How to teach an old dog new tricks: appeals and the English Arbitration Law Reform

How to Teach an Old Dog New Tricks: Appeals and the English Arbitration Law Reform

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The English Arbitration Act 1996 (AA 1996) is founded on the principle that arbitration gives effect to the parties' choice to refer their disputes to arbitration and that courts should only intervene to support and not displace it. This article discusses the Arbitration Reform Project of the Law Commission, specifically appeals under section 69 of the AA 1996, with a special focus on shipping, where arbitration is the preferred dispute resolution method, so as to explore how the right to appeal in law is used differently in different categories of disputes, reflecting the different expectations of the parties involved. Where appeals on questions of law are permitted, there is in practice a tendency to abuse this mechanism, as questions of fact are often cloaked as questions of law. Additionally, we observe an inconsistent exercise of discretion of the courts in granting leave under section 69(3)(c)(ii) of the AA 1996 which requires both that the question be of general public importance and that the tribunal's decision be at least open to serious doubt. Courts seem to be not too readily granting leave, but rather reluctant to do unless the requirements set by law exist. This article also discusses the only new change regarding appeals in arbitration, namely, the new section 67 of the AA 2025. Previously (i.e., before the 2025 reforms), section 67 of the AA 1996 allowed a party to challenge an arbitral award, and courts could review all evidence and arguments even if not previously submitted to the tribunal (as per Dallah v. Pakistan, (2010) 10 UKSC 46 – court's de novo jurisdiction). In contrast, the 2025 amendments restrict courts from rehearing evidence or entertaining new objections unless they were previously undiscoverable, and limit reviews to tribunal materials unless justice requires otherwise. Our analysis shows that the appeals regime under section 69 of the AA 1996 is sound in principle as it strikes an appropriate balance between finality and legal oversight and therefore has been retained, as confirmed in the Law Commission's final report. However, this article argues that the English High Court must take care to avoid any misapplication of the statutory requirements when granting leave to appeal on questions of law under section 69.

Keywords: arbitration, appeals in arbitration, arbitration law reform, shipping arbitration, section 69 Arbitration Act 1996 and appeals, section 67 Arbitration Act 1996 and appeals

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1 HISTORICAL BACKGROUND OF APPEALS ON POINT OF LAW UNDER ENGLISH LAW

The court's review of the merit of an arbitration award is unique to English jurisprudence, as enunciated in the pre-1950 Arbitration Act (AA) regime.[1] Such review of the merits of an arbitration award has a distinct history in English law, rooted in the AA 1950, which preserved the stated case procedure. This allowed either party to require the arbitrator to refer a legal question arising during proceedings to the court, enabling wide judicial oversight of arbitral decisions. However, this mechanism was increasingly seen as undermining finality and efficiency. Hence, it is not surprising that section 69 of the 'AA 1996', which permits appeals on a question of law, was notably influenced by the previous English AAs and courts' guidance. The trend of supporting the finality of arbitral awards over judicial reviews first emerged under the English 'AA 1979' and courts' decisions thereafter.[2]

The AA 1979 marked a significant shift by abolishing the stated case procedure under the AA 1950 and prohibiting the court from setting aside an arbitral award on the grounds of errors of fact or law.[3] However, although this prohibition was mainly restricted to procedural matters, once an award is before the court it may accept the application of either party for a review on the question of law.[4] This shift laid the foundation for section 69 of the AA 1996, which permitted appeals only on a question of law and only with the court's permission or the parties' agreement. The evolution from broad judicial review to a more restrained model reflected a deliberate policy choice favouring the finality of arbitral awards over a merit-based court review, a trend that continued under the AA 1996. Furthermore, the House of Lords in the case of *Pioneer Shipping Ltd. and Others v. B.T.P. Tioxide Ltd* (hereinafter *'The Nema'*),[5] and in *Antaios Compania Naviera Sa v. Salen Rederierna Ab* (hereinafter *'The Antaios')*,[6] provided important guidelines regarding appeals on a point of law. In *The Nema*,[7] Lord Roskill emphasized that questions of fact fall exclusively within the tribunal's jurisdiction and should not be usurped by the court.[8] He further held that the High Court in exercising its discretion to grant a leave must balance the finality of arbitral awards against

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1 Lord Hacking, *The 'Stated Case' Abolished: The United Kingdom Arbitration Act of 1979* 14(1) Am. B. Ass'n 95–102, 96 (1980).

2 The Arbitration Act 1979 s. 1(1). *See also Pioneer Shipping Ltd. and Others v. B.T.P. Tioxide Ltd. (The Nema)* [1981] 3 W.L.R. 292; *Antaios Compania Naviera Sa v. Salen Rederierna Ab ('The Antaios')* [1985] AC 191[1982] A.C. 724.

3 The AA 1979, s. 1(1).

4 *The Nema, supra* n. 2, at 730 (Lord Roskill).

5 *Ibid.*

6 *The Antaios*, *supra* n. 2.

7 *The Nema*, *supra* n. 2.

8 *Ibid.*, at 753.

reviewing their merits.[9] In addition, Lord Diplock observed a clear parliamentary trend favouring the finality of arbitration over the legal review of arbitral awards.[10]

Under the AA 1979, appealing on a point of law could be brought either with the consent of all the parties to arbitration or with the leave of the High Court.[11] However, leave would not be granted unless the court, considering all circumstances[12] and exercising its discretion,[13] was satisfied that the 'determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement'.[14] The court had the discretion to impose conditions on the grant of the leave if the applicant's case was weak, such as requiring payment of the whole or part of the award into the court or the provision of security.[15] Moreover, section 1(7) of the Act restricted appeals from the High Court to the Court of Appeal. Leave had to be granted by the High Court or the Court of Appeal, and the High Court was required to certify that the question of law was one of general public importance or one which for some other special reason deserved consideration by the Court of Appeal.[16]

2 CHALLENGING ARBITRAL AWARDS

Under English law, the starting point is that an arbitral award is final and binding on the parties unless challenge is possible in accordance with the AA 1996. This principle of 'finality of the award' reflects both the text of the AA and the approach of the English courts. In other words, the courts will generally seek to uphold and enforce arbitral awards interpreting them with a degree of deference.[17] This is further justified by the recognition that time-consuming and costly challenges in the courts are directly contrary to the parties' objective in choosing arbitration as an efficient means of dispute resolution by their chosen tribunal. In essence, the AA 1996 aims to strike a balance between the interest of ensuring a right to challenge, in cases where the award or arbitration is plainly outside what the parties could reasonably have expected,[18] and the principle of giving effect to the parties'

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9 *Ibid.*, at 733.
10 *Ibid.*, at 739–40.
11 The AA 1979, s. 1(3)(a) and (b).
12 *Ibid.*, s. 1(4).
13 *The Nema*, *supra* n. 2, at 730 (Lord Roskill).
14 The AA 1979, s. 1(4).
15 *Ibid.*, s. 1(4); *The Nema*, *supra* n. 2, at 739 (Lord Diplock).
16 The AA 1979, s. 1(7)(a) and (b).
17 C. Ambrose, K. Maxwell & M. Collett, *London Maritime Arbitration*, Ch. 22, §22.1, 371 (4th ed., Informa 2018); *MRI Trading AG v. Erdenet Mining Corp LLC* [2013] EWCA Civ 156, [2013] Lloyd's Rep 638, at 23*; Zermalt Holdings v. Nu-Life Upholstery Repairs* [1985] 2 EGLR 14 (Comm).
18 The 1996 Departmental Advisory Committee (DAC) Report on the English Arbitration Bill, Feb. 1996, paras §§280, 285.

agreement to arbitrate. In effect, the AA 1996 is designed to ensure that challenges are not used as delaying mechanisms by the parties.

The AA 1996 thus aims to strike a balance: preserving limited avenues for a challenge in exceptional cases where the award falls outside what the parties could reasonably have expected, while safeguarding the parties' agreement to arbitrate and discouraging the use of challenges as delaying tactics.

Under the AA 1996 there are four main methods of challenging an award in court: appeal for error of law (section 69)[19]; challenging an award for serious irregularity (section 68)[20]; challenging an award for want of jurisdiction (section 67)[21]; and challenging an award at the enforcement stage (section 103).[22] The first three methods are only relevant where the arbitration is seated in London (or elsewhere in England, Wales or Northern Ireland), whereas the fourth also applies to foreign awards being enforced in England. A successful challenge at the enforcement stage may result in the English courts refusing to enforce the award. The other grounds of challenge may result in the award, or parts of it, being confirmed, varied, remitted, set aside or even declared to be of no effect. Such outcomes may affect enforcement in England and in foreign jurisdictions.[23] In effect, the setting aside or successful appeal of an award at the seat – including by the English courts – does not automatically preclude its enforcement abroad. Under the New York Convention,[24] foreign courts retain discretion to enforce such awards notwithstanding their annulment and may do so where the annulment is seen as improper or inconsistent with international standards. Although Article V(1)(e) of the New York Convention permits an enforcing court to refuse recognition if an award has been set aside or suspended by a competent authority of the country in which that award was made, it does not mandate refusal. The New York Convention grants discretion to courts, and some jurisdictions have enforced annulled awards when the annulment process was seen as unfair, biased, inconsistent with basic norms of justice, or otherwise improper.[25] Rix LJ in *Dallah v. Pakistan*[26] held that any such discretion under the Act is a narrow one[27] and that it is suggested that there are very limited situations where an award that has been set aside by the supervisory

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19 The AA 1996, s. 69.
20 *Ibid.*, s. 68.
21 *Ibid.*, s. 67.
22 *Ibid.*, s. 103.
23 H. Seriki, *Enforcing Annulled Arbitral Awards: Can the Unruly Horse Be Tamed?*, 8 J.B.L. 679–701, at 685–691 (2018).
24 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations 1958), https://www.newyorkconvention.org/english (accessed 30 Jul. 2025).
25 M. Zaheeruddin, *Recognition and Enforcement of Annulled Arbitral Awards under the New York Convention*, 8(7) Int'l J. Prof. Bus. Rev. 01–21, 3 (Miami 2023), doi: 10.26668/businessreview/2023.v8i7.2637.
26 *Dallah v. Pakistan*, 10 UKSC 46 (2010).
27 *Ibid.*, para. §89.

