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Under What Circumstances Will the English Courts Determine a Preliminary Point of Jurisdiction?

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In *Armada Ship Management (S) Pte Ltd v Schiste Oil and Gas Nigeria Ltd [2021] EWHC 1094 (Comm)*, the High Court considered the interplay between sections 32 and 72 of the Arbitration Act 1996 (the **Act**) and provided a rare indication of how the courts will consider section 32 applications, identifying when section 32 will be engaged and the circumstances in which an application is likely to succeed.

The court recognised section 72 as a vital protection for a party that does not take part in arbitral proceedings, and held that a section 32 application to determine a preliminary point of jurisdiction could not be granted where section 72 was engaged.

Factual Background

In August 2016, the parties entered into a contract (the **Charterparty**), pursuant to which the Claimant (Armada) time chartered a vessel to the Defendant (Schiste) for an initial period of two months. The Charterparty was in a standard form of time charterparties, the BIMCO Supplytime 2005 form, which allowed the parties to amend or opt out of terms they did not consider applicable to their agreement.

After several extensions of the Charterparty, a dispute arose concerning alleged unpaid invoices due from the Defendant to the Claimant under the Charterparty and the Claimant commenced arbitration proceedings in London in accordance with the provisions of the Charterparty.

The parties had amended Clause 34 of the Charterparty to provide for the appointment of a sole arbitrator, rather than three arbitrators. However, the parties' amendments meant that it was unclear on the face of the Clause how the sole arbitrator was to be appointed, because (i) the appointment process outlined in the Clause conflicted with the Terms of the London Maritime Arbitration Association (**LMAA**), which were said to apply to the appointment process; and (ii) the parties inserted a reference to the UNCITRAL Arbitration Rules, which provide for a different appointment mechanism to the LMAA Terms.

The Defendant failed to engage substantively with the Claimant's Reference to Arbitration and subsequent correspondence. In August 2020, after the Claimant's proposed sole arbitrator expressed reservations about his jurisdiction, the Claimant applied to the President of the LMAA

for the appointment of a sole arbitrator pursuant to section 11 of the LMAA Terms. Having not received a Defence or further correspondence from the Defendant in accordance with the instructions of the sole arbitrator appointed by the President of the LMAA, the Claimant sought the sole arbitrator's permission to make an application under section 32 of the Act seeking the court's determination of a preliminary point of jurisdiction.

Competing provisions of the Act?

Under section 32 of the Act, the courts may determine a question as to the substantive jurisdiction of an arbitral tribunal, either where an application is made by agreement of all the parties to the arbitration or with permission of the tribunal. In the latter case, applications are subject to the following conditions being satisfied:

- that the determination of the question is likely to produce substantial savings in costs;
- that the application was made without delay; and
- that there is good reason why the matter should be decided by the court.

In accordance with the scheme of the Act (and the expectations of the Departmental Advisory Committee on Arbitration), section 32 applications are relatively rare in practice, because questions of jurisdiction are resolved primarily before the tribunal itself (in accordance with section 30 of the Act).

Section 72 of the Act reserves certain substantive rights of parties to arbitral proceedings who take no part in those proceedings, namely the (i) ability to question the validity of an arbitration agreement, the proper constitution of the tribunal, and what matters have been submitted to arbitration under the arbitration agreement; and (ii) right to challenge an award on the grounds of lack of substantive jurisdiction or serious irregularity in accordance with sections 67 and 68 of the Act, respectively.

Judgment

In his decision, Cockerill J first considered the "*threshold question*" of the interrelationship between sections 32 and 72 of the Act. Cockerill J held that in circumstances where section 72 of the Act is engaged, the granting of an order under section 32 of the Act runs the risk of "*denuding s 72 of the important protection which lies at its heart.*" In explanation, he observed that, "[u]*nder section 32 a party may lose a right to object to jurisdiction if it takes part in the determination but, if it does not, it is not being heard on jurisdiction in relation to a determination which prima facie binds it.*" Cockerill J considered that, "*in the light of section 72*", that would "*put* [] *the non-participant in an unacceptable position.*"

Given the Defendant's non-participation in proceedings and the engagement of section 72 of the Act, the court therefore considered it inappropriate to grant the application.

Despite concluding that section 32 was not engaged, the Court went on to consider the circumstances in which such an application would be successful. In its "*non-binding indication*" the court outlined a two-stage process for determining section 32 applications:

- "*the court has to be satisfied that the section 32 conditions are met*"; and
- "*the Court has to be satisfied that the declarations sought concern questions of "substantive jurisdiction" and that the position in that respect is as the Claimant contends it to be*".

On the facts, having the court determine the preliminary question of jurisdiction was likely to produce substantial cost savings, the application was made without undue delay, and there was clearly a good reason that the court should give a declaration – to determine the proper construction of Clause 34 of the Charterparty and thus the correct method for appointment of the sole arbitrator. The court was therefore satisfied that the section 32 conditions would have been met. Further, the declaration sought was one of "substantive jurisdiction" within the meaning of the Act. Had the Defendant taken part in the proceedings and section 72 not been engaged, the application would have been successful.

Comment

The court's "non-binding indication" in *Armada* provides a rare glimpse of how the courts will consider the merits of applications made under section 32 of the Act. In addition, the decision is noteworthy for the court's confirmation that a party does not need to confirm its intention not to participate in arbitral proceedings for section 72 of the Act to be engaged.

In this regard, while a party has the right to challenge the decision of an arbitral tribunal under section 72 of the Act, section 72 does not afford a party the right to challenge an order of the court. A section 32 order would therefore appear to bar a subsequent section 72 application to set aside or vary that order. Further, any subsequent declaration sought by a party under section 72 against a determination of a tribunal would run the risk of being in conflict with, or subject to an estoppel by, an earlier order of a court granted under section 32.

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