



## **Practice Guideline 6: Guidelines for arbitrators dealing with jurisdictional problems**

### **1. Introduction**

1.1 These guidelines cover how to deal with jurisdictional problems in an English 1996 Act context.

1.2 The huge variety of issues that can arise in this area in arbitrations makes it impossible to provide definitive guidance to arbitrators dealing with jurisdictional problems in all situations. What the arbitrator needs is an awareness of the key issues that come up regularly and the relevant principles so that the tribunal can react intelligently when challenges to its authority are raised.

1.3 English law embodies four relevant principles which should be borne in mind by arbitrators when considering matters relevant to their own jurisdiction.

1.3.1 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 or judicial process of appeal or review.

1.3.2 The second principle is that the arbitral tribunal is not the final arbiter of a question of jurisdiction. Consequently, on any application to the Court, the question of jurisdiction may be approached anew and both the findings of and holdings of law of the arbitration tribunal may generally be challenged. Moreover, there is no absolute 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.

1.3.3 The third principle is that, if entered into after a dispute as to jurisdiction has arisen, an arbitration 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 to the extent that the Courts concerned regard decisions on the merits as unreviewable: *Astro Valiente Compania Naviera SA v. Pakistan Ministry of Food and Agriculture (The Emmanuel Colocotronis)* [1982] 1 Lloyd's Rep. 297

1.3.4 The fourth 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.

## **2. Initial enquiries to be made by the arbitrator**

2.1 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 should ask to be supplied with a copy of the agreement or details of agreement, as the case may be, under which the dispute is said to have arisen and should check that it contains a valid arbitration clause which appears to cover the dispute and that he is qualified under the clause.

2.2 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.

2.3 The position can be more doubtful when one party produces some reasonable prima facie evidence that the arbitrator has jurisdiction to decide the dispute but that evidence is not necessarily clear. 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 a 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 make but has not opted to make. The one well-known exception to this rule concerns the possible unenforceability of an arbitration clause under Council Directive 93/13/EEC on unfair terms in consumer contracts: *Mostaza Claro v. Centro Móvil Milenium SL* (C-168/05) [2006] ECR I-10421, [2006] EUECJ C-168/05, [2007] 1 CMLR 22 October 26, 2006 & *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, (C-40/08) [2009] EUECJ C-40/08, 6 October 2009.

2.4 These four considerations should guide the arbitrator's initial engagement with the matter. It is appropriate to next consider the issues that typically arise in respect of jurisdiction.

### **3. The issues that typically arise**

3.1 It may be helpful to list some of the most common types of dispute that may be regarded as jurisdictional:

- (a) identity of the parties;
- (b) identity of the contract or contracts governed by the agreement to arbitrate;
- (c) validity of the agreement to arbitrate;
- (d) the effect of a problem with the main contract on the validity of the arbitration clause (separability);
- (e) failure of a condition precedent to the right to arbitrate contained perhaps in an agreement to mediate in advance;
- (f) whether a particular subject-matter can be arbitrated;
- (g) time-limits for commencing proceedings;
- (h) whether an arbitrator may apply a law other than the one expressly chosen by the parties or breach a duty contained in arbitration or other legislation;
- (i) whether particular relief or remedies can be awarded.

3.2 There are issues that may contain elements of jurisdiction mixed in with other points. For example, problems relating to the constitution of a tribunal are definitely matters of jurisdiction. An improperly constituted panel does not have jurisdiction to render an award. However, issues of bias more properly belong to another subject.

3.3 Otherwise, the range of possible jurisdictional disputes is enormous. It covers all the typical formation and construction issues that arise in ordinary contract and company law, both domestic and international. In addition, one might have to consider features of one or

more set of municipal laws specifically related to arbitration or the resolution of disputes generally.

3.4 Jurisdictional issues considered by the arbitral tribunal usually break down uneasily into three categories:

(a) whether there is a valid agreement to arbitrate at all;

(b) whether the scope of the agreement to arbitrate covers the dispute; and

(c) whether the arbitrator has certain powers.

