

Commercial Court sets aside partial award of LCIA tribunal – time limits for objections to jurisdiction

March 15 2018 | Contributed by [Clifford Chance LLP](#)

[Introduction](#)
[Facts](#)
[Decision](#)
[Comment](#)

Introduction

It is relatively rare for the English courts to overturn awards of arbitral tribunals. However, a recent decision of the Commercial Court did just that, setting aside a London Court of International Arbitration (LCIA) partial award made by a panel of three queen's counsel. The partial award was challenged on the basis that:

- the arbitral tribunal had lacked substantive jurisdiction; and
- the application had been made pursuant to Section 67 of the Arbitration Act 1996.

In *A v B* ([2017] EWHC 3417 (Comm)) the Commercial Court considered:

- the validity of the request for arbitration, including whether a party can commence one arbitration for disputes arising under two contracts; and
- the time limit for objecting to the jurisdiction of an arbitral tribunal.

With regard to the first issue, Section 35 of the Arbitration Act requires parties to agree to the consolidation of multiple sets of arbitral proceedings, but does not provide an arbitral tribunal with inherent power to make such orders. Similarly, Article 22.1(ix) of the LCIA Rules 2014 permits an arbitral to consolidate disputes, where the parties have agreed to such consolidation (subject to the consent of the LCIA). In addition, as long as the LCIA agrees, under Article 22.1(x) of the LCIA Rules, an arbitral tribunal has the power to order consolidation at one party's request. The power is available in limited situations – for example, where arbitrations involve:

- the same parties;
- the same or similar arbitration agreements; and
- the same arbitral tribunal (if already constituted).

As regards the second issue, parties to arbitration proceedings seated in England and Wales have the right to object to the jurisdiction of an arbitral tribunal.

Section 31(1) of the Arbitration Act provides parties to arbitral proceedings with the right to object to the substantive jurisdiction of an arbitral tribunal "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".

Section 73 of the Arbitration Act provides that a party loses the right to object to jurisdiction if it:

"takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any

AUTHORS

[Marie Berard](#)



[Melissa Brown](#)



provision of this Part, any objection."

Similarly, Article 23.3 of the LCIA Rules 2014 allows a party to challenge the substantive jurisdiction of an arbitral tribunal provided that such objection is "raised as soon as possible but not later than the time for its Statement of Defence".

While the provisions of the Arbitration Act and the LCIA Rules are unsurprisingly similar, the precise wording used in relation to both the consolidation of proceedings and objections to jurisdiction is not identical. It is the interpretation of these provisions that the Commercial Court recently considered in *A v B*.

Facts

A and B were parties to two separate contracts for the sale of two consignments of crude oil, in which B agreed to sell oil to A. Both contracts were governed by English law and referred disputes to LCIA arbitration.

A subsequently resold the consignments of crude oil to a third party, C, again in two contracts and on terms mirroring its contracts with B, save for a 5% mark-up in price.

On September 23 2016 B commenced LCIA arbitration proceedings against A, serving a single request for arbitration for the full purchase price allegedly due under both contracts (the first arbitration).

On October 31 2016 A served its response (denying liability) and commenced separate LCIA arbitration proceedings against C, mirroring B's claims against it (the jurisdiction of the arbitral tribunal in those proceedings was challenged on March 23 2017 on the grounds that the request was invalid and this challenge was upheld on May 11 2017).

On February 8 2017 the arbitral tribunal in the first arbitration was appointed. It comprised Ian Glick QC (presiding), David Mildon QC and William Rowley QC.

On May 24 2017 A challenged the validity of the request for arbitration pursuant to Section 30 of the Arbitration Act and Article 23.3 of the LCIA Rules. The challenge was made on the grounds that the request did not identify the particular dispute or which of the arbitration agreements it related to. The challenge was made shortly before A was due to serve its statement of defence on June 2 2017.

On July 7 2017 the arbitral tribunal dismissed A's challenge to its jurisdiction in a partial award, stating that the challenge was brought too late in the proceedings.

Decision

On August 4 2017 A commenced proceedings in the Commercial Court challenging the arbitral tribunal's partial award pursuant to Section 67 of the Arbitration Act.

Mr Justice Phillips considered:

- the validity of the request for arbitration and whether B could issue a single request to commence arbitration proceedings under two contracts; and
- whether A had lost the right to object to the jurisdiction of the arbitral tribunal because it was unjustifiably late.

On the first issue, the judge reasoned that "[i]t is entirely plain that the LCIA Rules treat a single request as giving rise to a single arbitration" commenting that a single request also gives rise only to a single registration fee.⁽¹⁾ He noted that under Article 22.1(ix) of the LCIA Rules (and Section 35 of the Arbitration Act), an arbitral tribunal has the power to consolidate separate arbitral proceedings with the agreement of the parties.

The judge drew a distinction between *A v B* and another recent case, *Easybiz Investments v Sinograin (The Biz)* ([2011] 1 Lloyd's Rep 688). In *Easybiz*, a single arbitration notice commenced

proceedings in relation to 10 separate bills of lading, which did not contain arbitration clauses, but incorporated the terms of a charterparty which provided that disputes be referred to London Maritime Arbitrators Association arbitration. The judge distinguished the two disputes on the basis that *Easybiz* was not a case applying the LCIA Rules and was therefore not comparable with the LCIA-based institutional proceedings that he was considering.(2)

The judge concluded that in *A v B*, the single request was an ineffective attempt to refer separate disputes to a single arbitration.

The second issue, concerning objections to jurisdiction, was arguably more complicated. The judge stated that the starting points for determining whether a party has the right to contest an arbitral tribunal's jurisdiction are Sections 31 and 73 of the Arbitration Act (both mandatory provisions) and flagged Section 31(1) as the "crucial provision" to consider.(3)

The judge noted that Section 31(1) of the Arbitration Act does not impose a requirement on a party that an objection to jurisdiction must be made "as soon as possible".(4) The words "as soon as possible" were introduced in the 2014 version of the LCIA Rules (Article 23.3). The judge concluded that it was "inconceivable" that the LCIA had intended to introduce a stricter regime for jurisdictional challenge based on the (arguably vague) wording of Article 23.3 of the LCIA Rules than that imposed by Section 31(1) of the Arbitration Act.(5) The judge reasoned that Article 23.3 is simply intended to exclude "untimely objections".(6)

The judge also referred to the decision in *AIG Europe (Ireland) Ltd v Faraday Capital Ltd* ([2006] 2 CLC 770), in which a similar approach was taken to time limits.(7) The provision at issue in that case required notification of a claim "as soon as reasonably practical and in any event within 30 days", therefore arguably imposing two different time limits for notification. Justice Morrison held that the words "in any event" render the obligation to notify a claim before the 30-day time limit essentially redundant.(8)

The judge concluded that because the challenge was made before the filing of A's statement of defence, A had not lost its right to challenge the validity of the request.(9)

Comment

It is unusual for the English courts to set aside arbitral awards, particularly those of an arbitral institution made by such an eminent arbitral tribunal as the LCIA. The decision is interesting for a number of reasons.

Despite the guidance provided in *A v B*, there is no definitive answer to the question of the precise time limits for challenging the jurisdiction of an arbitral tribunal under Article 23.3 of the LCIA Rules or more generally in arbitrations seated in England and Wales.

The words "as soon as possible" may have been deliberately included in Article 23.3 of the LCIA Rules 2014 to afford an arbitral tribunal discretion to decide when to permit an objection on a case-by-case basis.(10) Notwithstanding the benefits of providing arbitral tribunals with such discretion, greater certainty on such important matters is surely desirable. The proper interpretation of Article 23.3 may be confirmed through practice; however, an explicit clarification of the rules in their next iteration would be welcome.

Parties for various reasons (both tactical and lethargy) will continue to push the time limits for raising objections to jurisdiction in arbitral proceedings. While the wording of the Arbitration Act and the LCIA Rules is not identical, the spirit of the act and the rules should be understood to be the same – if a party intends to object to the jurisdiction of an arbitral tribunal, this should be done early and before engaging in the substance of the merits.

For further information on this topic please contact [Marie Berard](mailto:marie.berard@cliffordchance.com) or [Melissa Brown](mailto:melissa.brown@cliffordchance.com) at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com or melissa.brown@cliffordchance.com). The Clifford Chance website can be accessed at www.cliffordchance.com.

Endnotes

- (1) *A v B* [2017] EWHC 3417 (Comm), at p 19.
- (2) *Ibid* at p 20 to 22.
- (3) *Ibid* at p 31.
- (4) *Ibid* at p 32.
- (5) *Ibid* at p 38.
- (6) *Ibid* at p 40.
- (7) *Ibid* at p 41.
- (8) *AIG Europe (Ireland) Ltd v Faraday Capital Ltd* [2006] 2 CLC 770 at [66].
- (9) *A v B* [2017] EWHC 3417 (Comm), at p 46.
- (10) See *Arbitrating under the 2014 LCIA Rules, A User's Guide*, M Scherer et al (2015), p 82-83.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).