The Existence of the Arbitration Agreement – The "Negative Effect" of the Competence-Competence Principle in English and Irish Law.

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Can't get no satisfaction…

Relevant Provisions

- Art 16 UNCITRAL MAL
  - Power of tribunal to award on existence or validity of arbitration agreement
  - In a preliminary ruling or in a final award on the merits
  - Arbitration can proceed pending court decision on preliminary ruling
- Section 30-32 of the Arbitration Act 1996
- Institutional Rules
  - Art 21(1) UNCITRAL
  - Art 6(3) ICC 2012
  - Art 23(1) LCIA

Effect of the Principle

- Arbitrators as sole judges of their own jurisdiction? (Kompetenz-Kompetenz) ✗
- Arbitrators' decisions on jurisdiction subject to *subsequent* review ✓
  - Arts 34 & 36 UNCITRAL MAL
  - S67 Arbitration Act 1996
  - Art V New York Convention
- Arbitrators as *prima facie* judges of their own jurisdiction?

Positive and Negative Effects

- Positive (i.e. can do)
  - Parties cannot delay the proceedings by simply alleging that the Agreement is invalid or non-existent, the tribunal can rule on jurisdiction, proceed with the arbitration, and award on the merits – without waiting for the outcome of a court decision on the jurisdiction issue
  - Parties with legitimate concerns about invalidity / existence can have them heard by the tribunal, subject to review thereafter
- Negative (i.e. cannot do)
  - Courts cannot interfere until the arbitrators have first determined their jurisdiction – court review arising only by way of action to enforce or set-aside the award ?????

Relevant Provisions (2) – Negative Effects

- "Courts shall/should not intervene"
  - Article 5 UNCITRAL MAL
  - Section 1 Arbitration Act 1996
- Staying provisions
  - Art II New York Convention
  - Art 8 UNCITRAL Model Law
    - "unless **it finds** the arbitration agreement is *null and void ….*"
  - Section 9(4) Arbitration Act 1996
    - "unless **satisfied** that the arbitration agreement is *null and void ….*"
  - Art 1458 French Code of Civil Procedure

Where the tribunal is already seized of the dispute

- France
  - *Coprodag v. Dame Bohin* 1995 Rev Arb 617 (Cour. Cass.)
    - Appeal against First instance and Court of Appeals decision that agreement was void and tribunal invalidly constituted
    - "the arbitral tribunal alone has jurisdiction to rule on the validity or limits of its appointment, provided that question has been brought before it"
    - Held that court was not properly seized of a question concerning the constitution of the tribunal.
    - i.e. no avenue of recourse until award rendered

A Marriage of Principles

- Gaillard and Banifatemi in *Enforcement of Arbitration Agreements and International Arbitral Awards* (1998)

> "In other words, the courts should limit, at that stage, their review to a **prima facie** determination that the agreement is not 'null and void, inoperative or incapable of being performed'. This principle is known as the 'negative effect of competence-competence, which means that the **arbitrators must be the first (as opposed to the sole) judges of their own jurisdiction and that the courts' control is postponed to the stage of any action to enforce or to set aside** the arbitral award rendered on the basis of the arbitration agreement. As a result, a court that is confronted with the question of the existence or validity of the arbitration agreement must refrain from hearing substantive arguments as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had an opportunity to do so."

Policy considerations in favour:

- Prevention of delaying tactics
- Centralisation of decision making

Comparative Approaches

- Swiss Federal Tribunal *Fondation M v. Banque X (1996)*
  - if the State court is seized of a request to decline jurisdiction in favour of an arbitral tribunal and if the arbitral tribunal has its seat in Switzerland, the court shall decline jurisdiction **if a summary examination** of the arbitration agreement does not allow it to find that the agreement is null and void, inoperative or incapable of being performed.
- French Cour de Cassation *Copropriété Maritime Jules Verne v. American Bureau of Shipping (2006)*
  - The combination of the principles of validity and competence-competence prohibit, as a consequence, the French judge from carrying out a substantive and thorough review of the arbitration agreement, irrespective of where the arbitral tribunal has its seat. The only limit to the judge's examination of the arbitration clause, before being asked to review its existence or validity in the context of an action brought against the award, is whether that **clause is manifestly null** or inapplicable.
- Indian Supreme Court: *Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, [2005] 7 SCC 234
  - A system which allowed the courts to make a final determinative conclusion on the validity of the arbitration agreement would require the arbitration to be stayed – "This evidently defeats the credo and ethos of the [Indian Arbitration] Act, which is to enable expeditious arbitration without avoidable intervention by the judicial authorities .... The two basic requirements, namely, expedition at the pre-reference stage, and a fair opportunity to contest the award after full trial, would be fully satisfied by interpreting Section 45 as enabling the court to act on a **prima facie** view.

English Approaches

- Ahmad Al Naimi v. Islamic Press Agency [2000] 1 Lloyd's Rep 522 (CA), endorsing
- *Birse Construction Ltd v. St David Ltd* [1999] BLR 194

"The dominant factors must be the interests of the parties and **the avoidance of unnecessary delay or expense**. Where the rights and obligations of the parties are clear the court should enforce them. Unless the parties otherwise agree section 30 of the Arbitration Act, 1996 now permits an arbitral tribunal to decide questions of jurisdiction where it might not previously have been competent to do so. **It is not mandatory and.. the existence of the power does not mean that a court must always refer a dispute about whether or not an arbitration agreement exists to the tribunal whose competence to do so is itself disputed.** The Act does not require a party who maintains that there is no arbitration agreement to have that question decided by an arbitral tribunal"

English Approaches (2)

- *Vale do Rio Doce Navigacao SA v. Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep 1 –
  - Suggestion that Court may only intervene under s32 after appointment of tribunal:
  - Thomas J – "in accordance with s 1(c), **the court must approach the application on the basis it should not intervene except in the circumstances specified in that part of the Act**.

    I accept the owners' submission that the use of the word 'should' as opposed to the word 'shall' shows that an absolute prohibition on intervention by the court in circumstances other than those specified in Pt 1 was not intended. That submission seems to me to have force as the view is expressed in the DAC report that a mandatory prohibition of intervention in terms similar to art. 5 of the Model Law was inapposite. However it is clear that the general intention was that the courts should usually not intervene outside the general circumstances specified in Pt 1 of the Act....

    The Act sets out in very clear terms the steps that a party who contends that there is another party to an arbitration agreement should take. First he should appoint an arbitrator. If the other party appoints an arbitrator, then s31(1) makes it clear that his appointment of an arbitrator does not prevent him challenging the substantive jurisdiction of the tribunal.

Recent Case Law

- ***AES Ust-Kamenogorsk Hydropower Plant LLC v. Ust Kamenogorsk Hydropower Plant JSC*** [2011] EWCA Civ 647 Rix LJ – anti suit injunction
- it seems to me to **be going too far** to say that because an arbitral tribunal " *may* rule on its own substantive jurisdiction" (emphasis added), therefore the court ought always to regard the position as though there **is an *obligation*** on the parties and/or on the arbitrators for the arbitrators to rule on any dispute about their substantive jurisdiction. Anything may happen. The potential dispute may not be pressed. The disputing party may stand aloof and come to court. The parties may join issue in the arbitration, but agree to go to court for a preliminary issue on jurisdiction. The parties may not be able to agree on such a preliminary issue, but an application may be made to the court with the permission of the arbitrators for such a preliminary issue. The court may or may not accept such an application.
- In such circumstances, I **do not with respect agree** with an interpretation of Vale do Rio which regards it as laying down a rule of jurisdiction that it is in **all circumstances necessary for a party who wishes to raise with the court an issue of the effectiveness of an arbitration clause first to commence an arbitration and go through the procedures and provisions of sections 30-32 and/or section 67 and/or section 72** . If, however, that is what Thomas J was saying in Vale do Rio , then I would not with respect agree with that view. In any event, since the alleged party to the charter and the arbitration agreement in that case was not as yet a party to the court proceedings (not having been served) and only a non-party (the brokers) were involved in the court proceedings, I would not regard any view expressed there as other than **obiter**. Thomas J did not in any event there consider the role of section 37 of the SCA 1981 .
- In my judgment, at any rate in a case **where no arbitration has been commenced** and none is intended to be commenced, but a party goes to court to ask it to protect its interest in a right to have its disputes settled in accordance with its arbitration agreement, it is open to the court to consider whether, and how best, if at all, to protect such a right to arbitrate. Whether it will assist a claimant at all, and if so, how, is a matter for its discretion: but it would to my mind be an error of principle and good sense for the court to rule that as a matter of jurisdiction, or even as a matter of the principled exercise of its discretion, it has no possible role in the protection and support of arbitration agreements in such a context.

