

CA on appeal from Commercial Court (Deputy Judge Mr Richard Field QC) before Lord Phillips MR; Rober Walker LJ; Clarke LJ. 28<sup>th</sup> May 2002

**LORD PHILLIPS, MR:**

**Introduction**

1. The three applicants, The National Basketball Association ("NBA"), Phoenix Suns ("Phoenix") and Federation International de Basketball eV ("FIBA"), are respondents to an appeal, which the Athletic Union of Constantinople ("AEK") has obtained permission to bring against a judgment of Mr Richard Field QC, sitting in the Commercial Court as a Deputy Judge of the Queen's Bench Division delivered on the 7 August, [2002] Lloyd's Rep Vol 1 305. Permission to appeal was granted by Rix LJ on 22 November 2001 in response to a paper application.
2. The applicants apply to strike out AEK's appellant's notice and to set aside the grant of permission to appeal. They do so pursuant to CPR 52.9, which gives the court powers to take such action where permission to appeal has been given in the absence of the respondents, but provides that the court will only exercise those powers in exceptional circumstances.
3. The first ground advanced by the applicants undoubtedly constitutes exceptional circumstances. It is that this court has no jurisdiction to hear the appeal that Rix LJ has given permission to bring. I propose to consider that ground first. AEK are not represented at this hearing. On 22 May 2002 Master Venne ordered that Messrs Thomas Eggar Church Adams be removed from the record as acting on their behalf.

**Background**

4. On 2 October 2000 Mr Ian Patrick Travers handed down what purported to be an arbitral award in relation to an arbitration between NBA and Phoenix on the one hand and AEK on the other. The arbitration was initiated under an agreement in writing dated 14 March 1997 between NBA and FIBA. NBA is the American Association of Professional Basketball Players and FIBA is the international association. The agreement provided an umbrella under which clubs' members of either association could take part in arbitrations to resolve disputes as to the employment of professional basketball players and, no doubt, other matters.
5. The agreement made provision that FIBA and NBA could take part in the arbitrations and would be bound by the consequences, but on this occasion FIBA did not choose to take part in the arbitration. When the matter came before the Commercial Court, in the circumstances which I shall describe, they intervened, as being interested in upholding the award made by Mr Travers. They have appeared before us on the same basis.
6. The subject matter of the arbitration related to the services of a professional basketball player called Mr Tsakelidis. Phoenix wished to engage him to play for them, but AEK contended that he was already contracted to them. As I understand it, the issue was whether this contention was well founded.
7. The details of the dispute are not material. I should record, however, that, while AEK took part in the arbitration proceedings, they challenged the jurisdiction of Mr Travers. Mr Travers ruled that he had substantive jurisdiction over AEK and he proceeded to make an award in favour of Phoenix and NBA. AEK then applied to the Commercial Court seeking the following relief:
  - (1) an order pursuant to section 67 of the Arbitration Act 1996 ("the Act") setting aside the award, or declaring it of no effect, on the ground that the arbitrator had no jurisdiction; and in the event of the first application not succeeding-
  - (2) permission to appeal against the award on a point of law pursuant to section 69 of the Act.
8. The Deputy Judge dismissed the first application and refused permission to appeal to the Court of Appeal against his decision. He also refused permission to appeal to the Commercial Court on a point of law under section 69.

**The Issue**

9. AEK have not sought to challenge the refusal of leave under section 69. Their application for permission to appeal is only in relation to the Deputy Judge's decision under section 67. The applicants contend that no appeal lay either against the section 67 decision or against the section 69 decision. They submit that the provision of each section required permission to be given by the Deputy Judge as a precondition to any right to appeal to the Court of Appeal.

**The Statutory Provisions**

10. Sections 67, 68 and 69 of the Act make provision for different circumstances in which an award can be challenged before the court. The relevant provisions of each section are as follows:

**"67. Challenging the award: substantive jurisdiction**

- (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court-
  - (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
  - (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
- (2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

- (3) *On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order-*
  - (a) *confirm the award*
  - (b) *vary the award, or*
  - (c) *set aside the award in whole or in part.*
- (4) *The leave of the court is required for any appeal from a decision of the court under this section.*

**68. Challenging the award: serious irregularity**

- (1) *A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.*

....

- (3) *If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may*

- (a) *remit the award to the tribunal, in whole or in part, for reconsideration,*
- (b) *set the award aside in whole or in part, or*
- (c) *declare the award to be of no effect, in whole or in part.*

*The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.*

- (4) *The leave of the court is required for any appeal from a decision of the court under this section.*

**69. Appeal on point of law**

- (1) *Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.*

- (2) *An appeal shall not be brought under this section except -*
  - (a) *with the agreement of all the other parties to the proceedings, or*
  - (b) *with the leave of the court.*

*The right to appeal is also subject to the restrictions in section 70(2) and (3).*

- (3) *Leave to appeal shall be given only if the court is satisfied -*
  - (a) *that the determination of the question will substantially affect the rights of one or more of the parties,*
  - (b) *that the question is one which the tribunal was asked to determine,*
  - (c) *that, on the basis of the findings of fact in the award -*
    - (i) *the decision of the tribunal on the question is obviously wrong, or*
    - (ii) *the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*
  - (d) *that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.*

- (4) *An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.*

- (5) *The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.*

- (6) *The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.*

- (7) *On an appeal under this section the court may by order-*

- (a) *confirm the award,*
- (b) *vary the award,*
- (c) *remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or*
- (d) *set aside the award in whole or in part.*

*The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.*

- (8) *The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.*

*But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal." (My emphasis)*

Section 105 of the Act provides, insofar as material, the meaning of "the court",

11. Jurisdiction of High Court and county court:  
"(1) In this Act 'the court' means the High Court or a county court, subject to the following provisions.  
(2) The Lord Chancellor may by order make provision -  
(a) allocating proceedings under this Act to the High Court or to county courts; or  
(b) specifying proceedings under this Act which may be commenced or taken only in the High Court or in a county court."

