Rules, 2018, https://unum.world/wp-content/uploads/2018/09/UNUM-Arbitration-Rules-EN.pdf.

> *appealed unless the parties agree otherwise. In the latter case the arbitrators may, in the instances where this is allowed by the law, declare the award provisionally enforceable, whether or not subject to the provision of security*

The provision, thus, stipulates that it is up to the parties to agree on deviating from the default rule pursuant to which no appeal is possible. However, that may be, in essence, appeal is permissible, and the UNUM Rules can by no means stand in the way of the parties' will to retain their right to challenge the Tribunal's decision.

The next set of institutional rules to investigate is the German Maritime Arbitration Association Rules (GMAA).[32] Pursuant to §10 Procedural Principles of the GMAA

> *The arbitral tribunal shall have the power to decide whether the arbitration agreement is valid, whether the arbitral tribunal is properly constituted and whether it has jurisdiction with respect to the dispute. If a party challenges the jurisdiction of the arbitral tribunal, the arbitral tribunal may decide by interim award whether it has jurisdiction; an appeal to the state court against such interim award shall not suspend the arbitral proceedings*

Also, in the framework of the GMAA Rules, we can discern that appeals mechanism works slightly differently than in the context of s.69 of the AA 1996. Pursuant to the GMAA Rules, appeals is permissible for a matter regarding the Tribunal's jurisdiction, which is a procedural issue, and not a question of law as reflected in s.69. Notwithstanding this difference, the GMAA Rules is the only set of rules allowing for the challenge of the Tribunal's jurisdiction by way of appeals to the state court. Such allowance could raise concerns with regards to the position of arbitration as a dispute resolution form that is supposed to be equal to state courts. Para. 10, however, nullifies such concerns as the commenced arbitral proceedings are not affected in any way by the filling of the aforementioned appeal to the state court, and thus the aforementioned principle is not undermined.

The last set of institutional rules to be examined is that of the Chambre Arbitrale Maritime de Paris.[33] Pursuant to Article XVII.- Second degree examination

> *When the main claim which is submitted to the Chambre by the claimant exceeds 30.000 €, each party to the award, including that which failed in the first instance proceedings, may request a second-degree examination of the case, if the award which is delivered has brought the case to an end. The award which is subject to a second-degree examination is then considered as a draft which cannot be enforced, even provisionally*. […]

[32] GMAA 2020, https://gmaa.de/images/gmaa/Regularien/GMAA-Arbitration_Rules_2020.pdf.
[33] Chambre Arbitrale Maritime de Paris, https://www.arbitrage-maritime.org/CAMP-V3/arbitration-rules/.

A second-degree application shall strictly relate to the facts examined at first instance and shall not contain any new application unless agreed by the parties.

As is shown above, in the framework of the Chambre Arbitrale Maritime de Paris Rules, a quasi-appeals mechanism could be held to appear in the form of a second-degree examination, conducted by the institution. It differs, therefore, from the device enshrined in s.69 of the AA 1996 in that the appeal is filed and scrutinized under the same institution, thus constituting a rather internal procedure – as was the case with the VMAA Rules as well. Genuine appeal, however, to state courts is prohibited by way of Article XIX of the Chambre Arbitrale Maritime de Paris Rules[34].

Further, it should be pointed out that, these rules are different from s.69 of the AA 1996, in that Article XVII requires that a party challenges the Tribunal's decision on the facts of the case, rather than on a point of law.

The abovementioned rules constitute exceptions to the principle that arbitral awards are final and binding and should be carried out by the parties without delay. It should be further noted that institutional rules which permit appeals to state courts, as is the case with LMAA, HKIAG, and GMAA Rules, can be proven to be extremely useful for research and case study as they offer an insight into their facts and the errors made by arbitrators that could be avoided in the future.

