Kluwer Arbitration Blog

Everyone Should Do His Own or Everyone Should Have His Own? An Analysis on the Requirements of Conferral of the Arbitral Tribunal's Jurisdiction

Georgios Martsekis (PotamitisVekris Law Firm) · Saturday, May 30th, 2020

In a recent decision in ***XPL Engineering ltd. v. K & J Townmore Construction ltd. [2019] IEHC 665***, the Irish High Court decided to refer a construction dispute to arbitration on an application by the defendant, K & J Townmore Construction Ltd, for an order under Article 8 (1) of the UNCITRAL Model Law referring the parties to arbitration. Mr. Justice David Barniville reasoned that the defendant had sufficiently demonstrated that the requirements of Article 8(1) of the UNCITRAL Model Law had been met with regard to the pertinent terms of the arbitration agreements concluded between the parties despite the contentions by the plaintiff that no dispute existed in the terms of the arbitration agreement.

Background of the Dispute

The defendant, a construction company, engaged the plaintiff, an engineering company, as a subcontractor to provide mechanical works on two subcontracts each containing an arbitration clause. Shortly after the commencement of both subcontracts, the plaintiff claimed that monies were owed to it by the defendant under both subcontracts. The plaintiff issued plenary proceedings[1)] in 2014 against the defendant, which the latter asserted to have arisen out of disputes that the underlying subcontracts required to be referred to conciliation or arbitration.

The plaintiff contended that the requirements set forth in Article 8(1) of the UNCITRAL Model Law for the referral of the dispute to arbitration have not been complied with by the defendant and, therefore, the Court is not obliged to stay the proceedings and refer the parties to arbitration. Notably, it alleged, *inter alia*, that:

(a) there is no "*dispute between the parties*" for the purposes of the arbitration agreement contained in the subcontract and Article 8(1) of the UNCITRAL Model Law, and

(b) that the defendant requested the reference to arbitration later than its "*first statement on the substance of the dispute*".

The Decision of the Court

The Court ruled that the defendant had demonstrated that the prerequisites of Article 8 (1) of the UNCITRAL Model Law were satisfied by making its request for the referral to arbitration not later than the relevant point in time and that a dispute indeed existed between the parties.

There was a Dispute Between the Parties

Pursuant to the High Court's rationale, in determining whether a dispute exists, the court should not examine whether the position of the party is tenable or credible. The court does not apply the same test as in the process of determining whether summary judgment or leave to defend have to be granted. By virtue of the enactment of Section 9(4) of the English Arbitration Act 1996 the role of the court is *not* to assess the merits of the parties' pleadings. That would be intrusive upon the role of the arbitrator and radically undermine the arbitral process, which the parties entrusted with their case.

On the other hand, as decided by the English Court of Appeal in *Collins (Contractors) Limited v. Baltic Quay management (1994) Ltd [2004] 99 Con LR 1,* the mere making of a claim by the plaintiff does not qualify as a dispute unless it can reasonably be inferred, if not explicit by the parties' submissions, that the respondent rejects the plaintiff's claim and therefore a dispute exists. In the case at hand, the Irish Court agreed with this reasoning, and held that the defendant denied the plaintiff's entitlement to payment under the subcontracts and that it had suffered damages in that respect. Additionally, the correspondence exchanged between the parties further proved the existence of a dispute. The Court employed a liberal interpretation of the term "*dispute*" relying on the presumption that the parties intended a "one-stop" forum for determining their dispute. That assumption should readily be made upon the discharge of the burden of proof by the party requesting the referral to arbitration. As the Court highlighted, in case the parties disagree as to the existence of a "*dispute*", the court shall lean in favor of its existence. The above presumption is in accordance with a teleological interpretation of the term "*dispute*" that should praise the "*commercial purpose of the arbitration agreement*" meaning that the parties intended to have their dispute decided by the same tribunal. However, the interpretation of the said term should not overlook the instructive wording of Article II (1) of the New York Convention 1958 as to the meaning of the term "*dispute*": "*[…]* ***differences*** *which have arisen or which may arise between them in respect of a* ***defined legal relationship****, whether contractual or not […]*". That suggests that there must be at least a dispute on a point of law or fact and the claim should concern a legal right or obligation, or the reparation for breach of a legal obligation.

There is no Time Limit to make an Application

The Court correctly opined that Article 8(1) of the UNCITRAL Model Law does not set

out any particular time limit within which an application for reference to arbitration shall be made. What is required is that the request shall be made no later than the "*first statement on the substance*". It may be the case that a court is not satisfied with this *de minimis* requirement and refuses to grant the referral to arbitration. Likewise, an unreasonable delay in making such application to the court, which may cause prejudice and abuse of process, could estop the party from relying on the arbitration agreement and obtaining an order under Article 8(1) of the UNCITRAL Model Law. Absent an express time limit in making the said application, it falls within the discretionary power of the court to rule on that issue and the procedural law of the jurisdiction of the court first seized.

Which Applicable Law and How far should the Judicial Review go?

Even if not discussed by the Court, there are two important questions that might arise in similar cases.

First, the applicable law: It generates some discomfort that it is not clear under Article 8(1) of the UNCITRAL Model Law which law governs the assessment of the above questions. To a great extent, such examination is carried out under the spectrum of the national law tradition of the court seised to determine such jurisdictional issues. Nonetheless, this effect should not be dispositive *ipso facto* since an approach that furthers the harmonisation and unification of the legal framework for the settlement of international disputes should prevail over national law idiosyncrasies.

