The LMAA
THE LONDON MARITIME ARBITRATORS ASSOCIATION

London Maritime Arbitration: Jurisdiction and Preliminary Issues

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JURISDICTION

Yukos

"*A Dutch court yesterday overturned a ruling that had granted onetime controlling shareholders in Russian energy group Yukos USD50bn in damages, saying the arbitration tribunal that had made the original finding had no jurisdiction in the case*"

You will no doubt have read of this case. The award was made by a tribunal of 3 very experienced, not to say distinguished, arbitrators in an arbitration conducted under the auspices of the Permanent Court of International arbitration in The Hague. The award was made against the Russian State in favour of the erstwhile shareholders of Yukos, the Russian oil company whose assets were sequestrated by the Russian Government in a dispute with the founder of the company, Mikhail Khodorkovsky. The award was one of the largest, if not the largest, ever made and inevitably attracted a backlash. (Ironically the Permanent Court of international Arbitration was established in the early years of the last century on the initiative of Tsar Nicholas II). The arbitration was founded on the agreement alleged to have been constituted by the signature of the Russian Government of The Energy Charter, an international agreement which included provision for the resolution of investment disputes by arbitration. The Russian Government had signed the Charter but it had not been ratified by the Russian State. The question of the jurisdiction of the tribunal was fully argued and the arbitrators found that they did have jurisdiction to decide the matter. The Dutch Court, after hearing an appeal on jurisdiction, decided otherwise.

I mention this case, which may seem to have little to do with ad hoc maritime arbitration as conducted under LMAA auspices in London, because it is a startling example of how important the issue of jurisdiction is in many arbitration cases of all kinds. Arbitration tribunals enjoy no "inherent jurisdiction" such as is available to the courts of a particular country. Their jurisdiction is founded on the arbitration agreement between the parties (sometimes, as in the Yukos case, enshrined in an international multilateral treaty). Supplemented perhaps by the provisions of the arbitration law of the country which is the seat (or perhaps putative seat) of the arbitration, the arbitration agreement delimits the boundaries of the arbitrators' jurisdiction. Outside the scope of the arbitration agreement the arbitrators have no jurisdiction.

Challenges in LMAA arbitrations

The two principal types of initial challenge with which we have to deal in LMAA arbitrations are challenges to arbitrators on grounds of lack of perceived impartiality and challenges to the jurisdiction of the tribunal. Unlike the case of LCIA or ICC arbitrations, the former type of challenge is rare in LMAA arbitrations (at east in my experience) and parties seem content to take a much more liberal approach in accepting that the impartiality of an LMAA arbitrator arbitrator is not necessarily likely to be compromised by him or her accepting a much larger

number of appointments from a particular specialist law firm than would be permissible under the IBA Guidelines.

One the other hand, challenges to the jurisdiction of LMAA tribunals are by no means uncommon and this paper will explore some of the circumstances in which these arise and the options available to the parties and the courses open to the tribunal.

Examples of jurisdiction issues

Whilst not an exclusive list, the following are among the most common types of questions which give rise to jurisdictional challenges:

- Was there a binding (main) agreement?
  This is perhaps a more common issue than might be expected. Particularly in the case of charterparty fixtures which consist of exchanges of emails around a fixture recap, there may be uncertainty as to whether a binding agreement was concluded. If there is no binding – main- agreement, there may be no arbitration agreement either. Similarly there may be issues as to whether an agreement is void for fraud or other illegality or voidable for misrepresentation. In such cases it will generally be possible for arbitrators to be appointed to determine whether there was a binding main agreement which can be enforced, i.e the arbitration agreement contained in the agreement whose validity is in issue will be treated as separate from the main agreement for the purpose of enabling the validity of the main agreement to be decided by arbitration.

- If an agreement was fully formed and binding, is it binding on the parties to the arbitration?
  This may involve consideration of such questions as whether the contract was concluded on behalf of a company not yet formed or an undisclosed principal. The title to sue of assignors and assignees and subrogated parties, notably guarantors or insurers, may be in issue.

