The Court of Appeal's "residual" arbitration appeals jurisdiction under s 16 of the Senior Courts Act 1981.

In *Philip Hanby Ltd v Andrew John Clarke Ltd* [2013] EWCA Civ 647, the Court of Appeal has stressed that its "residual jurisdiction" to grant permission to appeal against arbitration decisions under the Arbitration Act 1996 is confined to non-decisions, not wrong decisions.

Conventionally, only the first instance judge can grant permission to appeal to the Court of Appeal against a decision under s 69 of the 1996 Act (errors of law) – see *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] QB 388 and *Athletic Union of Constantinople v National Basketball Association (No 2)* [2002] 1 WLR 2863. The same rule applies to decisions made on appeals under s 67 (substantive jurisdiction) and s 68 (serious irregularity).

However, it is established that s 16(1) of the Senior Courts Act 1981 which provides that

> (1) Subject as otherwise provided by this or any other Act ... the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court.

might, in a special case, give the Court of Appeal such jurisdiction. But what kind of case?

In *Aden Refinery Co Ltd v Ugland Management Co Ltd* [1987] QB 650 Mustill LJ said that

> "if a judge had in truth never reached "a decision" at all on the grant or refusal of leave, but had reached his conclusion, not by any intellectual process, but through bias, chance, whimsy, or personal interest, an appellate or other court might find a way to intervene."

In *North Range Shipping Ltd v Seatrans Shipping Corpn* [2002] 1 WLR 2397 the Court of Appeal extended this principle to "unfairness" and said that the jurisdiction was

> "directed at the integrity of the decision-making process or the decision maker, which the courts must be vigilant to protect, and does not directly involve an attack on the decision itself."

and therefore to what could be described as method not merits. In *Daisystar Ltd v Town and Country Building Society* [1992] 1 WLR 390, Lord Donaldson said that

> "I cannot and do not contemplate bias, whimsy or personal interest in the judges of this court, mischance is always a remote possibility"

and that where it could be argued that there had not – by some mischance – really been a decision at all, then the restriction on who could grant permission to appeal would not apply.

In *CGU International Insurance plc v AstraZeneca Insurance Co Ltd* [2006] EWCA Civ 1340 the Court of Appeal had to analyse the precise legal basis on which it could intervene in an appropriate case. Referring to the Human Rights Act 1998, Rix LJ said that his

> "preferred analysis is that section 3 of the 1998 Act renders it possible to limit the restriction of section 69(8) of the 1996 Act, thus in any event enabling statutory jurisdiction to be found in section 16 of the 1981 Act."

He went on to say that

> "What one is looking for is not merely an error of law, but such a substantial defect in the fairness of the process as to invalidate the decision."

and, in an important limitation of even this stringent test, he emphasised that although perversity – a decision that no reasonable decision-maker could make – might be sufficient for judicial review purposes, it could not come within the residual arbitration appeal jurisdiction because "perversity is an error of law like any other".

In *Hanby v Clarke* the Court of Appeal described the residual discretion as applying to "situations of unfair or improper process" and said that

> "Those situations are, firstly, where the High Court judge never reached something which can properly be called "a decision" at all and, secondly, where the decision was reached through a process incompatible with the European Convention on Human Rights and Fundamental Freedoms ("the Convention")."

If the requirements of the jurisdiction are made out then the powers of the Court of Appeal are limited to setting aside the purported decision and remitting the application to the High Court for a fresh decision on the appeal under s 69 (or ss 67 or 68 as the case may be).

Hanby v Clarke involved an appeal against an arbitrator's award of costs in a partnership arbitration. Briggs J refused leave to appeal against it under s 69 of the 1996 Act and also refused permission to appeal against that decision to the Court of Appeal.

The Arbitration Claim Form had been issued in March 2012. Long delays followed. Inquiries at Court in August revealed no trace of the file nor any record of the case. In October 2012, personal attendance on the judge's clerk yielded an unsealed copy of an order dated May 2012 refusing leave. In November 2012, the appellant sought either an oral hearing of its application for leave under s 69 or permission to appeal from the decision refusing leave; it heard nothing further. The appellant then made further inquiries in January 2013 and was told that the court file could not be found. A further complete copy of the application was provided to the Court and the appellant was then sent "a further copy of the order dated 24 May 2012" which was a *different* version of the order refusing leave and which had been sealed on 13 June 2012. The appellant was then sent two different versions of an order refusing both an oral hearing and permission to appeal to the Court of Appeal.

The appellant sought to invoke the Court of Appeal's residual jurisdiction on the grounds that delay, the loss of the Court file, the provision of different versions of orders raised such questions about "what decision was made and when and what material" as to allow the Court to conclude that the judge had made no valid decision.

The Chancellor said that

> "It must frankly be admitted that the administrative processes within the court following the issue of the claim form on 2 March 2012 in this case leave a great deal to be desired. It is right that as head of the Chancery Division I should apologise to PHL and all the parties for those failings."

but the Court of Appeal rejected the application. There had been "regrettable" administrative inefficiencies but they "did not impinge on the decision-making process itself". The judge had made decisions which could properly be described as decisions under ss 69(2) and 69(6) and they did not infringe the appellant's convention rights. It considered that the essential thrust of the appellant's complaint was that the judge had made the wrong decision but this was precisely the circumstance in which the Court of Appeal does not have jurisdiction to grant permission to appeal.

There is no case (of which the writer is aware) where the residual jurisdiction has been successfully invoked. One wonders whether there ever will be?

Shantanu Majumdar
Radcliffe Chambers
smajumdar@radcliffechambers.com