The nuts and bolts of appealing an arbitral award when you need the Court's leave

By Maria Cole

What is involved when you want to appeal an arbitral award but need leave from the High Court to get a foot in the door? Two recent decisions out of Hong Kong and New Zealand look at different aspects of the application process.

Any party to an arbitration can appeal an arbitral award on any question of law arising out of the award if all the parties agree, or with the leave of the High Court. The focus of this article is on what is involved when the Court's leave is required.[1]

In order to appeal an arbitral award in New Zealand, a party has to identify an "error of law" in the award,[2] and be able to demonstrate that the consequences that flow from the error substantially affect the rights of one or more of the parties.[3] The Arbitration Act 1996 (**Act**) states that an error of law involves an incorrect interpretation of the applicable law.

Last year we wrote an article which analysed decisions of the High Court on applications for leave over the period 2019 to 2021 and looked at the overall statistics on leave applications. The results showed that a restrictive approach was being taken by the Court when considering leave applications and that over the last decade less than a third were successful.[4]

So, how do you decide whether you have a runner or not? What do you need to demonstrate to the High Court to persuade it to grant your application, and what is the Court of Appeal's role?

Identifying a question of law

As with a lot of legal issues, although it seems it should be quite simple to work out if something is a question of law, it can turn out to be anything but (as the statistics show). In *KH Foundations Ltd v Sze Fung Engineering Ltd*,[5] the Hong Kong Court of Appeal set out the following practical guidance on how to identify a question of law to enable parties to assess whether an arbitral award is capable of being appealed:[6]

> *Some questions are easy to classify. The correct scope and content of a specific legal rule is obviously a question of law. Traditionally, the interpretation of contracts has been regarded as a question of law. In less straightforward cases … dividing an arbitrator's process of reasoning into three stages, may be of assistance:*
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> *(1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.*
> *(2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the*

1 The parties can agree to this before the award is made, or give consent to it afterwards – see clauses 5(1)(a) and (b) of schedule 2 of the Arbitration Act 1996. Leave to appeal an award law is required under clause (5)(1)(c) of schedule 2 of the Act.

2 The parties can also agree that the appeal be on "mixed" questions of law and fact.

3 Clause 5(2) of schedule 2 the Act.

4 *Limits to appeal of arbitral awards* https://www.nzdrc.co.nz/resources/resolution/resolution-issue-28/ at page 19.

5 *KH Foundations Ltd v Sze Fung Engineering Ltd* [2021] HKCA 970.

6 Citations have been omitted.

identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.

…

Stage (2) of the process is the proper subject matter of an appeal … In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another: and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct — for the Court is then driven to assume that he did not properly understand the principles which he had stated.

In the past, applications for leave were often vague and would merely state boldly that the ground for the appeal was an error of law, without saying what it was. Those days are long gone. In *KH Foundations*, the Court said that identifying the question of law is not just a formality but a requirement of some importance, as the question of law is central to the application. It said the failure to identify a clear, crisp and correct question of law may result in the application being rejected on that ground alone.[7]

Are rights "substantially affected" and the *Doug Hood* guidelines

In *Gold and Resource Developments (NZ) Limited v Doug Hood Limited* the Court of Appeal confirmed that a finding that the question of law concerned could substantially affect a party's rights was only a precondition and was not enough in itself to justify granting leave.[8] It said the High Court still had to exercise its discretion and the starting point was to exercise it to promote the objects of the Act, which include to encourage arbitration as a dispute resolution mechanism. It said Parliament intended that parties should be made to accept the arbitral decision when they have chosen to submit their dispute to arbitration. With that in mind, it suggested the following guidelines for the High Court to consider when deciding whether to grant leave:

- the strength of the challenge / nature of the point of law
- how the question arose before the arbitrators
- the qualifications of the arbitrators
- the importance of the dispute to the parties
- the amount of money involved
- the amount of delay involved in going through the courts
- whether the contract provides for the arbitral award to be final and binding
- whether the dispute before the arbitrators is international or domestic

In *Restaurant Brands Limited v QSR Limited*,[9] the Court of Appeal was presented with a "double whammy". The High Court had refused leave to appeal the arbitral award on the basis that, while it was satisfied the question of law could substantially affect the rights of one or more of the parties, it wasn't persuaded the appeal points were "strongly arguable" – so the applicant failed on the first *Doug Hood* guideline.[10] However, the High Court then

7 Above, n 5 at [5]. For decisions where the High Court declined leave on the basis of no question of law being identified, see *Milk New Zealand (Shanghai) Co. Limited v Miraka Limited* [2019] NZHC 2713; *Napier City Council v H20 Management (Napier) Ltd* [2020] NZHC 1913; and *Ventura Limited v Robinson* [2021] NZHC 932.

8 *Gold and Resource Developments (NZ) Limited v Doug Hood Limited* [2000] NZCA 131.

9 *Restaurant Brands Limited v QSR Limited* [2021] NZCA 680.

10 It is interesting to note that the Judge did consider all of the Doug Hood guidelines, but placed the most weight on the first one, which the Court of Appeal confirmed was the correct approach.

granted leave for its refusal decision to be appealed to the Court of Appeal.[11] This was on the basis that while the applicant's argument was not "strongly arguable" it was "seriously arguable", which was sufficient to get it before the Court of Appeal under clause 5(5) of schedule 2 of the Act.

The Court of Appeal's judgment explained the different tests. In the High Court under clause 5(1)(c), the test is whether the points on appeal are "strongly arguable". However, for leave to appeal to the Court of Appeal, the test is different. It involves a preliminary assessment of the likelihood of success on the appeal against refusal of leave, which must "raise some question of law … capable of … serious argument" (and in a case of sufficient importance to justify the cost and delay of further appeal).[12] Because the High Court had granted leave for the matter to go to the Court of Appeal, the applicant was provided another bite at the cherry to prove it should be granted leave to appeal the arbitral award (it didn't succeed).

Conclusion

It's not difficult to avoid the complexities of having to make a leave application. Just ensure there is a crystal clear clause in the contract that provides for an appeal on a question of law (or mixed law and fact). In the absence of such a clause, ensure the application for leave correctly identifies the error of law that is being relied on, shows that the error substantially affects the rights of one or more of the parties and, crucially, addresses the *Doug Hood* guidelines to persuade the High Court to exercise its discretion to grant the application. If at first you don't succeed and you think you can convince the High Court it is at least seriously arguable, you can apply to take it to the Court of Appeal and have another go!

11 This was done under clause 5(5) of schedule 2 of the Act.

12 Above, n 9 at [37].

About the author

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She was previously a civil litigation barrister for over a decade, where she gained experience in arbitration and mediation.