Kluwer Arbitration Blog

Out of Order: Seeking the Court's Assistance Under Section 42 of the English Arbitration Act

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One of the complaints levelled at arbitration is that tribunal orders lack teeth because, unlike a court, arbitrators do not have wide-ranging powers to enforce interlocutory measures against a party. Tribunals must often rely on the courts of the seat to enforce interlocutory measures.

In December 2022, the English Court of Appeal ("**CoA**") in *S3D Interactive Inc v Oovee Ltd [2022] EWCA Civ 1665* ("**S3D**") considered for the first time the circumstances in which applications under s.42 of the English Arbitration Act ("**AA 1996**"), can be used to ensure a recalcitrant party's compliance with a tribunal's peremptory order.

In England, unlike many other jurisdictions, provisional relief ordered by a tribunal is not treated as an award for the purpose of judicial enforcement, and is instead subject to a distinct statutory scheme for enforcement under s.41 and s.42 of the AA 1996.

The CoA decision in S3D, endorsing the Commercial Court's decision at first instance in *RQP v ZYX [2022] EWHC 2949 (Comm)* ("**RQP**"), should provide comfort to parties seeking to enforce interlocutory measures in England as it held that a court need not consider the tribunal's jurisdiction as a threshold issue before enforcing a peremptory order.

Section 42 AA 1996 (which can be disapplied by agreement) provides that the tribunal, or a party (with the tribunal's permission) may apply to the English court for an order compelling a defaulting party to comply with a peremptory order made by the tribunal. Under s.41(5) AA 1996, if a party unjustifiably fails to comply with any order of the tribunal, the tribunal may make a peremptory order (requiring a defaulting party to comply with the original order within a prescribed time).

The First Instance Decision

In *RQP*, Butcher J in the Commercial Court granted ZYX's application for an order under s.42. RQP had failed to comply with a London-seated LCIA tribunal's order to provide security ostensibly because it had become impecunious. RQP, resisting the application, argued that ZYX had repudiated the arbitration agreement, depriving the tribunal of jurisdiction, and therefore of its status as "tribunal" and so it could not consent to the s.42 application.

Butcher J rejected this argument. This was partly because if the fact of a jurisdictional challenge was enough to mean that the apparent tribunal did not count as a 'tribunal' for the purposes of s.42, that would allow a party "*to prevent the court exercising a power which is there precisely to help support the tribunal in the face of recalcitrance*" by raising a jurisdictional challenge.

Butcher J also considered the more interesting question of *how if at all* the existence of a jurisdictional challenge should factor into the decision of whether or not to make an order under s.42.

The courts' approach when exercising the power under s.42 is to treat it as a matter of limited discretion, such that a court will not *"routinely consider whether it would have made the order"* that the tribunal made, and its review will be limited to whether the order is *"required in the interests of justice to assist the proper functioning of the arbitral process"* (Emmott v Michael Wilson & Partners (No2) [2009] EWHC 1 (Comm), ¶¶59-62).

Butcher J described Emmott as giving *"helpful guidance"* on the exercise of discretion. He held that *"the fact that the jurisdiction of the arbitrator is challenged is a material, and may be a very material, factor in whether the court should grant an order under s.42"*. He referred to three (non-exhaustive) factors affecting that significance:

> *(a) the apparent strength of the challenge, if the court can take a view on this;*
>
> *(b) what it is that the tribunal has ordered which the court is being asked to require compliance with; and*
>
> *(c) the stage in the proceedings at which the challenge to the jurisdiction of the tribunal is made.*

Butcher J concluded that the existence of the extant jurisdictional challenge was not a significantly weighty factor in this case. However, he granted permission to appeal on whether it was an error of law to make the s.42 order without first determining jurisdiction.

The CoA's Decision

The CoA endorsed Butcher J's conclusion. Although the case had settled, the CoA considered that the appeal "raised a point of general interest." It therefore gave judgment, explaining why it would have dismissed the appeal, holding that the jurisdiction of the tribunal is not a threshold issue when enforcing a peremptory order.