3.5 Validity of the agreement to arbitrate and problems with the main contract (separability) (issues (c) and (d)) typically fall within the first category. They involve a decision on whether there is a valid agreement to arbitrate. Questions relating to whether the arbitrator may disregard the parties' choice of law and whether he can award particular relief or remedies (issues (h) and (i)) come within the third category. They deal with the ambit of the arbitral tribunal's powers. The other points, such as subject matter arbitrability, fit within the second category. They relate to whether the arbitration agreement allows the arbitrator to deal with the particular dispute and the parties to it.

## **4. The Process**

### **4.1 Attitude**

4.1.1 The first question that an arbitral tribunal faced with a challenge to its jurisdiction must consider is the process by which it is going to deal with the problem. The internationalization of the process and the greater risk of cultural clashes make it vital for the tribunal to deal calmly with the facts and issues. It must not, and must not appear to take personally the challenge to its authority. The tribunal must avoid anything which may give the impression to the losing party on the jurisdictional issue that it has any bias against that party.

4.2 The arbitral tribunal has the right to rule on its own substantive jurisdiction

4.2.1 If the tribunal 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.

4.2.2 The parties are at liberty to exclude the power of the tribunal to make a ruling as to its substantive jurisdiction. They may do so either expressly or by implication.

4.2.3 "Substantive jurisdiction" embraces disputes as to:

(i) whether there is a valid arbitration agreement;

(ii) whether the tribunal is properly constituted;

(iii) what matters have been submitted to arbitration in accordance with the arbitration agreement.

It is reasonably clear that (iii) does not, unless the arbitration agreement clearly states otherwise, normally embrace the question whether or not the claim is time-barred: *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).

4.2.4 Section 30(1) of the 1996 Act permits the arbitral tribunal to rule on a challenge to its own jurisdiction. The tribunal does not have to wait for a party to bring court proceedings. Under the Act, there is also no obligation to wait for the court to make up its mind. So, the tribunal faced with a challenge to it needs to consider straight away what to do with the problem.

4.2.5 However, the arbitral tribunal is not the final arbiter of a question of jurisdiction. Given this, on any application to the Court the question of jurisdiction may be approached anew and typically both the findings of fact and holdings of law of the arbitration tribunal may be challenged: section 30(2). Moreover, there is no hard and fast 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.

### **4.3 Waiver**

4.3.1 Section 31 of the Act says:

“(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal’s jurisdiction.

A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.

(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified.

4.3.2 The parties must raise their jurisdictional objection within a reasonable time. Section 31(1) of the English 1996 Act 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, as with Article 16(2) of the Model Law, an arbitral tribunal may admit a later objection "if it considers the delay justified" (Section 31(3)). 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".

4.3.3 In practice, there is considerable divergence in the way in which different courts and tribunals interpret behaviour in this area. The individual facts of a case can easily sway a judge or arbitrator either way. The general test should be whether the party now seeking to raise the objection has behaved in a way inconsistent with the position that it now wishes to take in relation to the point in question. A greater concern, though, is whether waiver requires some finding of prejudice to the other party or parties.

4.3.4 Similar provisions appear in various arbitration rules. Article 23(2) of the UNCITRAL Rules is almost identical to Article 16(2) of the Model Law which in turn is almost indistinguishable from section 31 of the 1996 Act. Other examples include Article 23.2 of the LCIA Rules which says:

“A plea by a Respondent that the Arbitral Tribunal does not have jurisdiction shall be treated as having been irrevocably waived unless it is raised not later than the Statement of Defence; and a like plea by a Respondent to Counterclaim shall be similarly treated unless it is raised no later than the Statement of Defence to Counterclaim. ...In any case, the Arbitral Tribunal may nevertheless admit an untimely plea if it considers the delay justified in the particular circumstances.”

4.3.5 The last sentence, clearly based on section 31(3) of the 1996 Act and Article 16(2), gives the tribunal a little more latitude than some national laws might allow. The first part of the rule is based on Article 16(2) of the Model Law and the almost identically worded Article 23(2) of the UNCITRAL Rules.

4.3.6 Article 39 of the ICC Rules (2012 Version) contains a general waiver provision which may be interpreted as being much stricter than the UNCITRAL approach. It reads:

“A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.”