Courts can be enforced.[28] In order for the English Courts to enforce an award that has been set aside at the seat of the arbitration, positive and cogent evidence that the decision offended basic principles of honesty, natural justice and domestic concepts of public policy will be needed, as was the position in *Malicorp Ltd v. Government of Arab Republic of Egypt*,[29] whereby it was established that where the decision setting aside the award meets the test for recognition, there is no need to exercise any discretion not to recognize it.[30] It follows that where it is established that the decision setting aside the award meets the test for recognition, there is no need to exercise any discretion not to recognize it.[31] English Courts are only prepared to use their discretion to enforce an award that has been set aside by the supervisory Courts in limited circumstances, and the level of cogency needed is a high one, as was also evident in *Nikolay Viktorovich Maximov v. Open Joint Stock Company Novolipetsky Metallurgichesky KomBinat*[32] where Burton J noted that the fact that a foreign Court's decision is manifestly wrong or perverse is not sufficient, but, in addition, the decision must be so wrong with evidence of bias that a Court acting in good faith could not have arrived at such a decision, the evidence or grounds must be cogent, and the decision of the foreign Court must be deliberately wrong and not simply wrong by incompetence.[33] Given that there was no cogent evidence of bias against Maximov, the judge dismissed the claimant's application to enforce the award. The high threshold established in *Malicorp Ltd v. Government of Arab Republic of Egypt*[34] and in *Nikolay Viktorovich Maximov v. Open Joint Stock Company Novolipetsky Metallurgichesky KomBinat*[35] is a clear indication that, whilst the English Courts are prepared to review a foreign Court's decision to annul an award, it will only enforce that award in very limited circumstances with cogent evidence. There is also a clear message that a supervisory Court retains control over the arbitral process in its territory and the English Courts will not second guess that Court nor rectify any deficiencies in the decision of the same.[36]

Section 69: Appeal on a point of law

Section 69(3) of the AA 1996 sets a high threshold for granting leave to appeal. The court must be satisfied that:

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28 *Ibid.,* paras §§89–90.
29 *Malicorp Ltd v. Government of Arab Republic of Egypt* [2015] EWHC 361 (Comm), [2015] 1 Lloyd's Rep 423.
30 *Ibid.,* para. §27.
31 *Ibid.*, para. §28.
32 *Nikolay Viktorovich Maximov v. Open Joint Stock Company Novolipetsky Metallurgichesky KomBinat* [2017] EWHC 1911 (Comm).
33 *Ibid.*, para. §16.
34 *Malicorp v. Egypt*, *supra* n. 29.
35 *Maximov v. KomBinat*, *supra* n. 32.
36 Seriki, *supra* n. 23, at 685–691.

- the issue will materially affect the parties' rights;
- it was a question the tribunal was asked to determine;
- based on the tribunal's findings of fact, the decision is either obviously wrong or the question is one of general public importance and the decision is at least open to serious doubt; and
- it is just and proper for the court to determine the question despite the parties' choice of arbitration.

Any appeal of substantive matters is regulated under section 69 of the AA 1996, the title 'appeal on point of law' being used to emphasize the important principle that an error of fact cannot be reviewed. Additionally, as a way of supporting the finality of arbitration, the AA 1996 expressly provides that section 69 is not a mandatory provision.[37] The parties are free to contract out of any substantive judicial review on points of law. For example, an agreement that the tribunal shall not give reasons for its award will be treated as an agreement to opt out of section 69.[38] It is also worth noting that this can also happen through the adoption in the contract of certain institutional rules which exclude rights of appeal (e.g., the Londo Court of International Arbitration (LCIA) Rules, Article 26.8).[39]

Where parties do not opt out, an appeal under this section can only be brought either with the agreement of all of the other parties to the proceedings, or with the leave of the court.[40] Such appeal is also subject to the restrictions under section 70(2) and (3).[41] Furthermore, the ambiguity surrounding the extent of the judges' discretion in granting leave to appeal on a point of law under the AA 1979 had led to divergent practices between individual judges in the English courts.[42] Although the House of Lords sought to clarify the applicable standard in *The Nema*[43] and in *The Antaios*,[44] these standards were construed as per the AA 1979 *'in a way that very much limited the right of appeal, and which was not evident from the words of the Act themselves'*.[45] As a result, and in an attempt to express these limits put on

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37 The AA 1996, s. 69(1).
38 *Ibid*.
39 London Court of International Arbitration (LCIA), LCIA Arbitration Rules (2020) (effective 1 Oct. 2020), available at https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx (accessed 30 Jul. 2025).
40 The AA 1996, s. 69(2)(a) and (b).
41 Section 70(2) and (3) of Arbitration Act 1996 states that '(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted (a) any available arbitral process of appeal or review, and (b) any available recourse under section 57 (correction of award or additional award). (3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process'.
42 *The Nema*, *supra* n. 2, at 734 (Lord Diplock).
43 *Ibid*.
44 *The Antaios*, *supra* n. 2.
45 The 1996 DAC Report, *supra* n. 18, para. 287.

the right to appeal by the House of Lords in *The Nema*,[46] the Law Commission codified many of them in section 69 of the AA 1996.[47] The jurisdiction of the English courts to correct some errors of law in awards is a recognized, if not always a welcome feature of English arbitration. The AA 1996 maintains a limited right of appeal because the Departmental Advisory Committee (DAC)[48] considered that parties generally contemplate that the law will be properly applied by the arbitrators in the resolution of their disputes.

In practice, the majority of appeals heard under section 69 relate to shipping disputes.[49] This is mainly because the London Maritime Arbitrator Association (LMAA) Terms, unlike institutional rules such as those of the LCIA or the International Chamber of Commerce (ICC), do not exclude the right of appeal. Shipping disputes often raise complex questions of contract law.

Court Practice and Case Law under section 69

The courts continue to emphasize restraint in granting permission to appeal. Although not a shipping case, *A v. A*[50] reiterated the high threshold that must be met for permission under section 69, so as to preserve the role of arbitration as an Alternative Dispute resolution (ADR) mechanism promoting party autonomy. In *A v. A*[51] a divorcing couple had agreed to submit a financial remedy dispute to arbitration, to be determined in accordance with the rules of the Family Law Arbitration Financial Scheme. Subsequently the husband refused to consent to the draft order to be converted into a consent award, and the wife issued an application for the husband to show cause as to why he should not be held to the terms of the award. The husband

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46 *The Nema*, *supra* n. 2.

47 The 1996 DAC Report, *supra* n. 18, paras 286(iv)–287; The AA 1996 requires four conditions which must be satisfied by the court before granting leave on questions of law. First, the error of law must substantially affect the rights of one or more of the parties (s. 69(3)(a)); second, the question of law must be one that the tribunal was asked to determine (s. 69(3)(b)); third, on the basis of the findings of fact in the award, the following criteria must apply: (1) the decision of the arbitrators on the question is obviously wrong; or (2) 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)). s. 69(8) AA 1996 further provides that no appeal on the decision of the High Court lies without leave, which shall not be granted unless the question of law was 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, the court has the discretion to 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 shall not be exercised unless the court is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration (s. 69(7)).

48 The 1996 DAC Report, *supra* n. 18, para. §285.

49 C. Tevendale, *English Commercial Court Releases Section 68 and Section 69 Statistics For Court Year 2019–2020: Challenges Down Again And the Non-interventionist Approach Sustained* (Arbitration Notes, Herbert Smith Freehills 22 Jan. 2021), https://www.herbertsmithfreehills.com/notes/arbitration/2021-01/english-commercial-court-releases-s68-and-s69-statistics-for-court-year-2019-2020-challenges-down-again-and-the-non-interventionist-approach-sustained/ (accessed 1 Feb. 2025).

50 *A v. A* [2021] EWHC 1889 (Fam).

51 *Ibid*.

applied to challenge the award pursuant to sections 68 and 69. Both applications were dismissed. Guidance was also given by the court on the correct procedure to be adopted where one party wishes to challenge an arbitral award, or where a party wishes to implement an arbitral award in the face of opposition from the other party.

In *France v. London Steam-Ship Owners' Mutual Insurance Association Ltd,*[52] France applied for permission to appeal against two partial arbitration awards under section 69 within twenty-eight days of the second partial award but not within twenty-eight days of the first. France argued that it did not need an extension of time to apply for permission to appeal because the first partial award had not been a complete award which required any appeal to be lodged within twenty-eight days. However, the court held that the first award was an award for the purposes of section 69, meaning any appeal had to be lodged within twenty-eight days of it: it complied with the formal requirements for an award in section 52; it dealt with the parties' substantive rights and liabilities and set out the arbitrator's reasoning; and, in respect of the matters on which she had expressed a concluded view, the arbitrator's authority had been at an end. The appeal was allowed in part. France could not contest issues decided in the first award by way of an appeal against the second award: if the first award was an award, and had not been appealed against, that award was final and binding. Although the case relates to time limit issues and what constitutes an award, its relevance for this article lies in that it was judicially demonstrated that the limits to appeal an award are set by law and are final and conclusive. In *Laysun Service Co Ltd v. Del Monte International GmbH*[53] Calver J held that appeals against a tribunal based on factual findings the tribunal did not make, or which were 'in reality thinly veiled challenges to the tribunal's findings of fact', are outside of the scope of section 69. In this case, the tribunal had ruled that it had become impossible for the charterers to perform their obligations under the contract of affreightment following the imposition of sanctions on Iran by the United States, thus relying on the *force majeure* clause in the contract. Amongst others, the owners asked whether the charterers were entitled to invoke the *force majeure* clause – a factual question which the tribunal had answered and could not be reopened.