[A]. Non-Maritime Arbitration Institution Rules and their Internal Rules and Boards of Appeal

The shipping industry clearly takes a prominent place in the world of international arbitration. However, we will now turn towards examining the broader scope of arbitration disputes by discussing the arbitration rules of some of the most popular and widely used institutional rules, which are not necessarily focused on maritime disputes *per se*. While it will be interesting to examine each separately, it is submitted that most institutional rules share significant similarities when it comes to the final and binding character of arbitral awards and the extremely limited scope for appeal.

As we are comparing institutional rules on the issue of appealing arbitral awards – something which the English Arbitration Act 1996 has addressed in its section 69, it only makes sense to review the approach of the Rules of the London Court of International Arbitration. The LCIA Arbitration Rules are universally applicable, suitable for all types of

[34] *Arbitration awards rendered according to the present Rules cannot be appealed against irrespective of whether the arbitrators were empowered to act as amiables compositeurs or not. They may be subject to an application for setting aside in the cases provided for in articles 1492 and 1520 of CPC. The application for setting aside does not confer upon the jurisdiction in which the application is made the power to pronounce judgement on the merits of the case. In case of setting aside of an award, the dispute shall be brought again before the Chambre Arbitrale Maritime at the request of one or other party. Such new proceedings shall be started and pursued according to the present Rules.* https://www.arbitrage-maritime.org/CAMP-V3/arbitration-rules/.

arbitration disputes and offer an approach combining civil and common law systems.[35] The most up-to-date version of the LCIA Arbitration Rules became effective in October 2020,[36] with which it amended the 2014 Rules as a response to the COVID-19 pandemic and the need to transform arbitral proceedings to incorporate online proceedings. The Rules also include an institutional rule of a standard waiver that prevents parties from acquiring the right to challenge an arbitral award in court.

> *Every award (including reasons for such award) shall be final and binding on the parties. The parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.*

This precludes the parties from seeking an appeal, review or recourse to any state court or other legal authority.[37] In fact, such an express waiver is not unusual for institutional rules. The same waiver can be seen in the ICC Arbitration Rules[38] as well as in the SIAC Arbitration Rules of 2016.[39] The most recent Arbitration rules of the Hong Kong Arbitration Centre also maintain the final and binding character of the arbitral award and provide for the waiver of the parties' rights "in respect of the setting-aside, enforcement and execution of any award, in so far as such waiver can validly be made."[40] Consequently, a standard waiver assists the parties in ensuring finality of the arbitral proceedings and the award. The article makes it clear that the scope of the waiver goes so far as it is not prohibited under any applicable law, which suggests that where the Arbitration Act 1996 applies by virtue of the fact that English law is the law applicable to arbitral proceedings, then the non-mandatory s. 69 can be invoked. Article 26.8 can therefore be seen as carefully lurking between civil and common law approaches with respect to the right to challenge an arbitral award. While the LCIA Rules explicitly prove for a waiver of this right, they also recognise that the waiver can be limited by virtue of any applicable law wherein an appeal might be possible. In the same vein, Article 29.2 recognises that if an appeal or review takes place due to a mandatory provision of any applicable law or otherwise, "the LCIA Court may determine whether the arbitration should continue, notwithstanding such appeal or

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[35] LCIA Arbitration, https://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration.aspx accessed 01/04/2022.
[36] LCIA Arbitration Rules 2020, effective 1 October 2020, available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx accessed 01/04/2022.
[37] *Ibid*, Article 26.8. https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx#Article%2027.
[38] 2021 ICC Arbitration Rules, effective 1 January 2021, Article 35(6), available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#:~:text=They%20define%20and%20regulate%20the,resolution%20of%20cross%2Dborder%20disputes. Accessed 01/04/2022.
[39] Arbitration Rules of the Singapore International Arbitration Centre, SIAC Rules 6th Edition, 1 August 2016, Rule 32.11, available at https://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule32 accessed 02/04/2022.
[40] 2018 HKIAC Administered Arbitration Rules, Section V, Article 35(2); See also WIPO Arbitration Rules, Schedule of Fees and Costs, July 2021, Article 66.

review."[41] Otherwise, in line with most arbitration rules, the LCIA Rules also provide for the correction of an award where errors might have occurred. [42]

