# Arbitration Law Update

## 1. The Agreement to Arbitrate

### Fiona Trust & Holding Corporation & 20 others v Yuri Privalov & 17 others (2007) 4 All ER 951

The facts are fairly brief. The Appellant commenced court proceedings to seek a declaration that the certain Charterparties entered into with have been validly rescinded because the charterparties were procured by the bribery of a number of senior officials in the Russian state owned group of companies Sovcomflot by a Mr Nikitin. The Respondents applied for a stay under section 9 of the Act citing an arbitration clause in the Charterparties.

The Charterparties incorporated the standard form Shelltime 4. Clause 41 provided:

"41.(a) This charter shall be construed and the relations between the parties determined in accordance with the laws of England.

(b) Any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree.

(c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving written notice of election to the other party, elect to have any such dispute referred . . . . to arbitration in London, one arbitrator to be nominated by Owners and the other by Charterers, and in case the arbitrators shall not agree to the decision of an umpire, whose decision shall be final and binding upon both parties. Arbitration shall take place in London in accordance with the London Maritime Association of Arbitrators, in accordance with the provisions of the Arbitration Act 1950, or any statutory modification or re−enactment thereof for the time being in force

(i) A party shall lose its right to make such an election only if:
(a) it receives from the other party a written notice of dispute which
(1) states expressly that a dispute has arisen out of this charter;
(2) specifies the nature of the dispute; and
(3) refers expressly to this clause 41(c)
And
(b) it fails to give notice of election to have the dispute referred to arbitration not later than 30 days from the date of receipt of such notice of dispute"

The Appellant's case for resisting the stay was put on two grounds:

1. whether, as a matter of construction, the arbitration clause is apt to cover the question of whether the contract was procured by bribery and [The Arising Under point],
2. whether it is possible for a party to be bound by submission to arbitration when he alleges that, but for the bribery, he would never have entered into the contract containing the arbitration clause [The Severability point].

Lord Hoffmann:

"Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language."

Lord Hoffmann went on to ask himself and answer the question he saw as central to this rational commercial purpose:

If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another, one would need to find very clear language before deciding that they must have had such an intention.

Lord Hoffmann also considered that Section 7 of the Act supported his views that businessmen wanted a single forum for all disputes:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non−existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

Armed with this presumption in favour of a single forum Lord Hoffmann considered the particular points.

## The Arising Under Point

Lord Hoffmann pointed out that all these cases that explained the differences between the different wording had in this case fallen upon deaf ears:

It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions "arising under this charter" in clause 41(b) and "arisen out of this charter" in clause 41(c)(1)(a)(i) as mutually interchangeable.

Well you can all fear no more. In two short sentences they are gone forever.

I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law.

So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at paragraph 17) that the time has come to draw a line under the authorities to date and make a fresh start.

The approach to construing such clauses in future is:

In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

## The Severability point

Section 7:

"Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non−existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement."

Lord Hoffmann said of the appellant's argument:

It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement.

Lord Hope said:

The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do. That being the situation in this case, the agreement to go to arbitration must be given effect.

Stretford v Football Association [2007] EWCA 21 March 2007 & Sumukan Ltd v The Commonwealth Secretariat

Article 6 rights:

"In the determination of his civil rights and obligations …. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

The Court reviewed the Act and drew attention to Sections 24, 33, 67, 68, 69, 70 and 71 and said:

These provisions of the 1996 Act are important in the context of article 6 of the Convention because they provide for a fair hearing by an impartial tribunal. Moreover, the mandatory provisions ensure that the High Court has power to put right any want of impartiality or procedural fairness, so that the only provisions of article 6 which could arguably be said not formally to be met by the Act are the requirements that the hearing be in public, that the members of the tribunal be independent, that the tribunal be established by law and that the judgment be pronounced publicly.

This leaves the public hearing point:

Many of the authorities in this area have been cited in our decision in *Stretford v The Football Association Ltd*. Principles relevant to this appeal, as demonstrated by those authorities, seem to us to be the following. First the court has recognised that in "civil

matters, notably in the shape of arbitration clauses in contracts…the waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention." [see *Deweer*] Second thus there is no reason in principle why at least certain Article 6 rights may not be waived, since that is the effect of an arbitration clause. Third, a condition of waiver must be the absence of constraint and (what may come to the same thing) a waiver must be voluntary and not compulsory. Fourth, in considering to what extent Article 6 has been waived and its impact, account must be taken not only of the arbitration agreement between the parties and the nature of the arbitration proceedings, but also of the legislative framework providing for such proceedings in order to determine whether domestic courts retained some measure of control of the arbitration proceedings.[see *Nordstrom-Janzon*] Fifth it is not a requirement that national courts must ensure that all aspects of Article 6 are complied with – for example arbitration is intended to be private- and it is for the contracting state in principle to decide itself on which grounds an arbitral award should be quashed. [see again *Nordstrom-Janzon*]. Sixth, there may be Article 6 rights which are difficult to waive, e.g. the right to an impartial judge.