In situations where the court finds that the tribunal has not completely spelled out the analysis of its findings on the face for the award, then the presumption under section 69(7) would be in favour of remittance of the award to the tribunal, rather than setting it aside. Such were the circumstances in *Nobiskrug Gmbh v. Valla Yachts Limited*[54] where Nobiskrug, a German shipyard, was ordered to repay Valla Yachts, the purchaser of a yacht, on the basis of unjust enrichment, but the court

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52 *France v. London Steam-Ship Owners' Mutual Insurance Association Ltd* [2023] EWHC 2474 (Comm).
53 *Laysun Service Co Ltd v. Del Monte International GmbH* [2022] EWHC 699 (Comm).
54 *Nobiskrug Gmbh v. Valla Yachts Limited* [2019] EWHC 1219 (Comm).

found that the extent of Nobiskrug's liability had to be reconsidered by the tribunal and remitted the matter accordingly.

Section 67: Challenge to Jurisdiction

Section 67 of the AA 1996 provides for challenges to an arbitral tribunal's jurisdiction, for instance, if the tribunal operated outside the arbitration agreement or was improperly constituted. A successful application may result in the award being confirmed, varied, or set aside, in whole or in part.[55] Unlike section 69, section 67 is a mandatory provision: it cannot be excluded by party agreement. The new AA 2025 has amended this framework to ensure that no new evidence or new arguments can be made when a tribunal's jurisdiction is challenged under section 67. The English courts have taken the view that if a matter cannot be heard by the tribunal then a jurisdictional question arises, and if a matter that can be heard by the tribunal is not heard by it, then the tribunal has failed to exercise its jurisdiction and explicit provision is made under section 67 of the 1996 Act for an appeal.

In *AMEC v. Secretary of State for Transport*,[56] it was stated that an award, given on a matter on which it is claimed there was allegedly no dispute, is challengeable on grounds of excess of jurisdiction. This contrasts with the Singaporean notion that the presence or absence of a dispute is treated as a question of admissibility rather than jurisdiction.

English authorities have blurred the distinction between jurisdiction and admissibility, particularly in relation to allegedly premature references to arbitration under multi-tiered dispute resolution clauses.

In *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd*.[57] a clause required the parties to seek to resolve a dispute by friendly discussions and only after four weeks could the dispute be referred to arbitration. In this case, the dispute was referred to arbitration before the expiry of the four-week period, and the tribunal ruled that the clause was void for uncertainty. A subsequent section 67 challenge was dismissed on the basis that the treatment of this matter as jurisdictional served only to cause delay in that, had the jurisdictional challenge been upheld, the tribunal would have had to wait for up to a month before taking up the reference. Hence, tribunals are undoubtedly best placed to determine whether to delay or proceed with the arbitration. This position was confirmed in *Sierra Leone v. SL Mining Ltd*.[58] There, the respondents issued a request for arbitration six weeks early. An appeal filed under section 67(1)(c) was dismissed on the ground that the correct construction of the dispute resolution

[55] J. Carter & C. Macpherson, *Arbitral Awards: Challenging to Challenge*, 19(4) Int. A.L.R. 89–97, 89 (2016).
[56] *AMEC v. Secretary of State for Transport* [2004] EWHC 2339 (TCC).
[57] *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm).
[58] *Sierra Leone v. SL Mining Ltd* [2021] EWHC 286 (Comm).

clause was that adopted by the tribunal, namely that the end of the settlement period is to be viewed as a condition precedent and is a matter of procedure, i.e., a question of admissibility of the claim and not a matter of jurisdiction.[59] In *Dallah v. Pakistan*[60] the Supreme Court made clear that even where the question of the tribunal's jurisdiction has been fully debated before the tribunal, a challenge under section 67 entails a full rehearing of the court. *Dallah v. Pakistan*[61] was reaffirmed in *GPF GP S.à.r.l. v. Republic of Poland,*[62] which clarified that a challenge to jurisdiction under section 67 is not a mere review of the arbitral tribunal's prior decision on the same issue of jurisdiction. In that case, Poland argued that the seminal decision of Rix J. in *Azov Shipping Co. v. Baltic Shipping Co.*,[63] as referred to by Lord Mance's speech in *Dallah v. Pakistan*,[64] concerned only a substantial issue of fact as to whether a party had entered into an arbitration agreement, not a scope of disputes issue, and that the Court should not seek to extend the rehearing principle any further *ratione personae* issues. It also sought to rely on *Ranko Group v. Antarctic Maritime SA*,[65] in which, Toulson J. had held that it would be wrong for the courts to rely on new evidence, justified by the reduced role of the courts under the AA 1996. However, Bryan J. in *GPF GP S.à.r.l. v. Republic of Poland*[66] emphatically rejected any distinction either in the cases or in principle. He strongly endorsed the position in *Dallah v. Pakistan*,[67] confirming that it is for the Court under section 67 to determine jurisdiction afresh, unfettered by the reasoning of the arbitrators or by how arguments were advanced before them.[68] Most recently, in August 2024, in *Diag Human and Stava v. Czech Republic,*[69] the Commercial Court confirmed that it was not limited to considering only evidence or arguments presented before the tribunal. Hence, it upheld previous decisions that new evidence may be presented before English courts, subject to the controls imposed by the court's procedural rules.[70] This decision demonstrates the broad discretion afforded to English courts in the context of evidence in jurisdictional challenges.

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59 R. Merkin, *Substantive Jurisdiction and the Arbitration Act 1996*, 3 J.B.L. 273–284, 280–281 (2021).
60 *Dallah v. Pakistan*, *supra* n. 26.
61 *Ibid*.
62 *GPF GP S.à.r.l. v. Republic of Poland* [2018] EWHC 409 (Comm).
63 *Azov Shipping Co. v. Baltic Shipping Co.*, [1999] 1 Lloyd's Rep 68.
64 *Dallah v. Pakistan*, *supra* n. 26.
65 *Ranko Group v. Antarctic Maritime SA* [1998] ADRLN 35.
66 *GPF GP S.à.r.l. v. Republic of Poland, supra* n. 62.
67 *Dallah v. Pakistan*, *supra* n. 26.
68 S. Rainey KC, *Time to Stop Trying? Attempting to Sidestep the 'Rehearing' Nature of a Section 67 Jurisdiction Challenge* (Quadrant Chambers 14 Mar. 2018), https://www.quadrantchambers.com/news/time-stop-trying-attempting-sidestep-rehearing-nature-s67-jurisdiction-challenge (accessed 1 Feb. 2025).
69 *Diag & Mr Josef Stava v. Czech Republic* [2024] EWHC 2102.
70 *Central Trading & Exports Ltd v. Fioralba Shipping Co (The Kalisti)* [2014] EWHC 2397, at 13–34.

The position of Toulson J. in *Ranko Group v. Antarctic Maritime SA*,[71] that an appeal under section 67 is a review limited to the evidence before the tribunal, was rejected in subsequent cases and in *Dallah v. Pakistan*[72] where 'review' was replaced by 'rehearing'. However, the case is different where there has been a full inter parties hearing before the tribunal, on issues such as the proper construction of the arbitration agreement. In such cases, a full rehearing – potentially involving new arguments or evidence – may be viewed as undesirable, particularly where it encourages parties to revisit arguments simply because the arbitration did not turn out as they had hoped. In those circumstances, there is arguably a case for courts to adopt a more limited review-based approach.[73] Clause 11 of the new 2025 AA amends section 67 to address precisely this issue. It confers powers for rules of court to provide that where an application is made under section 67 by a party that took part in the arbitration, and that relates to an objection to the arbitral tribunal's substantive jurisdiction on which the tribunal has already ruled, there will be no full rehearing.

2.1 Cases where leave to appeal was granted and appeal was upheld

Recent cases involving successful appeals on a point of law under section 69 further demonstrate that applicants face a high hurdle. However, a few recent decisions offer rare examples of successful challenges to arbitral awards on a point of law.

