SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
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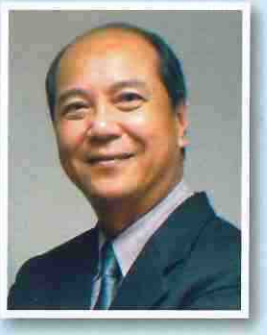
VIEWPOINT

THE PRESIDENT'S COLUMN



On behalf of the Institute, I thank you for your encouraging response to my invitation to participate actively in the Institute's programmes by volunteering to serve on its many committees. Please keep them coming. Your contributions and support will go a long way to enhancing the Institute's growth.

Alternative Dispute Resolution (ADR) for Sports in Singapore

I am pleased inform you that the framework for the Alternative Dispute Resolution (ADR) for Sports in Singapore has been approved by the Ministry of Community Development, Youth and Sports (MCYS). The framework was officially launched in January 2008.

The framework entails a Memorandum of Understanding (MOU) between the Singapore Sports Council (SSC) and Singapore National Olympic Council (SNOC) with Singapore International Arbitration Centre (SIAC), Singapore Mediation Centre (SMC) and Singapore Institute Arbitrators (SIArb). The Parties will collaborate towards establishing an alternative dispute resolution method for the Sports fraternity to resolve all sports related disputes in a formal, structured, expeditious and cost-effective manner.

We thank fellows of the Institute who have responded to the call for volunteers to offer themselves to be on the Panel for Sports Arbitration. Our sports men and women have sacrificed much to bring sporting glory to the nation. This is our way of helping them resolve any dispute they may face in the course of their pursuit of sports excellence. At the same time, it provides a good platform for new arbitrators with an opportunity to hone their arbitration skills in small scale non-commercial arbitrations.

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Modular Programmes for International Entry Course (IEC) and Fellowship Assessment Course (FAC)

We have made good progress in the development of the International Entry Course (IEC) and Fellowship Assessment Course (FAC) modules. It is envisaged that the modular components leading to the IEC and FAC examinations will be ready for implementation by middle of 2008. The following are the 5 modules identified (inclusive of CTE module):

1. Contract, Tort and Evidence (for non-legally trained participants)
2. Arbitration Agreement, Arbitral Rules and Lex Arbitri
3. Commencement of Arbitration and the Tribunal
4. The Arbitration Procedure
5. The Award

Participants of an Award Writing examination are required to attend Modules 2 to 5. It will be compulsory for non-lawyers to successfully complete Module 1. The modules are formulated to be flexible for one to choose to meet one's professional needs and schedules. Essentially, the modular approach provides both flexibility and choice in preparing for the Award Writing examination.

Collaborations with the Singapore Manufacturers' Federation (SMa)

Further to our Memorandum of Understanding with the SMa, several initiatives will be implemented to foster closer ties between members of the SMa and the Institute. Members of the SMa have extensive cross-border business both regionally and internationally. The two institutes can leverage on the MOU established to members of both organizations. Among the initiatives put in place are:

1. Establishing a hyperlink of the SMa's and SIArb's websites to keep members informed of the activities of the two organisations;
2. Providing SMa with the SIArb's standard arbitration agreement clause for incorporation into SMa's contracts:
3. Providing the List of SIArb's Panel of Arbitrators and Rules of Arbitration to SMa; and
4. Holding and promoting joint seminars and courses open to members of both organisations.

Partnership Initiatives with the Singapore Management University (SMU)

The Law Faculty of the SMU will work in partnership with the Institute on launching a series of public arbitration seminars for enhancement and promotion of arbitration. Further, we have plans to conduct a joint research on the practice of arbitration from the perspective of an academic and a practitioner.

Training Programmes for the Singapore Institute of Architects (SIA)

The Institute has been in talks with the SIA to launch a comprehensive arbitration training programme for the SIA's panel of arbitrators. It is hoped that this joint initiative will serve to augment the skills and knowledge of members of the SIA's panel in the conduct of construction arbitration.

Finally, I wish everyone a merry Christmas season and a Happy New Year. I look forward to your continual support in driving the above initiatives collectively.

Johnny Tan Cheng Hye
President

COUNCIL 2007 - 2008

Members' Night - 27 November 2007

MC Edwin Sim

President with Guest Speaker, Lok Vi Ming SC

Some of the proud new Members and Fellows

Report from London: Recent developments and cases In England

by

Khawar Qureshi QC

Opening Observations.

International Arbitration has conventionally been the dispute resolution process of choice for sophisticated business users engaged in cross-border transactions.

The perceived benefits of neutrality of process (as opposed to a domestic court), greater scope for cultural sensitivity, confidentiality, expedition, informality and finality have led to a rapid rise in the number of international arbitrations in recent years, as well as an increasing clamour amongst institutions (as well as venues) which are vying to be the service providers/ "hot seats".

Gone are the days (certainly in the UK, as is evidenced by the cases summarised below), when the "interfering" Courts could be blamed for delay and cost.

The selected cases manifest a strong signal from the English Courts to parties seeking to arbitrate that they can be assured of support and not interference from those Courts.

Recent cases.

I have summarised recent cases dealing with four current issues underpinning the arbitral process:

(1) The ambit of the arbitration clause.

Fiona Trust v. Privalov [2007] UKHL 40 (17th October 2007)

The Issue: Was a claim for rescission of standard form charter parties on the grounds of alleged bribery outside the terms of an arbitration clause?

The House of Lords strongly upheld the Court of Appeal's reversal of the decision of Morison J (who had granted a stay of arbitration proceedings pursuant to Section 72 of the Act), in holding that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. This meant that the words "arising out of" (and also, where, as in this case the dispute resolution clause used the words "any dispute arising under this charter") should be interpreted to cover every dispute except a dispute as to whether there was a contract at all.

It is highly significant that the Court's approach was pivoted on the requirements of commercial certainty and "one-stop" arbitration. As such, the decision provides a very strong signal to the arbitration user community that the English Courts are (at least in this context) likely to adopt a more "common-sense/ purposive" and less literal approach to contract terms when seeking to ascertain the parties intentions.

(2) Anti-suit injunctions.

The Issue: Should the English Courts be able to grant anti-suit injunctions to restrain Court proceedings in an EU Member State on the basis that such proceedings violate an arbitration agreement?

In the case of *West Tankers* v. *Ras Riunione, the Front Comor* [21/2/07] the House of Lords referred to the European Court of Justice the question "is it consistent with EC Regulation 44/2001 ["the EC Regulation"] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?"

The facts were essentially that ship owners had sought and obtained anti-suit injunctions against insurers of a jetty who had brought claims in Italy arising out of an incident where the jetty had been damaged by the ship owners', vessel. The ship owners contended that the insurers claim (arising as a result of rights of subrogation from the charterers of the vessel – who also owned the jetty) fell within the arbitration provision contained in the charterparty.

On March 21st 2005, Colman J. upheld the ship owners' contentions and granted an injunction to restrain the proceedings in Italy. Colman J. certified that the question raised was suitable for appeal directly to the House of Lords under Section 12 of the Administration of Justice Act 1960.

As the matter was in turn referred to the ECJ by the House of Lords, there was no decision. However (and perhaps with some desire that the ECJ would take notice) Lords Hoffman and Mance expressed their view that the EC Regulation system for allocation of jurisdiction between EU Member States excluded arbitration from its scope (and hence anti-suit injunctions in this context were permissible).

Lord Hoffman observed, inter alia, as follows (paragraph 12) *"The basic principles by which the Regulation allocates jurisdiction, giving priority (subject to exceptions) to the domicile of the defendant, are entirely unsuited to arbitration, in which the situs and governing law are generally chosen by the parties*

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on grounds of neutrality, availability of legal services and the unobtrusive effectiveness of the supervisory jurisdiction. There is no set of uniform Community rules which Member States can or must trust each other to apply".

Lord Mance also observed (paragraph 29) that *"The purpose of arbitration (enshrined in most modern arbitration legislation) is that disputes should be resolved by a consensual mechanism outside any court structure, subject to no more than limited supervision by the courts of the place of arbitration...Anti-suit injunctions issued by the courts of the place of arbitration represent a carefully developed-and, I would emphasise, carefully applied – tool which has proved a highly efficient means to give speedy effect to clearly applicable arbitration agreements".*

It remains to be seen what the ECJ will decide on this point. However, a decision to the effect that anti-suit injunctions in this context are impermissible will have a serious effect upon the choice of arbitration in London. So far as non EU related anti-suit injunctions, the position should remain unaffected – a recent example of an anti-suit junction granted to restrain Chinese Court proceedings in breach of an LMAA arbitration clause is to be found in the case of *Starlight Shipping Co. v. Tai Ping and others* [1/8/07] (Cooke J).

For recent examples of the basis upon which an English Court will consider whether to grant an injunction restraining arbitration (namely only in very exceptional circumstances) see the cases of *Elektrim SA v. Vivendi Universal* [20/3/07] (Aikens J) and *J. Jarvis v. Blue Circle* [2007] EWHC 1262 (TCC) [14/5/07] (Jackson J.).

(3) Incorporation of an arbitration clause by reference.

The Issue: Is an arbitration clause which does not violate fundamental fairness rights a provision which is so unduly onerous that steps must be taken to draw it to the attention of other contracting parties?

In the case of *Sumukan v. Commonwealth Secretariat* [21/3/07] the Court of Appeal held that it was sufficient for the contract to expressly include an arbitration clause which in turn referred to the Statute and Rules of the relevant arbitral tribunal (in this case the Commonweath Secretariat Arbitral Tribunal ("CSAT") which was a body created and constituted by the Defendant). Accordingly, their Lordship's held that a provision in the CSAT Statute which excluded the right to appeal on a point of law pursuant to Section 69 of the Act was valid.

The key point in the Court's decision was that exclusion of the right of appeal was a matter that the Claimant could have identified before entering into the agreement for arbitration (if a copy of the CSAT Statute had been obtained and examined). There was nothing unduly onerous in excluding the right to appeal on a point of law – many parties perceived a benefit in doing so.

(4) Fairness in the arbitral process.

In the Sumukan and *Paul Stretford* decisions, the Court of Appeal considered the nature and extent of the applicability of Article 6 ECHR to the arbitral process.

In essence, the Court observed in those cases Article 6 was not violated by recourse to arbitration. Moreover, the Court noted that some provisions of the 1996 Act (such as Section 33 - the duty on the arbitral tribunal to act fairly and impartially, and Section 24 – removal of an arbitrator by the Court on the grounds that "circumstances exist that give rise to justifiable doubts as to his impartiality..[giving rise to actual or likely substantial injustice]) were intended to provide a foundation of fairness for the process.

The Issue: What are the facts and circumstances which give rise to a justifiable doubt as to the impartiality of an arbitrator?

In the case of *TTMI Ltd of England v. ASM* [2005] EWHC 2238 (Morison J) (upheld by the Court of Appeal on an aspect which was appealed by invoking Article 6 ECHR) the issue was whether a member of the arbitral tribunal dealing with a shipping dispute should have recused himself because one of the parties witnesses had been cross-examined by him qua Counsel 7 months previously in another case brought against that party (where the same Solicitors had been acting as for the claimants in the arbitration). In that other matter, serious allegations relating to disclosure had been made against the witness. The arbitrator "Mr. X QC" was asked by the complaining party to recuse himself. Instead, he gave a lengthy explanation as to why he considered that there were no justifiable doubts as to his impartiality.

Morison J held that Mr. X QC should have recused himself because an objective and independent observer considering the facts would have shared the discomfort expressed by the witness about Mr. X QC's impartiality, and would have concluded that there was a real possibility of bias.

However, as the complaining party had failed to apply to the Court after Mr. X QC refused to recuse himself, and thereafter had paid for and taken up an interim award from the arbitral tribunal, complaints as to past participation of Mr. X QC in the arbitral proceedings had been waived (pursuant to Section 73 of the Act).

For the latest stage in this saga, see the decision of Andrew Smith J. rejecting the attempt by the owners to have the remaining two arbitrators removed (inter-alia on the grounds that they were "tainted" by having been involved in/agreed with decisions of Mr. X QC-held). Section 24 of the 1996 Act was not engaged. Even if it was, there had been a waiver of any right to challenge – by virtue of Section 73 of the Act): *ASM Shipping Ltd v. Bruce Harris and others* [28/6/07].