**Conclusion**

12. The applicants rely on the provision of section 67(4). They submit that in the present context "the court" that is referred to twice in that subsection is, in each instance, the Commercial Court which has made the decision against which it sought to appeal. I am in no doubt that this submission is correct for the following reasons:  
(1) The natural construction of the subsection accords to the word "court" the same meaning on each occasion that it is used. On the second occasion that it is used, it manifestly, indeed expressly, means the court which has given the decision under section 67.  
(2) It is natural, and in accordance with the established approach to statutory construction, to give the words "the court" the same meaning wherever they appear in sections 67, 68 and 69 unless the context otherwise requires. The context does not otherwise require; on the contrary, it usually requires that "the court" mean the Commercial Court in the present context and universally strongly suggests that "the court" carry that meaning.  
(3) Section 105(1) requires that "the court" mean the Commercial Court in the present context.  
(4) Sections 67, 68 and 69 demonstrate a consistent legislative policy that no appeal shall be made against the decision of a court without the permission of that court. In this respect, there is no logical reason for distinguishing between the effects of sections 67(4) and 68(4) on the one hand, and the effect of section 69(8) on the other hand.  
(5) In reserved judgments, this court has recently unanimously held that, on the true construction of section 69(8), a party who wishes to appeal from the decision of the High Court or the county court on appeal from an arbitration award requires the permission of the High Court or the county court, as the case may be, and that the Court of Appeal has no jurisdiction either to grant permission itself or to review a refusal of the High Court or county court to grant permission: (see *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd* [2001] 1 QB 308). Much of the reasoning of Waller LJ, who gave the leading judgment in that case, can be applied to section 67(4).
13. It follows that Rix LJ had no jurisdiction to grant permission to AEK to appeal against the Deputy Judge's decision under section 67, and the applicants are entitled to the relief they seek. In those circumstances, I do not propose to explore their alternative grounds for the application.

**Postscript**

14. It is right that I should put on record some of the circumstances in which Rix LJ came to grant permission to appeal.
15. On 27 September 2001, after AEK's application had been received in the Civil Appeals Office Registry, the Deputy Manager of the Registry wrote to AEK's solicitors in the following terms, so far as material:  
*"Your application has been referred to the Deputy Master of Civil Appeals who has asked that I convey his direction to you in this letter.  
Please advise this Court whether the effect of the decision in *Henry Boot Construction (UK) Ltd v Malmaison Hotel Ltd* (which was decided in May 2000) does not preclude you from seeking permission to appeal (?) from the Court of Appeal. Additionally, please separately address the issue of what jurisdiction this Court has to grant permission."*  
To this letter Thomas Eggar replied on 9 October 2001, in so far as material:  
*"In response to the queries raised by the Deputy Master of Civil Appeals we have discussed this matter with our counsel.  
Looking at the report of *Henry Boot Construction v Malmaison Hotel* in the Queen's Bench Reports 2001 at page 338 and following, it seems that the case revolved around a S69 application that had been made, and from which decision an appeal was attempted. In this case AEK did make both a S69 and a S67 application to the High Court, but only sought from the judge leave to appeal on the S67 point, and only makes application to the Court of Appeal for leave to appeal on the S67 point. The wording of S69 and S67 is different, for understandable reasons. S69 goes to the 'merits' decision of the arbitrator or arbitral tribunal, whereas S67 in essence goes to the issue as to whether there was a valid arbitration. There is no equivalent of S69(8) in S67. Thus, there is no similar bar as existed in the *Henry Boot* case."*
16. I make no comment on this passage save to state that I find the assertion in the last two sentences surprising. It appears to us that when the papers thereafter were placed before Rix LJ, the issue as to the jurisdiction of this court cannot have come to his attention.
17. For the reasons that I have given I would grant this application.

**LORD JUSTICE ROBERT WALKER:**

18. I agree.

**LORD JUSTICE CLARKE:**

19. I also agree.

**Athletic Union Of Constantinople v National Basketball Association** [2002] APP.L.R. 05/28

**Order:** Application granted. Costs of First and Second Respondents summarily assessed in the sum of £15,528.49 plus VAT. No costs awarded to Third Respondents.

MR RICHARD SPEARMAN QC (Instructed by Messrs Theodore Goddard & Co, London) appeared on behalf of the Applicants/1<sup>st</sup> & 2nd Respondents  
MR MURRAY SHANKS (Instructed by Farrer & Co, London, WC2A 3LH) appeared on behalf of the Applicants/Third Respondent.  
The Respondents did not attend and were not represented.