Unlike in previous years, the 2019–2020 court year saw two successful section 69 appeals in the English High Court cases of *Tricon Energy Ltd v. MTM Trading LLC*[74] and *Alegrow S.A. v. Yayla Agro Gida San ve Nak AS.*[75]

In *Tricon Energy Ltd v. MTM Trading LLC*,[76] the English High Court granted a rare successful appeal under section 69 of the AA 1996, overturning an arbitral award on a point of law. The case revolved around the issue whether Tricon's claim was contractually time-barred under the parties' agreement. In that case, charterers successfully appealed an arbitration award under section 69. The charterers contended that the owners, by not producing the bills of lading, did not submit all supporting documents for a demurrage claim within the ninety-day time bar under the charterparty. The arbitral tribunal had ruled that the claim was not time-barred, but the High Court disagreed, finding that the tribunal had erred in

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71 *Ranko Group*, *supra* n. 65.
72 *Dallah v. Pakistan*, *supra* n. 26.
73 Merkin, *supra* n. 59, at 284.
74 *Tricon Energy Ltd v. MTM Trading LLC* [2020] EWHC 700 (Comm).
75 *Alegrow SA v. Yayla Argo Gida San ve Nak A.S.* [2020] EWHC 1845 (Comm).
76 *Tricon, supra* n. 74.

its interpretation of the contractual time-bar provision. Knowles J, on the basis of interpretation of relevant clauses of the contract, ruled that where the bills of lading detailing the quantity of such parcel were available and were referred to in the charterparty, they were part of all supporting documents to be presented with the demurrage claim, and that the failure to submit them led to the entire demurrage claim being time-barred. The court held that the arbitral tribunal had been wrong to conclude that the claim was not contractually time-barred. While the court confined its judgment to the specific contractual wording in question, the decision underscores the narrow but significant scope for judicial intervention in arbitration under English law, particularly when a clear error of law affects the outcome of the dispute and represents a rare example of a successful appeal against the decision of an arbitral tribunal on a point of law. It serves as a useful reminder that leave to appeal under section 69 may be granted where the statutory test is met, even if rarely. Hence, it follows that the threshold set by section 69 is notoriously difficult to satisfy and, accordingly, successful appeals pursuant to section 69 are rare.

A further successful appeal in the same court year arose in *Alegrow SA v. Yayla Argo Gida San ve Nak A.S.*[77] The dispute concerned a contract governed by the Grain and Feed Trade Association (GAFTA) rules. The GAFTA Appeal Board had found that Alegrow had repudiated the contract by failing to provide a shipment schedule. Alegrow appealed, arguing there was no such contractual obligation. The High Court agreed, holding that the tribunal had erred in law by implying a requirement that did not exist in the contract. The award was remitted to the GAFTA Appeal Board to consider Alegrow's counterclaim. The court therefore remitted the award to the GAFTA Appeal Board to consider Alegrow's counterclaim, and for the award to be varied. The Commercial Court reiterated that English courts strive to uphold arbitration awards, reading them in a commercial and reasonable way highlighting the light touch approach to review under section 69.[78]

Unlike in *Tricon*,[79] the court in *Alegrow*[80] referred to the previous case law regarding section 69 appeals. The Court reiterated the courts' restrained approach, emphasizing that the English courts strive to uphold arbitration awards, that an arbitration award should be read in a reasonable and commercial way, expecting – as is usually the case – that there will be no substantial fault that can be found with it, and that in cases of uncertainty it will, so far as possible, construe the award in such a way as to make it valid rather than invalid. It also recognized that in trade disputes, such as those under GAFTA rules, deference should be accorded to the views of arbitrators who are industry professionals.

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77 *Alegrow*, *supra* n. 75.
78 C. Tevendale, *supra* n. 49.
79 *Tricon, supra* n. 74.
80 *Alegrow*, *supra* n. 75.

Tricon[81] and *Alegrow*[82] are recent examples of rare success in challenging arbitral awards on points of law. In these cases, the English High Court did not lay down any legal principles but simply overturned the awards owing to their peculiar facts due to obvious errors on a point of law. However, these cases do not represent a departure from the established trend of English courts allowing a very small number of section 69 appeals on a point of law.

A third example of a successful appeal – one which progressed beyond the High Court – is *Sharp Corp Ltd v. Viterra BV*.[83] The dispute arose under contracts for the sale of peas and lentils. After Sharp Corp. (the Buyer) failed to pay for the goods on arrival, Viterra BV (the Seller) re-sold them to its associated company. In GAFTA arbitration proceedings, the Appeal Board found that the Buyer was in default and awarded damages. The Buyer appealed the decision under section 69. The question before the High Court concerned how damages should be assessed, i.e., either by reference to the market value of the goods at the discharge point, or by the theoretical cost on the date of default of: (1) buying those goods Free on Board (FOB) at the original port of shipment, plus (2) the market freight rate for transporting the goods from that port to the discharge port.[84] The High Court found that the Appeal Board had not erred in law and dismissed the appeal. On appeal, the Court of Appeal allowed the appeal but in relation to a question of law which it had amended. It held that damages should be awarded on the basis that the contracts had been varied, a point not reflected in the findings of the arbitral tribunal.

Permission to appeal to the Supreme Court was then granted on three grounds. On the first ground, the Supreme Court upheld the Court of Appeal's decision. It did not find that the Court of Appeal had erred in amending the question of law for which permission to appeal had been given as the amendment was permissible and did not change the substance of the question of law.[85] However, on the second and third grounds, the Supreme Court reversed the Court of Appeal's decision. On the second ground, the Supreme Court found that the Court of Appeal had erred in law by determining the value of goods based on its conclusion that the contracts had been varied – a point that had already been presented to the tribunal's determination. Lastly, it was found that the Court of Appeal erred in making findings of fact on matters on which the tribunal had made no finding. The Supreme Court emphasized that the court's jurisdiction is limited to appeals on a question of law and cannot make its own findings of fact.[86] It may

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81 *Tricon, supra* n. 74.
82 *Alegrow, supra* n. 75.
83 *Sharp Corp Ltd v. Viterra BV* UKSC/2023/0029.
84 *Ibid.*, at 42.
85 *Ibid.*, at 57.
86 *Ibid.*, at 71.

be possible to infer that the tribunal has made a finding of fact, but in limited circumstances: the inferred finding has to be one which inevitably follows from the findings which have been made.[87] Overall, the Supreme Court reaffirmed the approach to be adopted with regard to section 69, upholding party autonomy and emphasizing minimal judicial intervention. It reiterated that a court is limited to appeals on questions of law and to issues that were presented to and determined by the tribunal, and that findings of fact are impermissible.

Together, *Tricon*,[88] *Alegrow*, and *Sharp Corp*[89] offer useful illustrations of the circumstances in which section 69 appeals may succeed. However, they do not mark a broader shift in judicial approach. The English courts remain committed to upholding arbitral awards and confining appeals to rare cases where the statutory requirements are clearly met.

2.2 The operation and abuses of section 69 of the AA 1996 in the light of shipping cases

When considering representative English shipping cases which were brought pursuant to section 69, it is of note first to remark that the provision has, at times, been used in a manner that stretches its intended scope. There have been repeated instances where applicants and, on occasion, the courts have taken a more liberal approach to the statutory conditions governing leave to appeal on questions of law. These concerns primarily relate to the application of the statutory conditions for granting a leave on questions of law from the arbitral award – in particular, of the gateway under section 69(3)(c)(ii), 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.

The case of *Boskalis Offshore Contracting BV v. Atlantic Marine and Aviation LLP* (*'The Atlantic Tonjer'*)[90] involved a time charterparty. The appeal was on a question of the interpretation of a payment clause. The appeal, brought under section 69, was dismissed by the High Court, which upheld the arbitral tribunal's decision. The Court held that the clause in question was clear and unambiguous.[91] However, the grant of leave to appeal in this case appears difficult to reconcile with the statutory test under section 69(3)(c)(ii), which requires that the tribunal's decision be at least open to serious doubt. If the payment clause was indeed clear

87 *Ibid.*, at 72–74.
88 *Tricon*, *supra* n. 74.
89 *Alegrow*, *supra* n. 75.
90 *Boskalis Offshore Contracting BV v. Atlantic Marine and Aviation LLP ('The Atlantic Tonjer')* [2020] Vol 1 Lloyd's Rep 171.
91 *Ibid.*, at 171.

and unambiguous, it raises the question of whether the threshold for granting leave was met in the first place.

The case of *Quiana Navigation SA v. Pacific Gulf Shipping (Singapore) Pte Ltd* (*'The Caravos Liberty'*)[92] was a time charterparty case, with the appeal from the arbitral award relating to the construction of a standard form clause. The question of law was whether the shipowners were entitled to serve an anti-technicality notice and withdraw a vessel when the breach related to a non-payment for an earlier period of hire.[93] The initial judge permitted the appeal on the basis that a question is one of general public importance and the decision of the tribunal is open to serious doubt. However, the High Court dismissed the appeal and praised the analysis of arbitral award, noting that the award had been rendered by 'two eminent QCs and one of the foremost London maritime arbitrators'.[94] This raises a tension in the reasoning: if the tribunal's analysis was so evidently sound and authoritative, it is arguable whether the threshold for granting leave under section 69(3)(c)(ii) – particularly the requirement that the tribunal's decision be open to serious doubt – was in fact satisfied.

Imperator I Maritime Co v. Bunge SA (*The 'Coral Seas'*)[95] concerned a time charter dispute about the construction of terms concluded in the charterparty. The vessel's performance had deteriorated significantly because of underwater fouling of the vessel's hull and propeller caused by marine growth. The sub-charterers consequently made deductions from hire, alleging breach of the continuing speed warranty by the shipowners. The arbitral tribunal held that the owners were liable for the vessel's reduced speed, as the marine growth was not an unexpected occurrence but constituted fair wear and tear during ordinary trade.[96] This article argues that in this case the court misapplied its discretion in granting leave under section 69(3)(c)(ii), because the principles which relate to the question of law were well settled by the authorities. Phillips J. upheld the tribunal's decision and held that the continuing performance warranty did apply 'where the vessel's performance fell-off because of fair wear and tear in the course of contractual trading'.[97]

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92 *Quiana Navigation SA v. Pacific Gulf Shipping (Singapore) Pte Ltd ('The Caravos Liberty')* [2019] EWHC 3171 (Comm).

93 *Ibid.*, para. 2.

94 *Ibid.*, para. 32.

95 *Imperator I Maritime Co v. Bunge SA (The 'Coral Seas')* [2016] EWHC 1506 (Comm).

96 The owners appealed to the Court on a question of law for the case where the owner warrants a particular level of performance throughout the charter period, and the time charterer alleges underperformance in breach of that warranty, whether it is a defence for the owner to prove that the underperformance resulted from compliance with the orders of the time charterer. The owner contended that the arbitrators' reasoning was contrary to settled principles in law which answered the question of law mentioned above with a yes and cited the decision of Colman J. in *The Pamphilos* [2002] 2 Lloyd's Rep 681. Males J. granted the leave stating that the awards were of some general interest and at least open to serious doubt (*The Coral Seas, supra* n. 95, para. 8.

97 *The Coral Seas*, *supra* n. 95, paras 19, 29.

Moreover, Phillips J. expressly distinguished Colman J.'s *obiter* view in *The Pamphilos*,[98] noting that the latter's comments appeared only in the context of a judgment on an application under section 68 and were not part of a reasoned section 69 analysis. For all these reasons, the granted leave to appeal in this case is questionable.

The case of *China Offshore Oil (Singapore) v. International Pte Ltd*[99] involved a voyage charter dispute. The Court granted the charterers leave to appeal against the arbitral award on a question of law, namely whether there had been a breach of the charterparty, specifically whether the vessel had failed to load a full and complete cargo and was not seaworthy and in every respect fitted for the voyage.[100] The Court upheld the tribunal's decision, which held that in accordance with the provided evidence, there is no proof to hold that the owners were in breach of their obligation to provide a seaworthy vessel. This case is a good example of the problematic practice by applicants of attempting to reframe a question of fact as a question of law. The court should not have granted a leave, because the question in this appeal was a question of seaworthiness of the vessel, which was a question of fact. As Webster J. observed in *Athenian Tankers Management SA. v. Pyrena Shipping INC. (The 'Arianna')*,[101] 'questions of seaworthiness were originally and are probably still in principle questions of fact'.[102] Accordingly, the Court arguably erred in granting leave to appeal, given that the threshold under section 69(3)(c)(ii) of the AA 1996 was not genuinely met. A refusal to grant leave at the outset would have spared the parties unnecessary expense and delay.

In *Sea Success Maritime Inc. v. African Maritime Carriers Ltd*[103] the court granted leave under section 69 on the basis that the question of the construction of the charterparty was of general public importance, and that the decision of the tribunal on the questions was at least open to serious doubt. Given that there is no complexity or difficulty in the construction of a clause to suggest that the leave to appeal raised an issue of public interest, the grant of the leave was, as argued in this article, granted unnecessarily in this case, which is against the important principle of finality and speed of arbitral awards.

Bunge SA v. ADM DO Brasil LTDA & Others[104] concerned a dispute which was brought by the time charterer against nine shippers alleging that a shipment contained dangerous cargo. The Court found that the arbitrators had applied the

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98 *The Pamphilos, supra* n. 96.
99 *China Offshore Oil (Singapore) v. International Pte Ltd* [2000] EWHC 229 (Comm).
100 *Ibid.*, para. 19.
101 *Athenian Tankers Management S.A. v. Pyrena Shipping Inc. (The 'Arianna')* [1987] 2 Lloyds Rep 376.
102 *Ibid.,* at 390.
103 *Sea Success Maritime Inc. v. African Maritime Carriers Ltd* [2005] EWHC 1542 (Comm).
104 *Bunge SA v. ADM DO Brasil Ltd & Others* [2009] EWHC 845 (Comm).

law correctly. Additionally, the award was decided by arbitrators who are experts in maritime arbitration.

In *Pentonville Shipping Ltd v. Transfield Shipping Inc.*,[105] the question of law was whether the arbitrators were bound to find – in accordance with the decision of the Court of Appeal in *Aktieselskabet Reidar v. Arcos Ltd*[106] – that the charterers were liable to pay dead freight or damages in a like sum.[107] As argued in this article, such a question of law should not result in leave being given under section 69(3)(c)(ii) because the question does not satisfy the general public importance requirement, nor the requirement that the decision of the tribunal was at least open to serious doubt.

In *Independent Petroleum Group Ltd v. Seacarriers Count Pte Ltd*[108] the vessel was unable to sail from the port, because the channel was blocked following the grounding of another vessel. The arbitrators concluded that the port was unsafe, that the charterers were in breach of the contract and that they were therefore liable for the consequences of any delay which resulted from the grounding. The charterers were granted leave to appeal on four questions, which were in substance questions of fact cloaked as questions of law, specifically concerning issues of causation. As the appeal largely turned on the tribunal's factual findings, the court should not have granted a leave on such issues. Even if one were to treat them as questions of law, they were neither questions of general public interest, nor did they require the development of new principles of law. Moreover, the decision of the tribunal on these questions was not 'at least open to serious doubt' within the meaning of section 69(3)(c)(ii) of the AA 1996. Accordingly, as argued in this article, the grant of leave in this instance was unwarranted.

The cases discussed show that English courts have at times adopted an overly permissive approach in exercising their discretion under section 69. Such practices – in effect abuses of permissions of leave to appeal – contradict the parliamentary intention underpinning the strict provisions of section 69, which is to uphold the finality of an arbitral award and to limit judicial interference to only those rare cases that meet a high threshold. As Bingham J. recognized in *Zermalt Holdings v. Nu-Life Upholstery Repairs*,[109] finality is a central and indispensable feature of arbitration – one that should not lightly be undermined.[110]

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105 *Pentonville Shipping Ltd v.Transfield Shipping Inc* [2006] EWHC 134 (Comm).
106 *Aktieselskabet Reidar v. Arcos Ltd* [1927] 1 KB 352, [1926] All ER Rep 140.
107 *Pentonville Shipping, supra* n. 105, para. 20.
108 *Independent Petroleum Group Ltd v. Seacarriers Count Pte Ltd* [2006] EWHC 3222 (COMM).
109 *Zermalt Holdings SA v. and Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14.
110 *Ibid.*, at 15 (Bingham J.).

3 COURT REASONING FOR GRANTING OR REFUSING A PERMISSION TO APPEAL UNDER SECTION 69 OF THE AA 1996

In *The Antaios*,[111] Lord Diplock provided guidance for commercial judges when considering whether to grant leave to appeal on a point of law, arguing that if a detailed semantic and syntactical analysis of the words in a commercial contract leads to a result that defies business common sense, then that analysis must give way to commercial practicality.[112] He suggested that judges should not normally give reasons when granting or refusing leave to appeal on points of law.[113] However, this guidance was later rejected by the Court of Appeal in *North Range Shipping Ltd v. Seatrans Shipping Corporation*,[114] on the basis that Article 6 of the European Convention on Human Rights 1998 requires the courts to give sufficient reasons to the unsuccessful applicant, to ensure they can understand which of the criteria under section 69 has not been satisfied.[115] Notwithstanding the above, Lord Diplock's reasoning encouraged the adoption of a purposive and commercially rational approach, rather than adherence strictly to literal meanings. Although the case of *The Antaios*[116] predates the AA 1996, courts have still drawn on Lord Diplock's approach when deciding whether to grant leave to appeal under section 69, particularly in assessing whether a point of law justifies judicial interference. Lord Diplock's emphasis on common sense continues to underpin the principle that appeals should only be allowed where a legal error undermines the coherence or fairness of the arbitral outcome.

Additionally, a party may seek permission to appeal against a judge's decision in relation to procedural matters. In the case of *Peel v. Coln Park LLP*,[117] the claimant applied for permission to appeal against the judge's refusal to grant an extension of time to bring applications under both section 68 and section 69. The court upheld the judge's discretion in ruling out extension of time by holding that there was no evidence that the judge had failed to take relevant matters into account, or had taken irrelevant matters into account, or had made any error of law.[118] Hence, once again the application for permission to appeal was dismissed.[119] This case highlights the importance of strict compliance with

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111 *The Antaios*, *supra* n. 2.
112 *Ibid.,* at 201.
113 *Ibid.,* at 242 (Lord Diplock).
114 *North Range Shipping Ltd v. Seatrans Shipping Corporation* [2002] EWCA Civ 405; [2002] 1 WLR 2397.
115 *Ibid.,* paras 26–27.
116 *The Antaios*, *supra* n. 2.
117 *Peel v. Coln Park LLP* [2010] EWCA Civ 1062.
118 *Ibid.,* para. 14 (per Longmore LJ).
119 *Ibid.,* para. 24.

procedural time limits, as an application for appeal might fail as a result of the expiration of a time period, as per section 70 of the AA 1996.[120]

The current trend in English case law supports the duty of the court to provide reasons for its decisions.[121] This new approach is a step towards greater transparency when judges exercise their discretion on granting or refusing leave. However, the Court of Appeal's guidance in *North Range Shipping* remains incomplete.[122] While requiring commercial judges to mention at least which element of the statutory test the applicant has failed, it has encouraged more explanatory reasoning and it has also led, in some instances, to incorrect interpretations of the statutory requirements under section 69. The courts, besides citing the relevant test for granting or refusing leave, should also provide clear reasons for their conclusions – for example, explaining why the question of law is one of general public importance, and why the decision of the tribunal is at least open to serious doubt. There are many abuses of section 69 both by applicants and by the courts, because of the reluctance to strictly apply the statutory criteria for leave. The broad exercise of the judge's discretion on granting leave could be described as a real deviation from the legislative aim to limit appeals on points of law in arbitration.

The analysis of the case law constitutes an effort to assess whether the courts adopt a more lenient approach, or whether the threshold for successfully obtaining leave to appeal was already a high one.

Notwithstanding the difficulty in being granted leave to appeal, there have been cases where the statutory criteria have been satisfied and leave to appeal was duly granted. Although rare, there are also cases where the appeal itself was ultimately successful. Hence, it is suggested that, if the court identifies an error of law in the arbitral award, it will not hesitate to correct the outcome.