The second is, how far should the judicial review go: Although it remains unsettled whether the courts' review in order to determine jurisdictional issues under Article 8(1) of the UNCITRAL Model Law should be a *prima facie* review or an expansive and full review, it is well justified why courts should adopt the first solution. Courts have to consider that a high standard of review may well affect the role of the tribunal to rule on its own jurisdiction, pursuant to Article 16 of the Model Law, or even other courts' role throughout the arbitral process (whether the court at the seat of arbitration or the courts of enforcement of the award).[2)]

At any given time that the referral to arbitration becomes pertinent, courts and interested parties should scrutinise the requirements of the conferral of jurisdiction under the respective applicable body of law. More importantly, one has to pay close attention to the dynamics between court's permissible review for purposes of determining jurisdiction and the arbitral tribunal's *kompetenz-kompetenz*. Put simply, the fact that "everyone should do his own [case]" does not mean or result in that "everyone should have his own".[3)] It is imperative therefore to integrate the advantageous synergies developed between courts and arbitral tribunals yet thoughtfully consider how far each one should go.

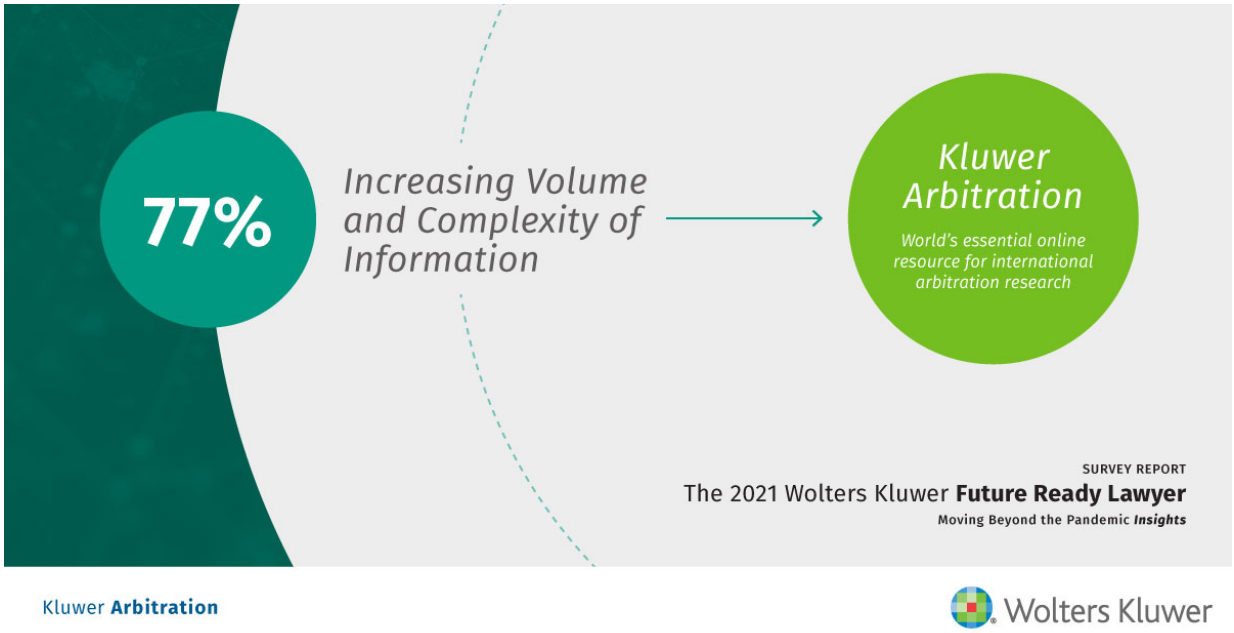
Conclusions

The reasoning of the Court is enlightening. Examining whether the parties intended to have their dispute resolved through arbitration should be the principal objective of the review of the authority first seised. Although not explicitly dealt with by the Court at hand, it is instructive to employ the most suitable standard of judicial review bearing in mind that a *prima facie* review would leave the determination of arbitral jurisdiction to the competent tribunal, whereas a full review might affect the commencement or continuance of arbitral proceedings while the court's final determination on jurisdiction is pending.

Kluwer Arbitration

The **2021 Future Ready Lawyer survey** showed that 77% of the legal professionals are coping with increased volume & complexity of information. Kluwer Arbitration is a unique tool to give you access to exclusive arbitration material and enables you to make faster and more informed decisions from every preferred location. Are you, as an arbitrator, ready for the future?

Learn how **Kluwer Arbitration** can support you.



References

↑1 This term refers to court proceedings with pleadings and hearing on oral evidence, which are initiated by a plenary summons, as opposed to summary proceedings that are held without pleadings and the hearing of which is based on affidavit with or without oral evidence.

↑2 Lawrence Boo, "The Enforcement of Arbitration Agreements under Article 8 of the Model Law" *in*: *UNCITRAL Model Law After Twenty-Five Years: Global Perspectives on International Commercial Arbitration*, 2013.

↑3 Those concepts emanate from Plato's and Aristotle's theory of justice as a sense of duty and system of rights, respectively. See: Afifeh Hamedi, "*The Concept of Justice in Greek Philosophy (Plato and Aristotle)*" 5, 27 Mediterranean Journal of Social Sciences MCSER Publishing, Rome-Italy, 2014.

This entry was posted on Saturday, May 30th, 2020 at 9:00 am and is filed under Applicable Law, Construction arbitration, judicial review, UNCITRAL Model Law
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.