



## Appeal still possible

**William Chetwood**

SECTION 69 of the Arbitration Act 1996 provides that “unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings”.

The Act does not stipulate a particular wording required in an agreement to exclude the right to appeal, but the recent decision of the High Court in *Shell Egypt West v Dana Gas Egypt* highlights the need to use clear language to achieve this.

In that case, disputes arose under a contract for a gas concession that provided that any “dispute shall be submitted to the arbitrators in such manner as they shall deem appropriate *and the decision of the majority of the arbitrators, rendered in writing, shall be final, conclusive and binding on the parties*, and the judgment upon such decision may be entered in any court of a country having jurisdiction”. (emphasis added).

At first sight, the words in italic might be thought to be exactly the type of agreement contemplated in the Act to exclude the right of appeal, and the successful party in the arbitration sought to defeat an application for permission to appeal from the award on the basis that these words amounted to an agreement not to appeal.

There are contradictory decisions in Canada and Australia as to whether the words “final and binding” on their own would prevent an appeal. However, it was argued that the addition of the words “conclusive” made it clear that the parties intended to exclude the possibility of appeal. The use of this word “could only sensibly be construed as restricting all rights of appeal or review so far as the parties were contractually able to do so”.

Mrs Justice Gloster disagreed. She held that although no express reference to Section 69 is required, clear words must be used. The words in this clause would not convey to a reasonable person that the parties had agreed to exclude all rights of appeal on points of law under section 69. The words “final and binding” in her view were not enough — they merely indicated that it was not open to the parties to re-litigate the issues.

She also held that the word “conclusive” added little to this. In the judge’s view, “the addition of such word does not connote, either by its normal meaning, or, if different, by the meaning it would convey to the “... reasonable person having all the background knowledge etc.”, that the parties were agreeing to exclude their statutory right of appeal on points of law. It certainly does not do so with sufficient clarity to amount to an exclusion agreement. She held that “an award can also be said to be ‘conclusive’ in that it precludes a party from reopening in a later dispute individual issues of law or fact which had been necessarily decided by the award” while still having the possibility of an appeal.

The Arbitration Act 1996 makes clear that parties who wish to achieve finality can include a provision in agreements to arbitrate that exclude the right to seek permission to appeal from the arbitration award. However, the courts require clear words to do this. If the parties wish to do so, it would be prudent to make express reference to the right to appeal. This is the approach adopted, for example in the LMAA Small Claims Procedure when seeking to exclude the possibility of an appeal. “The right of appeal to the Courts is excluded under this procedure. By adopting the Small Claims Procedure the parties shall be deemed to have agreed to waive all rights of appeal...”

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