4.3.7 One can argue as to whether there needs to be any reliance on the behaviour by either the tribunal or the other party. The Act does not require it. In practice, it will not be difficult to find reliance where one party's behaviour is inconsistent with its position on the jurisdictional challenge.

4.3.7 Overall, 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 but which should be recorded in writing with brief reasons explaining why the right to object has been lost. The arbitrator should subsequently record that he has done so in any later award on the merits.

#### **4.4 Dealing with jurisdictional issues not raised by the parties**

4.4.1 Where an arbitrator identifies a jurisdictional issue that the parties have not noticed, the question arises as to whether he should take any active steps to draw this to their attention. In many cases, failure to raise a point promptly will result in its waiver. Bearing in mind the fact that the parties have not objected to the arbitrator dealing with the case or at least not on the ground in question, the arbitrator should normally not raise issues on his own. This is particularly the case when the tribunal may not know where the parties will have to enforce the award.

4.4.2 However, in some rare public policy situations, it can be argued that the arbitrator has a duty not to deal with the case for fear of offending local norms or risking the subsequent recognition or enforcement of the award. In most such situations and only if the arbitrator is confident of the argument's validity, the point should be raised with the parties so that they can make submissions on the point. This may be the case where the tribunal risks allowing an arbitration to be used to cover up corruption or other criminal matters or actually become part of the means by which the parties aim to transfer funds as part of money laundering, terrorist financing, exchange control fraud or other criminal activity. The legal consensus has been for some time that such problems do not invalidate the arbitration agreement. Nevertheless, with the modern emphasis on the need to avoid money laundering, terrorist financing and corruption, an arbitrator may think it more appropriate to decline jurisdiction.

4.4.3 An area where the law is much clearer concerns possible unenforceability of an arbitration clause under Council Directive 93/13/EEC on unfair terms in consumer contracts: *Mostaza Claro v. Centro Móvil Milenium SL* (C-168/05) [2006] ECR I-10421, [2006] EUECJ C-168/05, [2007] 1 CMLR 22 October 26, 2006 & *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, ( C-40/08) [2009] EUECJ C-40/08, 6 October 2009. In the *Asturcom* case, the European Court of Justice held that a national court when dealing with an application to enforce an arbitration award against a consumer had a duty to take the point relating to the Directive even where the consumer had not raised it. It must follow that an arbitration tribunal has a similar duty when confronted with an agreement that appears to be unenforceable under the Directive.

#### **4.5 Agreements about jurisdictional issues**

4.5.1 Increasingly in international cases, the tribunal has to issue a ruling on jurisdiction. With different legal cultures involved, it may be vital for the tribunal to obtain the parties'

agreement as to the precise scope of the challenge. The use of Terms of Reference, mandatory in ICC cases, or a document like it, may be particularly useful here. If signed, even under protest by the objecting party, it may reduce the scope for challenges not listed in the Terms of Reference. For example, an argument about the overall formal validity of the agreement may be excluded if the challenging party only indicates in the Terms of Reference concerned a general concern about whether one or all of the parties agreed to arbitrate.

4.5.2 It is always open to the tribunal to invite the parties to agree to it resolving the jurisdictional issue. This is a practical solution notably where the ruling on whether there is a contract containing the arbitration clause in question may determine both the jurisdictional point and the outcome of the case.

4.5.3 Without the parties' agreement to submit the relevant dispute to the arbitrator, there does not appear to be any scope for forcing the parties to be bound by the tribunal concerned. This applies even if the parties appear to have agreed to arbitration under a set of rules which empower the tribunal to rule on its own jurisdiction: *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46. It is always open to the party objecting to the arbitrator dealing with the case to argue before a court that he did not validly consent to arbitrate at all or under the relevant rules.

4.5.4 In an English arbitration, the tribunal or the other parties may consent to a party bringing an application to court to resolve a jurisdictional issue under section 32 of the 1996 Act. Where a challenge is made in good faith and seems to have a reasonable prospect of success, there is something to be said for consenting. If the parties agree to the court deciding the matter, the arbitrator has no choice in the matter. This consensual approach seems to be unique to England. It is discussed in more detail below.