- Was the respondent a party to the arbitration agreement?
  For example, was the arbitration agreement in a charterparty incorporated into a bill of lading?
  This has been a frequent issue in cargo claims where the jurisdiction of local courts at the port of discharge has been invoked, allegedly in breach of an arbitration agreement which it is claimed was incorporated in the bill of lading contract under relevant law. [1]

- Has the tribunal been properly appointed?

[1] See for example: Kallang Shipping SA Panama v Axa Assurances Senegal and Another (The "Kallang" (No 2)[2008] EWHC 2761 (Comm)

For example, do the arbitrators have the particular qualifications required as, say, members of the Baltic Exchange or commercial men or women?

- Has notice of arbitration been properly served?
  For example, under the ASBATANKVOY form of charter the notice of arbitration must be served on an "officer" of the respondent. There may be an issue as to whether this formal requirement has been satisfied.
  If notice is served on brokers or solicitors, did they have actual or implied authority to accept the notice or must it be served at the respondent's registered address?
  Is notice served by email sufficient?

- Has the relevant dispute been submitted to arbitration?
  In the case of LMAA arbitrations this is less likely to be a problem by virtue of paragraph 10 of the LMAA Terms which provides:

  > "*Notwithstanding the terms of any appointment of an arbitrator , unless the parties agree, the jurisdiction of the tribunal shall extend to determining all disputes arising under or in connection with the transaction the subject of the reference, and each party shall have the right before the tribunal makes its award... to refer to the tribunal for determination any further dispute(s) arising after the commencement of the arbitral proceedings..*"

- Is another form of dispute resolution mandatory: e.g expert determination?
  Many shipbuilding contracts contain provision for issues concerning the interpretation of classification society rules to be finally determined by the classification society and for technical issues to be referred to technical experts agreed on by the parties. In these cases the jurisdiction of an arbitration tribunal maybe excluded

- Have other mandatory forms of dispute resolution been exhausted?:
  In Emirates Trading Agency LLC v Prime Minerals Export Private Ltd[2] an agreement to negotiate the possible settlement of a dispute before resorting to arbitration was held enforceable, as may in future suitably worded contractual requirements to mediate.

Statutory provisions

Apart form the terms of the arbitration agreement itself certain provisions of the Arbitration Act 1996 may come into play in the determination of jurisdictional issues. The principal provisions, the text of which is set out in the Appendix, are are:

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[2] [2014] EWHC 2104 (Comm)

- section 30: Kompetenz-Kompetenz
- section 31: Challenge to the tribunal
- section 32: Determination by the court
- section 67: Appeal based on lack of substantive jurisdiction
- section 72: Rights of a party not taking part in proceedings
- section 73: Loss of the right to object

Parties' options

In case of issues concerning the jurisdiction of the tribunal the parties' options are likely to be one of the following:

1. Ask the tribunal to deal with jurisdiction as a preliminary issue
2. Ask the opponent to agree, or the tribunal to permit, reference to court : s.32
3. Not participate in the arbitration and challenge later under s.67 or 72. It should be noted that participation in the proceedings without appropriate objection or reservation may easily result in loss of right to object under s.73.
4. Start court proceedings and challenge any stay application under s.9.
5. Await the award and challenge under s. 67
6. Participate under protest and challenge under ss.31 and 67

Tribunal's options

1. Determine the jurisdictional issue in a partial award on jurisdiction
2. Reserve the issue to be dealt with in the final award on both jurisdiction and merits
3. Give permission to refer the jurisdictional issue to court under s.32
   As to this, it should be noted that, absent the agreement of the parties (which is binding on the tribunal), the issue can only be referred to the court under s.32 with the tribunal's permission. It is suggested that the intention of the 1996 Act was that permission should not be given except in exceptional cases. It is not, despite the readiness of some judges to advocate this step, intended to be a course to be adopted as a matter of course or perhaps as soon as a party threatens the tribunal that it will in any event appeal to the court against an unfavourable decision. The determination of jurisdiction is intended to be primarily a matter for the tribunal to decide and this is considered to be an incident of the parties having chosen arbitration as the means of dispute resolution.