These principles are to be found in Sumukan.

The Court of Appeal concluded in Paul Stretford:

In our judgment the cases support the general proposition that, where parties have voluntarily or (as some of the cases put it) freely entered into an arbitration agreement they are to be treated as waiving their rights under article 6.

Thus, as we see it, questions such as whether the disciplinary proceedings involve a determination of the parties' civil rights and obligations and, if so, whether any of their rights under article 6 have been validly waived and/or, in the absence of waiver, whether any of Mr Stretford's rights have been infringed, are all within the jurisdiction of the arbitrators and thus for them to determine.

## 2. Appointment of Tribunal

Sumukan Ltd v The Commonwealth Secretariat [2007] EWCA Civ 1148

The Court of Appeal held:

In my view Sumukan are entitled to say that even if they must be taken to have agreed to a tribunal appointed without any input from them, and with a major influence of the party with whom they were contracting, they were at least entitled to rely on

compliance with any measure that might protect even to a small degree the independence of the panel or the President.

Lord Justice Waller said:

37. Furthermore the judge quotes Lord Hope's observation in *Miller v Dixon* [2002] 1WLR 1615:-
"the Strasbourg jurisprudence shows that, unless the person is in full possession of all the facts, an alleged waiver of the right to an independent and impartial tribunal must be rejected as not being unequivocal"

38. I would uphold the judge's decision on this aspect. It thus follows that this award must be set aside and the matter remitted to a differently and properly constituted tribunal under the 2004 statute unless of course a sensible compromise can now be reached.

## 3. Bias

### ASM Shipping Ltd v Bruce Harris & Others [2007] EWHC 1513

The real thrust of the objection was in a Court of Appeal case in Re Medicaments and Related Classes of Goods (No 2), [2001] WLR 700, in which it was held that a lay member of the Restrictive Practices Court was tainted by apparent bias. Lord Phillips said (at paragraph 99 of his judgment) this:

"Having reached this decision [that the lay member, Dr Rowlatt, should have recused herself] we then had to consider the position of the other two members of the court. The trial had reached an advanced stage by the time that it was disrupted by the appellant's application. Dr Rowlatt must have discussed the economic issues with the other members of the court. We concluded that it was inevitable that the decision that Dr Rowlatt should be disqualified carried with it the consequence that the other two members of the court should stand down".

Mr Justice Smith was having none of it:

I am unable to accept that there is an invariable rule, or it is necessarily the case, that where one member of a tribunal is tainted by apparent bias the whole tribunal is affected second-hand by apparent bias, and therefore should recuse themselves, or should be excluded, from the proceedings. After all, it is common practice when a juror has to be discharged (for example, because he or she recognises a witness) for the judge to consider whether there is a risk of "contamination" or other jurors, and if

there is no reason to think that there is, to continue the trial with the remaining jurors. In the Sussex Justices and the Pinochet cases the tribunal had already reached a decision and in those circumstances it is not surprising that those who had committed themselves to the decision should not be on the tribunal who conducted a re-hearing. In the Pinochet case (cit sup) Lord Browne-Wilkinson said (at page 137D)

"It was appropriate to direct a hearing of the appeal before a differently constituted committee, so that on the re-hearing the parties were not faced with a committee, 4 of whom had expressed their conclusions on the points in issue".

The position was rather different in the Re Medicaments case, but the passage that I have cited from the judgment of Lord Phillips makes clear the relevance of the fact that there had been discussions involving Dr Rowlatt about matters upon which there was to be a re-hearing. That is to say, the tribunal would be re-hearing matters issues which presumably they would have discussed with Dr Rowlatt.

## 4. Reasons

### Halifax Life Ltd v The Equitable Life assurance Society [2007] EWHC 503

The Court did offer us arbitrators some additional guidance as to what reasons are sufficient:

Interpretation of the word "reasons" involves the ascertainment of the meaning which that word would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

Applying this approach in my opinion the Umpire was required to provide reasons which were intelligible and adequate in the circumstances. The circumstances included:

i) the context (the relevant provisions of the Reassurance Agreement and the Terms of Reference); and

ii) the nature of the Issues; and

iii) the fact that the Umpire was to conduct an expert determination leading to a Decision, including reasons for the Decision (not a judicial decision or a reasoned arbitration award).

The reasons could be stated briefly but they had to explain the Umpire's reasons for his conclusions on key or substantial points raised, or in other words his reasons for conclusions on the "principal important controversial issues" (see Lord Brown in South Bucks DC above at paragraph 36).

## 5. Determination of question of law

Taylor Woodrow v Barnes & Elliott [2006] EWHC 1693

Section 45 provides:

### 45 Determination of preliminary point of law

(1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An application under this section shall not be considered unless—
(a) it is made with the agreement of all the other parties to the proceedings, or
(b) it is made with the permission of the tribunal and the court is satisfied—
(i) that the determination of the question is likely to produce substantial savings in costs, and
(ii) that the application was made without delay.