The 2021 ICC Arbitration Rules also express the finality of the award with no mention of a right to appeal. The parties should comply with and carry out the award without delay and are deemed to have waived their right to any form of recourse "insofar as such waiver can be validly made".[43] This article seems to recognize that there might be jurisdictions in which the waiver may not be permitted and thus unlawful. Unlike the LCIA Rules where the LCIA would not normally review or scrutinize an award by an arbitral tribunal, the ICC Rules require that every award be reviewed by the ICC Court and its form approved before any final award is rendered. In the course of the review, the Court "may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance."[44]

Another example to observe is the Arbitration Institute of the Stockholm Chamber of Commerce. The Institute is part of, but independent from the Stockholm Chamber of Commerce. The SCC consists of a Board and a Secretariat and provides dispute resolutions services for national and international parties in commercial and investment arbitrations.[45]

We can observe that Article 46 of the SCC Arbitration Rules 2017[46] asserts the finality and binding effect of the award on the parties and does not include a right to appeal. This is in fact a common feature we will see in virtually all institutional rules as well as the obligation upon parties to carry out their obligations under the award promptly. The only possibility to review the award in some way is under Article 47, which allows the parties, within 30 days of receiving the award, to request that the arbitral tribunal corrects "any clerical, typographical or computational errors in the award" or provides "an interpretation of a specific point or part of the award." Therefore, the tribunal can only request to correct minor errors not relating to the law in any way or to provide the correct interpretation of the award as to the parties' obligations after the proceedings. In fact, Article 52 excludes from liability the arbitrators, administrative secretary of the arbitral tribunal and any experts appointed by the tribunal for any acts or omissions in connection with the arbitration. This exclusion of liability applies unless the act or omission constitutes willful misconduct or gross negligence. The article speaks of gross negligence, under which scope impliedly included might be serious errors of law as caught under s. 69 of the AA 1996. However, this would mean expanding the wording of the article and adopting a very purposive approach. Nevertheless, the SCC Arbitration Rules have not found it necessary to include not only a consideration of the arbitrator's liability, but also of the consequences of such potential gross negligence – in other words, there is a recognition that the arbitrator may get things

[41] 2020 LCIA Arbitration Rules, Article 29.2.
[42] LCIA Arbitration Rules 2020, Article 27; See also 2018 HKIAC Administered Arbitration Rules, Section V, Articles 38 & 39.
[43] 2021 ICC Arbitration Rules, Article 35(6), available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_40 accessed 01/04/2022.
[44] *Ibid*, Article 34, available at https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_40 accessed 01/04/2022.
[45] Arbitration Institute of the Stockholm Chamber of Commerce, About the SCC, available at https://sccinstitute.com/about-the-scc/ accessed 01/04/2022.
[46] Arbitration Institute of the Stockholm Chamber of Commerce, SCC 2017 Arbitration Rules, Article 46, available at https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf accessed 01/04/2022.

wrong, but there is no recognition of remedying such situations by virtue of allowing the parties to challenge an award. Article 52 only relates to the arbitrator's liability. This article is consistent with the powers and decisions by the SCC Board under Article 11, which can decide on a number of matters, including the appointment and challenge of an arbitrator, but not on the award (review, finality or in any other form). Therefore, the only possibility for a party to object to an arbitrator's decision is indirectly through Article 19 providing for bringing a challenge against an arbitrator for circumstances which give rise to justifiable doubts as to their impartiality or independence or lack of qualifications. The challenging party must submit its written statement within 15 days from the date the circumstances giving rise to justifiable doubts became known to the party (Article 19(3)). If so, Article 20(1)(ii) allows the Board to release an arbitrator from appointment and replace the released arbitrator (Article 21(1)). This is in line with the approach adopted by the Supreme Court of Sweden, which has reiterated that the standard for arbitrator's impartiality is necessarily a high one, as arbitral awards cannot be challenged on the merits. [47] While there are both arguments 'in favour' and 'against' to having a strict standard of impartiality - wherein arguments against would relate to criticism that sometimes the standard is too strict, this is not a sufficiently satisfactory response to the absence of merits review of arbitral awards as errors of law are a separate issue from impartiality of the arbitrator, even though we can see the possible interrelationship. However, the tribunal might have been impartial and independent and still issue an award in error of law.