Recent Case Law (2)

- ***Excalibur Ventures LLC v. Texas Keystone Inc*** [2011] Arb LR 27 – Gloster J – anti arbitraton injunction, ICC arbitration in New York, non-signatories.
- "Cost and Case Management Considerations"
- "strong and arguable case that the signatories were not parties" / "grounds which in an English Court were not "legally or evidentially convincing"
- English Court best placed to decide, given non-signatories had no connection with New York or ICC, and claimant had earlier commenced litigation in England
- To subject the non-signatories to the New York Courts would be "oppressive"

Recent Case Law (3)

- ***Claxton Engineering v. TXM*** [2011] Arb LR 16 – Rix LJ (anti-arbitration injunction)
  - Leave to appeal a decision at first instance that a Hungarian arbitration clause did not exist on ex post facto evidence grounds ("post-contractual materials")
  - "arguable issue" that the courts should not interfere where there was no common ground that the arbitral jurisdiction be decided by the English courts
  - "arguable issue suitable for appeal as to the effect of the Ahmad Al *Naimi* judgment"

Written Arbitration Agreement

- New York Convention
- Arbitration Act 1996
- Art 7 UNCITRAL MAL

Is Writing Enough?

- *Midgulf v. Groupe Chimique Tunisien (2010) 2 IALR 50*
  - *Tunisian Court*
  - *English Court*

Respect for the Negative Effect in Ireland

- **Winthrop Engineering and Contracting Ltd v Clery and Doyle Contracting Ltd [2011] IEHC 249** – whether to grant a declaration that sitting arbitrator lacked jurisdiction as no arbitration agreement existed.
- Laffoy J at Para 3.4 :
- ", the core procedural question is what, if any, power is conferred on the Court to determine the type of issue which arises on this application, namely, whether an **arbitration** agreement exists and Mr. O'Brien has jurisdiction to arbitrate the dispute between the parties in this case. **I can find nothing in those Acts [i.e. the pre-2010 Irish Legislation] analogous to the provisions of Article 16 of the Model Law.**
- There is long established authority in the United Kingdom that the Court has an inherent power to make a declaration that the arbitrator has no jurisdiction to hear or determine a claim, but the exercise of the power is discretionary. A similar inherent jurisdiction has been recognised in this jurisdiction. … outside the **Arbitration** Acts 1954 – 1998, the High Court has jurisdiction to grant declaratory and injunctive relief in respect of the **arbitration** process…*Anglo-Irish Banking Corporation v. Tolka Structural Engineering* [2005] IEHC 239 is a recent example of a case in which a party successfully applied for a declaration that the arbitrator lacked jurisdiction to decide a dispute."
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What type of "satisfaction" do the Irish Courts seek?

- ***Barnmore Demolition and Civil Engineering Ltd v. Alandale Logistics Ltd* [2010] IEHC – Feeney J , 11 November 2010.**