## 6. Serious Irregularity

Bandwidth Shipping Corp v Intaari The Magdalena Oldenorff [2007] EWCA Civ 998

The Court of Appeal had two concerns:

In my view the authorities have been right to place a high hurdle in the way of a party to an arbitration seeking to set aside an award or its remission by reference to section 68 and in particular by reference to section 33. Losers often think that injustice has been perpetrated when their factual case has not been accepted. It could be said to be "unjust" if arbitrators get the law wrong but if there is no appeal to the court because the parties have agreed to exclude the court, the decision is one they must accept. It would be a retrograde step to allow appeals on fact or law from the decisions of arbitrators to come in by the side door of an application under section 33 and section 68.

Their second concern was:

Can it be said that they acted unfairly in not saying something to Mr Young about the way Mr Parsons was now putting his case? In my view it would be placing an unfair burden on any tribunal where (I stress) they do not appreciate that a point is being missed, to check whether leading counsel understands what is being said.

…

If an arbitrator appreciates that a party has missed a point then fairness requires the arbitrator to raise it so that the party can deal with it. But where there is no such appreciation it is not unfair to leave it to counsel particularly highly experienced counsel who shows a detailed knowledge of the case totake such points as he wishes.

The Court of Appeal were taken to some of the 1950 Act authorities Lord Justice Lawrence Collins said:

I doubt if reference to pre-1996 Act cases on misconduct or technical misconduct or procedural mishap (such as *Interbulk v Aiden Shipping (The Vimeira) (No 1)* [1984] 2 Lloyd's Rep 66) is today helpful.

OAO Northern Shipping Co v Remol Cadores De Marin SL (The REMMAR) [2007] EWHC 1821

Held:
In such cases, whilst it is not necessary for the tribunal to refer back to the parties each and every legal inference which it intends to draw from the primary facts on the issues placed before it, the tribunal must give the parties "a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion" (*ABB AG v Hochtief Airport* [2006] 2 Lloyd's Rep 1, paragraph 70).

In relation to the need to show a substantial injustice the Court said:

The Court's task on this type of application is not to second−guess the tribunal's views on any additional submissions which Buyers might have made have made if called upon to do so. It is sufficient if Buyers have been deprived of the opportunity to advance submissions which were "at least reasonably arguable", or even simply something better than "hopeless" (per *Vee* , at paragraph 88).

J D Wetherspoon plc v Jay Mar Estates [2007] BLR 285

HHJ Peter Coulson, as he then was found:

Both valuers had striven to quantify this amount, and as summarized in Paragraph 22 above, the arbitrator accepted parts of each valuer's approach to the calculation but also rejected other parts of each approach. Having made those findings, it seems to me that the arbitrator was entitled to arrive at a valuation which reflected his own approach and which produced a result which was part way between the figures advocated by the respective valuers.

In relation to whether there had been substantial injustice HHJ Peter Coulson found:

The applicant must secure findings of fact which established the precondition of a substantial injustice.

Contrast with the next case.

London Underground Ltd v Citylink Telecommunications Ltd [2007] BLR 391

From these decisions I derive the following propositions relevant to grounds under section 68(2)(a) :

(5) The underlying principle is that of fairness or, as it is sometimes described, natural justice.

(2) There must be a sensible balance between the finality of an award and the residual power of a court to protect parties against the unfair conduct of an arbitration.

(3) It will generally be the duty of a tribunal to determine an arbitration on the basis of the cases which have been advanced by each party, and of which each has notice. To decide a case on the basis of a point which was not raised as an issue or argued, without giving the parties the opportunity to deal with it, will be a procedural irregularity.

(4) In relation to findings of fact:

(5) A tribunal should usually give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings.

(b) A tribunal has an autonomous power to make findings of fact which may differ from the facts which either party contended for. This will often be related to inferences of fact which are to be drawn from the primary facts which are in issue. Such findings of fact will particularly occur where there are complex factual or expert issues where it may be impossible to anticipate what inferences of fact might be drawn. In such a case the tribunal does not have to give the parties an opportunity to address those findings of fact.

(c) Where a tribunal has been appointed because of its professional legal, commercial or technical experience, the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning.

(5) In each case whether there is a procedural irregularity and whether it is serious is a matter of fact and degree which requires a judgment to be made taking into account all the relevant circumstances of the arbitration including an analysis of the substance of the arbitration and its conduct viewed as a whole.

Mr Justice Ramsay QC also said:

In my judgment, the test for substantial injustice focuses on the issue of whether the arbitrator has come by inappropriate means to one conclusion whereas had appropriate means been adopted, he might realistically have reached a conclusion favourable to the applicant. It does not require the court to try the issue so as to determine, based on the outcome, whether substantial injustice had been caused.

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