#### **4.6 Ruling on jurisdiction: the process**

4.6.1 More commonly, the tribunal has to issue a ruling on jurisdiction before the court can intervene directly. However, under the English 1996 Act, a party who declines to participate in the arbitration may apply for a declaration or injunction using a similar procedure found in section 72(1). Either way, the tribunal might consider it better for it to express an opinion on the point regardless, to allow the court the benefit of its view of the case.

4.6.2 The key question is whether to deal with jurisdiction separately from substance. Section 31(4) of the 1996 Act reflects modern legislative practice by giving the arbitrator a choice as to whether to rule on his own jurisdiction in a preliminary ruling or the final award on the merits.

4.6.3 There is much to be said for the view that normally the arbitrator should deal with jurisdictional matters separately. It is helpful if such problems can be cleared up at an early stage of the process with any court challenges being concluded before extensive consideration of the merits. If the tribunal is likely to declare that it has no jurisdiction over all or part of the case, it is imperative that it rules swiftly on jurisdiction. It needs to end the arbitrators' consideration of parts of the claim that fall outside their authority. Delays may also cause an unsuccessful claimant to be time-barred elsewhere. There are, though, exceptions to this, notably:

(i) Jurisdiction and substance revolve around the same facts or issue

(ii) The challenge is made in bad faith

(iii) Delays in the local legal system could result in the case being delayed for many years pending the resolution of any court challenge to the ruling.

4.6.4 As seen above, jurisdiction and substance sometimes concern the same point, notably where the case revolves around whether the parties ever concluded the contract or validly assigned it. Normally, in such a case, issuing a final award on jurisdiction and substance together makes sense.

4.6.5 The same applies where the jurisdictional challenge appears to be a delaying tactic with no prospect of success or there is a risk of delays within the local court system damaging the proceedings.

4.6.6 When considering matters of jurisdiction, the tribunal must be careful to observe the rules of natural justice and give both parties a reasonable opportunity to present their case. An informal approach has led to challenges to the tribunal's general ability to handle the case as well as to its actual decision.

**4.7 Circumstances where a party objecting to jurisdiction can go directly to court to obtain a ruling on this.**

4.7.1 Under the English 1996 Act, the Court will directly consider a jurisdictional issue:

(i) if the application is made with the written agreement of all parties to the arbitral proceedings or, (ii) where the application is made by one party and

(A) it is made with the permission of the arbitral tribunal and

(B) 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. (Options (i) and (ii) are dealt with in section 32.)

(iii) where a party not participating in the arbitration seeks a declaration or injunction (under section 72(1)).

#### **4.8 Enabling the parties to go straight to the Court under the English 1996 Act**

4.8.1 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. 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.

4.8.2 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:

4.8.2.1 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.

4.8.2.2 In such a situation, an experienced arbitrator may sometimes be able to persuade the parties to agree to go straight to the Court.

4.8.2.3 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.

4.8.2.4 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.

4.8.2.5 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.

4.8.2.6 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.

#### **4.9 The form of a ruling on jurisdiction**

4.9.1 An issue that can arise relates to the form in which the arbitrator's decision should be delivered. Any ruling against jurisdiction may terminate the case and should in such a situation clearly be in the form of a final award. It should also cover the tribunal's fees.

4.9.2 A problem arises with rulings that reject jurisdictional challenges. Anything called an "award" in ICC cases must be subject to the approval process of that organization under Article 33 of that organization's rules (2012 version). This can create delays. There is, therefore, much to be said for avoiding making the decision on jurisdiction in that form. Unfortunately, it is not just a question of labelling the ruling "order" or such like. One solution is to make a ruling giving reasons but reserving the tribunal's right to reach a

different decision at a later date in the proceedings. The final option is just to incur the delays of institutional approval while campaigning for the relevant requirements to be relaxed.

#### **4.10 Dealing with the objection in a ruling on the merits**

4.10.1 A tribunal 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 a ruling on the merits.

4.10.2 Should it decide to proceed in this way, the tribunal should give each party an opportunity to put its case both on the jurisdictional objection and on the substance of the dispute.

4.10.3 If the tribunal rejects the objection, it will give reasons for so doing in its ruling and then proceed to make a ruling on the merits.

