

## Court refuses to intervene in disputed arbitration proceedings

**In an interesting recent decision where Clyde & Co acted for the successful defendant, the Commercial Court reconfirmed its reluctance to interfere with the parties' choice of arbitration as the dispute resolution medium, even where the very existence of the arbitration agreement (and associated contract) was in dispute.**

### Facts

The claimant alleged that the parties had entered into a binding commodities sale and purchase contract which contained a London arbitration clause. No shipments took place under the contract.

The claimant sought to pursue a claim against the defendant under the contract, in London arbitration; however, the defendant rejected the claimant's request to accept service of an arbitration notice at its London solicitors' office, and denied that there was a valid contract. It took the position that if, or when, the claimant commenced London arbitration, it would contest the arbitrator's jurisdiction. For its part, the defendant had no claim against the claimant.

In response, the claimant sought a declaration from the Commercial Court that there was a binding arbitration agreement. It was the defendant's case that the Court had no jurisdiction to entertain the claim for declaratory relief, in circumstances where the claimant was about to commence arbitration, since a tribunal had express power to determine its own jurisdiction under section 30 of the Arbitration Act 1996 (the Act). The main factors why the defendant decided to challenge the Court proceedings were to preserve the confidentiality of the underlying substantive dispute, and to test whether the claimant's attempt to short circuit the correct process was indicative of an unwillingness to properly invest in its claims. It applied to set aside the claim for declaratory relief.

### Decision

Judge Waksman QC agreed that the Court had no jurisdiction, in principle, on the facts of the case, and set aside the claim for declaratory relief. He cited the following reasons:

1. a party's ability to apply to the Court for declaratory relief (as to jurisdiction or otherwise) once arbitration was commenced, was prescribed by the Act: the arbitrator rules on his own jurisdiction, and recourse to the Court, thereafter, is subject to the conditions set out in section 32 of the Act;
2. where the Act laid down an extensive code for the governance of arbitrations, it would be wrong for the Court to exercise a general declaratory power in respect of the arbitrator's jurisdiction before the claimant had commenced arbitration;
3. the Act's intention was that the Court would not usually intervene outside the specific circumstances specified therein. It could not have been intended that a party to a disputed arbitration agreement could, by merely not appointing an arbitrator, obtain a court decision on its existence, without being subject to the restrictions contained in section 32;
4. the Court had jurisdiction to fill a legislative gap, and consider the existence of an arbitration agreement in the context of an anti-suit injunction, but that did not mean the Court was entitled to entertain an application for a declaration where the party seeking it was about to enter into the scheme provided by the Act;

5. where a claimant had a claim that it wished to assert in arbitration, on the basis that there was a binding arbitration agreement, it would be wrong, in principle, for the Court to grant declaratory relief which determined that issue; and
6. there was no impediment to the claimant commencing arbitration, so that there was no need for the Court to exercise its discretion, and grant the declaratory relief sought.

### **Comment**

This case addressed a previously untested point: whether a party seeking to rely on a disputed arbitration agreement, could seek declaratory relief of the Court (hence outside the scope of the Act) before appointing an arbitrator. The answer was a firm no.

Despite the defendant's assertion that there was no valid contract, and, accordingly, no valid arbitration agreement, it was clear that, in order to have that issue determined, the claimant should have commenced arbitration in accordance with the terms set out in the disputed contract. Questions of efficiency and cost (which may well have ultimately been misplaced in any event) could not serve to deviate from the legislated procedure.

This case confirms that a strategy to seek declaratory relief from the Court (rather than commence arbitration) which could be designed to circumvent the entire process by obtaining a declaration on the main dispute (i.e. whether there was a valid arbitration agreement) had no legislative support and would not be tolerated.

Waksman J's decision serves as a timely reminder to parties considering the commencement of arbitration: to ensure that reliance on the Court's powers is not misplaced. On facts such as these, the provisions of the arbitration agreement (whether its existence is disputed or not) must be followed before the Court is prepared to intervene. The Court will only consider interfering on the rare occasions where there is a legislative gap that warrants the Court exercising its discretion to make good any such lacuna. This was clearly not the case. The decision gives primacy to the contractually agreed (albeit contested, in this case) dispute resolution forum.



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