

Rare Judgment from Commercial Court on Scope of AA 1996, s 32 and Its Interaction With AA 1996, s 72 (Armada Ship Management v. Schiste Oil And Gas Nigeria)

Article

July 01, 2021 | LexisNexis | 5 minute read

Arbitration analysis: In recognition of the relative rarity of applications under section 32 of the Arbitration Act 1996 (AA 1996), Mrs. Justice Cockerill in the Commercial Court elected to hand down a written judgment in respect of an application for declarations confirming the jurisdiction of a sole arbitrator and the validity of his appointment. AA 1996, s 32 grants the court power to determine jurisdictional issues in two narrowly defined scenarios. It is intended to be an exceptional remedy and the courts have, in general, treated it as such. This was further demonstrated by the decision in this case where the court dismissed the claimant's application, concluding that it would be inappropriate for it to exercise its AA 1996, s 32 powers in circumstances where a determination on jurisdiction could prejudice the rights of an alleged party who has not participated in the proceedings under AA 1996, s 72. Written by Alistair Calvert and Laura Young of Bracewell (UK) LLP.

Armada Ship Management (S) PTE Ltd v. Schiste Oil and Gas Nigeria Ltd [2021] EWHC 1094 (Comm)

What are the practical implications of this case?

In accordance with the general scheme of AA 1996, a tribunal should determine its own jurisdiction to resolve a dispute pursuant to AA 1996, s 30. The Departmental Advisory Committee on Arbitration Law Report on the Arbitration Bill of February 1996 (the DAC Report) stated this to be the 'basic rule' and confirmed that AA 1996, s 32 should be reserved for exceptional cases so as not to detract from the rule.

Consequently, AA 1996, s 32 is 'narrowly drawn' to give the court a discretionary power to determine jurisdictional issues in limited circumstances. Specifically, where:

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- the application is made with the agreement in writing of all the other parties to the proceedings, or
- the application is made with the permission of the tribunal and the court is satisfied:
 - that the determination of the question is likely to produce substantial savings in costs
 - that the application was made without delay, and
 - that there is good reason why the matter should be decided by the court

In this case, the court considered that, prior to determining whether the AA 1996, s 32 conditions were met, a further threshold question ought to be considered: was AA 1996, s 72, which provides continuing rights of challenge to ‘a person alleged to be a party to arbitral proceedings but who takes no part in the proceedings’, engaged?

AA 1996, s 72 is recognised as a vital protection for a party that disputes the validity of arbitral proceedings. Cockerill J referred to the decision of Mr. Justice Mann in *Law Debenture Trust Corporation plc v. Elektrim Finance BV* [2005] EWHC 1412 (Ch) in which he identified various scenarios where a party might have legitimate grounds to object to a tribunal’s jurisdiction, including circumstances where:

- it claims not to be a party to the agreement containing the arbitration agreement
- it accepts that it is a party to an agreement containing an arbitration agreement but considers that arbitration agreement does not cover the dispute in question, or
- where there is no dispute about the arbitration agreement or the fact that it covers the dispute in question, but there is a dispute as to the constitution of the tribunal in question

The DAC Report states that, in circumstances such as those listed above, it would undermine the substance of a party’s objections, and would be likely to lead to gross injustice, if that party was required to take part in the arbitration proceedings or to take positive steps to defend their position. The report confirms that such a party must be entitled, if they wish, to simply ignore the arbitral process but warns of the risk that, if the objection is not well-founded, an enforceable award may still be made against them.

Following analysis of the interrelationship between AA 1996, s 72 and AA 1996, s 32, the court concluded that in circumstances where section 72 rights are engaged, this will preclude another party from using the section 32 procedure to obtain a judgment on jurisdiction. The application of this threshold further emphasises the narrow scope of section 32, as well as reiterating the significant importance of the section 72 rights.

What was the background?

Armada commenced arbitration proceedings against Schiste in respect of a number of unpaid invoices under a charterparty pursuant to which Armada time chartered a vessel to Schiste. Armada claimed the unpaid invoices to be due and payable by Schiste.

The charterparty was based on the BIMCO Supplytime 2005 standard form but contained a number of bespoke amendments agreed by the parties. The amendments to the arbitration agreement, at clause 34 of Part II of the charterparty, clearly indicated that it was the parties' intention to appoint a sole arbitrator in respect of any dispute arising out of or in connection with the charterparty, however, the anticipated process for appointing the arbitrator was not made sufficiently clear. In particular, clause 34 sought to incorporate both London Maritime Arbitrators Association (LMAA) Terms and the UNCITRAL Rules, which contain conflicting mechanisms for appointment.

Armada sought to agree the appointment of a sole arbitrator with Schiste but attempts to engage Schiste were unsuccessful. Consequently, Armada applied to the president of the LMAA to make the appointment pursuant to section 11 of the LMAA Terms.

While the president of the LMAA appointed Mr. Jonathan Lux as sole arbitrator, Schiste continued to abstain from participating in proceedings. This created ongoing uncertainty for Armada and gave rise to concerns that, on an alternative interpretation of clause 34 of the charterparty, Schiste might at a later stage in proceedings seek to challenge the validity of Mr. Lux's appointment and consequently his jurisdiction to resolve the dispute. Inevitably this would result in significant wasted costs and efforts for Armada. With the permission of Mr. Lux, Armada applied to the court pursuant to AA 1996, s 32(2)(b) for an order confirming the jurisdiction of Mr. Lux as sole arbitrator.

What did the court decide?

The court dismissed the section 32 application.

Cockerill J concluded that a determination of the question of jurisdiction could place a non-participant in arbitral proceedings in an unacceptable position:

- by engaging in the section 32 process, the respondent would risk waiving the rights and protections afforded to a non-participant under AA 1996, s 72, but
- by simply ignoring the section 32 application, it would forego any opportunity to put forward its own submissions on jurisdiction and risk a determination that is contrary to its interests and is prima facie binding on it

In circumstances where the defendant had continued to not participate in proceedings, the court held that its section 72 rights were engaged and the court should not therefore make a ruling on jurisdiction under section 32.

The court did provide a non-binding indication of the decision it would have reached had section 72 not applied. On this basis it concluded that the conditions of AA 1996, s 32(2)(b) would have been met. It also broadly agreed with the claimant's submissions as to the appropriate construction of clause 34 of the charterparty, indicating that the application to the president of the LMAA to appoint a sole arbitrator was the correct course of action, under the LMAA Terms and with regard to the UNCITRAL Rules, in circumstances where the parties had not reached an agreement in respect of an appointment. Although delivered as obiter, this section of the judgment may well deter any future challenge in respect of the validity of the arbitrator's appointment.

Case details

- Court: Commercial Court, Queen's Bench Division, Business and Property Courts of England and Wales, High Court of Justice
- Judge: Mrs. Justice Cockerill DBE
- Date of judgment: 28 April 2021 (although published more recently)

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