

# Arbitration & court intervention

Khawar Qureshi KC outlines key Arbitration Act 1996 cases in 2022

## IN BRIEF

► Last year saw a number of decisions illustrating the limited circumstances in which the English courts will intervene in Arbitration Act 1996 cases.

In November 2022, the Court of Appeal dismissed an appeal from the decision of Mr Justice Jacobs who had held that an arbitrator had wrongly decided that he had jurisdiction (*DHL Project & Chartering Ltd v Gemini Ocean Shipping Co. Ltd* [2022] EWCA Civ 1555, [2022] All ER (D) 77 (Nov)).

Charterers informed the owners of a vessel that it was not required, and a claim for approximately \$US280,000 was brought by the owners alleging breach of a binding contract which contained a London arbitration clause. The charterparty contained a provision (known as a recap) which stated 'subject/receivers approval'.

The Court of Appeal held that upon a proper construction, a binding contract would only come into existence where the 'subjects' (essentially conditions precedent) had been fulfilled, which had never happened. Accordingly, the separability principle (concerning whether an arbitration clause was itself valid and binding) did not apply. Furthermore, the Court of Appeal would have been prepared to grant permission to appeal on a point of law pursuant to s 69, Arbitration Act 1996 (AA 1996, given serious concerns as to the approach adopted by the arbitrator in interpreting the recap.

## Serious irregularity

In the context of a charterparty dispute under the London Maritime Arbitrators Association (LMAA) small claims procedure, a sole arbitrator incorrectly added the value of a counterclaim to the claim amount and then proceeded to deduct the wrongly added amount to award \$US37,81.83 by mistake. He was asked twice to correct his award pursuant to s 57, AA 1996, but considered there was nothing to correct.

The award was challenged pursuant to s 68(2)(a), AA 1996 on the basis that the arbitrator had failed to adhere to the common ground between the parties, in deciding how much was owed on a basis

which had not been argued by either party, without giving them the opportunity to comment on it.

In upholding the challenge to the award, the judgment of Mr Justice Butcher in *Ducat Maritime Ltd v Lavender Shipmanagement Inc* [2022] EWHC 766 (Comm), [2022] All ER (D) 44 (Apr) contains a very clear and helpful summary of the key principles relating to serious irregularity and what constitutes substantial injustice.

## Stay of legal proceedings

In *Soleymani v Nifty Gateway LLC (Competition and Markets Authority intervening)* [2022] EWCA Civ 1297, [2022] All ER (D) 23 (Oct), the claimant (a UK national) had bid using an online platform for a non-fungible token (NFT) titled 'Abundance' in the sum of \$US650,000 created by an individual who calls himself Beepie. A dispute arose as to whether the claimant was in breach by refusing to pay. Pursuant to its terms, on 20 July 2021 Nifty referred the dispute for determination by way of New York arbitration (JAMS). A retired US judge was appointed as the arbitrator. The claimant challenged the jurisdiction of the arbitrator on the basis that the arbitration clause was:

- i. unfair and not binding;
- ii. the governing law provision of New York law was unfair and not binding; and
- iii. the process of bidding was illegal and contrary to the Gambling Act 2005.

In a very carefully reasoned judgment, the Court of Appeal held that the arbitration agreement was outside the court's jurisdiction with reference to the Brussels Recast Regulation as incorporated into the Civil Jurisdiction and Judgments Act 1982.

However, a stay of the English court proceedings which had been granted at first instance was set aside to enable the English court to determine whether, with reference to the governing law dispute and the Gambling Act 2005 points, the arbitration clause was 'null and void, inoperative or incapable of being performed' (per s 9(4), AA 1996), inter alia, on the basis that the domestic court of a consumer was better placed to consider these matters, especially where the perceived benefit

of confidentiality vis arbitration was far outweighed by the public interest in consumer rights protection.

This is a very important decision not least in respect of online transactions entered into by UK consumers who may also benefit from a change to the Civil Procedure Rules which, as from 1 October 2022, expanded the jurisdictional gateway at CPR 6B PD 3.1(6)(a) to include contracts concluded by the acceptance of an offer which was received within the jurisdiction.

## Parties bound by an arbitration award

High Court litigation in *PJSC National Bank Trust and another v Mints and others* [2022] EWHC 871 (Comm) concerned allegations that the defendants had been involved in the execution of fraudulent transactions which had released three Cypriot companies controlled by the defendants from share pledge agreements with the second claimant.

Subsequently, on 23 June 2021, a London Court of International Arbitration (LCIA) tribunal comprising three retired Court of Appeal judges—namely Sir Stephen Tomlinson, Sir Christopher Clarke and Sir Rupert Jackson—made an award dismissing a claim brought by the Cypriot companies that the share pledges had been validly terminated and upholding the claimants' counterclaim on the grounds of fraud.

The claimants applied to the High Court to amend their pleadings and contend that the defendants (who had not participated in the arbitration) were precluded by issue estoppel and/or abuse of process from challenging findings in the awards.

In rejecting the application, Mr Justice Foxton held that the public policy imperative of final and binding effect in respect of arbitration as between the parties to the arbitral process and any person claiming through them, (reflected in s 58, AA 1996) was not itself conclusive, albeit that establishing issue estoppel on an award as binding on non-parties would be 'extremely challenging', and that it would be 'very rare' for an arbitral award to found an abuse of process as against a non-party.

## Concluding remarks

Post-Brexit and the COVID-19 pandemic, while hybrid and online hearings are commonplace, the courts remain ever stringent in upholding arbitral awards. The cases outlined above illustrate the very exceptional circumstances which will lead to court intervention.

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