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An Event-Filled October

IBA Conference, October 2007

SiArb members with IBA guests Hew Dundas (CiArb President) and Edward Lukell (from Botswana)

Siarb President, Johnny Tan, with CiArb President, Hew Dundas

Seminar on the Latest Developments in ICC Arbitration

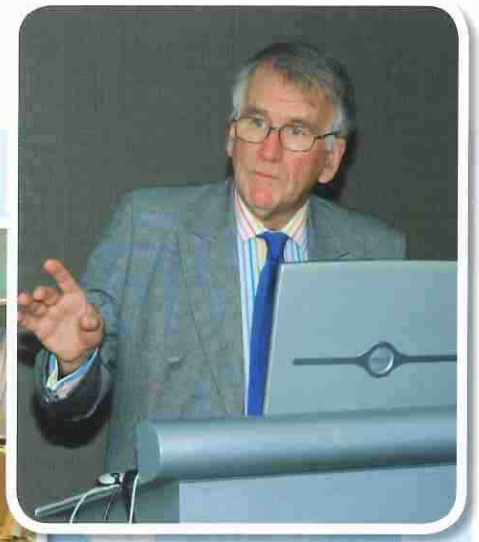
16 October 07

Fast-Track Fellowship Assessment workshop

19, 20 & 21 October 2007

Talk by Lord David Hacking

11 October 2007



Legal developments affecting Arbitration

by Dr Philip Chan Chuen Fye

Introduction

In this issue, only one case, as decided by the Court of Appeal, would be examined. This case is especially instructive to arbitration lawyers in respect of the procedures relating to appeals. A warning has been given by the Court of Appeal about the intricacies of the appeals procedure for domestic arbitrations. The case should also interest the users of arbitration as regards their right and extent to which parties may make an appeal in a domestic arbitration.

Ng Chin Siau and Others v How Kim Chuan [2007] SGCA 46 [Court of Appeal - Andrew Phang Boon Leong JA, Belinda Ang Saw Ean J, V K Rajah JA]

This was an application for leave to appeal to the Court of Appeal against a decision of the High Court setting aside a domestic arbitration award. The application was dismissed. The Court of Appeal in its judgment examined "the procedural pre-requisites for appeals on questions of law to the court in relation to domestic arbitration awards and, in particular, we clarify the very limited circumstances in which appeals pursuant to s 49 of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") may be pursued further to the Court of Appeal." [in paragraph 1 of the judgment]

The issues identified by the Court of Appeal in paragraph 7 of its judgment were twofold, as set out below.

- (a) whether an application may be made directly to the Court of Appeal for leave to appeal against a decision of the High Court on an appeal (against an arbitration award) under s 49(11) of the Act; and
- (b) in any event, whether the present application could have been brought despite the fact that the High Court had already refused such leave to appeal.

In the process, the Court of Appeal had to give its interpretation in respect of the following provisions:

- Section 49(11) of the Act
- Section 34(2) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA")
- Order 56 rule 3(1) of the Rules of Court ("ROC")
- Order 69 rule 8 of the ROC
- Section 49(7) of the Act
- Section 52 of the Act
- Residual jurisdiction of the court

To assist the reader in following the summary of the Court's reasoning in this article, it is proposed that the Court of Appeal's analysis of the scheme of appeal against arbitral awards as provided by section 49 be quoted as the starting point.

- "...In the general scheme of appeals against arbitration awards brought before the courts pursuant to s 49 of the Act, the High Court is first asked to decide whether or not to grant leave to permit such an appeal. If the High Court so decides that leave should be granted, it will then proceed to hear the merits of the appeal. The High Court when hearing such an appeal has a limited role and carefully-defined powers – these are found in ss 49(8) and 49(9) of the Act. Any decision on the merits is deemed pursuant to s 49(10) of the Act to be a judgment of the High Court. A party dissatisfied with such a decision has a further right to seek leave to appeal against that decision – but such leave will only be granted in the very restrictive circumstances prescribed in s 49(11) of the Act." [see paragraph 29]

In setting out the said scheme, the Court of Appeal also administered a warning to lawyers practising arbitration.