4.10.4 If it upholds the objection with regard to certain matters referred to arbitration but not to others, the tribunal will proceed to make a ruling on the remainder.

4.10.5 If the tribunal upholds an objection as to all matters referred to arbitration, it may seem pointless and illogical to proceed to deal with the merits of the dispute at all.

4.10.6 However, the parties might wish the award to deal with both aspects so that, if the Court subsequently upholds the tribunal's jurisdiction, the successful party can then enforce the ruling on the merits without having to start anew.

#### **4.11 Stopping the arbitration to await a court's ruling**

4.11.1 When a court is considering a challenge to his jurisdiction, should the arbitrator stop the procedure? Section 31(5) of the Act says:

“The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction).”

Normally, again, assuming the absence of any agreement, the answer depends on the likely success and good faith of the challenge. If the challenge seems reasonable, waiting at least initially for a reasonably prompt ruling can make sense. If not, the arbitrator should usually

continue to prevent an abusive application to court from delaying the resolution of the matter.

4.11.2 Faced with a challenge to his authority, the arbitrator must be aware of an injunction brought in aid of an application to court for a final order stopping the arbitration. Failure to observe this may affect the arbitrator's ability to complete the case or others in the future and depending on the jurisdiction concerned, could prevent the enforcement of the award.

4.11.3 However, the arbitrator may be faced with an injunction obtained outside the seat of arbitration. This may, and usually does, involve the home country of the party objecting to jurisdiction. In that case, the arbitrator should normally continue with the case. Otherwise, the ability of one party to obstruct an arbitration merely depends on the compliance of its local courts. Anyway, if the parties did agree to arbitrate, they consented to a process in the place of arbitration not elsewhere. If the English courts in the seat are happy for the case to continue or indeed unhappy for this to happen, it accords with the parties' agreement and common-sense to follow their lead.

## **5. Jurisdictional Issues**

### **5.1 Parties**

5.1.1 Increasingly, the arbitrator's main jurisdictional task is to decide whether the actual or prospective participants in the case are parties with claims under the arbitration agreement. A number of court decisions have shown that concepts of agency, unilateral contracts or simple construction based on the parties' intentions can be used to expand the arbitral agreement beyond the named parties in the contract.

### **5.2 Incorporation of arbitration clauses by general reference**

5.2.1 The issues here may be two-fold. First, there is the contractual question of whether the parties' behaviour demonstrated an intention to incorporate the second agreement. That often breaks down to two sub-questions: whether the words of incorporation are drafted widely enough and whether the arbitration clause fits the dispute in question. Secondly, there can be difficulties with the formal validity of the arbitral clause under local laws and notably Article II (2) of the New York Convention. This requires the agreement to

arbitrate to be contained either in a signed document or an exchange of letters or telegrams. Since well before the Convention was thought of, English law has always had more liberal formal validity rules (currently in sections 5 and 6(2)) which have overcome this aspect of the problem.

Nevertheless, arbitrators need to be careful in this area. The English courts have traditionally been more inclined than most countries to permit the incorporation of arbitration clauses by general reference to a standard form agreement. Even so, there is a great deal of conflicting English caselaw on the incorporation of arbitration clauses in charterparties into bills of lading when less than clear terms have been used in this area.

5.3.3 The greater emphasis is on the point about the parties' intentions. Not infrequently, one finds a master agreement to which other contracts refer with greater or lesser degrees of clarity and incorporation. This has given rise to the difficult line of English cases referred to above. Sometimes, arbitrators have to sort out conflicting dispute resolution clauses in the different agreements.

## **5.4 Formal validity**

5.4.1 Since the Arbitration Act 1889, English law has accepted that an oral agreement to an arbitration clause or agreement that is itself committed to writing is sufficient for the purposes of formal validity under the various Arbitration Acts. This is currently reflected in section 5 of the 1996 Act. This obviates the need to discover the effects of a purely oral arbitration agreement at Common Law.

5.4.4 Whatever the situation, having a properly signed agreement to arbitrate either in the original contract or a subsequent Terms of Reference or submission can facilitate enforcement of the award. The New York Convention still permits countries to decline enforcement in the absence of both parties' signature or an exchange of letters or telegrams. The fact that few countries insist on such formalities should not blind the arbitrator to the desirability of a signed document (typically obtained by asking the parties to sign a Terms of Reference). This reduces the scope for later disputes.

