Kluwer Arbitration Blog

Who is Most Competent? Some Comments on the Allocation of Jurisdictional Competence Under the English Arbitration Act 1996

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Monday, April 12th, 2010 · WilmerHale

In a post last year we considered the English Court of Appeal's judgment in the case of *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA Civ 755, where the Court of Appeal held that an order giving leave to enforce a French ICC arbitration award was rightly set aside by the High Court as it had been established, pursuant to section 103(2)(b) of the Arbitration Act 1996 ("the Act"), that as a matter of French law the respondent government was not a party to the arbitration agreement. The High Court and Court of Appeal agreed that an application under section 103(2) of the Act required a rehearing of the facts in contention (in *Dallah* the existence of an arbitration agreement), not just a review of the award.

It was suggested that *Dallah* highlighted a possible divergence between the apparent pro-arbitration and pro-enforcement attitude of English law, and the reality of practice before the English courts, where very limited deference is afforded to foreign arbitral awards in the circumstances of challenge to enforcement pursuant to section 103(2). As hoped, *Dallah* has now been granted leave to appeal to the Supreme Court, where the allocation of jurisdictional competence between the arbitral tribunal and the English courts – particularly as regards the finality of New York Convention awards – will hopefully be given close scrutiny.

Subsequent to *Dallah*, however, there have been a number of other cases that highlight the current tension between the English legal community's pro-arbitration and pro-enforcement attitude, and the Act, which may allocate jurisdictional competence to the English courts rather than international arbitral tribunals. This blog briefly reviews several such decisions, namely three recent challenges to the substantive jurisdiction of international arbitral awards pursuant to section 67 of the Act.

Who is Most Competent? Section 67 of the Act and Finality of Arbitral Decisions in England

Similarly as with *Dallah*, recent case law from the English courts indicates that when considering challenges to the substantive jurisdiction of an award pursuant to section 67, the English courts will conduct a complete rehearing into the matter, not just a review of the tribunal's determination. An arbitral tribunal's ruling as to whether there is a valid arbitration agreement; whether the tribunal is properly constituted; and what matters were submitted to arbitration in accordance with the arbitration agreement, are all subject to being reopened and reheard on the merits before the

English courts. Such challenges are available both at the enforcement stage, and as a preliminary question. Moreover, section 67 is a mandatory provision of the Act and parties agreeing to international arbitration in England cannot contract out of it.

In *Republic of Serbia v Imagesat International N*V [2009] EWHC 2853 (Comm) the High Court considered a challenge to the substantive jurisdiction of an ICC tribunal pursuant to section 67 of the Act. The tribunal, seated in England and applying English law, determined its jurisdiction as a preliminary issue in the arbitration. The ICC tribunal held that under the terms of reference it had substantive jurisdiction to deal with, among other things, the interesting question of whether Serbia had conferred on the ICC tribunal jurisdiction to determine if it was the "continuator/successor" of the former State Union of Serbia and Montenegro for the purposes of the latter's contract with Imagesat, and thus whether it was a party to the arbitration agreement.

For present purposes we are interested in the High Court's application of section 67 of the Act. In this regard the Court held, applying A*zov Shipping Co. v Baltic Shipping Co.*, that in hearing a challenge under section 67 "*it is for the court to determine whether the arbitrator had jurisdiction and whether he was correct in deciding that he did."* In undertaking this enquiry, the Court "*does so without any preconception that the arbitrator made the right decision."* The Court in *Serbia* went further still, stating that the "*arbitrator's determination [as to jurisdiction] can only be provisional."* That sweeping pronouncement is difficult to reconcile with the proposition that arbitral awards are final and binding between the parties, subject to limited judicial oversight. Equally, the tenor of the pronouncement is in some tension with the notion that that judicial review of arbitral awards is limited, with substantial deference being afforded to the arbitrators' decisions.

The English Court again considered its section 67 jurisdiction in *Habas Sinai ve Tibbi Gazlar Isthisal Endustri AS v Cometal SAL* [2010] EWHC 29 (Comm). The High Court did not consider it controversial that it would be conducting a rehearing of the arbitral tribunal's determination on jurisdiction. In that case Habas applied to set aside an interim final arbitration award on jurisdiction, which determined that the parties had concluded an arbitration agreement. The contract in question did not contain an arbitration clause but provided that "All the rest [of the terms] will be same as our previous contracts," of which there had been 14. The arbitral tribunal held that the reference to the terms of "our previous contracts" was to the terms of the 11 previous contracts between the parties, which were prepared by the respondent and contained London arbitration clauses (notwithstanding that the first three of the 14 contracts between the parties did not provide for arbitration).

Similarly, the February 2010 decision in *Norscot Rig Management PVT Ltd v Essar Oilfields Services Ltd* [2010] EWHC 195 (Comm) confirmed that a section 67 application involved a rehearing of the jurisdictional point. In *Norscot Rig* the applicant challenged the jurisdiction of the arbitrator to adjudicate certain set-offs and counterclaims by the defendant, Essar, in the arbitration. Those set-offs and counterclaims arose not by way of breach of the contract containing the arbitration agreement, but pursuant to breach of a second contract between the same parties, but which did not contain an arbitration clause. The arbitrator determined that he had jurisdiction under the arbitration agreement to determine the counterclaim. The High Court dismissed the section 67 challenge, holding that while the counterclaims did not "arise out of" the terms of the contract giving rise to the arbitration, they did "relate to" the contract under which the arbitration was commenced and therefore within the scope of the arbitration agreement.