For instance, in *White Rosebay Shipping SA v. Hong Kong Chain Glory Shipping Ltd*,[123] leave to appeal in respect of the claimant's three grounds, of which only one, i.e., the continued renunciation point, was successful. The court set aside the award and the award was remitted to the tribunal so that it might consider whether the charterers' renunciation of the charter party continued after the owners' affirmation of the charter party and if so whether the owners' termination of the charter party was a legitimate termination of the charter party rather than a repudiation of it.[124] The arbitral tribunal had concluded that the owners had

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120 *Daewoo Shipbuilding & Marine Engineering Company Limited v. Songa Offshore Equinox Limited, Songa Offshore Endurance Limited* [2018] EWHC 538 (Comm).
121 *Ibid.,* para. 15.
122 *North Range Shipping Ltd, supra* n. 114.
123 *White Rosebay Shipping SA v. Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355.
124 *Ibid.,* para. 54.

affirmed a repudiatory breach. However, the judge held that in the case of repudiation or anticipatory breach, a termination of the contract following an affirmation is not necessarily in itself a repudiatory breach, but may amount to a lawful termination of the contract entitling the innocent party to damages caused by the earlier renunciation,[125] and that this is where the arbitral tribunal had erred in law.

The appeal under section 69 in *Miranos International Trading Inc v. VOC Steel Services BV*[126] was also successful and the award remitted back to the arbitrator. The judge found that the arbitrator had erred in law when concluding that there was a guarantee of a minimum hire payable and was consequently misdirected in calculating and awarding damages to the owners.[127]

In conclusion, there are many cases that have sought leave to appeal under section 69 and the cases discussed herein represent only a small fraction. However, only few of those cases have been granted leave to appeal, and even a small number of the successful permission to appeal have ultimately succeed in establishing an error on a point of law – thus resulting in the award being remitted to the arbitrator, set aside or varied. Judges have exercised considerable caution before finding that a tribunal has erred in law. Nevertheless, when the courts have identified a clear misapplication of legal principles by the tribunal, they have not hesitated to take the requisite action.

4 THE FUNCTIONALITY OF SECTION 69 OF THE AA 1996 AND THE IMPACT OF THE LAW COMMISSION ARBITRATION LAW REFORM PROJECT

\From an international perspective, section 69 is perhaps the most debated section of the AA 1996[128] as there are voices raised both in favour and against it. Those advocating against section 69 argue that the statutory right to appeal on point of law ignores the modern practice of international arbitration and is out of line with the Model Law.[129] Moreover, they argue that this right is in conflict with the practice of many leading institutions of commercial arbitrations (e.g., ICC, LCIA, Singapore International Arbitration Centre (SIAC), which include an institutional rule of a standard waiver that prevents parties from acquiring the right to challenge an arbitral award in court. However, it is notable that besides England, many other

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125 *White Rosebay Shipping*, *supra* n. 123, para. 53.
126 *Miranos International Trading Inc v. VOC Steel Services BV* [2005] EWHC 1812 (Comm), para. 36.
127 *Ibid.,* para. 35.
128 R. Merkin & L. Flannery, *Part I*: Arbitration Pursuant to an Arbitration Agreement, in *Arbitration Act 1996* (5th ed., Informa UK Limited 2014), para. 69.4, at 735 on Appeal on points of law].
129 J. Lew et al., *Comparative International Commercial Arbitration* (Wolters Kluwer 2003), at Ch. 25 sub Ch. 49.

common law jurisdictions adopt similar mechanisms of appeal on points of law, such as Singapore, Hong Kong, Australia and the United States.

When the English Arbitration Bill was being debated in early 1996, one of the most controversial issues considered was whether to retain a right of appeal on a point of law. It was ultimately retained, albeit in limited form and with an 'opt-out' feature. A key justification given at the time was that a limited right of appeal on a point of law was not inconsistent with the decision to arbitrate rather than litigate. Almost thirty years on, the question which arises is whether this provision still serves a useful purpose or whether it damages the popularity of London as a seat of arbitration. Closely linked to this is the question of how frequently section 69 is relied upon in practice.

Those against section 69 might portray the right to appeal on a question of law as a key disincentive for arbitration in England. However, parties may opt out of this provision, and, indeed, if they choose to arbitrate under the rule of the leading arbitral institutions, the parties are required to waive their right to appeal in accordance with these rules. Nevertheless, this leaves parties to ad hoc arbitration most exposed to an extensive appeal process unless the provision is expressly opted out of.

Tuckey J., in *Egmatra AG v. Macro Trading Corporation*,[130] recognized that section 69 was broad, and warned that the courts should exercise it sparingly, in order to respect the decision of the tribunal of the parties' choice. Also, in *BMBF (No 12) Ltd v. Harland & Wolff Shipbuilding & Heavy Industry*,[131] it was stated that it is not for the courts to substitute its own view for that of experienced arbitrators. These comments of the judiciary might represent a sensible approach as regards the application of section 69, but they also serve to indicate the potential that the provision has in terms of undermining the decisions and awards of arbitrators.

Although the AA 1996 provides for appeals on a question of law by virtue of section 69, this remedy is not available to parties within the UNCITRAL framework. Whilst some voices raised previously had suggested that section 69 should be abolished, in the course of reform the AA 2025 has actually left the provision intact. This indicates a legislative decision to preserve a limited avenue for judicial oversight in English-seated arbitrations.

Given the importance that is laid on arbitrator's qualifications in their appointment, perhaps it may be suggested that the lack of appeal on a point of law is to some extent offset by the rigorous selection of arbitrators at the outset. This

[130] *Egmatra AG v. Macro Trading Corporation* [1999] 1 Lloyd's Rep. 862.
[131] *BMBF (No 12) Ltd v. Harland & Wolff Shipbuilding & Heavy Industry* [2001] APP.L.R. 06/08. Arbitration, Practice & Procedure Law Reports.

arguably reduces the likelihood of legal error.[132] A number of leading arbitral institutions (e.g., ICC, LCIA, SIAC) include in their institutional rules a standard waiver of the parties' right to any form of appeal, review or recourse to any state court or other legal authority.

As previously noted, many section 69 applications relate to shipping cases. However, irrespective of the nature of the dispute, the question remains: is section 69 still needed? In other words, should there have been a reform of arbitration legislation abolishing the section 69 provisions? One of the attractive characteristics of arbitration is its finality and the binding nature it has on the parties, with limited appellate review available. The call for the abolition of section 69 is often grounded in the desire to uphold the principle of finality in arbitration, on the basis that the parties who choose to arbitrate do so with the intention to abide by the tribunal's decision rather than to litigate in court. However, this proposal has already been rejected by the English Law Commission, which instead codified the high threshold requirements for an appeal under section 69. These strict requirements arguably show that the English legislator continues to support the finality of arbitral awards. At the same time, the provision also ensures that justice prevails when there are obvious errors of law on the face of arbitral awards.[133] More controversially, section 69 permits appeals for the purpose of developing English commercial law. This mechanism overrides the principle of finality of arbitration when the application for leave is related to a question of law that is one of general public importance, and the decision of the tribunal on the question is at least open to serious doubt.[134] This appeal mechanism maintains the continuous flow of cases from arbitration to the English Commercial Court, thereby contributing to the evolution and clarification of commercial legal principles.

In *Shell Egypt v. Dana Gas Egypt Ltd (QB)*,[135] a clause providing that the award would be 'final, conclusive and binding on the parties' was not sufficient to exclude an appeal under section 69.[136] The claimant, Shell, applied for permission to appeal pursuant to section 69, on points of law arising out of a final partial award, following an arbitration between Shell and Centurion under the UNCITRAL Rules. Centurion issued a counterapplication for an order that the court had no jurisdiction to hear Shell's section 69 application for appeal by virtue of the use of the words 'final, conclusive and binding', as per the signed agreement between the parties. Nevertheless, permission to appeal was given as Shell met the

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[132] Statistics on figures of cases are not pervasive, and whilst they may understate the position – applications for leave to appeal determined on the papers alone without a hearing are not reported – they indicate that very few applications are made each year, of which even fewer are successful.

[133] The Arbitration Act 1996, s. 69(3)(c)(i).

[134] *Ibid.*, s. 69(3)(c)(ii).

[135] *Shell Egypt v. Dana Gas Egypt Ltd (QB)* [2009] EWHC 2097 (Comm) [2009] 2 C.L.C. 481.