PRELIMINARY ISSUES

The power to decide a Preliminary Issue is derived from s.47:

"47. Awards on different issues, etc.

(1) Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.

(2) The tribunal may, in particular, make an award relating—
(a) to an issue affecting the whole claim, or
(b) to a part only of the claims or cross-claims submitted to it for decision.

(3) ....."

The power is to be exercised in accordance with the tribunal's 'General Duty' under s.33 of the Act to:

"*adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matter to be determined*."

The principal objective of determining a Preliminary Issue is to save the parties time and expense by disposing of the whole – or a substantial element of the case.

The Preliminary Issue may involve determination of:
1. Jurisdiction
2. Issues of fact
3. Questions of construction
4. Liability
5. Claims for immediate payment of hire: Kostas Melas

It is often asserted that Preliminary Issues can prolong matters and increase cost. Thus Lord Scarman in Tilling v Whiteman[3] warned: "*Preliminary points of law are too often treacherous short cuts. Their price can be...delay, anxiety and expense"*

My experience is that, used judiciously, they can also be very effective. I would mention in this context particularly the reported case of Zhoushan Jinhaiwan Shipyard Ltd v Golden Exquisite Inc[4] which was an appeal from four arbitration awards of two tribunals (David Martin-Clark was a member of one of the tribunals and I was a member of the other). The Preliminary Issues in each case were (mutatis mutandis and paraphrasing a little):

> *"(1) Did the Builder remain obliged to deliver the Hulls to their Buyers by the contractually stipulated Delivery Date and/or is the Builder prevented from claiming any relief,* ***even if the Builder's allegations that delays to the construction of the Vessel were caused by alleged defaults of the Buyer [principally delays by the Buyers' supervisors in attending inspections, failure***

[3] [1980] AC 1

[4] [2014] EWHC 4050 (Comm)

by them to work overtime and failures of the Buyers to return approved drawings on time], were to be established*[5]*, *due to:*
i. The Builder's failure to give notice to the Buyer of such delays pursuant to Article VIII.2 of the Shipbuilding Contract and/or
ii. The Builder's failure to deliver the Hulls to their Buyers by [the long-stop cancelling date] as required by the Shipbuilding Contract.
(2) If the answer to the above question is "yes", was the cancellation of the Contract by the Buyer valid with the consequence that the Builder is required to repay to the Buyers or the Assignee Bank the instalments together with accrued interest thereon?
(3) If the answer to the above question is "yes", is the Builder entitled to withhold repayment on the basis of the defence of equitable set-off as pleaded?
(4) Whether in the light of our decisions on the first, second and third Preliminary Issues, the tribunal should issue an award giving effect to those decisions and, if so, whether it should impose any condition for doing so, and if so, what condition?"

Put more simply, the main question was whether the Builder could rely at all on the alleged Buyer defaults to resist the Buyers' claim to cancel the contracts. Except as regards interest, the tribunals (by a majority) gave the answer "yes" to all the questions raised by the first two preliminary issues, and "no" in relation to preliminary issue (3). (The tribunals came to different conclusions on whether interest on the Buyer's downpayments was payable). In the light of their decisions on the issues, the tribunals issued awards to the effect that (again simplifying a little):

i) The Buyer's cancellation of the contract was valid and justified;

ii) The Yard was obliged to repay to the Buyer or its assignee the full amount of the instalments advanced by the Buyer.

In substance the judge held that the tribunal's interpretation of the contracts was correct and that even if the yard's case had been substantiated on the evidence the Buyer's cancellation was valid.