Thus, as with the position under section 103, in considering a section 67 application, the Court is to

undertake a full rehearing on the merits of the jurisdictional issue under challenge. This wide jurisdictional oversight again highlights a divergence between the apparent pro-arbitration and pro-enforcement attitude of the English legal community, and the very broad scope of the English High Court's jurisdiction to hear section 67 challenges – where no deference is afforded to the international arbitral awards at issue.

Azov Shipping Revisited

In light of this tension it is worth returning to the leading authority on section 67 jurisdiction, *Azov Shipping*, and examining the High Court's interpretation of its jurisdiction in that case. Notably, during the course of the *Azov Shipping* saga, on three separate occasions three justices of the High Court, Rix J (as he then was), Longmore J (as he then was) and Coleman J, each had opportunity to comment on the Court's section 67 jurisdiction.

Rix J, the first of the three to interpret the scope of Court's oversight function pursuant to section 67, held that it enabled the challenger *"to present his case and challenge the opposing party's case on the question of jurisdiction with the full panoply of oral evidence and cross-examination so that, in effect, the challenge becomes a complete rehearing of all that has already occurred before the arbitrator."* Rix J considered Lord Saville's distinguished Departmental Advisory Committee Report on the Arbitration Bill 1996 (1996 DAC Report), stating that "[i]*t is not as though the court is required to review a challenge to the arbitrator's award on jurisdiction through the eyes of the arbitrator or on his findings of fact. As para 143 of the report on the Bill makes clear: 'A challenge to jurisdiction may well involve questions of fact as well as questions on law.'"*

Coleman J also justified a wide section 67 jurisdiction by reasoning that it *"is intended to reflect the principles that, whereas an arbitrator has a limited jurisdiction of a provisional nature in line with the internationally accepted doctrine of Kompetenz-Kompetenz, his determination cannot be conclusive between the parties because of the nature of the intrinsic issue, for his jurisdiction can only be founded on the very mutual assent which is in issue."* That view was based on the 1996 DAC Report, which advised that clause 30 of the Bill (later to become section 30 of the Act) *"states what is called the doctrine of Kompetenz-Kompetenz,"* but that "*clearly the tribunal cannot be the final arbiter of a question of jurisdiction, for this would provide a classic case of pulling oneself up by one's own bootstraps."*

Reallocation of Jurisdictional Competence in England: Room For Debate

The 1996 DAC Report and the subsequent enactment of the Act marked a watershed in arbitration law in England, in particular the Act banished the position that arbitrators could do no more than express a view as to whether they had jurisdiction or not. Tribunals could now determine their own jurisdiction, including in a final award, subject to rights of challenge in the courts. The Act, however, did not go as far as to adopt the classic doctrinal conception of *Kompetenz-Kompetenz*, as the 1996 DAC Report might appear to suggest.

That original conception of *Kompetenz-Kompetenz* (under German law) was historically understood as recognizing an arbitral tribunal's jurisdiction to finally decide questions regarding its own jurisdiction, without the possibility of subsequent judicial challenge or review. Instead, the Act adopts its own formulation of *Kompetenz-Kompetenz* (by way of both sections 7 (separability) and 30), just as almost every significant international arbitration jurisdiction has adopted (and continues to develop) its own unique concept of the doctrine, affording different degrees of priority and finality to an arbitral tribunal's exercise of its *Kompetenz-Kompetenz*, or more accurately, its

jurisdictional competence.

Recognizing this, together with the evolving law of international arbitration, there should continue to be debate about whether English law strikes the best balance between acceptable judicial oversight of the international arbitral process (so as to ensure it is not subject to abuses or practices that undermine its legitimacy as best practice for international dispute resolution), and the interests of party autonomy and the efficient and flexible resolution of international disputes.

In *Azov Shipping*, Rix J expressed a common pro-oversight sentiment, that "[u]l*timately, a question of justice, where it conflicts with a modest prejudice to expedition or increase in cost, must be given greater weight."* The other side of the coin is that none of the section 67 challenges in Azov Shipping, or the more recent *Serbia, Habas Sinai* or *Norscot Rig* cases were successful. In the words of Longmore J in Azov, the applicants, having already lost their jurisdictional challenges before the tribunal were *"effectively now having a second bite at the same cherry."* It can readily be seen how parties can abuse the section 67 procedure, and it is questionable whether the interests of justice are served by providing recalcitrant parties with an instrument of cost and delay.

Just as importantly, the ability to require as of right a complete rehearing of jurisdictional issues (both fact and law) already determined by an arbitral tribunal, significantly undermines the cornerstones of the international arbitration regime, being procedural neutrality, judicial non-intervention, party autonomy, flexibility of procedures, and the finality and enforceability of arbitral awards. The potential for section 67 to erode the efficacy of international arbitration as an international dispute resolution procedure must also be considered alongside the stated purposes of the Act, which are to "obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense" and that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."

These recent cases should again promote debate about whether the Act strikes the right balance between these competing interests.

Gary B. Born and Timothy J. Lindsay

This entry was posted on Monday, April 12th, 2010 at 5:10 pm and is filed under Domestic Courts, Europe, kompetenz-kompetenz, Other Issues
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.