## **5.5 Separability**

5.5.1 The principle of separability contained in section 7 of the 1996 Act creates a presumption that the agreement to arbitrate will survive any problems with the validity of

the main contract. If the problem affects the arbitration clause equally, this may invalidate the arbitration clause. It is insufficient, though, to say the contract is illegal or its formation was affected by fraud. Unless it is argued that the arbitration clause suffers from those defects, the challenge must be rejected.

5.5.2 This applies even where it is argued that the parties never reached agreement on the contract containing the arbitration clause so long as they had reached a binding agreement on the arbitration clause: *Premium Nafta Products Ltd v. Fili Shipping Company Ltd* [2007] UKHL 40. Usually, though, a contract formation problem (but not the failure of a condition precedent) will affect the arbitration clause equally. This is more open to discussion, though, where, during negotiations, the parties agreed the arbitration clause but there is a dispute as to whether they reached agreement on the necessary substantive provisions.

### **5.5.3 Separability within an arbitration agreement**

5.5.3.1 The English Court of Appeal in *Jivraj v. Hashwani* [2010] EWCA Civ 712, concluded that the invalidity of the arbitration clause's requirement for a member of the Ismaili community to be the arbitrator invalidated the entire agreement to arbitrate. While it reversed the Court of Appeal's decision in this case on two other points, the UK Supreme Court declined to deal with this issue: [2011] UKSC 40. This contrasts with the US Supreme Court's approach in *Rent-A-Center v. Jackson*

5.5.3.2 The correct answer probably lies somewhere between the two. Courts are usually keen to save agreements to arbitrate where one has been clearly entered into freely.

### **5.6 Conditions precedent – mediation**

5.6.1 It is becoming increasingly common for arbitration clause to require the parties to engage in a mediation process before agreeing to arbitrate. Recent English High Court decisions has favoured the enforcement of these clauses. This whole approach can be used to prevent the arbitral tribunal from having jurisdiction over a party who fails to co-operate with the mediation process.

### **5.7 Subject-matter arbitrability**

5.7.1 There is no provision of the 1996 Act on subject-matter arbitrability. Subject to the obvious limitations on the remedies that an arbitrator can grant, there appear to be no

express statutory restrictions on arbitration in England at least in the commercial area. The English approach on the rare occasions where it can be identified is either to provide non-judicial alternatives such as the Financial Ombudsman Service which have jurisdiction regardless whether there is an arbitration clause or piecemeal prohibitions such as those found in section 27A(c) Landlord and Tenant Act 1985 (as amended) as to the reasonableness of a leasehold service charge.

5.7.2 As an example of the exclusivity approach of European law, it is now clear that an arbitrator can resolve a dispute over whether a contract infringes the anti-competition provisions of what is now Article 101 TFEU. The Swiss Tribunal fédéral even requires arbitrators to rule on this in cases involving the European Union's scope of activities. They cannot, though, give an exemption to the nullity of the contract entered into in violation of Article 101.

5.7.3 Bankruptcy of a party is a subject always to be handled with care and reference to expert lawyers. In practice, there is no general rule that stops an arbitration in the event of a bankruptcy. See J Sutcliffe & J Rogers, "Effect of Party Insolvency on Arbitration Proceedings: Pause for thought in Testing Times, 76 Arbitration 277 (2010).

5.7.5 The Insolvency Act allows an administrator, administrative receiver or liquidator in a voluntary liquidation to conduct arbitration proceedings and refer cases to arbitration. A liquidator in a compulsory liquidation only has these powers with the court's consent. The position of the insolvent respondent is a little different from that of a claimant. Once a company is in administration, no proceedings can be begun or proceeded with except with the permission of either the administrator or the Court. Leave of the court is required to commence or continue with proceedings against a company in voluntary liquidation; the consent of the Court is needed for a case brought against a company being compulsorily liquidated.

## **5.8 Time-limits for commencing proceedings**

5.8.1 It is an unusual feature of English law that the Court but not the arbitral tribunal unless the parties or applicable arbitration rules give it the power, has a limited power to extend time for commencing arbitration. Section 12 of the 1996 Act says on this subject:

“(1) Where an arbitration agreement to refer future disputes to arbitration provides that a claim shall be barred, or the claimant’s right extinguished, unless the claimant takes within a time fixed by the agreement some step—

(a) to begin arbitral proceedings, or

(b) to begin other dispute resolution procedures which must be exhausted before arbitral proceedings can be begun,

the court may by order extend the time for taking that step.

(2) Any party to the arbitration agreement may apply for such an order (upon notice to the other parties), but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time.

(3) The court shall make an order only if satisfied—

(a) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time, or

(b) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question.

(4) The court may extend the time for such period and on such terms as it thinks fit, and may do so whether or not the time previously fixed (by agreement or by a previous order) has expired.”

The arbitrator should note that even though he or she has been appointed beyond the time-limits for making such an appointment, the court can under section 12(4) extend that time-limit to make valid his or her appointment.

## **5.9 Disregarding the law applicable to the substance**

5.9.1 Where the parties have expressly chosen the law to govern the merits of the dispute in question, the arbitrator is normally bound to try to apply that law. (The only exception is where public policy requires otherwise.) If he fails to do this accurately, that is not typically regarded as a matter of jurisdiction. The House of Lords in the *Lesotho Highlands* case went further in deciding that a failure to observe the Arbitration Act 1996 when reaching a conclusion on the merits did not constitute an excess of jurisdiction and could only be reviewed under the procedure for an appeal on a question of law which the parties had excluded. Their Lordships’ reasoning suggested that so long as the remedy awarded was not excluded by the arbitration agreement, the arbitrator could not exceed his jurisdiction by

reaching a particular result on the merits. Lord Steyn in a part of his judgment with which the majority agreed said:

“It will be observed that the list of irregularities under section 68 may be divided into those which affect the arbitral procedure, and those which affect the award. But nowhere in section 68 is there any hint that a failure by the tribunal to arrive at the “correct decision” could afford a ground for challenge under section 68. On the other hand, section 68 has a meaningful role to play. An example of an excess of power under section 68(2)(b) may be where, in conflict with an agreement in writing of the parties under section 37, the tribunal appointed an expert to report to it. At the hearing of the appeal my noble and learned friend, Lord Phillips of Worth Matravers MR, also gave the example where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard of the agreement awarded compound interest. There is a close affinity between section 68(2)(b) and section 68(2)(e). The latter provision deals with the position when an arbitral institution vested by the parties with powers in relation to the proceedings or an award exceeds its powers. The institution would exceed its power of appointment by appointing a tribunal of three persons where the arbitration agreement specified a sole arbitrator.”

5.9.2 In any event, a court reviewing an award, as part of setting aside or enforcement proceedings, may always rule that for public policy reasons, the arbitrator was right not to apply the law agreed upon by the parties.

## **5.10 Remedies - Punitive Damages**

5.10.1 One can argue that this has less to do with jurisdiction than the limits of the arbitrator’s powers. Such restrictions are themselves “jurisdictional” in one sense. English law places no restrictions on the types of remedies that an arbitrator can grant. However, an arbitrator awarding treble damages under US antitrust law may find that only the compensatory damages recoverable in enforcement proceedings.

5.10.2 Other countries may be more sensitive about punitive damages awards than England. Consequently, when making such an award, a tribunal might do best to make the award according to the applicable law chosen by the parties, make it clear which parts of the award relate to any punitive damages element and risk partial annulment or limited enforcement of the award.

## **6. Concluding Remarks**

6.1 The arbitrator must focus on whether there is a valid agreement to arbitrate at all, whether it covers the dispute and parties in question and whether he has the power to act in the way in which he would like to. In resolving these issues, he must, as always, pay careful attention to the arbitration agreement and the surrounding circumstances including the constant need to avoid losing both the appearance and the reality of impartiality in dealing with the parties' objections.

The guidelines are inevitably something of a permanent work in progress. We would welcome it if you could send any suggestions for updating, improvements and corrections to [nmcnamee@ciarb.org](mailto:nmcnamee@ciarb.org). Thank you in advance.

30 October 2011