Appeals on mixed questions under the Arbitration Act 1996

Jack Davies and Jack Alexander, Wellington, on a question of interpretation

Clause 5 of sch 2 to the Arbitration Act 1996 (AA 96) allows, in prescribed circumstances, appeals on questions of law from arbitral awards to the High Court. Provisions which allow only for appeals on questions of law appear commonly and are well known to exclude appeals on pure questions of fact. In the recently released second edition of *Williams & Kawharu on Arbitration*, however, the authors note that the position under cl 5 is still unclear in respect of the appealability of mixed questions of fact and law (David AR Williams and others *Williams & Kawharu on Arbitration* (2nd ed, Wellington, LexisNexis, 2017) at 531). The authors state there are cases and policy arguments both for and against allowing appeals under cl 5 on mixed questions. This article examines the meaning of the term "mixed question" and then canvasses relevant cases decided under cl 5. We conclude the decisions, as a whole, are confused and that there is a real need for appellate guidance. We then go on to suggest how the law might best develop from here, advocating for a restrictive approach.

THE LEAVE PROVISION

The provisions of sch 2 to the AA 96 apply, by dint of s 6, to domestic arbitrations (unless the parties opt out) but not to international arbitrations (unless the parties opt in). Clause 5 provides for appeals to the High Court on any question of law arising out of an award if: (a) the parties have provided for such a right of appeal in their arbitration agreement; (b) both parties consent after the award has issued; or (c) the High Court grants leave. Subclause 5(10), inserted in 2007, further defines the term "question of law" as including an incorrect interpretation of the applicable law but excluding any question as to: (a) whether any part of the award was supported by the evidence, and (b) whether the tribunal drew the correct factual inferences from primary facts. These two exclusions are elsewhere commonly understood to constitute questions of law (see *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 (HC) at 87 and 89) so the AA 96 takes a restrictive approach. However, by providing for appeals to the High Court, cl 5 constitutes a deliberate and notable exception to the AA 96's general policy of reduced judicial involvement in arbitrations.

The AA 96 was preceded by a series of Law Commission papers and reports. In the Law Commission's final report before the AA 96 was enacted, it noted that whether to include a right of appeal from arbitral awards was the single most difficult issue it addressed in its review (Law Commission *Arbitration* (NZLC R20, 1991) at [93]). Providing for appeals in certain circumstances marked a shift from an earlier paper, where the Law Commission expressed a preference for no rights of appeal (at [93]). It appears to have been swayed by submissions that "the legal and other experience of arbitrators in New Zealand is variable" and that a right of appeal in prescribed circumstances would ensure awards continue to be determined in accordance with the law (at [94]). The Law Commission also identified other factors, relevant particularly to domestic arbitrations, which may have provided impetus for its shift in approach: parties to domestic arbitrations are more likely to have a connection with New Zealand, are more likely to have New Zealand law as the substantive law of their contract, and are less likely to be of equal bargaining power (see at [46]).

In its 2003 review of the AA 96, the Law Commission expressly said it would not address itself to the appealability of mixed questions (Law Commission *Improving the Arbitration Act 1996* (NZLC R83, 2003) at [115]). The only relevant recommendation the Law Commission made was to expressly exclude findings of fact based on no evidence from the AA 96's definition of "question of law" (at [125]), which recommendation was adopted by Parliament in 2007 as we have noted above.

Having set out in brief the background to cl 5, we turn to the question of what constitutes a mixed question of fact and law.

MIXED QUESTIONS OF FACT AND LAW

Commonwealth courts have long had to grapple with statutory rights of appeal which allow only for questions of law. Despite this, the question of what constitutes a question of law as opposed to its natural antithesis (a question of fact) or something in between (a mixed question of fact and law) remains in issue. Further, when interpreting these restrictive appeal provisions, the position taken by the courts in respect of the appealability of mixed questions has been inconsistent. Before turning to the cases under cl 5, we try to bring some clarity to both these issues in a general sense: (a) what is a mixed question, and (b) are they generally appealable when a statute provides only for appeals on questions of law.

What is a mixed question?

Both questions arose recently in New Zealand before Courtney J, albeit in a context removed from the AA 96 (*Commerce Commission v Harmoney Ltd* [2017] NZHC 1167). In *Harmoney*, the Commerce Commission brought a case stated under the Credit Contracts and Consumer Finance Act 2003 to clarify that Act's application to peer-to-peer lending. Harmoney applied to strike out the case on the basis that it posed mixed questions of fact and law, rather than "pure" questions of law, which it said the Act demanded.

Courtney J began by noting that the Canadian definition of a mixed question has been applied in New Zealand and

that it provides a clear and succinct test for separating mixed questions from pure questions of law (at [30] citing *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at [35]):

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

A survey of cases decided in the High Court of Australia generally supports the Canadian position that "mixed question" refers to questions regarding the legal exercise of applying the relevant legal test to the relevant facts (see, for example, *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9, (2005) 222 CLR 194 at [35] and *PP Consultants Pty Ltd v Finance Sector Union of Australia* [2000] HCA 59, (2000) 201 CLR 648 at [14]). The position is not clear-cut in Australia, however, and cases exist which suggest that questions of application are generally to be considered pure questions of law (see *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26, (2016) 333 ALR 384 at [24] and [27]).

In England, the term "mixed question" is well established. There is clear authority that, like the Canadian position, a mixed question is a question of application (see *Re Grayan Building Services Ltd (in liq)* [1995] Ch 241 (CA) at 254 and *Fitzpatrick v Inland Revenue Commissioners* [1994] 1 WLR 306 (HL) at 317).

Returning to New Zealand, in *Harmoney* Courtney J readily accepted that the term "mixed question" refers to a question of application (at [31]). Our survey of international authorities shows it was fair for her to do so — that definition is generally subscribed to across the Commonwealth.

Before progressing, we note that the appropriateness of the term "mixed question" has been doubted — a question of application does not *mix* fact and law (Timothy Endicott "Questions of Law" (1998) 114 LQR 292 at 300). That argument confuses the point. The term does not intend to suggest an amalgam of fact and law but a sequence, one being applied to the other. In our view, it is a useful and practical term to refer to those questions of application which involve both law and fact.

Are mixed questions appealable?

The second, and more difficult, question is whether mixed questions are appealable under provisions which allow only for appeals on questions of law — are they questions of law for the purposes of those provisions? This is the second question Courtney J had to answer in *Harmoney*.

The position in Canada appears to be the most restrictive — where a statute provides only for questions of law, mixed questions are not appealable (*Sattva Capital Corp v Creston Moly Corp* 2014 SCC 53, [2014] 2 SCR 633 at [55]). Conversely, as Courtney J found, there are authoritative New Zealand cases which hold that mixed questions equate to questions of law for the purposes of restrictive appeal provisions (see *Commissioner of Inland Revenue v Walker* [1963] NZLR 339 (CA) at 354 and *R v Vaihu* [2010] NZCA 145 at [23]). It appears Courtney J reached the same conclusion in *Harmoney* (at [44]). This is despite the Supreme Court's dicta in *Bryson v Three Foot Six Ltd* that a mixed question (one of application) will only amount to a question of law when the application of the law requires *one* answer ([2005] NZSC 34, [2005] 3 NZLR 721 at [21]). There is, therefore, an unresolved conflict in New Zealand as to whether mixed questions are generally appealable under provisions which allow only for questions of law. There are similarly conflicting decisions in Australia (compare *Williams v The Queen* (1986) 161 CLR 278 at 287 and 301, with the discussion in *Cosmopolitan Hotel (Vic) Pty Ltd v Crown Melbourne Ltd* [2014] VSCA 353, (2014) 45 VR 771 at [51]).

The orthodox position in England is that mixed questions do amount to questions of law (see *Fitzpatrick v Inland Revenue Commissioners*, above, at 318 and *Farmer v Cotton's Trustees* [1915] AC 922 (HL) at 932). However, as Courtney J noted in *Harmoney* (at [40]), a doctrine has emerged in England which holds that the appealability of mixed questions depends solely on matters of policy and whether the question is deemed fit for appellate review (see *Lawson v Serco Ltd* [2006] UKHL 3, [2006] 1 All ER 823 at [34]).

The reasoning in respect of whether mixed questions are appealable is rather limited. Decisions which reject appealability generally proceed on the basis that mixed questions are fundamentally different to questions of law — two judges may apply the law and reach different outcomes but neither may have committed an error of law (see *Sattva Capital Corp v Creston Moly Corp*, above, at [49]; *Bryson v Three Foot Six Ltd*, above, at [21]; and *Williams v The Queen*, above, at 287). Those decisions going the other way are even harder to interpret. In the round, they seem to say that mixed questions still involve the law and so merit the continued supervision of the court (see *Commissioner of Inland Revenue v Walker*, above, at 354; and *Fitzpatrick v Inland Revenue Commissioners*, above, at 317).

To this survey, we add two further relevant points. First, it is widely accepted that the interpretation of a contract, despite involving the application of interpretation principles to contractual terms, will always be a question of law (see *Bryson v Three Foot Six Ltd*, above, at [20]). This unique principle stems from medieval times when jurors were illiterate and only judges were capable of interpreting contractual documents.

Second, it has sometimes been stated that questions of law encompass "the legal consequences of facts which, for the purpose of the appeal, are assumed to have been correctly stated" (see *Auckland City Council v Wotherspoon*, above, at 86; and *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7). This stance suggests that mixed questions will amount to questions of law (and so be appealable) when there is no real dispute as to the relevant facts. The reasoning appears to be that, as there is no dispute about fact, the relevant question must logically be one of law.

Analysis

We draw the following three general conclusions in respect of the two issues discussed above.

First, the term "mixed question of fact and law" is generally accepted as referring to a question of application (notwithstanding the common position regarding contractual interpretation). Despite objections to the word "mixed", in our view the term remains a convenient and appropriate expression for those key questions of application which straddle fact and law. It is useful to have a shorthand term for them — the answers to mixed questions often form the

ultimate conclusions which matter most to parties to litigation or arbitration. Having a term which can be used when discussing their appealability under the AA 96 (and beyond) is therefore of benefit and we continue to use the term in this article.

Second, the appealability of mixed questions under restrictive rights of appeal is, in terms of the general law, a vexed issue. Courtney J in *Harmoney* seems to have suggested mixed questions do amount to questions of law — there is also Court of Appeal authority for this view despite the Supreme Court indicating otherwise in *Bryson*. Australian decisions conflict. Canada holds mixed questions are not appealable whereas the traditional position in England is that they are. England now seems to have shifted to a more "practical" position where the appealability of mixed questions rests on the whims of judges.

In our view, the modern English position is perhaps the worst of all. It runs counter to the ideals of certainty and uniformity, which the law should strive to uphold. Parties to disputes want predictability in respect of what issues may be reviewed and, frankly, the English doctrine is a recipe for inconsistency. Rather, it would be desirable to have a rule of general applicability in respect of mixed questions. The general law, however, has yet to formulate one.

Third, there are interesting anomalies in this area of the law. The first is the rule about contractual interpretation. Although these questions accord substantially with the standard definition of a mixed question, they are generally considered questions of law for historical reasons. The second is the rule in *Wotherspoon* that questions of application will be questions of law when there is no dispute as to the facts. This rule is an anomaly because, even when judges apply a legal standard to undisputed facts, they may still reasonably reach different results. Our reasoning suggests that, unless there is a real dispute as to the underlying legal test (a question of law), these questions are still mixed and do not amount to questions of law.

THE CASES

Having illustrated the discord in respect of mixed questions under the general law, we now examine arbitration-specific cases decided under cl 5. A number of these cases have considered the appealability of mixed questions. They reflect the controversies in the law canvassed earlier.

Early cases: 1998–2007

Early cases provide tenuous support for the appealability of mixed questions. The issue was first considered by Elias J some two years after the enactment of the AA 96 (*Trustees of Rotoaira Forest Trust v Attorney-General* [1998] 3 NZLR 89 (HC)). The arbitration concerned the method for calculating rent payable under a commercial lease. The question proposed on appeal was whether the arbitral panel erred in failing to consider the objects clause of that lease when it came to choosing the model for calculating rent. Elias J accepted that a mixed question will not involve an error of law if the conclusion reached is within a range reasonably available (at 101), a statement which was later echoed by the Supreme Court in *Bryson*. She then went on to say that what amounts to an error of law does not receive a more restrictive interpretation in arbitration than in the exercise of the Court's more general supervisory jurisdiction (at 101), although no further authority was offered for that statement. Obviously that statement is no longer true — cl 5(10) means what would otherwise amount to errors of law are not for the purposes of the AA 96.

In 2002, Master Venning was confronted with a proposed appeal following an arbitration regarding the dissolution of an accounting partnership (*Millar v Fletcher* HC Invercargill AP2/02, 16 July 2002). He refused to decline leave for the proposed appeal on the ground it involved mixed questions of fact and law (defined by the Master as including questions of contractual interpretation, implication and variation of terms, and estoppel) (at [45]–[51]). The Master did, however, acknowledge his consideration of the proposed grounds of appeal was not a "full analysis" as leave was declined on other grounds (at [50]).

The same can be said about John Hansen J's leave decision in *Nixon v Walker* concerning a dispute within a legal partnership (HC Auckland CIV-2007-404-001372, 13 July 2007). The Judge simply stated that he concurred with Master Venning's analysis in *Millar v Fletcher* (at [26]). No further analysis was provided. The mixed questions included acceptance by conduct and, as in *Millar v Fletcher*, estoppel. John Hansen J granted leave accordingly.

In summary, the early cases support a liberal interpretation of cl 5. The reasoning is generally conclusory, however. Judges have simply stated that mixed questions are appealable with little consideration of the wider law or policy.

Recent approach: 2007 onwards

More recent cases indicate a somewhat stricter approach (although the courts still consider questions of contractual interpretation and questions of application to unchallenged facts to be questions of law). This development may be a corollary of the clarifications to the AA 96's definition of "question of law", inserted as cl 5(10) in 2007. The first case hinting at a new approach is *Nixon v Walker* (HC Auckland CIV-2007-404-1372, 12 December 2008). There, Keane J determined the appeal which followed John Hansen J's leave decision mentioned above. While Keane J did determine the appeal, he noted that he was only able to decide the issues "insofar as they raise strict issues of law" (at [18]). However, in doing so, he explicitly endorsed the rule in *Wotherspoon* that conventional legal questions on unchallenged facts are questions of law capable of being appealed under cl 5 (at [14]).

LJS Management Ltd v Amirco Ltd (in liq) is another decision of Keane J (HC Auckland CIV-2010-404-4018, 12 August 2010). The case involved two purported errors of law. The first was that the arbitrator had misinterpreted the contract as requiring assets to be valued on a going concern basis. The second was that the arbitrator had wrongly included items amongst those to be valued. Keane J determined that the first question was one of law (being a question of contractual interpretation). However, the second was not — it simply required a factual inquiry into whether the arbitrator had included certain items (expressly set out in the contract) in his valuation. Relevantly, and consistently with his earlier decisions, Keane J noted that the effect of cl 5(10) was that "only the first species of question [in *Wotherspoon* — a conventional legal question on unchallenged facts] is open on appeal against an arbitral award" (at [17]). Accordingly, leave was declined on the second issue.

The issue also arose in *Stanaway Real Estate Ltd v Cooper and Co Real Estate Ltd* (HC Auckland CIV-2010-404-8007, 18 May 2011). This was yet another decision of Keane J, this

time regarding a dispute over a real estate agent's commission. Keane J, unsurprisingly, adopted his earlier analysis in *Nixon v Walker* and *LJS Management Ltd v Amirco Ltd (in liq)* — "an error of law susceptible of appeal appears ... confined to a conventional legal question on unchallenged facts" (at [7]).

Finally, we note the very recent decision of Williams J in *Todd Petroleum Mining Co Ltd v Vector Gas Trading Ltd* ([2017] NZHC 1166). Williams J noted the orthodox position in New Zealand is that "contractual interpretation is essentially a question of law" (at [51]). He then turned to the Canadian Supreme Court's decision in *Sattva Capital Corp* (above) where it was noted that the rationale for that orthodox position (the illiteracy of civil juries) no longer applies — the modern approach to contractual interpretation is a mixed question of fact and law. Williams J noted that New Zealand law has "perhaps not gone this far" (at [57]). However, he said the New Zealand Supreme Court's decision in *Vector Gas Ltd v Bay of Plenty Energy Ltd* ([2010] NZSC 5, [2010] 2 NZLR 444) meant that the factual matrix of a contract is relevant to its interpretation (at [57]). That, in turn, "makes contractual interpretation a mix of fact finding and word interpretation" (at [57]). When faced with an application for leave to appeal an arbitral award, it is necessary to "give careful consideration to whether the real matter in issue is the meaning of the contract, or the facts upon which that meaning is wholly or partly based" (at [57]). The former may raise a question of law, but the latter will not. *Todd Petroleum* seems to indicate a shift away from questions of contractual interpretation always being considered questions of law.

The inconsistencies continue. In 2012 Heath J noted that "there is some doubt about whether mixed questions of fact and law qualify for leave to appeal" (*Rua v Mamaku Highlands Ltd* [2012] NZHC 1848 at [25]). He preferred the view that a court might more readily exercise its discretion to refuse leave if a "question of fact is bound up inextricably with a question of law" (at [25]).

There are also indications of a return to a more liberal approach. In 2009 Allan J was faced with proposed grounds of appeal regarding whether a contract was concluded by certain conduct and whether certain terms of the contract were essential (*Carlson-Turnwald v Walling* HC Hamilton CIV-2008-419-1094, 5 May 2009). Faced with the respondent's submission that these questions turned largely on determinations of fact, Allan J simply stated that "a question of mixed fact and law is to be regarded for present purposes as a question of law" (at [13]). Similarly, in *Tourism Holdings Ltd v Jacques Ltd (No 2)* Rodney Hansen J noted that the arbitrator's ruling on estoppel "may be an error of law even though it is essentially fact dependent" (HC Auckland CIV-2010-404-2864, 30 November 2010 at [12]).

Conclusions

Some conclusions emerge. The first is that mixed questions of fact and law are often raised in applications for leave to appeal under cl 5. Questions of contractual interpretation and estoppel are particularly common. Second, early cases — decided before the enactment of cl 5(10) — appear to favour a broad interpretation of cl 5. While the approach was liberal, the reasoning was lacking. Third, the early liberal approach appears to have been since retreated from somewhat. The courts have been less willing to declare mixed questions appealable but still the discussions of the relevant law have been haphazard and variable. Two things are clear — the courts still generally deem questions of contractual interpretation and (following *Wotherspoon*) questions of application to unchallenged facts to be questions of law. This is despite both categories generally involving, at a conceptual level at least, mixed questions. Finally, on the occasions the appealability of mixed questions has come before the High Court, the analysis has been fairly limited. The question that remains is how the law should develop and whether questions of mixed fact and law should be appealable under cl 5. The next section of this article aims to provide some suggestions.

ANALYSIS

We make three points in our ultimate analysis. The first is a simple one: there is a real need for appellate guidance in this area. The cases decided under cl 5 are inconsistent.

It has been said that only strict questions of law are appealable. Elsewhere, following *Wotherspoon*, that questions concerning the application of the law to unchallenged facts are appealable. On one occasion, it was noted that a proposed mixed question will only mean that the discretion to refuse leave might be exercised more readily. Lastly, there is authority that mixed questions are always appealable.

These decisions do not make for easy interpretation. Nor are they able to give commercial parties confidence and certainty about which questions can be appealed under cl 5. These qualities are exactly what commercial parties need to operate efficiently and are considerations underlying the AA 96. Swift consideration of this issue by New Zealand's appellate courts will be of benefit.

Our second point concerns the two anomalies identified earlier in respect of what constitute questions of law. Anomaly one is the rule in *Wotherspoon*. As we have observed, even where the facts are undisputed, judges and arbitrators may nevertheless reasonably reach different results after applying the law. This suggests that, unless there is a dispute as to the legal test or if correct application of the legal test will only produce one result, what is involved is not a question of law but a mixed question. This reasoning is supported in England: (*Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 (HL) at [25]). The reasoning is bolstered by the fact that parties may be happy to agree to a statement of facts but nevertheless want to appeal, despite raising no real issue in respect of the relevant legal test. These considerations mean we consider that the *Wotherspoon* category of question should be considered mixed, rather than as a pure question of law.

Anomaly two is the contractual interpretation rule. As noted above, Williams J indicated a potential shift from the traditional position in *Todd Petroleum* (above). We think this is a positive development. The Canadian decision in *Sattva Capital Corp* provides a compelling exposition as to why questions of contractual interpretation are to be considered mixed (above, especially at [49]). Williams J said, however, that if the focus of the proposed appeal is on the contractual text a question of law will still arise — the traditional position should be moved from only insofar that the proposed appeal focuses on the factual matrix around the contract. We disagree. Unless there is a dispute about the legal test which the decision-maker applied, there is no reason to consider questions focusing on the text of a contract questions of law. On one view, nothing particularly special arises if the "facts" of the case constitute a written document. This reasoning attains even more force in the

arbitration sphere where commercial arbitrators are often selected for their familiarity with corporate contracts. Unless there is a dispute to the underlying law which has been applied, we favour the view that these questions should also be considered mixed.

The third point concerns whether mixed questions should be appealable under provisions which allow only for questions of law. We begin with some thoughts regarding the general law and then move to the AA 96. Our starting point is a simple one. When a statutory appeal right allows only for questions of law then on a plain and ordinary reading mixed questions should not be appealable — they are questions of application which combine both law and fact. Surely appeal rights are restricted to questions of law so as to both clarify the law for future cases and avoid prolonged litigation which hinges on the semantics of a particular dispute. We contend therefore that the approach suggested by the Supreme Court in *Bryson* is the correct one (above, at [21]). That approach (discussed above) accords with the Canadian position and states that a mixed question will not usually be a question of law.

> The essence of arbitration is that the parties agree their disputes are to be resolved by the arbitral tribunal, not the courts.

The one key exception to our preferred general rule is that noted in *Bryson*: where the correct application of law could only lead to one outcome and, if the answer to the question of application diverges from that outcome, then the correct inference is that an error of law has been made (even if this legal error is not apparent on the face of the reasoning). This general rule with its one key exception has the added benefit of aligning with both the Law Commission's and Endicott's views as to the appealability of mixed questions. In its 2003 report the Law Commission remarked in passing that a mixed question will not involve an error of law unless the answer is "unreasonable" as lying outside of a spectrum of possible conclusions (*Improving the Arbitration Act*, above, at [115]). Similarly, Endicott concludes that a mixed question will only be a question of law when the law requires one answer (Endicott, above, at 317).

We consider our preference for a restrictive approach is amplified under cl 5. The essence of arbitration is that the parties agree their disputes are to be resolved by the arbitral tribunal, not the courts. We accept that the inclusion of cl 5 is one of several instances where Parliament has derogated from the principle of limited court involvement. However, we do not agree with Elias J's comments in *Trustees of Rotoaira Forest Trust* that what amounts to an error of law should not receive a more restrictive interpretation in arbitration than in the exercise of the High Court's more general supervisory jurisdiction (above, at 101). Even if the courts were minded to take a broad approach to mixed questions generally, we submit that the approach taken under the AA 96 should (and could) be comparatively restrictive. So we accept there may be something in the modern English doctrine as explained in *Lawson v Serco Ltd* (above). While we consider it undesirable to assess the appealability of mixed questions by reference to the individual merits of each particular question, that should not necessarily foreclose the idea that different standards may apply in different areas of the law. The extent to which a court ought to assume appellate jurisdiction over a subordinate decision-making body — be it an arbitral panel or a regulatory agency — turns largely on whether the contested question falls within the legal expertise of the judiciary or instead addresses non-legal issues which are best resolved at first instance. Appellate oversight on questions of fact or mixed questions may well be intended by Parliament in certain legislative contexts, but we are satisfied the priority of party autonomy under the AA 96 warrants a narrow reading of the leave provision which is limited to questions strictly of law. Central to our reasoning is that the Law Commission, when tasked with reforming New Zealand's arbitration law, originally had a clear preference for no rights of appeal. As we have noted, that position was only shifted from so as to provide for an arbitrator's lack of ability to interpret the relevant law (above, at [94]). In our view, this concern is adequately addressed by providing an appeal avenue on pure questions of law. With regard to mixed questions, arbitrators will often have been chosen for their expertise and ability to swiftly determine key questions of application in disputes arising in their field of expertise. In our view, there is no good reason to subject their analysis to the High Court's microscope unless a compelling case is made at the leave stage that an error of law has been made. That is when the High Court's expertise becomes relevant.

A restrictive approach would also ensure that the courts' involvement is triggered only when there is a question of law of continued application. This was a key part of the decision in *Sattva Capital Corp* (above, at [51]):

> One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for the parties to continue their private litigation.

This policy is reflected in the fact that the High Court may exercise its residual discretion to decline leave, even if a question of law arises.

CONCLUSION

Some 20 years after the enactment of the AA 96 this area of the law remains unsettled. Moving forward, we contend that a restrictive approach be applied to the appealability of mixed questions under the general law, but particularly in respect of cl 5. We hope to have brought some clarity to the law on this issue, at least until it is considered by an appellate court or the Law Commission in its next review. □