The Chartered Institute of Arbitrators (CIArb) is another example of a professional body for dispute avoidance and dispute management.[48] CIArb produced its own set of International Dispute Board Rules in 2014 to help facilitate and resolve disputes occurring within contracts.[49] The institute has already designed and put in place its own Arbitration Rules which are effective since December 2015.[50] Similarly, the CIArb Arbitration Rules recognise that an arbitrator may be replaced[51] following a successful challenge as to their impartiality.[52] A commonality with the SCC Rules is Article 16 on exclusion of liability, which protects the tribunal from liability in relation to any action or omission in connection with the arbitration, unless it amounts to an intentional wrongdoing.[53] With regards to appeal, the CIArb arbitration rules are interesting with their express mention of the waiver of a right to appeal in Article 34(2).[54] The article provides that by adopting "these Rules, the parties waive their right to any form of appeal or recourse to a court or other judicial authority insofar as such waiver is valid under the applicable

[47] See Judgment of the Supreme Court of Sweden in case T 2448-06 of 19 November 2007. Available at http://www.arbitration.sccinstitute.com/dokument/Court-Decisions/1083436/Judgment-of-theSupremeCourt-of-Sweden-19-November-2007-Case-No-T-2448-06NJA-2007-s-481?pageid=95788, accessed 01/04/2022.
[48] The Chartered Institute of Arbitrators, https://ciarb.org/?gclid=Cj0KCQjw_4-SBhCgARIsAAlegrWl6llVBZQ7tXkS9MY1LIdoSrgkJ_UFLn3OOEx8Qedygqeq201xQSMaApjiEALw_wcB accessed 01/04/2022.
[49] The Chartered Institute of Arbitrators, International Dispute Board Rules, 2014. https://ciarb.org/disputes/dispute-appointment-service/dispute-boards/ accessed 01/04/2022.
[50] CIArb Arbitration Rules, Practice and Standards Committee, 1 December 2015, available at https://www.ciarb.org/media/2729/ciarb-arbitration-rules.pdf accessed 01/04/2022.
[51] CIArb Arbitration Rules 2015, Article 14.
[52] *Ibid*, Article 12(2).
[53] *Ibid*, Article 16.
[54] *Ibid*, Article 34(2).

law." Hence, the CIArb arbitration rules explicitly exclude an appeal of the award on any ground, including on a point of law. Unlike other institutional rules which make no reference to an appeal before a national court, the fact that the CIArb rules explicitly exclude this signifies that the drafters have considered the right of appeal and have decided against it. One can only speculate as to why the article was worded in such a manner, but it might be due to the traditional criticisms of an appeal on a point of law, which s. 69 of the AA 1996 has encountered. Such criticisms often concern the complexity of the section and the fact that it contradicts a key aspect of arbitration – the guaranteed finality of the arbitral award. Unsurprisingly, the CIArb rules allow for the interpretation[55] and the correction[56] of the award of "any error in computation, any clerical or typographical error, or any error or omission of a similar nature."

The commentary to article 5 on the effect of a final award explains that the correction of an error might be necessary so as to correct unintended consequences of errors in computation or denomination, and clerical, typographical or similar errors, but that arbitrators must be careful not to alter the content of the award. [57] The commentary also notes the possible remission of an award – when a party has applied to a local court to set aside an award, the court may remit an issue back to the arbitrators to rectify a defect in the award, but again notes that the arbitrator has to be careful not to change the content of the award. Similarly, the ISTAC Arbitration Rules allow only for the correction of computational and typographical errors as well as for the proper interpretation of the award, but beyond this the award is considered binding on the parties, [58] thus omitting any possibility for review or annulment of the award.

In Australia, the ACICA Arbitration Rules 2021 can govern the arbitration between the parties if expressly incorporated in the arbitration agreement, although reference to these Rules does not in principle exclude the operation of the UNCITRAL Model Law on International Commercial Arbitration.[59] The ACICA Arbitration Rules echo the approach undertaken by other arbitral institutions by reiterating the final and binding character of the award and the obligation upon the parties to carry out the award without delay.[60] While there is not an exact standard of waiver with respect to the final arbitral award *per se*, there is an identical standard in the context of consolidated arbitrations and a joinder. In particular, the Rules set out that the parties waive any objection to the validity and/or enforcement of any award that is made by the Arbitral Tribunal in the consolidated proceedings[61] as well as in the arbitration which is based on the joinder of an additional party to the arbitration,[62] "in so far as such waiver can validly be made."

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[55] *Ibid*, Article 37.
[56] *Ibid*, Article 38.
[57] The CIArb's International Arbitration Practice Guidelines, "Drafting Arbitral Awards Part I – General, Article 5 https://ciarb.org/media/4206/drafting-arbitral-awards-part-i-_-general-2021.pdf accessed 02/04/2022.
[58] Istanbul Arbitration Centre, ISTAC, "Arbitration and Mediation Rules", Section V, Article 37 and Article 36(4), available at https://istac.org.tr/wp-content/uploads/2016/03/istac_tahkim_kurallari_v3_EN_2020.pdf accessed 02/04/2022.
[59] Australian Centre for International Commercial Arbitration, "ACICA Arbitration Rules and Expedited Arbitration Rules", 1 April 2021, Article 2(1) and 2(3), hereby referred to as ACICA Arbitration Rules.
[60] ACICA Arbitration Rules, Article 42(2).
[61] *Ibid*, Article 16.9.
[62] *Ibid*, Article 17.4.

Additionally, the CIETAC Arbitration Rules 2015 are no different in respect of challenging an award. In fact, the wording of these Rules is even stronger and more explicit as it states that "[n]either party may bring a lawsuit before a court or make a request to any other organization for revision of the award."[63]

As already noticed, a permanent feature of all institutional rules discussed so far is the provision that an arbitral award is final and binding and should be carried out by the parties without delay. This feature of arbitration is also recognised in the ICDR Rules.[64] Similarly, the Rules also recognize that the parties waive their right to appeal.[65] The waiver is qualified by the phrases "absent agreement otherwise" and "insofar as such waiver can be validly made."[66] Consequently, the rules recognise not only that certain jurisdictions may not permit such a waiver, which is a feature shared by the ICC Rules, but also purport that under the ICDR Rules it is possible to have an appeal by agreement. Such an appeal can be undertaken through the AAA-ICDR Optional Appellate Arbitration Rules 2013.[67] The OAA Rules would be applicable where the parties have either "by stipulation or in their contract" agreed to the appeal of an award issued under the AAA or the ICDR.[68] Therefore, the utilisation of the Rules is dependent upon an agreement between the parties. As a result, the right to appeal becomes a matter of contract. Without an agreement, the parties cannot unilaterally refer to the OAA Rules. The OAA Rules offer a system of appeal to an appellate arbitral panel under which the whole process is expected to be completed within three months, while giving each party an opportunity to submit appellate briefs.[69] However, the Rules seem to exclude disputes between individual consumers and businesses.[70] In particular, the OAA Rules provide that an award "shall not be considered final for purposes of any court actions to modify, enforce, correct, or vacate the Underlying Award" and "the time period for commencement of judicial enforcement proceedings shall be tolled during the pendency of the appeal."[71] Under these Rules, the parties will stay any already initiated judicial enforcement proceedings of the award until the appeal process is concluded.[72] If the appeal is withdrawn, then the award will be deemed final on the date of withdrawal.[73] The Rules provide for two grounds for an appeal. A party may bring an appeal on grounds that the award was based on "an error of law that is material and prejudicial" or

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[63] China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules, 1 January 2015, Article 49(9).
[64] International Centre for Dispute Resolution, "International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)", Rules Amended and Effective March 1, 2021. https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar accessed 02/04/2022.
[65] ICDR, International Arbitration Rules, Article 33(1).
[66] *Ibid*, Article 33(1).
[67] American Arbitration Association - ICDR, Optional Appellate Arbitration Rules, Rules Effective November 1, 2013 https://www.icdr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf, accessed 02/04/2022.
[68] American Arbitration Association - ICDR, "Optional Appellate Arbitration Rules, A-1. Agreement of Parties", Rules Effective November 1, 2013, hereafter the OAA Rules, available at https://www.icdr.org/sites/default/files/AAA-ICDR_Optional_Appellate_Arbitration_Rules.pdf accessed 02/04/2022.
[69] OAA Rules, Introduction.
[70] OAA Rules, A-1. Agreement of Parties.
[71] OAA Rules, A-2. Effect of Appeal on Underlying Award.
[72] *Ibid.*
[73] *Ibid.*

"determinations of fact that are clearly erroneous."[74] Within 30 days of the last appeal brief by a party, the Appeal Tribunal should take any of the following actions: adopt the underlying award on its own; substitute its own award for the underlying award; or request additional information and notify the parties of the tribunal's exercise of an option to extend the time to render a decision, not to exceed 30 days.[75] The decision of the Appeal Tribunal on the appeal of the award becomes the final award upon conclusion of the process. Therefore, the OAA Rules offer a merits review of the arbitration award similar to the English Arbitration Act 1996, which some parties may find attractive and thus feel incentivised to refer to the OAA Rules. Therefore, the Rules are in contrast with the narrow (or entirely lacking) appeals procedures in the vast majority of institutional rules. The appeal on substantive grounds resembles the appellate review process found in courts, whilst also appearing to be more time efficient.[76]

Further examples of US arbitral institutions which have established optional appellate rules are the CPR Arbitration Appeal Procedure and the JAMS Appeal Procedure. The appellate review under the Conflict Prevention & Resolution's (CPR) Appeal Procedure is available, if the original award "(i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record" or if the award "is subject to one or more of the grounds set forth in Section 10 of the Federal Arbitration Act for vacating an award."[77] In contrast, the JAMS Optional Arbitration Appeal Procedure provides that the Appeal Panel "will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision" and that the Panel "may affirm, reverse or modify an Award."[78] Therefore, US institutions take a different approach as to the standard of review, but what is clear is that US arbitral institutions have explicitly recognised the right to appeal an award, if the parties have so expressed in their agreement.

These three Appeal Procedures have been created to address situations where flawed or unjust awards have been rendered. Reference to appellate procedures is considered suitable to parties whose dispute has legal and factual complexity, heavy practical repercussions or the dispute is high in amount.[79] On the one hand, an appeal introduces a level of uncertainty as to the outcome of the arbitration or the identity of the arbitrators forming the appeals tribunal. On the other hand, these aspects can be mitigated by inserting a clause according to which the parties agree on the profile of the appeal arbitrators, the applicable substantive and procedural rules, a deadline for the award to be issued, etc.[80] Importantly, the appeal

[74] OAA Rules, A-10. Issues Subject to Appeal.
[75] *Ibid*, A-19. Appeal Tribunal's Decision.
[76] 'AAA Adopts Optional Appellate Arbitration Process', 12 November 2013, https://www.proskauer.com/alert/aaa-adopts-optional-appellate-arbitration-process accessed 02/04/2022.
[77] International Institution for Conflict Prevention & Resolution (CPR), CPR Arbitration Appeal Procedure and Commentary, Rule 8.2, available at https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure/_res/id=Attachments/index=0/CPRArbitrationAppealProcedure2015.pdf accessed 02/04/2022.
[78] JAMS Optional Arbitration Appeal Procedure, Paragraph D, Effective June 2003, available at https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf accessed 02/04/2022.
[79] Aníbal Sabater, Chaffetz Lindsey LLP, "Optional Appellate Arbitration Rules: Are They Good For Your Case' Practical Law Arbitration", 15 Aug 2016, available at https://uk.practicallaw.thomsonreuters.com/w-000-5258 accessed 02/04/2022.
[80] *Ibid*.

