Multi-Contract Disputes & Arbitration: Minimising Time and Costs

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22 March 2021

First published on Thomson Reuters Practical Law Arbitration Blog

Where a number of disputes arise between the same parties under different contracts or between related contracts between different parties, the Courts have a number of procedural and legal mechanisms to ensure that, as much as possible, there is a "one-stop shop" for resolution of all issues at the same time. This is commonly encountered in a shipping context where a single shipment can give rise to disputes under multiple bills of lading and/or charterparties. However, where one or more of the contracts in a multi-contract scenario contains an arbitration clause, procedural complications can arise.

It is well-known that each contract containing an arbitration clause is a separate arbitration agreement and therefore, absent the consent of all parties, requires a separate reference (***The Biz*** [2011] 1 Lloyd's Rep 688). Similarly, one result of the confidentiality of arbitration is that Tribunals cannot order consolidated or concurrent hearings without the consent of all parties or express provision in institutional rules (see ***The Eastern Saga*** [1984] 2 Lloyd's Rep. 373 at pg 379). When it comes to evidence, the starting point is that parties are only entitled to use documents disclosed or generated in an arbitration for the purposes of that arbitration, and cannot disclose what evidence has been given by witnesses in an arbitration (see ***Emmott v Wilson*** [2008] 1 Lloyd's Rep. 616 (CA) [79]-[81]). The potential for delay and duplication of effort (as well as inconsistent decisions) is obvious.

In a multi-contract scenario therefore, the more the parties can co-operate (for example, by agreeing to a particular forum or an ad hoc arbitration for all disputes), the better. One recent case where the Court held that the parties had agreed a consolidated ad hoc arbitration pursuant to a P&I Club Letter of Undertaking is ***The Majesty*** [2020] EWHC 3462 (Comm). In that case Mr Justice Calver had to determine whether claims under five different bills of lading required five separate arbitrations using the LMAA Small Claims Procedure to be commenced. The Court held that, on construction, the LOU was an agreement to consolidate all claims in respect of the cargo before a single Tribunal, albeit constituted in accordance with the arbitration clause incorporated into the various bills. This is therefore a potential route to simplify matters, but the clearer the language the better.

Furthermore, in many references there are ways to avoid or minimise procedural problems. Some institutional rules, such as the LMAA Terms 2017, provide for related arbitrations to be conducted and heard concurrently with disclosure and evidence served in one arbitration to be admissible in another as appropriate. Such powers can allow parties in the middle of contractual chains to, in effect, drop out where the real issues are between those at the top and the bottom of the chain, leading to significant costs savings.

In terms of disclosure and witness evidence, it is often in the interests of all parties to agree to evidence between disclosed in related proceedings e.g. where claims are being passed up and down contractual chains by way of indemnity. Otherwise, there are exceptions to the confidentiality obligation, in particular where disclosure is reasonably necessary for the establishment or protection of an arbitrating party's legal rights (see ***Ali Shipping Corporation v Shipyard Trogir*** [1999] 1 WLR 314 (CA)) or where an order requiring disclosure is made in subsequent Court proceedings.

During the currency of an arbitration, the Tribunal can be asked to determine issues arising as to the scope of the parties' obligations of confidentiality and whether the "reasonable necessity" test has been met in the case of any particular piece of evidence. Once the arbitration has ended, ***Westwood Shipping v Universal Schiffahrtsgesellschaft mbH*** [2013] 1 Lloyd's Rep. 670 suggests that applications can be made under section 44 of the 1996 Act for liberty to rely upon arbitration materials in other proceedings. Similarly, if the parties to English Court proceedings are not the same as the parties to the arbitration, the Court may have jurisdiction over the issue of what use can be made of arbitration material in the Court proceedings (***Webb v Lewis Silkin*** [2015] EWHC 687 (Ch)). Otherwise, the better view is that, in an ongoing arbitration, this is an issue for the Tribunal to determine.

Another issue is set-off. The respondent to a claim in an arbitration under contract X may have a counterclaim under contract Y that it wishes to set-off. In broad terms, and absent a contractual right of set-off or provision in institutional rules, the Tribunal will have no jurisdiction to allow a set-off unless there is what is known as a "transaction set-off", which requires that the counterclaim is very closely connected to the claim (***Ronly Holdings Ltd v JSC Zestafoni*** [2004] 1 CLC 1168). Even then, the availability of a set-off depends on the true construction of the arbitration agreement and relevant institutional rules. The law in this regard is complex and fact-specific.

In the last resort, both the claim and any counterclaim references can be progressed to Awards and then an attempt can be made to set-off at the enforcement stage. For instance, the English Courts set off mutual debts under enforceable Awards to arrive at a "net result" (***Glencore v Agros*** [1999] 2 Lloyd's Rep. 410 [3]).

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Stephanie's practice encompasses a wide range of commercial litigation and arbitration, but is primarily focused on dry shipping (especially charterparty and bill of lading disputes), shipbuilding and offshore construction, international trade, insurance, aviation/travel and energy. Her practice often involves cases of technical complexity, such as unsafe port claims, dangerous cargo claims and shipbuilding contract termination claims involving large numbers of defects. She undertakes drafting and advisory work in all areas of her practice. Stephanie also appears regularly (both as a junior and as sole counsel) in Commercial Court hearings and in commercial arbitrations on various terms including LMAA.

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