- "...It is crucial that any counsel who seeks to rely on s 49 of the Act carefully appraise the ambit of the provision. A failure to properly appreciate its ambit could result in adverse cost consequences (and not just for their clients)." [see paragraph 30]

Application under section 49(11) of the Act

Section 49(11) is reproduced below for ease of reference.

- "The Court may give leave to appeal against the decision of the Court in subsection (10) only if the question of law before it is one of general importance, or one which for some other special reason should be considered by the Court of Appeal."

The decision of the court of appeal is contained in paragraph 27 as reproduced below.

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- "In our view, an application under s 49(11) of the Act for leave to appeal against a decision of the High Court on an appeal against an arbitration award cannot and should not be brought before the Court of Appeal. This conclusion is not reached by any strained interpretation of the statutory provisions; rather, the answer is the same in our view, whether the issue is approached on the basis of a plain reading of s 49(11) of the Act, a comparison with s 34 of the SCJA and the corresponding Rules or a consideration of the immediate statutory predecessor of s 49(11) of the Act. ..."

The plain meaning of section 49(11)

- "...When read with s 2(1) of the Act, which expressly states that the term "Court" when employed in the Act means the High Court, this plainly stipulates that leave to appeal to the Court of Appeal against a decision on an appeal from an arbitration award, after satisfying either of the two requirements set out in s 49(11) of the Act (*viz*, that the question of law before it is one of general importance, or one which for some other special reason should be considered by the Court of Appeal) must be obtained from the *High Court*." [see paragraph 20]

Comparison with scheme of Appeal in SCJA

- "...It is clear beyond peradventure that leave to appeal under the SCJA operates under a wholly different scheme from that under the Act. First, the statutory architecture of the two schemes was drawn up differently. Whereas s 34(2) of the SCJA expressly provides that leave to appeal may be obtained from the *Court of Appeal or a Judge*, s 49(11) of the Act merely stipulates that "[t]he Court may give leave to appeal" and it is common ground that the "Court" here refers only to the High Court." [see paragraph 21]
- The Rules also reflect this difference in that O 56 r 3(1) of the Rules specifically recognises and provides for the situation where leave to appeal is refused by the High Court whereupon an application for leave to appeal may be filed to the Court of Appeal. The corresponding provision in the Rules, in relation to arbitration proceedings under the Act, *ie*, O 69 r 8 of the Rules, only states that "[a]n application under the Act for leave to appeal against a decision of the Court to the Court of Appeal must be made to the Court within 7 days of the decision of the Court". Yet again, "Court" here is defined to mean the High Court: see O 1 r 4(2) of the Rules. These differences are plainly material and are not statutory slips between the cup and the lip as we shall now see." [see paragraph 22]

Comparison with predecessor Act

- "We have similarly appraised the statutory predecessor of s 49(11) of the Act – s 28(7) of the repealed Act: ...the deliberate omission in s 49(11) of the Act of any reference to the Court of Appeal having the power to grant leave (which was present in s 28(7) of the repealed Act), inexorably points to the fact that the English position [i.e. not open to the Court of Appeal to conduct a review of the lower court's refusal to grant permission- see paragraph 25] has been consciously adopted in Singapore." [see paragraph 26]

Application under section 49(7) of the Act

Section 49(7) is reproduced below for ease of reference.

- "The leave of the Court shall be required for any appeal from a decision of the Court under this section to grant or refuse leave to appeal."

The Court of Appeal identified the relevant questions (in paragraph 33) as follows:

- What decision does s 49(7) of the Act contemplate?
- Is it leave to appeal against an arbitration award?
- Or is it leave to appeal against a decision of the High Court?

The Court of Appeal analysed the meaning of appeal applying three approaches, namely, the literal interpretation, the purposive interpretation and the presumption of law approaches.

The literal interpretation

The Court of Appeal held at paragraph 35 that, "Once the context of s 49 of the Act is taken into account, the term "appeal" must refer only to an appeal against an arbitration award." It had relied on the principle as set out below.