[136] *Ibid.,* para. 36 (per Gloster J.).

statutory criteria under section 69(3) and the court constructed the above-noted phrase of the parties' agreement as not excluding their right of appeal. Gloster J specifically highlighted that there must be sufficiently clear wording to exclude a right of appeal, although no express reference to section 69 was required.[137] The words 'final, conclusive and binding' in isolation would not convey to a reasonable person with all of the knowledge available to the parties in the situation they were at the time of the contract, that the parties had agreed to exclude all rights of appeal on points of law under section 69.[138] The judge relied on the *obiter* comments of Yeldham J in *Corner v. C and C News Pty Ltd*,[139] where the same expression was 'employed to bring finality, subject to well-recognised methods of challenging awards' and where although the award was binding in the traditional sense, yet it created a res judicata but was still subject to judicial review.[140] Although permission to appeal was granted, Shell ultimately lost the appeal. The court concluded that Shell had incorrectly believed that Centurion had failed to acquire a 50% interest in the concession for the joint exploration of gas within the prescribed contractual period, and thus, mistakenly issued a letter of termination. The arbitrators were held to have been correct to conclude that the termination letter was not effective to bring about contractual rescission.[141]

Section 69 was designed to play an important role in strengthening and developing the principles of English commercial law to establish the jurisdiction's global influence over trade, commerce and markets. This point was expressly recognized by Lord Thomas of Cwmgiedd, the then Lord Chief Justice of England and Wales, in his 2016 Bailli Lecture, where he advocated for a more flexible approach for appeals under section 69 appeals.[142]

However, although it is in the interest of the parties to an arbitration to affirm justice and avoid any potential errors of law in the award, it is arguably not in their interest to incur additional costs and time on an appeal solely for the purpose of developing English commercial law. In this regard, Lord Saville disagreed with Lord Thomas's proposal to introduce more flexible requirements to section 69. He argued that parties seek arbitration to solve their disputes efficiently, not to subsidize the development of English commercial law, and

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137 *Ibid.,* para. 37 (per Gloster J).
138 *Ibid.,* para. 38 (per Gloster J).
139 *Corner v. C and C News Pty Ltd* (unreported 17 Mar. 1989, Supreme Court of New South Wales), at 5 (Yeldham J), cited in *Shell Egypt v. Dana Gas*, *supra* n. 135, para. 46.
140 *Ibid*.
141 *Shell Egypt, supra* n. 135.
142 Lord Thomas, *Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration* (The Bailii Lecture 2016), https://www.judiciary.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf (accessed 28 Jan. 2025).

warned that loosening the criteria for appeals would threaten London's standing as a leading global arbitration centre.[143]

However, it has also been suggested that the constant development of commercial law by the courts is vital for the enhancement of the qualitative decisions of arbitral tribunals in commercial matters.[144] Today, while many arbitral awards are issued by professional arbitrators, there are still many awards issued by non-lawyer arbitrators, which may raise concerns about the proper application of legal principles. However, this argument may be overstated because London is home to a large pool of expert arbitrators with deep legal commercial expertise. Hence, perhaps a middle ground could be for the parties to appoint both a subject-matter expert arbitrator as well as a legally qualified arbitrator. Ultimately, parties must take responsibility for their choices in the composition of the tribunal and accept the consequences that flow from those choices. The measure of justice for section 69 appeal purpose has brought with it some uncertain results. The construction of commercial clauses can depend on the individual opinions of judges; however, the threshold set by law guarantees that no detrimental deviations will occur.

In *NYK Bulkship (Atlantic) NV v. Cargill International SA*[145] leave was granted on a question of law related to the meaning and effect of an off-hire clause contained in a time charter. The commercial judge decided to remit the question of causation to the tribunal, and the appellate court upheld the decision of the commercial court, but for different reasons. However, the majority of the Law Lords in the Supreme Court decided to set aside the orders of both courts and dismiss the appelant's (NYK Bulkship (Atlantic) NV) appeal under section 69. This disagreement between the judges for the correct interpretation of commercial clauses shows that arbitrators are qualified to decide commercial matters, as the Supreme Court ultimately upheld the tribunal's decision. This case also weakens the argument that the development of English commercial law by the court is fundamental for underpinning the quality of arbitral awards. This case cost the parties money and time and delayed the enforcement of the award, through the three stages of judicial review in the Commercial, Appellate and Supreme Courts, which in the end resulted in an unsuccessful appeal. This shows that the test, under section 69(3)(c)(ii), which holds that the decision of the tribunal in the question is at least open to serious doubt, is not clear and brings uncertainty. Some judges may believe that there is serious doubt on the question, but others may disagree.

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143 Lord Saville, *Reforms Will Threaten London's Place as a World Arbitration Centre* (The Times 28 Apr. 2016).

144 Thomas, *supra* n. 142.

145 *NYK Bulkship (Atlantic) NV v. Cargill International SA* [2013] EWHC 30 (Comm); [2014] EWCA Civ 403; [2016] UKSC 20.

In the last thirty years, the procedural hurdles of section 69 have meant that there have been very few successful appeals of awards. While in hindsight section 69 may appear relatively harmless and difficult to successfully trigger due to its strict threshold, its very existence, in the authors' opinion, arguably hinders the popularity of England as a pro-arbitration jurisdiction. The objective of the AA 1996 was to improve and clarify the major elements of English arbitration law. Traditionally, the English courts have given greater weight to the principle of justice than of finality. However, the need to also preserve confidentiality is another reason why some argue that section 69 should be abolished.[146] Cooke J. in *Moscow City Council v. Bankers Trust Co*[147] stated that open justice and publication of judgments was not a principle directly applicable to arbitration claims which fall within a private and confidential sphere.

It follows that the present system may be regarded as unsatisfactory for the following four reasons. First, it allows erroneous decisions to go uncorrected and inhibits the coherent development of commercial law. Second, it runs contrary to the principle of arbitration by allowing legal questions to be decided by individuals who may lack the requisite expertise in the relevant field. Third, it ignores the growing complexity and sophistication of disputes. Lastly, it risks affecting London's standing as a leading global centre for international dispute resolution.

However, those in support of section 69 argue that the Commercial Courts need to have a regular flow of cases arising from everyday commercial disputes such as those typically encountered in arbitrations in order to continue to develop and refine English commercial law in a way that is most relevant to the market. The existence of a right of appeal under section 69 should be seen as a safeguard of the correct application of the law and of the right of the parties to seek the national courts' protection in cases of clear disregard or misapplication of the law by arbitrators. This may explain why an appeal procedure on a point of law against awards has long been a feature of English arbitration law and it will not be easily accepted to have it abolished. While it has been suggested that in order for arbitration to be fully transnational it has to be freed from judicial interference, it is also acknowledged that it needs to have the support of national law whenever needed, for it to be able to function accordingly effectively.[148] A limited right of appeal, as provided in section 69, is supportive of the arbitral process, when and if correctly used. Any abuse reflects a misuse of procedural rights by individual parties, rather than a fundamental flaw in the law in itself. [149]

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[146] R. Finch, *London: Still The Cornerstone of International Commercial Arbitration And Commercial Law?*, 70(4) Arbitration 256–266, 258 (2004).

[147] *Moscow City Council v. Bankers Trust Co* [2003] EWHC 1377 (Comm).

[148] P. Esposito, *The Development of Commercial Law Through Case Law: Is Section 69 of the English Arbitration Act 1996 Stifling Progress?,* 74(4) Arb. 429–438 (2008).

[149] *Ibid.*

The functionality of the AA 1996 in general, and of section 69 in particular, was further examined by the Law Commission in its most recent review of the Act. The Law Commission was asked to conduct a review by the UK Government in order to consider what amendments might be necessary, if any, to ensure that the Act remains fit for purpose and continues to promote the UK as a leading destination for commercial arbitration. After two consultation papers, one in September 2022 and another in March 2023, and having received a number of responses from consultees, the Law Commission published its report with recommendations containing several major initiatives and a few minor corrections. The main recommendations included codifying an arbitrator's duty of disclosure, improving the framework for bringing challenges under section 67, and introducing a new rule on the law governing the arbitration agreement.

Ultimately, with regard to section 69 the Law Commission considered that a reform was unnecessary. In its first consultation paper, the Law Commission weighed two competing goals, i.e., the need to enhance the finality of arbitral awards and promote the efficient dispute resolution, against the need to ensure consistency of legal rights and duties. While the goal of finality leans towards limiting appeals, the imperative to correct clear legal errors supports the availability of an appeal mechanism. Ultimately, the Law Commission decided against a reform of section 69 because the provision already provides a 'defensible compromise' between the two goals, i.e., it allows for a possibility to appeal on a point of law, but it also promotes finality of arbitral awards by allowing the parties to opt out of the section.

Therefore, the Law Commission's report confirms the argument supported in this article that section 69 functions well as an opt-out provision, and that it strikes a good balance between party autonomy and the chance to submit errors of law for review to English courts and promoting the finality of arbitral awards. This provision is unique to English arbitrations, and it is not common to see arbitration rules explicitly providing for the right of appeal.

This position was confirmed by Parliament in the 2025 AA which received Royal Assent on 24 February 2025. This article agrees with the Law Commission's stance and the position adopted in the 2025 AA. It expresses the belief that there is no obvious need to reform something that operates well and that provides legal certainty to businesses.

There had also been a suggestion that section 69 should become an opt-in provision so as to align it better with the UNCITRAL Model Law on International Commercial Law and with arbitration rules such as the ICC Arbitration Rules 2021.[150] This proposal sought to preserve the possibility of an

[150] S. Jackson & L. Lintott, *Sober Modernisation of the Arbitration Act 1996* 2 Int. A.L.R. 95, 109 (2023).

appeal on a point of law for those parties who specifically wished to retain it, whilst reinforcing the finality of the arbitration award where no such agreement had been made.[151] However, as argued in this article, we are not convinced that any material improvement would be achieved by making section 69 an opt-in provision. In any case, section 69 is already a non-mandatory provision and can be expressly excluded by the parties in their arbitration agreements, and/or by selecting institutional arbitration rules which expressly exclude the possibility to challenge an award on a point of law.[152]

The reforms suggested by the Law Commission and subsequently adopted by Parliament were positive overall. They have contributed to maintaining the UK's position as an attractive and reliable forum for international arbitration, with London continuing to hold its status as a leading seat of arbitration. The recent amendments can be seen as evolutionary, rather than revolutionary, with no drastic changes to the AA 1996, which remains state of the art. This may be observed not only by the stance taken by the Law Commission, but also by the responses received from the majority of the consultees, who were against a reform of section 69. The Law Commission expressly stated that it did 'not wish to unsettle the preferred relationship with section 69 that has been struck by arbitral rules and arbitration clauses'.[153] Therefore, it appeared reasonable to retain the wording of section 69 in its existing form, as it had been widely agreed that it operates well and that there was little evidence nor sufficient consensus on what a better version of the provision might look like. The current opt-out approach reiterates the importance of preserving the finality of arbitral awards, whilst allowing courts limited supervisory jurisdiction to correct manifest errors that are 'obviously wrong' so as to promote access to justice.