rules offer a higher degree of certainty that the final award will be factually and legally sound and just, as it will have been decided on by two panels.[81] However, the parties should also be diligent when drafting their arbitration clauses to involve appellate rules and the arbitrators to decide the underlying arbitration as well as the arbitral appeal.[82] In deciding whether to agree on an appellate arbitration or not, the parties should weigh the need for a rational and sound judgment against the increased time and arbitration cost.[83]

The limited review of arbitral awards under institutional rules is often perceived as an advantage as it reaffirms the finality of the award and minimizes the chances of the losing party invoking an appeal as a mere delaying tactic to the recognition and enforcement of the award. This saves time and finances. However, the lack of an appeals procedure also raises the question as to what happens when an arbitrator has got the law wrong and has rendered a flawed award. Therefore, those institutional rules which have included an appeals procedure seem to address this gap. We have examined three set of institutional rules that have included an appeals procedure: the AAA-ICDR Optional Appellate Rules, the CPR Appeal Procedure, and the JAMS Optional Arbitration Appeal Procedure.

The very limited scope for appeal has been observed in most of the institutional rules examined. This serves to reaffirm a common approach towards challenges of arbitral awards across various legal systems. For example, the European civil law systems have largely taken the view that arbitral awards are final and binding. Apart from explicitly stating this, such rules often go further by incorporating a standard waiver, which prevents the parties from acquiring the right to seek the review or challenge of an arbitral award in national courts. However, it is notable that this approach is not shared only amongst European civil law systems. The CIETAC Arbitration Rules have been very clear that a party cannot appeal an award in national courts. Furthermore, similar mechanisms of appeal on points of law have been adopted in other common law jurisdictions, such as Singapore via the SIAC Rules, Honk Kong via the HKIAC Rules and Australia via the ACICA Rules. An exception to the rule is surprisingly seen by the United States as we explored three sets of institutional rules, which have established optional appellate rules. Overall, the discussion proves useful to parties who are yet to make the choice as to whether any future disputes shall be governed by institutional arbitration rules and if so, which rules should be applicable. Whilst we examined that neither s. 69 of the AA 1996, nor the US appellate rules are mandatory, in fact the AAA-ICDR have expressly called their appeals system "optional," the mere availability of a right to challenge the finality of the award on a point of law creates food for thought for parties and their legal representatives when drafting the arbitration agreement/clause.

5. Conclusions

[81] *Ibid*; "AAA/ICDR Optional Appellate Arbitration: A Step-by-Step Guide" Practical Law Arbitration, Practice Notes, available at https://uk.practicallaw.thomsonreuters.com/w-013-0215 accessed 02/04/2022.
[82] Abater, Lindsey, op. cit. n. 79.
[83] Practical Law Arbitration, op.cit. n. 81.

As our discussion has shown, in England the recent project of the Law Commission to review the AA 1996 and its consultation paper, leave out of the proposed reform s. 69 AA1996. This is for good reasons, i.e., because it is deemed to preserve its legislative function and purpose and because it helps evolve the law. Similarly, in the institutional rules examined, a very limited right to appeal is contained in most of them, in accordance with the trend in most civil law jurisdictions. This is noted in the EU and outside it, e.g., in the CIETAC Arbitration Rules. In the US as seen in the three sets of institutional rules chosen to be examined optional appellate rules are contained. However, neither s. 69 of the English AA 1996, nor the US appellate rules are mandatory, which proves that the right to appeal in arbitration should be left to parties and considered by courts on an *ad hoc* basis. Even if parties may cloak questions of fact as questions of law, the result is that very few cases are directed to be appealed and from those even fewer are successful. Hence, the finality of the arbitral award is safeguarded whilst the right to appeal is existent and contributes to a fairer arbitration system mechanism.