- "...It is trite that even a literal approach to statutory interpretation such as the "plain meaning rule" (as laid down by Lord Tindal CJ in *The Sussex Peerage* (1844) 11 Cl & Fin 85; 8 ER 1034) mandates that the courts give the words of the statute their ordinary meaning *in the context in which they appear*. As rightly pointed out in *Maxwell on the*

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Interpretation of Statutes (P St J Langan ed) (N M Tripathi Private Ltd, 12th Ed, 1969) ("*Maxwell*") at p 58, "[i]ndividual words are not considered in isolation, but may have their meaning determined by other words in the section in which they occur". Our courts have also similarly stated that the rule "prescribes that the statutory provision [is to] be interpreted in its entirety, without undue focus on an isolated word or phrase": see *PP v Low Kok Heng* [2007] SGHC 123 ("*Low Kok Heng*") at [30]. ..." [see paragraph 35]

The purposive interpretation

The Court of Appeal held at paragraph 40 that, "In applying a purposive approach in interpreting the Act, the objective should be to promote the desirability of finality and limited curial intervention in arbitration proceedings. The availability of an onward appeal has been severely attenuated." It had relied on the principle as set out below.

- "...any discourse on the construction of statutes in Singapore must take place against the backdrop of s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) ("Interpretation Act")." [see paragraph 36]
- "...section 9A.—(1) In the interpretation of a provision of a written law, *an interpretation that would promote the purpose or object underlying the written law* (whether that purpose or object is expressly stated in the written law or not) *shall be preferred to an interpretation that would not promote that purpose or object*. [see paragraph 36]
- "...It is plain that a purposive approach is to be adopted in the construction of s 49 of the Act; and the purposive approach will take precedence over a literal interpretation. Section 9A(2) of the Interpretation Act also allows us to make reference to, and draw assistance from, the reports of the Law Reform and Revision Division of the attorney General's Chambers (see [23] above and [49] and [52] below), as well as various other extrinsic material "capable of assisting in the ascertainment of the meaning of the provision". [see paragraph 37]

The Presumption of Law Approach

The Court of Appeal held as follows:

- "...It is a rule of statutory interpretation that it is presumed that a statute does not create new jurisdictions or enlarge existing ones, and express language is required if an Act is to be interpreted as having this effect: see *Maxwell* ([35] *supra*) at p159. ..." [see paragraph 42]
- "...there is simply no presumption of law that litigants have a right of appeal. The express provision granting a dissatisfied litigant in the High Court (in relation to an appeal from an arbitration award) a right of appeal to the Court of Appeal is s 49(11) of the Act. Even then it is available only in extremely limited statutorily-prescribed circumstances. Any alternative or further right of appeal cannot be implied into the Act; express language is required to allow s 49(7) to be interpreted as having this effect." [see paragraph 42]

Application of section 52 of the Act

The Court of Appeal held at paragraph 47 that section 52 is irrelevant to the dispute before the court. However, the Court of Appeal made the following observations:

- "...the legislative purpose of s 52 is merely to spell out the jurisdiction and the powers that the Court of Appeal possesses when the High Court grants leave to appeal pursuant to s 49(7) of the Act. ..." [see paragraph 48]
- "...s 52(3)(*b*) of the Act merely confirms that the Court of Appeal has a complementary jurisdiction to that of the High Court if and when it is properly seised of a matter. Ultimately, the High Court is meant to fulfil the role of an exclusive gate-keeper for arbitration matters in relation to the appeals procedure prescribed by the Act. Therefore, it is *only* when the High Court decides that leave under s 49(7) of the Act is to be granted, that the Court of Appeal thereafter has the jurisdiction to hear the matter. [see paragraph 50]
- "...In a situation where the High Court refuses to grant leave to appeal pursuant to s 49(7) of the Act against an initial decision refusing leave to appeal against an arbitration award, even if there has been no determination on the merits in this type of situation, we are of the view that s 52(3)(*b*) will have no role to play. The Court of Appeal simply does not have the jurisdiction to hear such an application. ..." [see paragraph 51]

Residual jurisdiction

The Court of Appeal held at paragraph 68 that it had "a residual jurisdiction to enquire into unfairness in the process of a refusal of leave under s 49(11) of the Act read together with ss 29A(3) and 29A(4) of the SCJA." but warned in the following paragraph that its use, "cannot itself be turned on its head to become a forensic tool for undermining the process of arbitration and the legislative intent."