Although rare, there have been instances where appeals on a point of law have been successful, thus proving that section 69 has generally served and will continue to serve a valuable function for those who believe that the arbitrator has erred in law. Allowing courts some right to correct errors of the tribunal would enhance the tribunal's role by ensuring that it gives effect to the bargain of the parties.[154]

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151 *Ibid*.

152 Note, however, the importance of the specific context and wording of the provisions of the arbitration agreement. In *National Iranian Oil Co v. Crescent Petroleum Co International Ltd* [2022] EWHC 1645 (Comm), [2023] 1 All E.R. (Comm) 549, the Court was not convinced that the parties had 'otherwise agreed' to waive their right to appeal to the court on a question of law by incorporating the ICC Rules into their arbitration agreement. The language of the relevant provisions in the agreement was insufficient to amount to a waiver, as the ICC Rules had been applied in case of a disagreement or gap in the procedural rules of arbitration.

153 Law Commission, *Review of the Arbitration Act 1996: Final Report and Bill*, Law Com No 413 (2023), Ch. 10, at 10–16.

154 L. J. Saville, *The Arbitration Act 1996 and Its Effect on International Arbitration in England* 63 Arbitration 104 (1997).

Hence, any potential threat that section 69 might pose to the finality and confidentiality of an arbitral award, which have been the two reasons raised against having an appeals procedure, would be limited, as the provision has been constructed in a narrow manner that sets a high threshold. In short, section 69 embodies a careful compromise that safeguards the integrity of the arbitral process, whilst upholding the central pillar upon which arbitration is founded, i.e., party autonomy. The Law Commission's recent review and recommendations demonstrate that sometimes a reform does not need to involve groundbreaking changes but can lie in fine tuning aspects of a system that is already functioning well.

5 THE CASE FOR REFORM OF SECTION 67 OF THE AA 1996

Section 67 of the AA 1996 provides for challenges of an award on the ground that it was made without jurisdiction. The AA 2025 revised section 67 in its Clause 11 to ensure through insertion of Rules of Court that no new evidence or new arguments may be introduced. An exception was proposed, allowing a new ground for challenge if the objecting party did not know or could not with reasonable diligence have discovered the grounds for objection earlier. The concern which the Law Commission had aimed to address with its proposal was that the current approach had 'the potential to cause delay and increase in costs through repetition' and raised 'a basic question of fairness'.[155] In other words, it allowed the losing (objecting) party 'a second bite of the cherry'.[156]

Awards can be challenged under section 67 on the basis that the arbitral tribunal lacked jurisdiction. Clause 10 of the AA 2025 amends section 67 to provide the remedies, including remittance for reconsideration, and declaring the award to be of no effect. This aligns the remedies available under section 67 with those available under section 68 and section 69. This also reflects the assumption in the case law that these remedies were intended to be available.

In *Dallah v. Pakistan*[157] the Supreme Court had held that even where the question of the tribunal's jurisdiction has been fully debated before the tribunal, a challenge under section 67 is a full rehearing by the court. Clause 11 amends section 67 to confer powers for Rules of Court to restrict this rehearing. Where an application is made under section 67 by a party that took part in the arbitration, and relates to an objection on which the tribunal has already ruled, there will be no full rehearing, contrary to *Dallah v. Pakistan*,[158] unless it is not reasonably possible to put such objections before the tribunal – but even then, the evidence is not to

[155] Law Commission, *supra* n. 153, paras 9.16–9.17.
[156] *Ibid.,* para. 9.18.
[157] *Dallah v. Pakistan*, *supra* n. 26.
[158] *Ibid.*

be reheard by the court.[159] The new, more restrictive approach seeks to limit the broad discretion on evidence and challenges which have been witnessed in cases such as *Diag Human and Stava v. Czech Republic.*[160] Nevertheless, there has been some resistance to this proposal, as some argue that the theoretical objectives of these reforms are not substantiated with practical evidence.[161]

6 CONCLUSIONS

This evaluation of section 69 and our analysis of recent case law support the view that section 69 remains good law and continues to serve its intended function.

While questions have been raised about its effectiveness, any review of the appeals mechanism under section 69 does not necessarily call for statutory reform. Rather, further judicial guidance could help clarify the types of questions that properly fall within the scope of a section 69 appeal – even when parties attempt to frame factual disputes as legal questions. Clearer parameters would assist parties in assessing whether an appeal is viable.[162]

The point is not to deny appeals because questions of facts are brought and cloaked as questions of law. The practice of bringing questions of facts presented as questions of law is a long-standing one. Appeals should be allowed where there are valid grounds, not least so as to permit arbitration law to come before the courts and thereby also develop. However, it is necessary that detailed and consistent criteria should be applied to distinguish genuine legal questions from factual disputes in disguise to prevent abuse of the appeal mechanism.

Such criteria have already been laid down by the judiciary in previous judgments and could be further defined and elaborated in future case law. A clear example of the principles that should guide substantive appeals on arbitration is found in *Kershaw Mechanical Services Ltd. v. Kendrick Construction Ltd.*[163] Jackson J held that courts should read arbitral awards as a whole, in a fair and reasonable way, and not engage in overly technical or minute textual analysis. He also stated that courts should accord some deference to arbitrators' decisions, particularly where the arbitrators are experts in the relevant field disputed, and to intervene only if they are satisfied that the arbitrator, despite such expertise, reached the wrong

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159 Arbitration Bill [HL], Explanatory Notes, https://bills.parliament.uk/publications/55946/documents/4959 (accessed 28 Jan. 2025).

160 *Diag & Mr Josef Stava v. Czech Republic*, *supra* n. 69.

161 Alexander Gunning, *Has A Sufficient Case Been Made For The Law Commission's Proposals In Respect of Section 67?* 40 Arb. Int'l 25–35 (2024), doi: 10.1093/arbint/aiad048; Jacob Grierson, *Two Brief Comments on the Law Commission's Proposed Reform of the Arbitration Act 1996* 39(6) J. Int'l Arb. 765–774 (2022), doi: 10.54648/JOIA2022033.

162 Finch, *supra* n. 146, at 264–266.

163 *Kershaw Mechanical Services Ltd. v. Kendrick Construction Ltd.* [2006] EWHC 727, [2006] 4 All ER 79.

conclusion. The development of such criteria will serve two aims: first, to preserve the proper functioning of the right to appeal; and second, to ensure that leave to appeal is granted only on the basis of the existence of objective grounds and criteria. This would safeguard the core principles of arbitration – its finality, autonomy, and flexibility – while maintaining public confidence in the system as a legitimate and effective means of resolving disputes.

The justification for retaining section 69 is closely tied to the importance of preserving a final recourse to the courts, which also leads to the progress of the commercial law system. Among those advocating for the abolition of section 69 there is a faction that argues that the reason for abolishing it is the fact that it restricts the development of commercial law, which should be attained by arbitration tribunals; and if the courts are prevented, due to a statutory restriction, from shaping the law through appellate review, the responsibility for legal development must necessarily shift to arbitrators.[164] This view reveals many pitfalls. As demonstrated and argued in this article, the reality is quite to the contrary. Having a right of appeal in court means that more arbitration law cases will be heard in court, and this will strengthen commercial law.

The approach to the appeals against arbitral awards remains sparse and fragmented, as our discussion has shown. The English Law Commission has codified a high threshold requirement for an appeal under section 69, to preserve the final and binding nature of arbitration, with a limited appellate review option being available, in an effort to ensure that justice prevails where there are obvious errors of law. Any law reform pertaining to arbitration appeals should be carefully considered to uphold the principles of party autonomy and procedural flexibility while guarding against erosion of arbitration's core feature, finality.

The *Tricon Energy Ltd v. MTM Trading LLC*,[165] *Alegrow SA v. Yayla Argo Gida San ve Nak A.S.*,[166] and *Sharp. Corp Ltd v. Viterra BV*[167] cases are recent examples of rare success in challenging arbitral awards on points of law. The English High Court did not lay down any new principles but simply overturned the awards in these cases owing to their particular facts due to obvious errors on a point of law. These cases cannot however be considered as reversing the past trend of allowing only a very small number of section 69 appeals on a point of law.

Furthermore, the High Court should be cautious when granting a leave to appeal on questions of law that ensures a proper compliance with the strict requirements under section 69, in particular when applying the two-pronged test that requires the question of law to be one of general public importance, and that the

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[164] Esposito, *supra* n. 148, at 435–438.
[165] *Tricon, supra* n. 74.
[166] *Alegrow*, *supra* n. 75.
[167] *Sharp, supra* n. 83.

decision of the tribunal must at least be open to serious doubt. These requirements are codified to uphold the finality of arbitral awards and to prevent unnecessary leave to appeal in the English High Court.

The discussion in this article has shown that there is a crucial distinction between appeals on a point of fact and appeals on a point of law, with only the latter being under the scope of section 69. The interpretation and application of section 69 by the judiciary has demonstrated that there are a number of instances of appeals on points of law, but only a few have actually been successful because of the higher threshold established and maintained by English courts. This reinforces the need to continue to examine the functionality and effectiveness of section 69 in light of the reform enacted by the Law Commission, with a view to preserving arbitration's integrity while allowing for limited and principled judicial oversight.