TENTH ANNUAL REVIEW OF THE ARBITRATION ACT 1996

Threshold Questions: Who Should Decide – Arbitrators or Courts

Rob Merkin
Southampton University; Barlow, Lyde & Gilbert

1 Statutory framework for resolution of threshold jurisdictional issues

- The principle of separability: AA 1996, s 7
  Arbitrability of disputes as to existence, validity and enforceability of main agreement

- The principle of competence-competence: AA 1996, s 30
  Provisional right of arbitrators to determine substantive jurisdiction – existence of arbitration clause, scope of arbitration clause, constitution of tribunal

- Relationship between separability and competence
  Vee Networks v Ltd v Econet Wireless International Ltd [2005] 1 Lloyd’s Rep 192.

  (a) Allegation that arbitration clause is void – arbitrators can resolve issue under s 30
  (b) Primary allegation that main agreement is void – arbitrators entitled to resolve issue by reason of s 7, decision one of law capable of challenge under s 69 only
  (c) Allegation that main agreement and arbitration clause are void – arbitrators entitled to resolve issue of validity of main agreement by reason of s 7, subject to challenge under s 69; if challenge to arbitration clause maintained, then arbitrators can resolve issue under s 30

2 Resolution of disputes over jurisdiction

- Contesting jurisdiction before the arbitrators: AA 1996, ss 30-32
  The operation of s 32

- Appeal against jurisdictional ruling of arbitrators: AA 1996, s 67
(a) Rehearing or review? *Electrosteel v Scan-Trans Shipping* [2003] 1 Lloyd’s Rep 190, but contrast Morison J in *Fiona Trust & Holding Corporation v Privalov* [2006] EWHC 2583 (Comm) (rehearing approach “unfortunate”)

(b) Admissibility of fresh evidence on appeal – *Primetrad v Ythan* [2006] 1 Lloyd’s Rep 457

- Commencing proceedings in alleged breach of arbitration clause: AA 1996, s 9, court to stay unless arbitration clause is null and void, inoperative or incapable of being performed

  Approaches open to the court:

  (a) order a trial
  (b) deal with the matter on the evidence before the court
  (c) remit to the arbitrators in all circumstances
  (d) remit to the arbitrators unless there is clearly no arbitration clause

  Should there be a distinction between

  (a) the existence of a dispute – no power to refuse stay, *Halki Shipping v Sopex Oils* [1998] 1 Lloyd’s Rep 49 (but should a refusal to pay an admitted debt be a “dispute” – *Exfin Shipping v Tolani Shipping* [2006] 2 Lloyd’s Rep 389)
  (b) the existence of the arbitration clause – stay to be refused as otherwise there would be a backdoor finding of validity, *Birse v St David* [1999] BLR 194, *Anglia Oils v Marine Champion* [2002] EWHC 2407 (Admlty)
  (c) the scope of the arbitration clause – *Al Naimi v Islamic Press Agency* [2000] 1 Lloyd’s Rep 522

- Application for injunctive or declaratory relief: AA 1996, s 72

  Now confined to a case in which the claimant under s 72 has not instituted proceedings in England and has refused to participate in the arbitration

  (a) not open to a person participating in arbitration as applicant (*Vale do Rio v Shanghai Bao* [2000] 2 Lloyd’s Rep 1) or defendant (*ABB Lummus v Keppel Fels* [1999] 1 Lloyd’s Rep 467)
  (b) not available if the only challenge is to the main agreement: separability under s 7 means that the arbitrators can still hear an action involving the validity of the main agreement – *Fiona Trust v Privalov* [2007] EWCA Civ 20
(c) if substantive proceedings are brought in England and the defendant seeks a stay under s 9, there is generally no basis for the grant of an injunction under s 72 in favour of the claimant and the only question is whether a stay should be granted – *Fiona Trust v Privalov* [2007] EWCA Civ 20

- Jurisdictional issues at the enforcement stage: AA 1996, ss 66 and 103

3 Other problems

- Limited arbitration clauses – quantum but not liability clauses in insurance cases *Insurance Corporation of the Channel Islands v McHugh* [1997] LRLR 94

- Set off. Does an arbitrator have jurisdiction over a claim giving rise to a transaction set off – *Benford v Lopecan* [2004] 2 Lloyd’s Rep 618, *Econet Satellite Services v Vee Networks* [2006] 2 Lloyd’s Rep 423