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Institute of
Arbitrators

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Guideline 6: Guideline for Arbitrators on How to Deal with Challenges to their Jurisdiction under the Arbitration Act 1996

1. Introduction

1.1 The present guideline deals with the way in which jurisdictional questions should be dealt with by arbitrators where the seat of the arbitration is in England, Wales or Northern Ireland and so the Arbitration Act 1996 applies. Under other systems of arbitration law jurisdictional questions may have to be approached differently. There is another Guideline which looks at the subject from a more international and comparative perspective. Nevertheless, many of the points made here apply equally to an arbitrator sitting in another country, particularly as is increasingly common where the legal systems are similar.

1.2 The 1996 Act embodies three relevant principles which should be borne in mind by arbitrators when considering matters relevant to their own jurisdiction.

1.2.1 The first principle is that, unless the parties otherwise agree, an arbitral tribunal has the power to rule on its own substantive jurisdiction and that, if it does so, that ruling will be binding on the parties, subject to any available arbitral process of appeal or review and subject to appeal or review by the Court.

1.2.2 The second principle is that the arbitral tribunal is not the final arbiter of a question of jurisdiction. Consequently, on any appeal to the Court the question of jurisdiction may be approached anew and both the findings of fact and holdings of law of the arbitration tribunal may be challenged. Moreover, there is no rule that the arbitration tribunal must always be the first to rule on its own jurisdiction or that there can be no court intervention or ruling until it has done so.

1.2.3 The third principle is that any objection to the tribunal's jurisdiction and any challenge to a ruling on jurisdiction must be raised promptly and within a specified time or the right to object may be lost.

1.3 While the powers of arbitrators as to ruling in their own jurisdiction are governed mainly by Sections 30 to 32 of the 1996 Act, the terms of the particular arbitration agreement may also be relevant. If entered into after a dispute as to jurisdiction has arisen, that agreement may confer on an arbitrator an unchallengeable right to rule on his jurisdiction to decide the original dispute. (This is because the parties may by an ad hoc agreement confer on an arbitrator the power to determine a question of jurisdiction in a manner that is definitive and excludes appeal or review by the Court.) If the only arbitration agreement is contained in the contract under which the dispute arose, it may contain relevant terms. Such rules may affect the procedure to be followed but cannot detract from the right of a dissatisfied party to apply to the court, as and when the Arbitration Act permits, to set aside the ruling of the arbitral tribunal as to its jurisdiction.

2. Comparative View

There is a separate guideline covering international cases. Having said all that, English law is increasingly similar in this area to that found in UNCITRAL Model Law countries and a number of major European legal systems, notably Switzerland and Holland. One peculiarity of Swiss law is that since it does not hear oral evidence on public law appeals, the Swiss Tribunal federal refuses to hear evidence of fact on jurisdictional challenges: *National Power Corporation v. Westinghouse International Projects Company* ATF 119 II 380.) This applies to all jurisdictional challenges under the LDIP.

3. The Relevant Provisions of the Act

3.1 Under Section 30, the arbitral tribunal may rule on its own substantive jurisdiction, unless otherwise agreed by the parties. Any such ruling may be challenged (see below).

3.2 Under Section 31 (a mandatory provision) any objection to the tribunal's jurisdiction must be raised promptly or it may be lost (Sections 31(1) to (3)).

3.3 Where an objection is taken to the jurisdiction of the tribunal, it may rule on its jurisdiction either (a) in an award as to jurisdiction or (b) in its award on the merits, save that, if the parties agree on one or other course, the tribunal shall proceed accordingly. There is no power to decide jurisdiction in a "preliminary ruling" unless that ruling consists of an award as to jurisdiction.

3.4 Any decision of the arbitral tribunal as to its jurisdiction can be challenged (both on the facts and the law) by making application to the Court (Section 30(2) and 67), save that the right to object may be lost by taking part in the arbitration without making an objection (Section 73(1) or by failing to apply promptly within short time limits (Section 70(2) and (3) and Section 73(2)). Before any application is made to the Court, any arbitral process of appeal or review must first have been exhausted unless the application has not participated in the arbitration.

3.5 Under Section 32 there is an exceptional procedure whereby the parties may apply to the Court to determine a preliminary point of jurisdiction. Either both parties must agree to this course or the applicant must obtain the tribunal's permission and persuade the Court that the decision is likely to produce a substantial saving in costs, the application was brought without delay and that the Court should exercise its discretion to hear the matter. The Tribunal can continue to hear the case and issue an award while still awaiting the Court's decision. It is relatively rare, though, that a Tribunal that has consented to the application would want to continue the case. It probably should not do so, in the vast majority of cases, if both parties have agreed to the matter being decided by the Court and definitely should not do so if both parties have asked it to stop.

3.6 Unusually, Section 72 allows a party that does not participate in the arbitration to apply for a declaration, injunction or other relief as a way of questioning the existence of a valid arbitration agreement, whether the dispute or disputes come within its scope and whether the tribunal is properly constituted. This does not prevent such a non-participant from challenging any award on the basis of a lack of jurisdiction under section 67.

3.7 Finally, it must be borne in mind that Sections 31, 32, 67, 70, 72 and 73 are mandatory provisions which apply notwithstanding any agreement of the parties to the contrary.

4. The Meaning of "Substantive Jurisdiction"

4.1 This expression embraces disputes as to:

- (a) whether there is a valid arbitration agreement;
- (b) whether the tribunal is properly constituted;
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

4.2 It is reasonably clear that paragraph (c) does not normally embrace the question whether or not the claim is time-barred. This is the view expressed by the US Supreme Court in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U. S. 79 (2002). Equally, where the dispute falls within the arbitrator's jurisdiction and the remedy granted is not prohibited by the arbitration agreement, it is not a matter of substantive jurisdiction at least in English law as to whether the parties' agreement or the law has been followed in reaching the decision on the merits: *Lesotho Highlands Development Authority v. Impregilo SpA* [2005] UKHL 43. As the House of Lords also pointed out in that case, the use of a remedy that is barred by the arbitration agreement would be regarded as a case of an arbitrator exceeding his or her power. That is dealt with exclusively under section 68(2)(e) and is not regarded for this purpose as a matter of substantive jurisdiction.

5. Initial Enquiries

5.1 On being appointed, an arbitrator should normally satisfy himself that the parties have made a relevant arbitration agreement and that the dispute falls within its terms. He or she should ask to be supplied with the contract under which the dispute is said to have arisen and should check that it contains an arbitration clause which appears to cover the dispute and that he or she is qualified or meets the criteria for appointment under it.

5.2 Similarly when the details of the claim are brought to his attention he should check whether they fall or appear to fall within the terms of the agreement. If it is clear that there is no relevant agreement to arbitrate and that the parties are unwilling to conclude one, it will serve no purpose to proceed further.

5.3 The position can be more doubtful where one party produces some reasonable prima facie evidence that the arbitrator has jurisdiction to decide the dispute but that evidence is not necessarily correct. If the other party does not take part in the arbitration or does not challenge the arbitrator's jurisdiction, the right course would normally be for the arbitrator to proceed to the merits of the dispute. Where there is reasonable prima facie case for saying that jurisdiction exists the arbitrator should not take it upon himself to mount a challenge to that case such as the opposing party might (but has chosen not to) make.

6. Alternative Procedures

6.1 Introduction

6.1.1 Where a party submits that the arbitrator does not have jurisdiction to decide the dispute or part of it, the arbitrator will normally have to choose between the following three ways in which challenges to their jurisdiction may be resolved:

(a) the arbitral tribunal may make an award as to jurisdiction under Section 31(4)(a);

(b) the arbitral tribunal may continue with the arbitration and deal with the objection in its award on the merits; Section 31(4)(b); or

(c) the arbitral tribunal may, exceptionally, encourage the parties to go straight to the court for a ruling on a preliminary point of jurisdiction.

6.1.2 Where an arbitrator is faced with a choice as to which of these procedures he should follow, the guiding principle by which he should be guided must necessarily be that set out in Section 33(b) of the Act; namely, that he should follow the procedure which is most suitable in the particular circumstances of the case having regard to the overriding objective of avoiding unnecessary delay or expense and providing a fair means for resolving the matter.