The CoA said the key to addressing the issue was consideration of the AA 1996's provisions, governing how and when jurisdictional challenges to the tribunal may be made to the court. Beginning with the *kompetenz kompetenz* principle enshrined in s.30 of the AA 1996, which allows the tribunal to rule on its own jurisdiction but not to be the final arbiter of the matter, it noted that s.30(2) provides that a party may challenge a tribunal's jurisdictional determination in court in one of three ways: (i) by challenging an award under s.67; (ii) resisting enforcement under s.66; or (iii) by an application under s.32. Only s.32 permits a party to challenge jurisdiction before the tribunal

has itself ruled on its jurisdiction and "*recourse to the court under s.32 is very much the exception*." Furthermore, pending applications under s.67 and s.32 do not deprive a tribunal of power to make an award or further award (s.32(4) and s.67(2)).

The CoA noted that s.42 empowers the court to make orders to support the arbitral process. Requiring a court to first satisfy itself of the tribunal's jurisdiction before exercising such powers

> *… would cut across the careful structure of the limited circumstances in which the Court is entitled to address and determine a challenge to the jurisdiction of the tribunal during the course of the reference, a structure which is itself calibrated to assist the arbitral process.*

The CoA also agreed with Butcher J's conclusion that "tribunal" in s.42 includes a tribunal whose jurisdiction has been challenged. This conclusion was buttressed by the sense in which the word is used in other sections of the AA 1996 and the 'established principle" that where the same words are used more than once in a statute, there is a presumption that they have the same meaning.

It further held that the appellant's position "*… would have consequences which are inconsistent with the principles in s.1 of the Act*." This was because the court would either have to decide whether the tribunal had jurisdiction, undermining the principle of minimum intervention by the courts (section 1(c)), or would have to refuse to consider the matter and necessarily refuse the s.42 application, thus undermining the principle of efficacy of the arbitral process (section 1(a)).

The CoA passed no comment on Butcher J's reasoning in relation to the extant jurisdictional challenge. However, there was a clear *obiter* endorsement of one of the conclusions which followed: that the s.42 application had to be determined in the context that there was *"an arguable but unresolved case that the jurisdiction of the tribunal had been terminated"*, and that nothing more could be said without impermissibly considering the substantive jurisdictional question, a conclusion that the CoA called *"plainly correct"*.

Commentary

The CoA's clarification is to be welcomed. Importantly, parties should not agree to disapply s.42 if they wish to preserve their ability to ensure compliance with a tribunal's peremptory orders in circumstances where the tribunal's own range of sanctions (under ss.41(6) and (7)) are unlikely to achieve this.

The approach to the question of the tribunal's jurisdiction under s.42 in England contrasts with the approach taken by some courts in the United States where a tribunal's interlocutory orders are treated as awards and are subject to the court's authority "*to review and vacate an arbitration panel's interim order*" under 9 U.S.C. § 10(a) (Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 264 F. Supp. 2d 926, 937 (N.D. Cal. 2003)) (*see also* Ecopetrol S.A. v. Offshore Expl. & Prod. LLC, 46 F. Supp. 3d 327 (S.D.N.Y. 2014); Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019 (9th Cir. 1991)). The CoA's confirmation that the tribunal's jurisdiction is not a threshold question on a s.42 application confirms the less interventionist and more deferential approach of the English courts.

However, the approach to exercising the discretion under s.42 at first instance, left open and arguably endorsed by the CoA, opens the door to new arguments that parties resisting a s.42 application can make if there is an extant arguable challenge to the tribunal's jurisdiction.

First, where compliance with the order could cause real prejudice (unlike this case where the order was for security for the award and for costs), there may well be scope for the party concerned to argue that the pending jurisdictional challenge makes an order under s.42 inappropriate.

Second, where an order is sought at an early stage of proceedings, or where there is a short gap between the tribunal's initial interim measure and the application for an order under s.42, there may be scope to argue that the court should not (at least yet) order compliance with the order where there is an arguable case that the tribunal lacks jurisdiction.

Either of these arguments may carry further force if the tribunal is to determine its own jurisdiction before any merits hearing, and such determination has not yet been made.

Finally, while the Law Commission's consultation paper on reform of the AA 1996 reflects the view that s.42 does not require amending in favour of the court rubber-stamping peremptory orders, it raises the question of whether s.42 could also be used to enforce emergency arbitrator orders. This may lead to amendment of s.42 to make this clear.

The views in this article are the authors' own and do not necessarily reflect those of Enyo Law LLP or Holwell Shuster & Goldberg LLP.

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