Had the relevant questions not been decided as Preliminary Issues (and the same issues have been raised in many arbitrations on the same contract wording), it would have been necessary for the tribunal to have heard extensive evidence at an oral hearing of shipyard witnesses complaining about the details of the buyer's supervisors' activities and witnesses from the Buyer's side justifying their behaviour. The result was that this huge unnecessary expense was avoided and is perhaps likely to be avoided in other cases where this defence might have been run with ultimately the same result.

This is by no means the only example of the successful use of the possibility of deciding a Preliminary Issue. Clive Aston has helpfully referred me to another recent arbitration which will be reported shortly in Lloyds Maritime Law

[5] Emphasis supplied

Newsletter where taking a point of construction of the words "as presently performing" in a charterparty enabled a case to be effectively dealt with, again with the saving of what would have been considerable expense.

Hearings are inevitably very expensive and prolong the time taken to publish awards. Where hearings can be avoided or reduced in scope and length by taking appropriately worded and well considered points as Preliminary Issues the opportunity should not in my view be missed, with of course the warning of Lord Scarman in mind when the Preliminary Issue is inappropriate in principle or inappropriately worded.

Jurisdiction of the arbitral tribunal

30 Competence of tribunal to rule on its own jurisdiction.

(1)Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

(a)whether there is a valid arbitration agreement,

(b)whether the tribunal is properly constituted, and

(c)what matters have been submitted to arbitration in accordance with the arbitration agreement.

(2)Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.

31 Objection to substantive jurisdiction of tribunal.

(1)An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2)Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3)The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

(4)Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—

(a)rule on the matter in an award as to jurisdiction, or

(b)deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5)The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).

32 Determination of preliminary point of jurisdiction.

(1)The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.

A party may lose the right to object (see section 73).

(2)An application under this section shall not be considered unless—

(a)it is made with the agreement in writing of all the other parties to the proceedings, or

(b)it is made with the permission of the tribunal and the court is satisfied—

(i)that the determination of the question is likely to produce substantial savings in costs,

(ii)that the application was made without delay, and

(iii)that there is good reason why the matter should be decided by the court.

(3)An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.

(4)Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

(5)Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

(6)The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

33 General duty of the tribunal.

(1)The tribunal shall—

(a)act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and

(b)adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

(2)The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it.

47 Awards on different issues, &c.

(1)Unless otherwise agreed by the parties, the tribunal may make more than one award at different times on different aspects of the matters to be determined.

(2)The tribunal may, in particular, make an award relating—

(a)to an issue affecting the whole claim, or

(b)to a part only of the claims or cross-claims submitted to it for decision.

(3)If the tribunal does so, it shall specify in its award the issue, or the claim or part of a claim, which is the subject matter of the award.

67 Challenging the award: substantive jurisdiction.

(1)A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—

(a)challenging any award of the arbitral tribunal as to its substantive jurisdiction; or

(b)for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2)The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3)On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—

(a)confirm the award,

(b)vary the award, or

(c)set aside the award in whole or in part.

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

72 Saving for rights of person who takes no part in proceedings.

(1)A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—

(a)whether there is a valid arbitration agreement,

(b)whether the tribunal is properly constituted, or

(c)what matters have been submitted to arbitration in accordance with the arbitration agreement,

by proceedings in the court for a declaration or injunction or other appropriate relief.

(2)He also has the same right as a party to the arbitral proceedings to challenge an award—

(a)by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or

(b)by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him;

and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.

73 Loss of right to object.

(1)If a party to arbitral proceedings takes part, or continues to take part, in the 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—

(a)that the tribunal lacks substantive jurisdiction,

(b)that the proceedings have been improperly conducted,

(c)that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d)that there has been any other irregularity affecting the tribunal or the proceedings,

he may not raise that objection later, before the tribunal or the court, unless he 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.

(2)Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings who could have questioned that ruling—

(a)by any available arbitral process of appeal or review, or

(b)by challenging the award,

does not do so, or does not do so within the time allowed by the arbitration agreement or any provision of this Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling.