INTERNATIONAL ARBITRATION NEWS

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EDITORIAL by Lord Clarke of Stone-cum-Ebony

The recent publication of the 2018 International Arbitration Survey by Queen Mary University of London and White & Case is a timely reminder of what providers of international arbitration services are doing right and which areas need improvement. Happily for those of us in the International Arbitration field, 99% of respondents would recommend international arbitration for cross-border disputes and 97% say that it is their preferred method of dispute resolution. Particularly desirable are the enforceability of awards, avoiding specific legal systems, flexibility and the ability of parties to select arbitrators. This last benefit does not extend to appointing an arbitrator whose connection with a party or dispute gives rise to apparent bias. Peter Ashford discusses the uncertain ambit of that restriction below.

As one might expect, cost is identified as the main drawback to international arbitration. Another issue was the lack of power in relation to third parties. One might quibble that this is inherent in the nature of arbitration, but John Russell's article on the next page shows that there are still battles to be had about the extent to which arbitrators have jurisdiction in relation to third party claims.

It is incumbent on any editorial writer these days to mention Brexit and the 2018 Survey affords me that opportunity. Heartening for practitioners in London, the Survey records that most respondents think Brexit will have no impact on London as a seat, although Paris is in the frame as the seat most likely to benefit from any Brexit dividend. For now, London remains the preferred seat for respondents in all regions, but the Survey shows an impressive diversity of international arbitration across the world, befitting of its international users.

Unanswered Question on Apparent Bias

Author: Peter Ashford, Fox Williams

The law on apparent bias has received particular attention recently. In ***Almazeedi v Penner*** and ***Halliburton v Chubb*** the Privy Council and Court of Appeal respectively, applied established law, albeit with different results.

There remain three areas of the law that were not directly addressed and remain unsatisfactory.

Firstly, the sentence in ***Halliburton***: "You can only disclose what you know and there is no duty of inquiry." The first part of that sentence is a truism, it is the second that is more insidious. The duty on the arbitrator to enquire and investigate is well recognised. Moreover, in ***Locabail***, the Court of Appeal recommended that solicitors "conduct a careful conflict search". However it is framed, the Court in ***Locabail*** plainly endorses inquiry and investigation and the Court in ***Halliburton*** is at odds with that.

Secondly, both ***Almazeedi*** and ***Halliburton*** were cases of 'known knowns' i.e. they both knew that they had the other appointments. Equally, both Courts held that the other appointments ought to have been disclosed, but reached different results. The Privy Council held that the non-disclosure "represented a flaw in his apparent independence". The Court of Appeal, however, rejected the concept of non-disclosure amounting to unconscious bias. As bias means the absence of demonstrated independence and impartiality it is difficult to reconcile these positions.

Thirdly, there are cases of 'unknown knowns': these are cases where a tribunal does not, but ought to, know, at the time of making an award, of some connection or other matters that might question their independence. In ***W v M*** it was held ignorance cannot have had any impact. Is it satisfactory that a challenge to an arbitrator or an award is to be determined by the asserted state of mind of the arbitrator? The apparently subjective nature of the knowledge of the arbitrator sits unhappily with the objective nature of the test for apparent bias. The answer to this conundrum lies, as ever, in a spectrum: anything of substance ought, out of caution and to protect the integrity of the process and any award, to lead to those results.

Peter Ashford has extensive experience in all aspects of the litigation, arbitration and mediation processes across a broad range of commercial disputes, but is a specialist in international arbitration.

He is also a Fellow of the Chartered Institute of Arbitrators and the author of the Handbook on International Commercial Arbitration published by Juris Publishing of New York in 2014. He has also written a Guide to the IBA Rules on the Taking of Evidence in International Arbitration and a Guide to the IBA Guidelines on Party Representation in International Arbitration, both published by Cambridge University Press in early 2013 and mid-2016 respectively. Both guides are available here. A Guide to the IBA Guidelines on Conflict of Interest in International Arbitration is being written and is anticipated to be published in 2018.

In this extended issue:

Arbitral Appeals under s.69…No Second Bites?

Author: Peter Stevenson

***Agile Holdings Corporation v Essar Shipping Ltd* [2018] EWHC 1055 (Comm)**

Overview: second bites at s.69(3)?

The English statutory regime for appeals against arbitration awards on questions of law under s.69 of the Arbitration Act 1996, as is well known, applies a two stage process: (i) the application of permission to appeal and, (ii), if permission is granted the appeal itself.

Section 69(3) sets out the matters on which the Court is required to be satisfied as pre-conditions for granting permission to appeal. Where a party unsuccessfully resists permission on the basis that some or all of the requirements are not met, can it nevertheless reargue the point or points all over again on the appeal proper?

The position and the few cases in this area were recently considered by the Commercial Court in ***Agile Holdings Corporation v Essar Shipping Ltd*** [2018] EWHC 1055 (Comm).

The answer is: "it depends".

How the issue arose

The claimant sought permission to appeal against an arbitration award on a question of law arising from the Award. The defendant opposed permission on various grounds including a submission that the tribunal had not been asked to decide the relevant question (and therefore that the threshold requirements of s.69(3) of the Arbitration Act were not met). It was contended that the argument now being sought to be run had never been argued in that way before the arbitrators. The claimant disputed that and put in evidence of the written submissions and the transcript of the oral submission. The Judge granted permission, rejected the submission and held that the point had been argued. He refused an application by the defendant for an oral hearing on the point.

On the full appeal, the defendant sought to re-open the issue and re-argue its original submission.

The Commercial Court's decision

The Judge (HHJ Waksman QC, sitting as a deputy Judge of the High Court) allowed the appeal in full. On the s69(3)(c) point, he held that:

(i) the exercise undertaken by the judge granting leave to appeal involves a detailed consideration of the threshold questions;

(ii) once leave has been granted, there is every reason to move onto the merits of the question without the distraction of re-litigating tangential points which have already been decided;

(iii) a party cannot resist the appeal on the basis that the threshold requirements of s.69(3)(a) and (d) are not met. Those issues arise exclusively at the leave stage and the decision of the judge at that stage is final;

(iv) the position is different in respect of the requirements of s.69(3)(c) because, whether a point was put to the tribunal is tied to the issue of whether there is a question of law arising out of the award at all;

(v) however, while the Court hearing the appeal may not be bound as to whether the question arises from the award, it should give considerable weight to the decision of the judge granting leave.

Simon Rainey QC, leading Peter Stevenson, represented the successful appellant.

The Detailed Reasoning of the Court

The defendant submitted that the Court did not have jurisdiction to entertain an appeal because the threshold requirements of s.69(3) were not met.

In support of that proposition it relied upon two authorities: ***Motor Image v SCDA Architects*** [2011] SGCA 58, a decision of the Court of Appeal of Singapore, and ***The Ocean Crown*** [2010] 1 Lloyd's Rep. 468 a decision of Gross J (as he was).

(1) In ***Motor Image v SCDA Architects***, the Singaporean court considered identical appeal provisions in s.49 of the Singapore Arbitration Act 2002. The judge at first instance (Prakash J., as she was) had granted permission to appeal a question of law under those provisions. When the same judge heard the appeal she decided that the question did not arise on the facts as decided by the tribunal. She took the view that as a result the appeal should be dismissed. The Court of Appeal agreed. It held that this sort of point could be reargued on appeal because it went to the very jurisdiction of the court to hear the appeal in the first place. In other words, the grant of leave was a finding that the court had the relevant jurisdiction. So if on further analysis, one of the threshold conditions was not made out, the court was actually deprived of jurisdiction and could not hear the appeal.

HHJ Waksman QC rejected that analysis. He held that once leave has been granted, the question of whether the Court has jurisdiction to determine the appeal has been determined. Subject to any challenge to that decision, the Court has jurisdiction to determine the appeal. The effect of this finding is that it is not open to a party to meet an appeal under s.69 by re-arguing points which relate exclusively to the threshold requirements for permission. Specifically the Judge held that a party cannot re-argue (i) that the determination of the question will not substantially affect the rights of the parties (s.69(3(a)); or (ii) that it is not just and proper for the court to determine the question (s.69(3)(d)).

(2) The decision ***The Ocean Crown*** was of a different nature. In that case there were three separate questions of law for appeal for which permission had been granted. The third question involved the allegation by the appellant that the tribunal had sought to restrict the ambit of a well-known legal principle concerning salvage remuneration and had thereby committed an error of law. The respondent argued that the tribunal had done no such thing but was merely dealing with how that principle was to be applied on the particular facts of the case. On that analysis there was no error of law at all.

Gross J. held that, in determining whether a question of law arises out of the award (a pre-requisite of allowing an appeal) the court is not bound by the decision of the judge granting leave.

As HHJ Waksman QC noted, Gross J's decision not concerned with the threshold requirements of s.69(3) of the Act. It is concerned with whether

NEWS

Quadrant Chambers to welcome three new tenants

We are very happy to announce that Jamie Hamblen, William Mitchell and Tom Nixon have accepted our offer of tenancy. They will join Quadrant Chambers as tenants upon successful completion of pupillage in October 2018.

Jamie, Will and Tom will be developing their practices in line with our core areas of work.

s.69 is engaged at all: s.69 only permits appeals on questions of law arising from an award (s.69(1)). The Judge described this as 'the Law Question' which he distinguished from the issue of whether the question of law was actually put to the tribunal (which he described as 'the Determination Question').

However, although not addressing the point head on, the Judge appears to have accepted that the Determination Question is connected to the Law Question and is therefore not merely a threshold requirement for obtaining leave, but may also be considered as part of the substantive appeal.

Having drawn this distinction the Judge held that he was not prohibited from reconsidering whether the question of law raised in the appeal was one that the tribunal had been asked to determine. But he emphasised that the Court should give 'considerable weight' to the decision of the judge granting leave to appeal, particularly if (i) the decision was made after an oral hearing; and/or (ii) the materials before the judge granting permission are the same or substantially the same as those before the appeal court.

Adopting that approach the Judge reviewed the material advanced by the defendant and held that he was in no doubt that the question of law was one that the tribunal had been asked to determine.

Conclusions

The decision of the Judge is helpful in three respects.

First, it clarifies that the decision of the judge granting permission to appeal is final and determinative of that issue. It is not open to a party to meet an appeal by arguing that the threshold requirements for leave to appeal were not met and leave should not have been granted. In that respect it drew a clear distinction between the position under English law and the approach taken by the Singaporean Court of Appeal in ***Motor Image v SCDA Architects***.

Second, it confirms that when determining whether the question of law arises from the award, the Court hearing the appeal is not bound by the decision to grant leave and, as part of that process, can reconsider whether the question was one that the tribunal was asked to determined.

Third, it provides clear guidance as to the weight that should be given to the decision of the judge granting leave to appeal. If the judge granting leave considered the issue and had the same material before him/her, 'very considerable weight' should be given to the original decision.

It is to be hoped that this robust approach discourages defendants who are unsuccessful at the permission stage from re-opening such points thereby rendering the s.69 process more time-consuming and more costly.

> click to download the judgment

Peter Stevenson has a broad commercial practice with a particular emphasis on shipping, marine insurance, private international law, insolvency law and commercial injunctions.

He is recommended as a leading junior in The Legal 500 and in Chambers & Partners UK in which he is variously described as 'bright and punchy on his feet.' 'savvy, quick and sharp', 'someone who can turn things around very quickly" and "very good at getting to the nub of the issue."

Peter regularly appears in the High Court and has been led in a number of significant appellate cases both in the Court of Appeal and the Supreme Court including ***The Alexandros T*** [2014] 1 Lloyd's Rep. 223, ***Star Reefers v JFC*** [2012] 1 C.L.C. 294 and ***The Cendor Mopu*** [2011] UKSC 5.

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Who should pay for serious irregularities in international arbitration?

Author: Robert-Jan Temmink QC

This blog was first published by Practical Law Arbitration on 4 May 2018.

The case of ***P v D, X & Y***, heard in November 2017 but only recently published, concerned an application under section 68(2)(d) of the English Arbitration Act 1996 (AA 1996) in which P, the claimant in a London Court of International Arbitration (LCIA) arbitration, claimed that the failure of the tribunal to deal with an issue in the arbitral reference was a serious irregularity which had resulted in substantial injustice to the claimant, justifying remission of the award to the tribunal.

A question then arises: who should pay for the substantial injustice caused by the tribunal's failure to consider a claim properly before it? The application before the Commercial Court had resulted in C being granted the relief it had sought. That application had been opposed by D2, although D2 failed to attend the hearing. D1 had attended the hearing but had played no active part in it and D1 stated that it was "neutral" as regards the merits of the application. The court ordered D2 to pay C's costs of the section 68 application on well-established principles that the unsuccessful opponent of an application should pay the successful party's costs.

Moving away from this case, and considering these rare situations more generally, what further costs might then be incurred? First, there are the costs involved in enforcing the costs order in the Commercial Court. Those costs ought, in principle, to be recoverable from the paying party. Secondly, having remitted the matter to the tribunal, most arbitral institutions will ask for a deposit against further fees of the tribunal. Thirdly, if the tribunal's papers have been destroyed, a new bundle of documents for each arbitrator will have to be produced. The tribunal will have to reconstitute itself and will need to spend time considering the issue it missed, considering submissions and producing a fresh award on the remitted issue, or issues. On the one hand, the tribunal might expect to be paid for that additional work. On the other, it could surely properly be argued that the only reason there is any additional work is because the tribunal erroneously, and seriously, failed to deal with the issue or issues in the first place? In those circumstances, why should the party the court has found has suffered substantial injustice pay any further costs for the serious irregularity perpetrated by the tribunal?

Is it fair for the tribunal, or the arbitral institution to ask for further fees in those circumstances? Whilst the tribunal might fairly say that it could have added something to the costs in the original reference to consider a point which was before it and which should have been then considered, such costs would most likely have been very modest whilst the tribunal was already seized of the matter and whilst it was considering all of the issues.

Almost inevitably, by the time an article 27 (***LCIA Rules***) challenge has been made and considered, and a section 68 application made, heard and determined, a substantial amount of time is likely to have passed. Indeed, in ***P v D***, the Phase 2 award, which was found to be subject to a serious irregularity, was dated 11 January 2017. An article 27 application was made to the tribunal within the time limit specified in the LCIA Rules. The dismissal

of the article 27 application by the tribunal followed relatively shortly thereafter. The judgment in the Commercial Court which determined the section 68 application was handed down, on the day of the hearing, on 28 November 2017. That timetable is not surprising and is unlikely to be atypical. In those circumstances, it will surely take the tribunal members some time to read back into the case, familiarise themselves with the issues and then write an award to deal with the issue they missed the first time.

Could the tribunal simply reserve the costs and award them to whoever is the successful party on the remitted issue? A successful applicant before the court will have shown that the tribunal was in error, but on the remitted issue the tribunal (perhaps already slightly defensive in the light of the court's findings) may determine the remitted issue against the applicant in any event. In those circumstances, perhaps costs should simply follow the event and the additional costs should be added to the bill of whomever loses the remitted issue?

However, having "won" a section 68 application, it seems iniquitous that the successful applicant should bear not only the risk of failing to recover the costs awarded by the court on the application, but then also have to pay for the tribunal to correct its own mistake, whatever the outcome of the remitted issue. If a lawyer had made a serious error which had caused substantial injustice (which often means "damage") to a client, the lawyer would surely correct that mistake at his or her own expense, or would call upon professional indemnity insurers to make good any losses suffered by the client? In a time when tribunals are increasingly criticised for the fees which they charge for awards which have become terribly formulaic (an often massive and interminable recitation of each side's arguments followed by very short reasons and a shorter dispositive section), surely the tribunal should also take responsibility for those few instances where a court has been convinced it has made a serious mistake, and offer to deal with a remitted issue without seeking to levy any further fees?

Robert-Jan Temmink QC is recognised as a talented advocate with a commercial practice encompassing a broad spectrum, from Chambers' core areas of aviation and shipping, to energy, construction, and insurance law together with financial services, insolvency and fraud. Many of Robert's cases involve cross-border, or other jurisdictional issues both in the UK and abroad and he most regularly appears in the Commercial, Chancery and Technology & Construction courts in the United Kingdom. He is also registered to practice at the Dubai International Financial Centre Court where he has frequently appeared and is called to the Bar in Northern Ireland and as a Foreign Legal Consultant in the State of New York. He is often asked to work on cases in the Caribbean arising out of contractual or commercial chancery disputes.

Robert is a Fellow of the Chartered Institute of Arbitrators and is one of the arbitrators at the Dubai International Arbitration Centre. He is also a panel arbitrator at the Kuala Lumpur International Arbitration Centre and the Hong Kong International Arbitration Centre. He has appeared in a wide variety of arbitral proceedings under different institutions' rules, and as sole arbitrator in ICC proceedings. Robert is an accredited commercial mediator in the UK and abroad and is a TECBAR-accredited adjudicator, arbitrator and mediator.

Robert is ranked as a leading barrister in the current editions of Chambers UK and The Legal 500. Areas include commercial litigation, international arbitration and aviation.

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Interim court assistance in arbitral proceedings under s44 - A reducing or expanding jurisdiction?

Author: Jonathan Chambers

This blog was first published by Practical Law Arbitration on 26 March 2018.

The English courts have traditionally followed the principle of non-intervention in arbitral proceedings. This non-interventionist stance was given statutory force under section 1(c) of the English Arbitration Act 1996 (AA 1996), which provides that "the court should not intervene except as provided by [the Arbitration Act 1996]".

However the AA 1996 provides for such intervention under sections 42 (enforcing of peremptory orders of the arbitral tribunal), section 43 (securing the attendance of witnesses), section 44 (interim remedies) and section 45 (determination of a preliminary point of law by the court).

Court intervention is generally subject to the precondition that the parties have not agreed to dispense with such court powers of intervention, either in their arbitration agreement or subsequently. It is also dependent on the relief sought being shown to be "urgent" in the case of interim remedies.

Section 44 is the most common route under which court intervention is sought. It generally takes the form of an application made as a matter of urgency for either a freezing injunction (section 44(2)(e)), an order for the inspection, photographing, preservation, custody or detention of the property (section 44(2)(c)) (sometimes known as a "Vasso Order") or for the preservation of evidence (section 44(2)(b)).

Additionally, in the context of carriage of goods, an order for the sale of property, "the subject of the proceedings", may also be sought under section 44(2)(d). This latter application is generally sought where goods are deteriorating or are liable to deterioriate, or where their continued presence is likely to incur storage and other costs, or where such goods have been abandoned or discharge has not been effected.

A section 44 application is made under CPR 62 and by way of an arbitration claim form (Form N8). It can provide a party to an arbitration agreement with a speedy and powerful weapon with which to preserve the status quo, pending the appointment of an arbitral tribunal or once it has been constituted.

Two very recent cases demonstrate that:

The English courts will be willing to accede to an application for interim relief under section 44 where such relief is required urgently and where such relief is sought solely against a party to the arbitration agreement, albeit it will have an effect on others: ***Dainford Navigation Inc v PDVSA Petroleo SA 'Moscow Stars"*** (order for sale of goods subject to a lien granted).

The English courts will not ordinarily grant relief under section 44 against third parties and in particular not against those who are based abroad: ***DTEK Trading SA v Mr Sergey Morozov and another 'MV MBA Rosaria"*** (order for the preservation of evidence against a third party out of the jurisdiction refused).

The Moscow Stars

In ***Moscow Stars***, Males J ordered the sale of a cargo of crude oil belonging to charterers, which was being carried on

board the owners' vessel. The owners had already exercised a contractual charterparty lien over that cargo and had commenced arbitration proceedings in respect of unpaid sums due under the charterparty.

Males J held that, even if the arbitration was not directly "about" the cargo or its ownership, the arbitral award would determine what was to happen to that cargo, depending on whether or not the owner's claims succeeded in arbitration. Section 44 did not give the English courts "power to make a free-standing order for sale as a form of independent relief". The power was limited to a case where the goods were "the subject of the proceedings". A paradigm case is where the ownership of goods is in dispute. However, the wording, "the subject of the proceedings", was wider and required only a "sufficient nexus between the cargo and the arbitral proceedings". Males J did not answer the question of whether the position would have been different if the cargo on board the vessel was owned by a third party, not a party to the arbitration.

MV MBA Rosaria

In ***MV MBA Rosaria*** some further indications were given by the English courts on the issue of whether a section 44 application might be advanced against a third party based outside the jurisdiction.

The case involved an application, under section 44(2)(b), to preserve evidence in the hands of a non-party based outside England and Wales.

Sara Cockerill QC held that section 44 of the AA 1996 did not permit the court to make orders against a non-party, and that CPR 62.5(1)(b) did not allow service out against third parties (following the reasoning of Males J in ***Cruz City 1 Mauritius Holdings v Unitech Ltd***).

Conclusion

The decision in ***Moscow Stars*** is a welcome widening of the jurisdiction of the English courts to assist in arbitrations. However, the decision in ***MV MBA Rosaria*** is more problematic. This is because it may produce a lacuna whereby a non-party might take steps to seek to thwart the arbitration agreement, with seemingly no right to obtain injunctive relief against that non-party pursuant to section 44. However, the English court held that such a lacuna was not a good reason for extending the supervisory jurisdiction of the English courts over arbitrations to affect third parties, in particular those abroad.

As a consequence, an arbitral party may be forced to go abroad and seek what relief it can against the third party using the legal avenues available there. This cannot be in the interests of the parties to the English arbitration, or to a proper and organised supervisory function being exercised by the English court over arbitral proceedings.

Jonathan Chambers has a broad practice covering all aspects of commercial and transport law.

He is consistently ranked by Chambers UK and Legal 500 as a Leading Senior Junior, with Chambers UK (2018) commenting "A tenacious advocate with an admired intellectual capacity. His redoubtable practice focuses on complex cases involving personal injury and fatality" and "He is easy to work with and responsive. He quickly identifies the issues" and Chambers UK (2016) commenting that he is "Noted by peers for his meticulous preparation, strong advocacy skills and easy manner with clients" and Legal 500 (2016) describing him as "Very well prepared"

Jonathan has a strong international practice and he is qualified to practise in England & Wales, Northern Ireland (practising) and Australia (currently non-practising). He has also advised on disputes involving Australia, Canada, the Channel Islands, Hong Kong, Northern Ireland, Scotland, Singapore, and the United States of America.

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Clarifying / Correcting an Award .... and the Effect on the 28 days for Challenge: Clarity at last

Author: Simon Rainey QC

Daewoo Shipbuilding & Marine Engineering Company Ltd v Songa Offshore Endurance Ltd [2018] EWHC 538 (Comm)

Overview

Where a party seeks correction or clarification of an arbitral award as a precursor to challenging the award either under s.67 or 68 or 69 of the Arbitration Act 1996, when does the Act's 28 day time period for the challenge start? From the date of the award? Or of the correction or clarification? And does that apply to any correction or clarification or only to certain types? If the latter, what types and why? And what happens if the tribunal declines to correct?

The decision of Bryan J. (handed down on 16th March 2018) in ***Daewoo Shipbuilding & Marine Engineering Company Ltd v Songa Offshore Endurance Ltd*** [2018] EWHC 538 (Comm) brings welcome and definitive clarity to the position. It sets out what should now be regarded as the settled practice of the Court to these problems and to the correct construction of the 28 day time limit provisions in s.70(3). It resolves an apparent conflict in other first instance decisions once and for all.

In summary, after a thorough analysis of the authorities, the Court held:

- The arbitral process of correction and clarification of an award by the tribunal under s.57 of the Act is not "any arbitral process of appeal or review" under s.70(3) for the purposes of the running of the 28 days.
- Accordingly, simply applying for a correction will not, of itself, push back the start date for the running of time: the decision in ***Surefire Systems Ltd v Guardian ECL Ltd*** [2005] EWHC 1860 (TCC) to the contrary effect was wrong.
- But where a correction or clarification must necessarily be sought in order to be able to bring the challenge to the award itself (pursuant to section 70(2)), then time runs from the date of that type of correction or clarification being made (a 'material' correction).
- To give effect to that, the "date of the award" in section 70(3) is to be read as "the date of the award as corrected" by a correction of this kind, but this kind only.
- The submission that the decision in ***K v S*** [2015] EWHC 1945 (Comm) was wrong would be rejected.

Leave to appeal was refused.

Simon Rainey QC, leading Tom Bird, represented the successful applicant.

The Background

DSME contracted with Songa to build a series of drilling rigs. The hull design (including the front-end engineering design ("FEED") documentation) was to be provided by a third party design consultancy. Construction proved to be very protracted and DSME claimed in respect of delays and cost over-runs, alleging that the cause was defects in the FEED. It alleged that under the contracts, responsibility for design, including the FEED, was with Songa not DSME and DSME was entitled to recover all costs

and expenses and was not responsible for delay. This was contested by Songa.

The question of design responsibility under the contracts was determined as a preliminary issue in two arbitrations. The Tribunal (Sir David Steel, John Marrin QC and Stewart Boyd QC) held that Songa was correct and that DSME bore full responsibility for the design, including for the FEED.

The Awards were published on 18th July 2017.

Under section 70(3) of the Arbitration Act, DSME had 28 days in which to apply for permission to appeal, expiring on 15th August. Section 70(3) provides:

> "Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process."

On 4th August, DSME applied to the Tribunal for the correction of what it itself described as four "clerical errors in the Awards arising from accidental slips" such as transposing Songa for DSME, etc. The corrections were unopposed.

The Tribunal issued a Memorandum of Corrections on 14th August (27 days after the Awards).

On 8th September, 24 days late, DSME issued an Arbitration Claim Form seeking permission to appeal the Awards under section 69, on the basis that the Tribunal's construction of the contract as to design responsibility was obviously wrong in law.

Songa applied to strike the application out as being out of time.

DSME responded that the 28 days ran from the date of the Memorandum of Corrections and so was brought in time; alternatively it sought an extension of time under s. 80(5) because its management structure and intervening holidays meant that a decision to appeal could not reasonably have been taken any sooner. (Given the 24 day delay and this 'justification', unsurprisingly this application was dismissed on ordinary principles.)

The Issues Raised by Songa's Application

Section 70(3) contains only two express start dates for the running of the 28 days for any challenge to the award: (a) "the date of the award" and (b) the date when the parties are notified of the outcome of "any arbitral process of appeal or review".

How does this work in the context of a request for the correction or clarification of an award? Section 70(3) is silent on the topic and there is prima facie a lacuna in the drafting of the Act.

A connected issue is the so-called 'Catch 22' inherent in section 70(2) which requires a party to exhaust all available arbitral routes of recourse (including under s.57) before being entitled to challenge the award. In relation to corrections, if these are ones which have to be sought before a challenge can be made, then how can time run from the date of the original, uncorrected, award if this date is what has to be taken for s.70(3) purposes?

Question (1): Can the correction / clarification process under s.57 be regarded as an "available process of appeal or review" under section 70(3)?

DSME's primary argument was that the term "any available process of appeal or review" covered a correction or clarification process carried out by a tribunal itself. It argued that the process of correction involved, in one sense, a process of 'reviewing' the award and accordingly this was enough. It also relied upon the definition of a different term ("available arbitral process") in s. 82(1) as one which "includes any process of appeal or review by an arbitral or other institution or person" as showing that "appeal or review" did not just mean appeal or review by some other arbitral body (such as common forms of 'two-tier' arbitral procedures in commodity arbitration under GAFTA or FOSFA Rules) but must be wider and therefore had to cover an 'internal' corrective review.

DSME relied heavily on an unreported decision of Jackson J. in ***Surefire Systems Ltd v Guardian ECL Ltd*** [2005] EWHC 1860 (TCC), noted in the textbooks. In that case, Jackson J. baldly stated; "*In my view, the arbitrator's clarification issued on 2nd May 2005 constitutes "an arbitral process of … review" for the purposes of section 70(3) of the Act*".

Bryan J rejected DSME's argument for three reasons.

(1) First, on the plain meaning of the statutory language.

The construction was contrary to the plain and ordinary meaning of the term "appeal or review" as used in section 70(3) which had to be viewed in the light of s.70(2). Section 70(2) requires an applicant seeking to challenge any award to have first exhausted, as a pre-requisite to the right of challenge, all routes of recourse to the arbitral process. It distinguishes in this context between "any available arbitral process of appeal or review" (s.70(2)(a)) and "any available recourse under section 57" (s.70(2)(b)). The Judge held that this was "a clear, and indisputable, distinction" [52]. He considered that the "ordinary and natural meaning" of the reference to "appeal or review", in the context of a statutory provision that draws a delineation between an appeal or review and a correction, "is that it is a reference to a process by which an award is subject to an appeal or review by another arbitral body".

(2) Secondly, on the better view of previous decisions

The Judge regarded this as being as the settled approach which had been taken in the previous cases (***Price v Carter*** [2010] EWHC 1451 (TCC); ***K v S*** [2015] EWHC 1945 (Comm) and ***Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd*** [2016] EWHC 2361 (Comm) as well as the commentaries. He regarded the view of Jackson J. in ***Surefire*** as wrong. [53]

(3) Thirdly, as contrary to the founding principles of the 1996 Act.

The Judge held the questions of construction of the Act before him had to be approached in the light of the guiding principles in s.1(1)(a) of the Arbitration Act. One of these is that "*the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*".

"*The principles of speed and finality of arbitration are of great importance. These would be undermined if the effect of making any application for a correction is that time for appealing runs from the date the appellant is notified of the outcome of that request. This is not simply a "concern" (nor is it one that has been over-stated as alleged by DSME) rather it is contrary to the whole ethos of the Act. It would be open to parties who have freely agreed to arbitrate their disputes to frustrate and delay that agreed mechanism of dispute resolution by relying upon completely irrelevant minor clerical errors. This cannot have been the intention of Parliament…*" [55].

Question (2): Is the term "the date of the award" in section 70(3) to be read as meaning the date of the award as and when corrected, irrespective of the nature of the correction?

DSME argued next that an award could not be regarded as final for the purposes of time running until and unless any process of correction started in respect of the award had been fully completed; that applied as much to a material correction impinging upon a potential ground of challenge as to an immaterial textual or

other clerical correction. The date when the process was completed was the "date of the award" for s.70(3) purposes.

DSME contended that there was no warrant for treating "the date of the award" as running from a corrected award where the correction was 'material' (whatever that meant) but not where it was a purely typographical correction. The date was either affected by corrections for all purposes or none. The Court having previously held that it was affected for material ones, then this applied equally to all other corrections.

Songa argued that the key to the resolution of the lacuna was to recognise the inter-relationship between section 70(3) and section 70(2). Under the latter, a party had to seek a correction or clarification of the award where this affected the challenge which it intended to make against the award as a pre-condition to challenging the award. This need to exhaust arbitral recourse to the tribunal under section 57 identified a class of corrections and clarifications which were indeed 'material', because if they were not sought, then the challenge would be barred. It was in relation to these and these only that the lacuna arose. Therefore the distinction between 'material' and non-material corrections was inherent in the Act itself and the term "date of the award" would be construed accordingly.

The Judge accepted that argument. He stated at [63] (original emphasis):

> "*The purpose is to ensure that before there is any challenge, any arbitral procedure that is relevant to that challenge has first been exhausted. Thus if there is a material ambiguity that is relevant to the application or appeal you have first to go back to the arbitrators, however if what you are doing is seeking correction to typos then that is not a bar to you pursuing your application. Materiality is inherent within section 70(2). It is only where a matter is material that you first have to exhaust the available remedies specified in section 70(2), so that it is only in those circumstances that it is necessary for time only to run after those available remedies have been exhausted. There is no reason or necessity for time not to run, or be extended, in the context of immaterial corrections – these are not matters that have to be corrected before an appeal can be brought. This illustrates that the test of materiality is inherent in the structure of section 70(2) and 70(3).*"

Again deploying the ethos of the Act and section 1(1(a), he held that it was contrary to any sensible construction of "the date of the award" to treat it as accommodating trivial or irrelevant corrections [56]. As the Judge held (and as DSME accepted) "these are classic clerical and typographical errors. They are not connected in any way, shape or form with DSME's subsequent appeal." [10]

Conclusions: "Materiality" and Unanswered Questions?

The decision is to be welcomed as laying to rest the '***Surefire*** argument' once and for all.

The Court, in refusing permission to appeal, considered the point to have no realistic prospect of success on appeal and stated in terms that it was "high time to draw a line under the debate" given the "consistent and continuing practice of this Court which has particular expertise in the construction of the act, and its application."

Materiality? The Judge saw no difficulty with a 'materiality' test which is "clear and easy to apply" [65]. With the section 70(2) concept in mind, it is submitted that the Judge is plainly right: a party can usually easily tell the difference between points which it has to investigate under s.57 before it can make a challenge under s. 67, 68 or 69 at all and all other corrections or clarifications.

If in doubt however, as the Judge said "[one] could always issue an application for an extension of time before the 28 day time period expired, and indeed seek permission to appeal to the extent that it was able to do so at that time. No doubt in many cases (based on the content of the application for a correction showing materiality) such an application for an extension of time would not even be opposed, or if opposed, would be resolved in the applicant's favour should any point be taken." [65]

Refusal to correct? An unanswered question (which the Judge did not have to address) is as to the position if a material correction is sought under s.57 but the tribunal refuses to make any correction. How is the "date of award as corrected" test then to be applied? In Maclean, the Judge thought it would be the date of the notification of the refusal to correct [19]. The same view was implicitly suggested in ***K v S*** where Teare J referred to the grounds of challenge being "dependent on the outcome of the application for clarification" [24]. Given Bryan J's general endorsement of the reasoning in these cases, the same approach to this question must follow.

This seems right. If a material correction is (and has to be) sought in the exercise by an applicant of all available recourse to satisfy the s.70(2) requirement, then the applicant's fate cannot sensibly be dependent on the whim of the tribunal and whether it is an expansive one, happy to explain better what it has done or, as is not infrequently the case, one which is resentful of the temerity of a suggestion of the need for clarification and whose approach is the 'nil return'.

> click to download the judgment

Simon Rainey QC is one of the best-known and most highly regarded practitioners at the Commercial Bar with a high reputation for his intellect, advocacy skills, commercial pragmatism and commitment to client care. He has established a broad commercial advisory and advocacy practice spanning substantial commercial contractual disputes, international trade and commodities, energy and natural resources, insurance and reinsurance and shipping and maritime law in all its aspects. He appears in the Commercial Court and Court of Appeal and also the Supreme Court (with two recent landmark victories in ***NYK v Cargill*** [2016] UKSC 20 and ***Bunge SA v Nidera SA*** [2015] UKSC 43.) He regularly handles Arbitration Act 1996 challenges.

He has extensive experience of international arbitration, regularly appearing as advocate or co-counsel in disputes under all of the main international arbitral rules (LCIA; SIAC, UNCITRAL; ICC, Swiss Rules etc) and also sitting as arbitrator.

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Time to stop trying? Attempting to sidestep the 'rehearing' nature of a s.67 jurisdiction challenge

Author: Simon Rainey QC

***GPF GP S.à.r.l. v Republic of Poland* [2018] EWHC 409 (Comm)**

Overview

The recent decision of the Commercial Court in ***GPF GP S.à.r.l. v Republic of Poland*** [2018] EWHC 409 (Comm) reinforces what should, by now, be well-known to be the unassailable position that a challenge to jurisdiction under section 67 of the Arbitration Act 1996 takes place as a full rehearing of that challenge and not as a review of the arbitral tribunal's prior decision on the same issue of jurisdiction.

The patent unpopularity of that position in many quarters of the arbitral community is illustrated by the most recent hard-fought attempt in this case to argue that this approach is not justified and should be restricted wherever possible. The decision demonstrates however that attempts to pick away at the position, post the Supreme Court in ***Dallah Real Estate v Pakistan*** [2010] UKSC 46, or to seek by other routes to sidestep the effect of a rehearing will be unavailing.

The decision of Bryan J unsurprisingly but usefully confirms that:

(a) that there is no difference between a question of jurisdiction ratione personae or ratione materiae: both are subject to a rehearing;

(b) that the position is no different where a party fails to raise issues in the arbitration and seeks to raise wholly new points on the s.67 challenge, irrespective of the nature of the jurisdictional aspect in play; and

(c) that resort by a party to 'waiver' to preclude the other party from raising such new points on the rehearing

The decision also contains a useful analysis of the concept, in the context of a BIT, of creeping expropriation qualifying as an expropriation in aggregate effect and the application of a BIT arbitration clause in that context (not addressed in this case note).

The Background

In a dispute between GPF (Griffin) and Poland under a BIT between Belgium, Luxembourg and Poland, Griffin claimed that a Polish court judgment constituted an expropriation measure. Griffin financed a property group seeking to invest in the redevelopment of ex-State properties for commercial and residential use. It claimed for violation of the fair and equitable treatment standard in the BIT and for indirect or creeping expropriation, similarly in breach of the BIT, relying on a series of acts or course of conduct by authorities and the court, attributable to Poland. A distinguished tribunal (Prof. Gabrielle Kaufmann-Kohler, Prof. David Williams QC, Prof. Philippe Sands QC) held that aspects of Griffin's claim fell outside the arbitration clause in the BIT and could not be pursued, effectively tying Griffin to reliance solely on the court judgment and not the "prior measures" on which it also relied in support of its FET / expropriation claims.

Griffin challenged the Award under section 67 and, in so doing, supplemented in material aspects its case with new evidence as to the drafting history of the BIT and the "prior measures" and developed additional and different arguments. Poland contended that this was not permissible.

Poland's Two Points and Bryan J's Decision

Poland took two points, against the background of the general undesirability of the rehearing rule as eroding the efficacy of international arbitration, buttressed with reference to what the Judge referred to as "the spirited attack on the re-hearing approach undertaken by the editors of Arbitration Law 5th edn" (Robert Merkin and Louis Flannery QC).

(1) A difference between identity of party and scope of dispute jurisdictional issues?

First, Poland argued that the rehearing approach, enshrined in ***Dallah***, was on analysis only applicable in a case which involved a question of jurisdiction ratione personae, i.e., a fundamental issue concerning a claimant who claimed not to be party to the arbitration agreement, and not where the issue arising is one of jurisdiction ratione materiae, or the scope of disputes referred to arbitration.

It argued that the seminal decision of Rix J. in ***Azov Shipping Co. v Baltic Shipping Co.*** [1999] 1 Lloyd's Rep 68, on which Lord Mance's speech in ***Dallah*** was said to hinge, concerned only a substantial issue of fact as to whether a party had entered into an arbitration agreement, not a scope of disputes issue. Reference was also made to a s.67 decision of Toulson J in ***Ranko Group v Antarctic Maritime SA*** [1998] ADRLN 35 (post Azov) in which, he held that it would be wrong for the courts to rely on new evidence which "could perfectly well have been put before the arbitrator, but was not placed before him, and with no adequate explanation why it was not". Toulson J based his decision, in part, on the reduced role of the courts under the Arbitration Act 1996. With that in mind, Poland argued that the Court should not seek to extend the rehearing principle any further than was strictly justified, i.e. to ratione personae issues only.

Bryan J's decision was an emphatic rejection of any distinction either in the cases or in principle and a vigorous endorsement of the validity of the ***Dallah*** principle [70]:"In each case, where it is said the tribunal has no jurisdiction, it is on the basis that either there is no arbitration agreement between the particular parties, or that there is no arbitration agreement that confers jurisdiction in respect of the claim made. In each case if the submission is proved, the Tribunal has no jurisdiction as no jurisdiction has been conferred upon it by the parties in an arbitration agreement. In such circumstances it is for the Court under section 67 to consider whether jurisdiction does or does not exist, unfettered by the reasoning of the arbitrators or indeed the precise manner in which arguments were advanced before the arbitrators."

(2) Waiver by Griffin of its Right to Raise New Points / New Evidence

Secondly, Poland argued that the doctrine of waiver applied, because Griffin could have advanced the new materials and arguments before the arbitrators but failed or chose not to do so and should therefore be taken to have waived them or to be precluded from running them, even at a rehearing. The argument is, unfortunately, only shortly summarised in the judgment.

The difficulty with this argument, as explained by the Judge, is that once it is recognised that a rehearing is an entirely de novo determination, it is difficult to see how and where waiver will arise.

He put it this way [72]: "it is difficult to see how a waiver could arise in circumstances where it is well established that there can be a re-hearing under section 67, a fact parties are taken to know), and in the context of no restriction being set out in section 67 itself restricting what arguments may be re-run, no question of any loss of a right to advance particular arguments on a re-hearing under section 67 can arise".

However, while conceivably some form of formal abandonment of a point in the arbitral jurisdiction hearing on which the other relied to its prejudice and detriment and which could not be redressed at the rehearing might amount to a waiver, in the present case (as in most if not all) Poland dealt with the 'new' points in detail and could not point to any prejudice.

Conclusion

While the logical underpinning, the justifications and the demerits of a ***Dallah*** approach will doubtless and understandably continue to be discussed in the arbitral community (as illustrated by an entertaining debate between Sir David Steel and Louis Flannery QC at the recent Quadrant Chambers International Arbitration Seminar), in practical 'practitioner' terms it has been a wholly sterile one since 2010, and perhaps it is time to recognise that fact.

"BITing the bullet": Arbitration Clauses in Internal EU Bilateral Investment Treaties are struck down by the European Court of Justice

Author: Michael McParland QC

In their landmark decision of 6 March 2018 in ***Case C-284/16 Slovak Republic v Achmea BV*** (EU: C: 2018: 158), the Court of Justice of the European Union ("CJEU") has declared that arbitration clauses in bilateral investment treaties between EU Member States are incompatible with EU law. In a world where there are approximately 200 bilateral investment treaties in force between EU Member States, the consequences of the Court's decision could prove to be far reaching.

The Facts

On 1 January 1992, a bilateral investment treaty ('the BIT') was entered into by the Netherlands and (what was then) the Czech and Slovak Federative Republic. As is common, this BIT contained an arbitration clause at Article 8 which provided:

1. All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if, possible, be settled amicably.
2. Each Contracting Party hereby consents to submit a dispute referred to in paragraph 1 of this Article to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement.
3. The arbitral tribunal referred to in paragraph 2 of this Article will be constituted for each individual case in the following way: each party to the dispute appoints one member of the tribunal and the two members thus appointed shall select a national of a third State as Chairman of the tribunal. Each party to the dispute shall appoint its member of the tribunal within two months, and the Chairman shall be appointed within three months from the date on which the investor has notified the other Contracting Party of his decision to submit the dispute to the arbitral tribunal.
4. If the appointments have not been made in the abovementioned periods, either party to the dispute may invite the President of the Arbitration Institute of the Chamber of Commerce of Stockholm to make the necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the most senior member of the Arbitration Institute who is not a national of either Contracting Party shall be invited to make the necessary appointments.
5. The arbitration tribunal shall determine its own procedure applying the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.
6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
   - » the law in force of the Contracting Party concerned;
   - » the provisions of this Agreement, and other relevant agreements between the Contracting Parties;
   - » the provisions of special agreements relating to the investment;
   - » the general principles of international law.
7. The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute.'

In 1993, the Slovak Republic succeeded to the rights and obligations of the former Czech and Slovak Federative Republic under the BIT. On 1 May 2004, it also acceded to the EU.

In 2004, as part of a reform of its health system, the Slovak Republic opened its internal market to national operators and those of other Member States offering private sickness insurance services. Achmea, an undertaking belonging to a Netherlands insurance group, obtained authorisation as a sickness insurance institution and set up a subsidiary in Slovakia through which it offered sickness insurance on the Slovak Market.

In 2006, the Slovak Republic had a change of heart and partially reversed the liberalisation of their private sickness insurance market. In particular, a 2007 law prohibited the distribution of profits generated by private sickness insurance activities. Achmea considered that the Slovak laws had caused it damage and had brought arbitration proceedings against the Slovak Republic in October 2008 in Frankfurt, Germany, pursuant to Article 8 of the BIT. German law was applied to the arbitration proceedings.

In response, the Slovak Republic challenged the jurisdiction of the arbitral tribunal. The State argued that, as a result of its accession to the EU, recourse to an arbitral tribunal provided for in Article 8(2) of the BIT was incompatible with EU law. The Slovak Republic's challenge failed before the tribunal and subsequently before the German courts at first instance and on appeal.

A substantive award was therefore sought and obtained, and by an arbitral award of 7 December 2012, the arbitral tribunal ordered Slovak Republic to pay Achmea damages in the sum of €22.1 million.

The Slovak Republic in response brought an action before the German Courts seeking to set aside the award, failed and appealed on a point of law to the Bundesgerichtshof (Federal Court of Justice, Germany). In their challenge, the Slovak Republic expressed doubts as to the compatibility of the arbitration clause in the BIT with Articles 18, 267 and 344 of the Treaty on the Functioning of the European

NEWS

Quadrant Chambers welcomes international arbitration specialist Brandon Malone

Quadrant Chambers is pleased to welcome international arbitration specialist Brandon Malone as an associate member of Chambers. Brandon has over 25 years' experience in commercial dispute resolution as arbitrator and counsel, specialising in construction, engineering, infrastructure, and energy, including oil and gas and renewables, and international trade law.

> *"I am absolutely delighted to be joining Quadrant Chambers as an Associate. Quadrant has a formidable reputation in the commercial sphere, and it is a set that I have long admired. I am very much looking forward to working with Quadrant and enjoying the support of its excellent clerks in my international arbitration practice."* Brandon Malone

> *"We are very pleased to welcome Brandon Malone to Quadrant Chambers. His reputation in international arbitration as counsel and arbitrator is outstanding and his areas of specialism, particularly his work within the energy field compliments the strengths at Quadrant Chambers."* Luke Parsons QC, Head of Quadrant Chambers

Union ("TFEU"). The German court did not share those doubts but considered that a reference to the Court was necessary, as the CJEU had not yet ruled on those questions, which were of considerable importance because of the numerous investment treaties still in force between Member States which contain similar arbitration clauses, then

Accordingly, the Bundesgerichtshof referred the following questions to the Court:

1. Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?

   If Question 1 is to be answered in the negative:

2. Does Article 267 TFEU preclude the application of such a provision?

   If Questions 1 and 2 are to be answered in the negative:

3. Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?'

The Court's answer

The Court of Justice decided to deal only with questions 1 and 2 together, treating them as essentially asking whether Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

Contrary to the earlier answers suggested by Advocate-General Wathelet, the Court of Justice decided such arbitration clauses in such BIT treaties were in fact incompatible with EU law.

The Court held that the provisions of both Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.

The Court held the disputes which the arbitral tribunal constituted in Article 8 of the BIT was called on to resolve may to relate to the interpretation or application of EU law: in particular, the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital. Yet, any tribunal established under Article 8 of the BIT was not part of the judicial system of either the Netherlands or Slovakia. Indeed, it was precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that was one of the principal reasons for the existence of Article 8.

In such circumstances, such a tribunal could not be regarded as 'a court of tribunal of a Member State' within the meaning of Article 267 TFEU and was not therefore entitled to make a reference to the Court of Justice for a preliminary ruling.

Was the effective operation of EU law sufficiently protected in such circumstances?

The Court decided that it was not. The BIT arbitral tribunal was different from commercial arbitration proceedings which derive from the freely expressed wishes of the parties (for the Court's earlier cases on them and the indirect supervisory role of the CJEU discussed in Michael McParland, ***The Rome I Regulation*** (OUP, 2015), paras [2.30]-[2.43]). In contrast, the BIT system is derived from a treaty by which Member States agreed to remove from the jurisdiction of their own courts, and thus from the system of judicial remedies that Article 19(1) TEU requires them to establish in the field covered by EU law, disputes which may concern the application or interpretation of EU law.

In such circumstances, the Court considered that the limited review available by the German courts of any German seated BIT tribunal was insufficient to ensure the full effectiveness of EU law. The Court concluded that, apart from the fact that the disputes falling within the jurisdiction of the arbitral tribunal referred to in Article 8 of the BIT may relate to the interpretation both of that agreement and of EU law, the possibility of submitting those disputes to a body which is not part of the judicial system of the EU was provided for by an agreement which was concluded not by the EU but by Member States. Article 8 of the BIT therefore also called into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and was therefore not therefore compatible with the principle of sincere cooperation. In those circumstances, Article 8 of the BIT was considered to have "an adverse effect on the autonomy of EU law".

Consequences

The matter will now be returned to the German courts, but the only answer that can logically be given by them is that the original arbitral award is null and void. Where does that leave the investor, and indeed any other investor operating under such a BIT?

The Court's decision therefore opens up a whole series of questions that may need to be answered in the future regarding both the role of arbitration in existing BIT treaties (including possibly also matters arising under the Energy Charter Treaty), as well as the status of existing arbitrations.

In an age of increasing uncertainty, the Court of Justice as added another factor to challenge existing thinking.

Michael McParland QC is a commercial silk with nearly 35 years trial and appellate advocacy experience in the courts and arbitral tribunals of England & Wales and overseas.

Michael is well known for his extensive trial advocacy experience in commercial litigation and international arbitration. He is especially known for his skills in cross-examining both factual and expert witnesses in complex disputes, skills he first developed in chambers with the late George Carman QC before joining Quadrant in 2000.

Chambers UK Bar Directory 2018 says that "Michael has unrivalled knowledge of international law issues and is a ferocious advocate". "He is very good with clients, and is a very clear thinker who can think strategically". Michael is ranked by the Legal 500 Directory (2017) in the fields of Commercial Litigation ("Pulls no punches and gives it 100%; he is good with clients and in court"), Aviation ("A bulldozer in court that demolishes the opposition"), and Travel Law, including jurisdictional issues ("An advocate with gravitas").

Michael is widely recognised at the Bar as an expert in cross-border disputes. He is the author of The Rome I Regulation on the Law Applicable to Contractual Obligations (Oxford University Press, 2015), a leading private international law textbook that is cited as authoritative by the Advocate-General in the European Court of Justice and by judges in the Commercial Court.

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Arguing 'retroactive deprivation' of arbitral jurisdiction ...and how not to make your s67 challenge

Author: Simon Rainey QC

Overview

Close upon the heels of the decision in ***A v B*** [2017] EWHC 3417 (Comm) (see Commencing LCIA Arbitration: The Perils of Non-Observance of the LCIA Rules) which considered when a challenge to arbitral jurisdiction must be made in an arbitration under the rules of the LCIA and considered the impact of section 73 of the Arbitration Act 1996 upon the interpretation of the relevant LCIA provision, the recent Commercial Court decision in ***Exportadora de Sal SA de CV v Corretje Maritimo Sud-American Inc*** [2018] EWHC 224 (Comm) emphasises the need to act swiftly in raising an objection to substantive jurisdiction under section 67.

The context was a highly unusual one: namely, where arbitral jurisdiction existed when the arbitration was commenced under an admitted contract and arbitration agreement but where it was argued that it had been removed subsequently by a supervening governmental act which declared the contract (and arbitration agreement) null and void *ab initio*.

Does that argument give rise to a section 67 challenge to jurisdiction at all? If so, how do sections 31 and 73 apply to it?

The decision gives stringent guidance on the test under section 73(1) of the Arbitration Act 1996 which is to be applied where a party contends that it "did not know and could not with reasonable diligence have discovered the grounds for the objection" to jurisdiction.

Further, the Court's decision is important in emphasising that on any section 67 (or indeed section 68) challenge, the purpose of the witness statement is to set out *evidence* and not argument. The habit, into which most practitioners have fallen, of setting out one's case in full in the witness statement was disapproved by the Court. This reflects the Commercial Court's increasing insistence upon the proper (and therefore much more limited) deployment of factual witness statements.

The Factual Background to the Section 67 Challenge

Exportadora de Sal is a Mexican salt mining company owned 51% by the Mexican Government and 49% by Mitsubishi Corporation. By reason of the majority state ownership, it was viewed in Mexican law as a state entity and was therefore subject to Mexican administrative law governing the tender and contracting procedures contained in a local Mexican law (the Law of Procurement, Leasing and Public Sector Charges).

Exportadora contracted as buyer with a shipbuilder, Corretje Maritimo, for the construction and sale of a specialist salt barge on 3rd July 2014. The shipbuilding contract and arbitration agreement were governed by English law.

The builder (as the arbitrator held) lawfully terminated the contract on 27th May 2015 leaving a substantial instalment owing from Exportadora. The builder commenced arbitration against the buyer in August 2015.

Initially the buyer took no part in the arbitration. However, a hearing date having been fixed by the arbitrator for September 2016, in July 2016 and shortly before the hearing the buyer appointed solicitors who came on the record stating that they would "*contest both liability and quantum (and possibly jurisdiction)*". Jurisdiction as a separate issue was not then pursued but other defences (including one of illegality) were raised. The hearing of liability and quantum was adjourned to 5th December 2016.

Separately, Exportadora's Órgano Interno de Control (OIC) carried out an audit on 10th August 2016 to ascertain whether Exportadora had complied with the requirements of the Mexican law in question. The OIC audit led to various interventions by the OIC, culminating in a decree by the OIC on 16th November 2016 that the tender process had been irregular and that the award of the contract to the builder was and had been a nullity. Exportadora issued an 'early termination declaration' in respect of the contract, as directed by the OIC.

Surprisingly, Exportadora than participated fully in the December 2016 hearing on the merits. Its counsel, taxed by the tribunal with the need to explain matters if it was being alleged that the arbitral process was irregular in some way by reason of the OIC ruling, confirmed that this was "a separate matter" and recognised the validity of the arbitral process.

Shortly after the hearing, on 22nd December, Exportadora then raised the issue and made a jurisdictional challenge. The arbitrator allowed further submissions and then rejected the challenge as raised too late.

Exportadora lost the arbitration.

It then commenced a section 67 challenge, contending that the effect of the OIC decree under Mexican law was to deprive the tender of validity, with the result that it did not have power or capacity to enter into the contract and that as from 16th November 2016 the contract was null and void.

The three points dealt with by the Court

(1) 'Retroactive deprivation': a matter going to substantive jurisdiction at all?

While there was contested evidence of Mexican law as to the effect of the OIC decree, the highest that Exportadora could put its case was that, while the arbitrator had not lacked substantive jurisdiction at the outset of the proceedings, "this became so after the OIC Resolution" and that from that time on the arbitrator did not have substantive jurisdiction to decide any of the matters in the arbitration.

Andrew Baker J. held that the section 67 claim failed at the first hurdle, because the effect of Exportadora's Mexican law argument as to 'invalidity', even if correct, was a matter going to the subsequent discharge of an existing contract and not a matter of initial and original capacity to contract and therefore arbitral jurisdiction.

As he put it at [39]: "A doctrine that accepts and acknowledges that a valid and binding contract was concluded, including a valid and binding arbitration agreement, but requires by reason of the act of an administrative body over two years later that it thereafter be treated as if it had never been validly concluded is, by nature, not a doctrine concerning capacity to contract." Accordingly a 'retroactive deprivation' of authority to contract could not impugn the arbitrator's substantive jurisdiction to make the award.

(2) How does Section 31 apply to a 'retroactive deprivation' case?

Section 31 deals with objections to the substantive jurisdiction of the arbitral tribunal at two stages: (a) under section 31(1), lack of jurisdiction "at the outset of the [arbitral] proceedings" and (b) under section 31(2), "during the course of those proceedings" where the tribunal "is exceeding its substantive jurisdiction".

Objectively, Exportadora was to be taken to know that it was contracting with the builder in contravention of Mexican law and (if true) in an unauthorised manner. Accordingly, any objection on that ground, even if it went to jurisdiction, was one which had to have been raised by Exportadora before taking any step in the arbitration. Under section 31(1) of the 1996 Act "must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits". The time for raising that jurisdictional issue was long past.

For this reason, Exportadora had to put its case as one founded on the OIC decree and on the contention that that decree, as from 16th November 2016, deprived the

arbitrator of substantive jurisdiction. In other words, it was a matter which arose "during the course of the arbitral proceedings". In these circumstances, Exportadora sought to put itself within the "as soon as possible" requirement under section 31(2) (: "Any objection … must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised"), arguing that its raising of the point on 22nd December shortly after the hearing and before the award met this requirement.

The builder argued that section 31(2) was inapplicable and that only section 73(1) applied, which thereby imposed a more exacting timescale for raising an objection as to jurisdiction than simply "as soon as possible", namely "forthwith". It was argued that continuing to act as arbitrator where the arbitrator had jurisdiction initially but then has lost it was not a case of "exceeding" jurisdiction as such, and that section 31(2) deals only with going beyond a jurisdiction which the tribunal has, not a case of subsequent loss of all jurisdiction.

It might be said that this was a hair-splitting argument in that it sought to distinguish "forthwith" from "as soon as possible". However, the language of section 31(2) does not sit very happily with a "retroactive deprivation of all jurisdiction" argument. This is not surprising since the framers of the Model Law and then the 1996 Act were unlikely to have such a possibility in mind as a bar to arbitral jurisdiction.

The Judge approached the matter on the robust basis that section 31 should be read so as to avoid any gap in coverage, stating at [45]: "That may make the case unusual. But if it were nonetheless viable, I find it entirely natural to describe an arbitrator who continues to act after his temporally limited jurisdiction has expired as exceeding his jurisdiction. This reading of section 31(2) avoids a lacuna in section 31 that seems to me unlikely to have been intended."

(3) Section 73(1) and the exception for late challenges to jurisdiction

Section 73(1) bars a late objection "unless [the party] shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection".

The obvious problem for Exportadora was that it had known about the matters on which it relied since, at the latest, 16th November 2016 when the OIC made its decree of nullity or, at the earliest, August 2016 when the OIC carried out its audit and instituted its 'intervention' for breaches of the Mexican law in respect of tender procedures. It then took part in the December hearing.

In those circumstances, there was little doubt as to the outcome.

But the Court usefully stressed that given the importance of jurisdiction, a party had to act very quickly indeed, and within a timescale of days not weeks, treating the investigation of any potential jurisdictional argument as one of "the highest priority". The Judge explained the rational for this as follows at [48]: "The general context in which that question of reasonable diligence falls to be assessed is that when faced with a legal claim asserted through arbitration, logically and practically the first question any respondent can fairly be expected to consider and keep under review throughout is whether it accepts the validity of the process."

The Court held that Exportadora should have taken "urgent advice" as soon as it learnt of the OIC decree and "treated with appropriate priority" should have objected within one week. The Court would have gone further if necessary and said that with the background since August, it should have objected "within a working day or two" of receiving the decree.

Witness Statements in section 67 (and section 68) challenges: the Correct Approach?

The general guidance to witness statements in the Commercial Court Guide (at Part H1.1(a) of the 10th Edition) is that "the function of a witness statement is to set out in writing the evidence in chief of the witness". The Court is increasingly hard on statements that argue the case or recite documentation with strict page limits.

No specific guidance on witness statements is given in Part O, dealing with Arbitration Claims, (beyond in relation to section 68 challenges, that these "must be supported by evidence of the circumstances on which the claimant relies as giving rise to the irregularity complained of and the nature of the injustice which has been or will be caused to the claimant": O8.4). Generally the place to argue the case is in the Claim Form which "must contain, among other things, a concise statement of the remedy claimed and, if an award is challenged, the grounds for that challenge": O3.1.

However, as the Judge noted in this case, on section 67 (and 68) applications, a practice has grown up of serving a very full witness statement with the Arbitration Claim Form. He saw as this as having arisen because of "the perceived convenience in a section 67 claim of setting out the claimant's detailed case as to the material facts, with explanatory comment or an outline of the proposed argument, in a single, main supporting witness statement from the claimant's solicitor." [25].

Andrew Baker J. in the course of his judgment disapproved of this practice. He laid down some 'reminders' which practitioners will do well to bear in mind for the future: see at [25] to [27].

» "Where the material facts will be proved by contemporaneous documents, whether generated by the original transaction or by the arbitral proceedings, the proper function of a witness statement may well be only to serve as the means by which those documents can be got into evidence by being exhibited."

» "The claimant's case as to what those documents prove, and as to the conclusions to be drawn, can and should be set out in the Arbitration Claim Form as part of the statement of the "Remedy claimed and grounds on which claim is made", a statement often produced in the form of a statement of case attached to the Claim Form."

» "The content of any witness statement, beyond a bare identification of exhibited documents, can and should be limited to matters of fact intended to be proved, if disputed, by calling the maker of the statement as a factual witness at the final hearing of the claim."

Where (as is likely) this approach has not been taken or 'old-style' statements are being considered, then a further requirement was stressed:

» "If a witness statement served with the Arbitration Claim Form has not been properly limited in that way, … it is essential, if the maker of the statement is to be called as a witness at the final hearing of the claim, that proper thought is given to which parts of the statement it is necessary or appropriate to take as their factual evidence in chief. That should preferably be done well ahead of the hearing. Any dispute over what should be allowed as evidence in chief can then be identified and resolved, by the court if necessary; the parties can then prepare cross-examination limited accordingly; and the hearing can then be listed upon the basis of a time estimate that is better informed."

In cases where the underlying facts are not in reality contentious but how they are to be argued is, this restatement of approach is likely to see the disappearance of any proper need for a full witness statement. The case can be summarised in pleading form in the Claim Form (and argued at fuller length in the skeleton, which witness statements often seek to foreshadow) and the accompanying statement limited to a vehicle for appending the relevant underlying documentation.

Jurisdiction issues in arbitration

Author: Ruth Hosking

This blog was first published by Practical Law Arbitration on 15 March 2018.

On 20 February 2018, about 80 participants attended Quadrant Chambers' biannual international arbitration seminar. The topic for discussion and debate was "Jurisdiction Issues in Arbitration". The panel event was chaired by Simon Rainey QC of Quadrant Chambers and the speakers were Louis Flannery (now QC), Head of International Arbitration at Stephenson Harwood, Philippa Charles, Head of International Arbitration at Stewarts, and former High Court judge, now full time arbitrator, Sir David Steel of Arbitrators at 10 Fleet Street.

Louis Flannery kicked off the event looking at two topics:

» What is jurisdiction?

» Institutional perspectives of jurisdiction challenges.

In relation to the former, Louis noted that the countries in the UK were the only legal jurisdictions which sought to define the jurisdiction of the arbitral tribunal: England, Wales and Northern Ireland by section 30 of the Arbitration Act 1996 (AA 1996), and Scotland by Rule 19, Part 2 of Schedule 1 to the Arbitration (Scotland) Act 2010. In broad terms, both pieces of legislation seek to define jurisdiction by reference to:

» Whether there is a valid arbitration agreement.

» Whether the tribunal is properly constituted.

» What matters have been submitted to arbitration in accordance with the arbitration agreement.

Louis focused on section 30 of AA 1996. His view was that the courts wrongly treat the three elements set out in section 30 as exhaustive, and therefore seek to "smash" jurisdiction issues into those three pegs. Whilst considering this issue in detail, Louis noted that arbitral tribunals (and the courts) often get confused and look at issues of admissibility as issues of jurisdiction. As the Chartered Institute of Arbitrators (CIArb) Guidelines on Jurisdictional Challenges notes (at paragraph 6 of the preamble):

> "When considering challenges, arbitrators should take care to distinguish between challenges to the arbitrators' jurisdiction and challenges to the admissibility of claims. For example, a challenge on the basis that a claim, or part of claim, is time-barred or prohibited until some precondition has been fulfilled, is a challenge to the admissibility of that claim at that time i.e. whether the arbitrators can hear the claim because it may be defective and/or procedurally inadmissible. It is not a challenge to the arbitrators' jurisdiction to decide the claim itself."

In this context, Louis was critical of the decision of Teare J in ***Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd***.

Louis then considered the role of the International Chamber of Commerce (ICC) Court under Article 6(4) of the ICC Rules, noting that the ICC is the only arbitral institution which carries out a gate keeper function in relation to jurisdiction. It does so in cases where the Secretary General refers matters to the ICC Court for its decision pursuant to Article 6(4). The ICC Court then decides whether and to what extent the arbitration shall proceed. Louis then looked at the statistics of the number of cases referred to the ICC Court and their outcomes, concluding that the gate keeper power was useful for the ICC Court to have.

Philippa Charles then spoke on "deciding your own jurisdiction". She addressed three questions:

» Is the role or responsibility of the tribunal to take a view on jurisdiction whether or not the parties raise it?

» The approach to determining questions of jurisdiction, premise, burden and construction.

» Pragmatism and effective solution finding.

In relation to the first of these issues, Philippa noted that section 30 of the AA 1996 gives an English-seated tribunal the power, but not the obligation, implicitly to determine its own jurisdiction, whether or not on the application of a respondent. In exploring this issue, Philippa looked at issues of enforcement (particularly under Article V.1(d) of the New York Convention) and whether it made a difference to the position of the tribunal if the respondent was non-participating or not represented by appropriate counsel. She went on to discuss an example of a claimant (represented by inexperienced counsel – it was their first ever international arbitration) who issued a single London Court of International Arbitration (LCIA) reference in respect of payments due under five separate contracts, where five separate references should have been commenced and an application to consolidate made. The question she posed was, "What should the tribunal do?"

In relation to determining jurisdiction, Philippa examined a number of issues including:

» Whether a tribunal should approach the question with a predisposition to finding jurisdiction where possible, or on the assumption that the challenge is justified or completely neutrally.

» Who had the burden of proof? The party seeking to say that the claim was within the arbitration clause or the party challenging jurisdiction?

» Whether the balance should be tipped in favour of arbitration if the alternative is the bringing of claims in a court system which is objectively more difficult (with a particular focus on the Kyrgyz mobile saga).

» Lastly, Philippa sought to give some pragmatic solutions (looking at submission agreements by way of example), the upshot of which was: don't leave it to the tribunal if you can avoid it!

Sir David Steel then considered section 67 of the AA 1996 and whether the English Commercial Court should retain a role. He started by noting that the Commercial Court has been very supportive of arbitration, but that the arbitral community often saw section 67 challenges as an obstruction of arbitration. In his view of ten years as a judge of the Commercial Court, he could not remember a single instance of a section 67 challenge which was demonstrably misconceived. He was also of the view that it was correct that section 67 was a re-hearing and not simply a review of the arbitrator's own decision on jurisdiction.

Sir David then considered alternatives to the current system, including one suggestion that findings of fact, made by the tribunal when considering their own jurisdiction, should be unchallenged. In his view, that would be wrong for four reasons:

If there is no contract at all (and therefore no agreement to arbitrate), how can a tribunal make a binding decision on fact?

In international arbitration, the governing law of the claim is often not English law and questions of foreign law are questions of fact.

The demarcation between fact and law is difficult to draw.

The Commercial Court does not care whether a jurisdiction challenge under section 67 succeeds or not, but an arbitral tribunal has a potential conflict of interest in

that they may be tempted (unconsciously) to make findings of fact, as the financial significance of the outcome to them may be great.

Following the panel's presentations, there were questions from the floor and a lively and thought provoking debate followed. At the end, Simon Rainey QC put to the participants whether section 67 should be looked at again – the overwhelming response from the audience was no.

Ruth Hosking's practice encompasses the broad range of general commercial litigation and arbitration. Her particular areas of specialism include shipping, civil fraud, private international law and commodities. She undertakes drafting and advisory work in all areas of her practice and regularly appears in court and in arbitration, both as sole counsel and as a junior. Ruth also accepts appointments as an arbitrator (both as sole and as part of a panel).

Ruth has appeared in the House of Lords, Court of Appeal, High Court and has represented clients in a variety of international and trade arbitrations (including ICC, LCIA, LMAA, GAFTA and FOSFA). She has been involved in a number of high profile cases, including "The Achilleas", a leading case on the contractual principles of remoteness of damage and "The Atlantik Confidence", the first case in which an English Court has determined that a person was barred from relying on the limits provided by the Limitation Convention.

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Commencing LCIA Arbitration: The Perils of Non-Observance of the LCIA Rules

Author: Simon Rainey QC

A v B [2017] EWHC 3417 (Comm)

The Requirements for (a) Valid and Effective Commencement of LCIA Arbitration and (b) When a Challenge to Jurisdiction Must be Made under the LCIA Rules

Summary: The LCIA Arbitration Rules (currently the 2014 revision) provide for a simple and well drafted procedure for the commencement of arbitration.

The decision of ***A v B*** [2017] EWHC 3417 (Comm), handed down on 21st December 2017 (and therefore perhaps escaping attention in the immediate Christmas rush), illustrates that failure to follow this simple procedure will result in a purported commencement of arbitration being wholly ineffective. This may have potentially highly significant consequences where the soi-disant "commencement" takes place hard up against the date of the expiry of a limitation period, statutory or contractual. The decision demonstrates that appeals to the 'flexibility', which may have a place in the very different context of arbitration where there are no rules or requirements as to how the arbitration is to be commenced (as in ***Easybiz Investments v Sinograin (The Biz)*** [2011] 1 Lloyd's Rep. 688), have no traction where the manner of commencement is defined by institutional arbitration rules, which have either been complied with or not.

The decision also sheds valuable light on when (i.e. how early) a challenge to jurisdiction must be made under the LCIA Rules and the correct construction of Article 23.2 of the LCIA Rules.

Simon Rainey QC is counsel in the separate contested LCIA sub-arbitration by A against C, referred to in the judgment, and in applications currently before the Commercial Court related to that purported arbitration.

How the Issues in *A v B* Arose

B was party as seller to two separate contracts, one concluded in September 2015 and the second in October 2015, for the sale of parcels of crude oil on FOB terms. Each separate contract was subject to an LCIA arbitration clause. A, as buyer, on-sold the parcels by two separate sub-contracts on substantially identical terms save as to price. A failed to pay the price and B sought to commence arbitration to recover the price.

Article 1 of the LCIA Rules provides that "Any party wishing to commence arbitration under the LCIA Rules … shall deliver to the Registrar of the LCIA Court … a written request for arbitration (the "Request") containing or accompanied by" and then setting out the basic core details relied upon as giving rise to the claim or dispute and as supporting the submission of that claim or dispute to LCIA arbitration.

Inexplicably B filed a single Request on 23rd September 2016 against A under Article 1 by which B purported to commence a single arbitration for the amounts claimed under the two separate contracts as if under a single contract and, in particular, as if under arbitration agreement. A single arbitration registration fee was paid under Article 1.1(vi) of the LCIA Rules.

A in its turn commenced a separate LCIA arbitration against C) on 31st October 2016), adopting an equally single form Request on the same 'single claim and arbitration agreement' basis. C challenged the jurisdiction of the Tribunal in the A vs C reference on the basis that A's purported Request for Arbitration was invalid and ineffective to commence arbitration.

A sought to adopt the same argument against B. However, by this stage, A had already served its Response under Article 2 of the LCIA Rules (on 31st October 2016). That contained a generic reservation of rights (summarised by the Judge as "(i) stating that the Response should not be construed as submission to any arbitral tribunal's jurisdiction to hear the claim as currently formulated; and (ii) reserving A's rights to challenge the jurisdiction of the LCIA and any arbitral tribunal appointed" [6]). But no specific challenge to the Tribunal's jurisdiction on the basis that B's Request was invalid and ineffective to commence arbitration was made by A in the Response. That specific challenge, passing on the point taken by C against A, was not made by A *vis-à-vis* B until shortly before A was due to serve its Statement of Defence and therefore well after the Response.

B argued that under Article 23.3 of the LCIA Rules A's challenge to jurisdiction on the grounds of an ineffective Request for Arbitration came too late.

The LCIA Tribunal (Ian Glick QC; David Mildon QC and William Rowley QC) agreed, holding that A should have raised its challenge in its Response, at the latest, and that it was too late to raise that challenge in its Statement of Defence.

A applied under section 67 of the Arbitration Act 1996 on the basis that the B's Request was ineffective; that the Tribunal had no jurisdiction and that its determination was invalid.

Issue 1: Was B's Request for Arbitration Effective to Commence Arbitration?

This, the threshold question as to whether the Tribunal enjoyed jurisdiction over A at all, turned on Article 1.1 of the LCIA Rules. Given the parties' arbitration agreement was on the basis of arbitration under the LCIA Rules, the Rules governed the manner in which arbitration was to be commenced.

Article 1 provides that a party wishing to commence arbitration is to file a Request for Arbitration which is to be accompanied by (a) "the full terms of the Arbitration Agreement (excepting the LCIA Rules) invoked by the Claimant to support its claim, together with a copy of any contractual or other documentation in which those terms are contained and to which the Claimant's claim relates" (Article 1.1(ii)) and (b) "a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the claim advanced by the Claimant" (Article 1.1(iii)). In addition under Article 1.1(vi) "the registration fee prescribed in the Schedule of Costs" is to be paid the LCIA with the submission of the Request.

B accepted (inevitably) that an arbitration can only encompass a dispute arising under a single arbitration agreement (recorded at [16]).

As there were two separate contracts and two separate arbitration agreements forming part of each contract, albeit in identical form, two separate Requests were therefore necessary, one under each contract and arbitration agreement.

Phillips J. had little difficulty in dismissing B's case that its single Request was to be read as a Request validly commencing two separate arbitrations, one under the September and the other under the October contract; in other words that while the Request was expressed in the singular, it could be and should be read as a double Request.

The problem for B was that its Request was, as the Judge summarised at [22], specifically drafted on the basis of a single Request referring a single dispute under a single contractual regime and, critically, under single arbitration agreement, to a single arbitration, with B as claimant thereby being entitled to pay a single arbitration fee.

The Judge summed up the ordinary objective interpretation of the Request and its language (drafted, as he pointed out, by lawyers) in these terms: "In my judgment, and given the analysis of the LCIA Rules and their effect above, a reasonable person in the position of the recipient would have understood the Request as starting one single arbitration. The Request makes no reference to the commencement of more than one arbitration, but refers throughout to "the Arbitration Agreement". The Request also claims one single amount of damages, refers to "the seat of the arbitration", "the language of the proceedings", "the governing law of the arbitration agreement" and payment of "the fee prescribed by the Schedule of Cost", being a reference to the fee for a single arbitration. It is entirely clear that the intention was to commence a single arbitration and no reasonable reader would conclude otherwise. Indeed, the LCIA itself regarded it as commencing just one arbitration."

B's ambitious argument that a Request for Arbitration under Article 1.1 of the LCIA Rules was nevertheless to be read in the light of section 61(c) of the Law of Property Act 1925 which provides that "in all deeds, contracts, wills, and other instruments [...] the singular includes the plural and vice versa" was rejected by Phillips J. as having "no merit whatsoever" [19].

As the Judge pointed out, this would mean that multiple different arbitrations could be commenced under one registration and one registration fee. Further, the language of Article 1.1 made it clear that a Request was singular and that the arbitration commenced by it was equally singular, not multiple or permitting the commencement in the Claimant's sole option of as many concurrent or consolidated arbitrations in one Request as it wished.

In seeking to remedy deficiencies in the commencement of arbitration, resort was made by B to the decision of Hamblen J. in ***The Biz*** [2011] 1 Lloyd's Rep. 688.

This was a very different case in which claims under 10 different contracts (10 separate bills of lading), each with its own identical arbitration agreement, were the subject of one notice of appointment of an arbitrator under each agreement in respect of each claim. There were no rules or requirements as to how arbitration was to be commenced and, accordingly, the default regime in section 14 of the Arbitration Act 1996 governed the position. Hamblen J held that the requirements of section 14 had to be construed broadly and flexibly concentrating on the substance and not the form of the notice.

Phillips J. held at [22] that, while that approach was unimpeachable *per se*, it could not assist B in the different context where detailed arbitration rules defining the way in which arbitration had to be commenced were in place and governed now a claim was to be referred to arbitration.

Issue 2: How Quickly Must a Party Challenge Jurisdiction under the LCIA Rules?

Even if B's Request was ineffective such that the Tribunal could have no jurisdiction, B contended in any event that A had lost its right to challenge jurisdiction.

Its case rested upon Article 23.2 of the LCIA Rules which provide in so far as material that: "An objection by a respondent that the Arbitral Tribunal does not have jurisdiction *shall be raised as soon as possible but not later than the time for its Statement of Defence […].*" [Emphasis added.]

B relied on the Tribunal's view that this required an "as soon as possible" response in all cases, such that if a party receiving a Request for Arbitration considered it to be misconceived in jurisdictional terms, then it had to raise that objection "immediately". This would require a challenge to jurisdiction to be made under the LCIA Rules potentially earlier even than the filing under Article 2 of the Response to the Request for Arbitration but in any event certainly no later than taking the challenge in and as part of the Response, such that a Respondent could not leave the taking of a challenge to the Tribunal's jurisdiction to its Statement of Defence.

Even leaving to one side the relevant statutory background, the Court found this to be a difficult argument simply on the wording of Article 23.3 itself which refers expressly to the Statement of Defence in terms as being the final cut-off point.

As the Judge stated at [40]: "the better construction of Article 23.3 is that it excludes "untimely objections", that phrase relating back to the requirement that an objection shall be not later than the time for its Statement of Defence. Whilst the Article stipulates that objections shall be raised as soon as possible, it does not state a sanction for non- compliance, the sanction for untimely objections being provided by or implicit in the words "not later than" which apply to the time for the Statement of Defence. Had the intention, in 2014, been to introduce a new and much stricter requirement, complete with heavy sanction, it would surely have been done with far clearer words".

The Judge supported that construction by the approach taken to a similar type of clause (: "as soon as reasonably practicable and in any event within 30 days") in ***AIG Europe (Ireland) Ltd v Faraday Capital Ltd*** [2006] 2 CLC 770.

The Court's view was further supported by the statutory context in which Article 23.3 was to be construed.

The Court recorded the fact that the Tribunal had cross-checked its construction of Article 23.3 against section 73(1) of the Arbitration Act 1996 which provides that where a party takes part in the arbitral proceedings "without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part" any objection to jurisdiction, the right to object is lost. The Tribunal viewed the requirement of "as soon as possible" as meaning just that with this being consistent with the "forthwith" element in section 73. It was therefore not open to a party to reserve jurisdiction at the response stage and then take it at the defence stage: it had to take it immediately but at the latest in and by the Response.

Phillips J. noted that the Tribunal had however not considered section 31(1) of the 1996 Act which specifically addresses when an objection to jurisdiction must be taken as the default position and which is referred to in section 73(1) (:"without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part", emphasis added). Section 31(1) provides that an objection to jurisdiction "must be raised … not later than the time he takes the final step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction." This follows Article 16(2) of the UNCITRAL Model Law save that the reference to it being not later than the statement of defence in the Model Law was replaced by a reference to the final contesting of the merits. As the Departmental Advisory Report on the Arbitration Bill records, the only reason for this change was the avoidance of the impression "that every arbitration requires some form of formal pleading or the like".

The Judge held that, reading Article 23.3 of the LCIA Rules in its proper context, it was highly unlikely (indeed the Judge put it thus: "it is inconceivable") that the LCIA had intended some new and stricter regime departing dramatically from section 31 and requiring a challenge even before Response or appointment of an arbitrator, even though both of those steps could not by themselves amount to a waiver of the right to challenge jurisdiction and even though the LCIA Rules provide that the omission to serve any Response does not affect the respondent's position as to the denial of any claim (Article 2.4).

Conclusions

Permission to appeal was refused by the Judge and so the decision is effectively final on the points it determines.

The Judge's decision on both issues should therefore be carefully noted.

First, it makes it clear that commencement of arbitration under the LCIA Rules is a straightforward process as defined in Article 1.1 where a claim or set of claims under one contract governed by an LCIA arbitration agreement is referred to arbitration by a Request and that if there are separate contracts and separate arbitration agreements, separate arbitrations must be commenced. Subsequent consolidation of the separate arbitrations is a different matter, with the necessary consents: the LCIA Rules provide for this in terms in Article 22.1(ix).

Secondly, it now clarifies the correct construction of Article 23.3 of the LCIA Rules (newly amended in the 2014 revision). While jurisdictional challenges must be made at an early stage in arbitral proceedings, the long-stop approach of requiring them to be made no later than the contesting of the merits and the time for the Statement of Defence which amounts to a step in the proceedings is consistent with the provisions of the Arbitration Act 1996 and similarly worded provisions.

Simon Rainey QC is one of the best-known and most highly regarded practitioners at the Commercial Bar with a high reputation for his intellect, advocacy skills, commercial pragmatism and commitment to client care. He has established a broad commercial advisory and advocacy practice spanning substantial commercial contractual disputes, international trade and commodities, energy and natural resources, insurance and reinsurance and shipping and maritime law in all its aspects. He appears in the Commercial Court and Court of Appeal and also the Supreme Court (with two recent landmark victories in ***NYK v Cargill*** [2016] UKSC 20 and ***Bunge SA v Nidera SA*** [2015] UKSC 43.) He regularly handles Arbitration Act 1996 challenges.

He has extensive experience of international arbitration, regularly appearing as advocate or co-counsel in disputes under all of the main international arbitral rules (LCIA; SIAC, UNCITRAL; ICC, Swiss Rules etc) and also sitting as arbitrator.

He is highly ranked by Chambers and Partners and Legal 500 as a first division international arbitration specialist ("Highly regarded for his expertise in handling high-profile international arbitrations in connection with complex oil and gas, banking and finance and trade issues. He is well known for his prowess in advising and representing clients in disputes in countries as far flung as Turkey, Russia, the USA, China and India" 2018; "Incredibly good, with a particular skill in reducing the complicated to the elegantly simple, which when you're trying to present a case to a tribunal or court is one of the more valuable things you need to have" 2018; "Clearly now one of the top commercial silks and a delight to work with." 2018; "A mixture of brilliance and brevity, his written submissions are like poetry" 2018), He was nominated for "International Arbitration Silk of the Year 2017" by Legal 500 and has also been awarded "Shipping & Commodities Silk of the Year" 2017 by both Chambers & Partners and Legal 500.

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Is the Fiona Trust "one-stop" presumption under attack?

Author: John Russell QC

Is the Fiona Trust "one-stop" presumption under attack?

Two recent cases raise this question.

First up is ***Michael Wilson & Partners v John Emmott*** [2018] EWCA Civ 51, the latest instalment in the long running saga following the falling out of former partners, or quasi-partners, Michael Wilson and John Emmott.

The origins of the dispute lie in the MWP Agreement made in December 2001, whereby Emmott became a director of, and acquired shares in, MWP. It included an arbitration agreement in wide terms that, "all and any disputes shall be referred to and are subject to arbitration in London".

In 2015/2016 MWP took assignments of contribution claims against Emmott from other persons whom MWP has successfully sued in New South Wales. Emmott applied to the English courts for an antisuit against the New South Wales proceedings, on the basis that any claim by MWP against Emmott had to be brought in London arbitration. The CA refused to grant an antisuit.

The essence of the decision was that "disputes" in the arbitration clause only captured claims between MWP and Emmott in their capacity as quasi-partners. It did not capture claims originally vested in third parties which MWP had acquired by assignment.

Some commentators [1] have interpreted this as an erosion of the Fiona Trust presumption. But, Lord Hoffmann's presumption was that, "rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal." The assigned claims were not, in origin, disputes arising out of the MWP/Emmott relationship at all- they were claims by third parties. It is very hard to see how, absent very specific wording, an arbitration clause could properly be construed as capturing claims which originally vested in strangers to the arbitration agreement. The decision, therefore, seems entirely orthodox, and the criticism unfounded.

More difficult, perhaps, is the decision of Butcher J in ***Eurochem v Dreymoor*** [2018] EWHC 909 (Comm). In this case there were numerous contracts between the parties. An "umbrella" agency agreement for the sale of fertilizer into the Indian market had a choice of law clause in favour of English law, but was silent as to forum. In some cases the "agent", Dreymoor, bought the goods as principal from Eurochem and on-sold to Indian buyers; in other cases the sale was between Eurochem and the Indian buyer with Dreymoor named as agent in the sales contract. The former type of sales contracts each contained an LCIA arbitration clause, the latter type each contained an ICC arbitration clause.

The breaches of the sales contracts alleged by Eurochem (essentially, that they were procured by bribery) would, if made out, all also be breaches of the agency agreement.

Dreymoor argued that the proper application of the one-stop presumption, as explained in multi-contract cases by the CA in ***AmTrust v Trust Risk*** [2015] 2 Lloyd's Rep 154, was that none of the claims were captured by the arbitration clauses. The claims, in essence, arose out of the agency agreement, and therefore should fall within the dispute resolution provision of that agreement. That was not altered by the fact that the agency agreement was silent as to forum: the claims would all be heard together in whatever court took jurisdiction according to its own gateway and forum conveniens rules. If the claims were captured by the arbitration clauses there would be fragmentation: essentially the same bribery allegations would be determined in multiple arbitration fora.

Butcher J rejected this argument. Rather than applying a one-stop presumption, he considered the absence of a specified forum in the agency agreement to be a key feature. He said: "I consider that reasonable business people would not have considered that this uncertain jurisdictional position should apply to a dispute such as the present as opposed to the specified dispute resolution mechanism in the individual contracts."

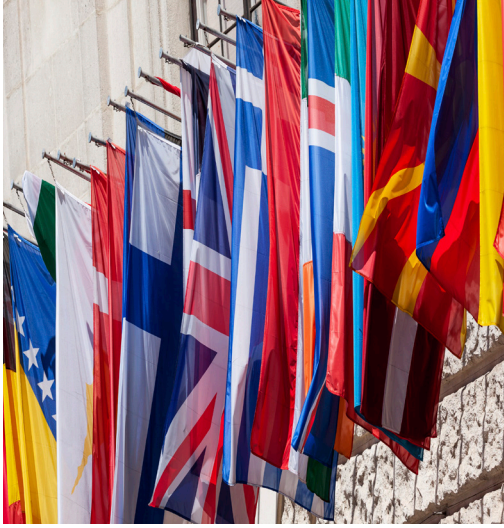
Thus, certainty of forum was favoured over the identification of a single "stop".

To this extent, the ***Eurochem*** case, though not the ***Wilson*** case, may be seen as at least a limited attack on the universality of the one-stop presumption.

1 For example, http://arbitrationblog.practicallaw.com/an-erosion-of-the-fiona-trust-one-stop-shop-presumption/

John Russell QC is an experienced and determined advocate and has acted as lead Counsel in numerous Commercial Court trials, international and maritime arbitrations and appellate cases. He relishes both detailed legal argument and cross-examination of lay and expert witnesses. He will always ensure that a client's case is presented in the most persuasive manner possible, both in writing and orally. He combines first rate technical legal analysis with a pragmatic, commercial, problem solving approach to cases and accepts instructions in many fields of commercial dispute resolution.

> view John's full profile



UPCOMING EVENTS

12 September - UKELG IBA event - jointly presented by Quadrant Chambers and Bracewell (UK) LLP

14 November - Quadrant Chambers International Arbitration Event

RECENT EVENTS

Our event on **Jurisdiction Issues in International Arbitration.** was chaired by Simon Rainey QC and our distinguished panel of speakers included Sir David Steel, Louis Flannery QC of Stephenson Harwood and Philippa Charles of Stewarts Law.

Simon Rainey QC spoke at the ICC Austria Seminar on **Damages in International Arbitration**.

We were in South Korea: Seoul IDRC 36th lecture series **'International Arbitration: making the hearing work for you'**

Meet the Female Arbitrator: Arbitration Pledge Event focused on the commodities sector, hosted by HFW, Quadrant and 20 Essex Street

The 2nd Quadrant Chambers **International Arbitration Team Quiz Night** took place on 12 July with teams from Allen & Overy, Baker McKenzie, Clifford Chance, Hogan Lovells, Pinsent Masons, Reed Smith and Stewarts Law competing for the prestigious trophy. Pinsent Masons took the title this year.

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