6.1.3 Each of the above procedures will now be considered in turn.

6.2. Awards as to Jurisdiction

6.2.1 There are many cases where it is more efficient in terms of time and cost for an arbitrator to rule on his own jurisdiction at the outset of the arbitration, rather than wait until he is in a position to make an award on the merits.

6.2.2 Before considering questions of time and cost, however, an arbitrator must be satisfied that it is open to him to make an award as to jurisdiction. This may involve him in looking at the following questions:

(a) Is the dispute really one as to the tribunal's substantive jurisdiction or does it relate to something else? (See above for the meaning of "substantive jurisdiction".)

(b) Have the parties excluded the power of the tribunal to make an award as to its substantive jurisdiction? Parties are at liberty to do this. They may do this either expressly or by implication. If after a dispute has arisen, the parties go straight to Court for resolution of a jurisdictional issue, it is possible that either expressly or by implication they have agreed to exclude the power of the arbitral tribunal to decide the issue under Section 30. The arbitrator should view the correspondence with care on this subject before reaching a view on the subject. It would certainly make sense for an arbitrator who was

considering making an award on jurisdiction in this type of situation to ask the parties for their views on whether he or she should go ahead with it.

6.2.3 Assuming that it is open to an arbitrator to make an award as to jurisdiction, it is next necessary for him to consider whether, in terms of time and costs, this is the most suitable procedure for him to follow. This may depend on a variety of factors including the stage of the arbitration at which the challenge is raised, the nature of that challenge, the evidence and arguments that may be adduced, the wishes of the parties and no doubt other considerations.

6.2.4 An arbitrator who decides that it is more efficient in time and cost to rule on his own jurisdiction at the outset cannot be criticised on the basis that his decision will give rise to a conclusion in respect of a major issue on the merits of the underlying claim in the arbitration. There are however cases where, because the question of jurisdiction involves deciding questions going to the merits of the case, it is impracticable to proceed at once to an award on jurisdiction.

6.2.5 Conversely a challenge made at a late stage in the arbitration (and particularly one which is more or less likely to fail) can often be more conveniently dealt with in an award on the merits.

6.2.6 There is nothing in the Act to suggest that a preliminary ruling on jurisdiction should involve a less comprehensive investigation of evidence than a determination of the merits by a final award. Indeed a preliminary investigation by an arbitrator of his own substantive jurisdiction can be regarded as one type of preliminary or interim investigation to which an arbitration may give rise. It has, however, the special characteristic that both the findings of fact and the conclusions of law of the arbitral tribunal may be challenged on an application to the court.

6.2.7. As to procedure, the following points may be relevant:

(1) An arbitrator should normally inform the parties and invite their comments before finally deciding to proceed to a preliminary investigation of his own jurisdiction that may lead to an award on jurisdiction;

(2) Once an arbitrator has concluded that he will rule on his own substantive jurisdiction in an award on jurisdiction he should normally give directions as to the procedure to be followed. Again he should invite comments before giving those directions.

(3) There are cases where the jurisdictional challenge can be decided on the construction of the relevant documents. In such cases the jurisdictional issue can sometimes be dealt with on documents alone and without the need for a hearing.

(4) An award on jurisdiction should always contain reasons unless the parties have agreed to dispense with them.

(5) Where an arbitrator decides that he has no jurisdiction to determine the merits, he will nevertheless have jurisdiction to make an award as to the costs of arguing and deciding the jurisdictional issue. (This seems to follow from section 30 of the 1996 Act.)

6.3 Dealing with the Objection in an Award on the Merits

An arbitrator may consider that in terms of time and cost the procedure most suitable to the circumstances of a particular case is to deal with the objection to his jurisdiction in an award on the merits. Should he decide to proceed in this way, the arbitrator should give each party an opportunity of putting its case both on the jurisdictional objection and on the substance of the dispute. If the arbitrator rejects the objection he will give reasons for so doing in his award and then proceed to make an award on the merits. If he upholds the objection with regard to certain of the matters referred to arbitration but not as to others, he will proceed to make an award on the remainder. If he upholds an objection as to all the matters referred to arbitration, it would seem perhaps pointless and illogical to proceed to deal with the merits of the dispute at all. However, the parties might wish the award to deal with both aspects so that, if the Court subsequently upholds the arbitrator's

jurisdiction, the successful party can then enforce the award on the merits without having to start all over again. During such a process, the parties may end up agreeing to submit their jurisdictional dispute to arbitration or the party or parties objecting may just decide to abandon the objection.

6.4 Enabling the Parties to go straight to the Court

6.4.1 The philosophy of the 1996 Act is that, usually (though not invariably), all questions relating to jurisdiction should be decided in the first instance by the arbitral tribunal and that its decision should be binding on the parties subject only to challenge under Section 67. This, however gives rise to a real danger that there may be two hearings on jurisdiction, the first before the arbitrator under Section 30 and the second before the Court under Section 67. The remedy of going straight to the Court under Section 32 is an exceptional one but it can lead to savings both in time and costs (particularly where a substantial body of evidence is to be investigated) provided that the Court is willing to decide the issue under the section.

6.4.2 The Court will do so

- (1) if the application is made with the written agreement of all parties to the arbitral proceedings or
- (2) where the application is made by one party and
 - (i) it is made with the permission of the arbitral tribunal and
 - (ii) the Court is satisfied that the determination 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.

The Court has no choice in the matter where a party who has not participated in the arbitration brings an application for a declaration, injunction or other appropriate relief under section 72(1). It must determine the point.

6.4.3 The points to be borne in mind by arbitrators in considering requests for consent to go to court under section 32 and dealing with jurisdictional challenges include the following:

(1) While normally it may be the duty of an arbitrator to rule on his own substantive jurisdiction, it may be better for the arbitrator not to express an opinion and simply consent to the matter being heard by the court on the application of one of the parties. Where the case will go to the Court on jurisdiction in any event under Section 32, this can result in a substantial saving in costs in that there will be one jurisdictional hearing instead of two. This is particularly the case where a substantial body of evidence is to be investigated because the Court, on a challenge to an award on jurisdiction, is not bound by the arbitrator's findings and may decide to hear the whole matter, including all the evidence, again, and may further decide to investigate arguments not advanced before the arbitrator.

(2) In such a situation an experienced arbitrator may sometimes be able to persuade the parties to agree to go straight to the Court;

(3) Where only one party wishes to go straight to the Court, the arbitrator should carefully weigh whether an early determination of the jurisdictional point by the Court is likely to produce substantial savings in costs, whether the application was made without delay and whether there is good reason why the matter should be decided by the Court;

(4) Before giving permission for one party to go straight to the Court the arbitrator should give the other party an opportunity to make submissions as to why that permission should not be given;

(5) If the arbitrator gives permission, it is usually desirable that he should state his reasons so that the Court can take them into account in deciding how to determine the matter;

(6) If an application is made to the Court the arbitrator may continue the arbitral proceedings and make an award while the application is pending or he may stay the arbitration until the Court gives its decision. Where a party is not participating in the arbitration and the jurisdictional objection appears to be weak, the arbitrator should be reluctant to halt

proceedings pending the court's decision for fear that the tribunal could be assisting a delaying operation. If the parties agree to either course, the arbitrator must proceed accordingly (Sections 31(5) and 32(4)). The normal course would be to await the Court's decision before proceeding to determine the merits of the dispute.

7. The Time for Raising Disputes as to Jurisdiction

7.1 Section 31(1) provides that a challenge to the jurisdiction arising at the outset of the arbitral proceedings must be made before the party making that challenge takes the first step in the proceedings to contest the merits of any matter in relation to which he contests the tribunal's jurisdiction. Section 31(2) provides that an objection during the course of the proceedings that the tribunal is exceeding its jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised. These provisions are mandatory save that an arbitral tribunal may admit a later objection "if it considers the delay justified" (Section 31(3)).

7.2 Similarly Section 73(1) provides that by continuing to take part in an arbitration without objecting a party may lose his right to object to the tribunal's jurisdiction unless "he did not know and could not with reasonable diligence have discovered the grounds for the objection".

7.3 These provisions can give rise to complex issues as to whether an objection has been made in time. If the point gives rise to arguable issues it is best dealt with in an award as to jurisdiction or an award on the merits, as the case may be. If the objection is obviously out of time, then an arbitrator, after giving both parties an opportunity to make submissions, may in a suitable case give a summary and informal decision that the right to object has been lost, subsequently recording that he has done so in any later award on the merits.