Case No. 1998 FOLIO 257

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
IN AN ARBITRATION APPLICATION

Strand
London WC2A 2LL

Date: Friday, 8th May 1998

Before:

MR JUSTICE RIX

B E T W E E N :

AZOV SHIPPING CO

Applicant

-and-

BALTIC SHIPPING CO

Respondent

Transcribed from the official court tape recording by
Harry Counsell & Company
61 Carey Street London WC2A 2JG
Telephone No: 0171-242-9346

MR V FLYNN (instructed by Messrs Shaw & Croft) appeared on behalf of the Plaintiff.
MR C SMITH (instructed by Messrs More Fisher Brown) appeared on behalf of the Defendant.

JUDGMENT Approved by the Judge

MR JUSTICE RIX: This is an interesting question under the Arbitration Act 1996. An arbitration has been commenced by- Baltic Shipping Company against Azov Shipping. Both those companies were shipping companies in the USSR. As a result of the splitting up of that Union disputes have occurred and an agreement was entered into by a number of former soviet shipping companies to deal with the question of their containers, and it is in issue as to whether Azov is a party to that agreement. That agreement contains an arbitration clause which, of course, is only binding on Azov if it is a party to the agreement in the first place.

The parties have agreed that if there is jurisdiction to arbitrate, in effect, that is to say if Azov is a party to the agreement, then Mr Donald Davies should be their sole arbitrator. The issue of his jurisdiction was in the first instance left to him under section 30 of the new Act. That, however, was under full reservations by Azov as to its not being a party to the agreement and thus there not being jurisdiction in Mr Davies to act as an arbitrator.

There was a three day hearing before Mr Davies solely on the preliminary point as to his jurisdiction in January of this year. Mr Davies rendered his award on 30th January and it was in favour of Baltic, that is to say he found that Azov was a party to the agreement and that he therefore did have jurisdiction. He had to consider a number of questions, both of fact and of foreign law, and witnesses of fact and expert witnesses of foreign law gave evidence before him orally and were cross cross-examined. He found that Azov's expert witness was somewhat evasive and partisan. He also found that the essential question of fact he had to decide as to whether Azov was or was not a party to the agreement was one as to which he had "no hesitation in conceding that I have had some uncertainty". He said that even after hearing the oral evidence and cross-examination to which I have referred.

Azov as the losing party to that award now seeks to challenge it, as is its right, and that is not in dispute, under section 67 of the Act.

That reads:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court - "(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction."

Where a challenge to an arbitrator's substantive jurisdiction is made, the party that challenges the jurisdiction has a number of options under the Act. It may agree to participate in the argument before the arbitrator of the question of his competence and jurisdiction: see section 30 of the Act. It may do so while reserving its right to challenge the arbitrator's award as to his own competence (see section 67). Of course, it may accept the award of the arbitrator even though it be against its own submission. In that case no question of challenge arises.

Alternatively, it may seek, without arguing the matter before the arbitrator, to promote the determination of the preliminary point of jurisdiction by the court under section 32. Under the terms of that section, that can only be done either where there is agreement in writing of all of the parties to the arbitral proceedings that it be done, or where there is permission from the arbitral tribunal for such a determination, and if the court is satisfied that that 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 (see section 32(2)).

The 1996 Report on the Arbitration Bill under the chairmanship of Saville LJ (as he then was) suggests in paragraph 140 that an application to the court for it to determine the point of jurisdiction under what is now section 32 would be very much the exception and it was to that end that section 32 was narrowly drawn. It was also there suggested that it would be the party wishing to arbitrate that would seek to make use of the powers under section 32. That may be so, but the application can be made by any party to the arbitral proceedings, and as I understand the matter, even a party which is disputing the substantive jurisdiction of the arbitrator would be such a party for the purposes of section 32.

The third option of someone disputing an arbitrator's jurisdiction is to stand aloof and question the status of the arbitration by proceedings in court for a declaration, injunction or other appropriate relief under section 72 of the Act. In such a case he is in the same position as a party to arbitral proceedings who challenges an award under section 67 on the ground that there was no substantive jurisdiction. He takes the risk, however, that in the meantime an award on the merits might be entered against him. However, in the typical case in which he has made his objection plain and seeks to protect his position by an application under section 72 it is perhaps unlikely, though of course possible, that an arbitrator would proceed to a final award on the merits before the matter has been dealt with in the courts. The Act nevertheless makes it clear that the arbitrator can do so.

The question before me in this context is this: where a full scale hearing on jurisdiction has been heard before the arbitrator under section 30 and there is a challenge to his award on jurisdiction under section 67, can the challenger seek an order from the court as to directions (for the purpose of the relevant arbitration application) which enable him to present his case and challenge the opposing party's case on the question of jurisdiction with the full panoply of oral evidence and cross-examination, so that, in effect, the challenge becomes a complete rehearing of all that has already occurred before the arbitrator?

Order 73 rule 14 begins as follows:

> "(1) The court may give such directions as to the conduct of the arbitration application as it thinks best adapted to secure the just, expeditious and economical disposal thereof.
>
> (2) Where the court considers that there is or may be a dispute as to fact and that the just, expeditious and economical disposal of the application can best be secured by hearing the application on oral evidence, or mainly on oral evidence, it may, if it thinks fit, order that no further evidence shall be filed and that the application shall be heard on oral evidence or partly on oral evidence and partly on affidavit evidence, with or without the cross-examination of any of the deponents as it may direct.
>
> (3) The court may give directions as to the filing of evidence and as to the attendance of deponents for cross-examination and any directions which it could give in proceedings begun by writ."

On behalf of Baltic, Mr Christopher Smith submits that it would be neither just, expeditious nor economical to permit such a complete rehearing. He submits that if such a rehearing were to be permitted then every case where an arbitrator gave an award as to his own jurisdiction under section 30 would be challenged by the losing party and would simply lead to a reduplication of costs, and that is obviously not economical. Nor is it, he submits, just in a situation where a party is not secured for those costs.

He submits that the right course for a party who wishes to make his substantial challenge to jurisdiction in the court is not to participate in a hearing under section 30, but to stand aloof and to go to court under the combination of section 72 and section 67. Section 72, of course, would be enough where there is no award on jurisdiction. Section 67 would need to be invoked as well where in the meantime an arbitrator had made an award as to jurisdiction.

It seems to me that there is a certain force in that submission, but, nevertheless, on balance I have come to the conclusion that, in at any rate this case, I should permit the challenge which Azov is perfectly entitled to make under section 67 to be accompanied by oral evidence and cross-examination.

This was perhaps a case where the parties might well have come to court, either by agreement or upon an application from the one side or the other for the court to determine the issues of jurisdiction, on the ground that it was likely to produce substantial savings in cost and that there was good reason why the matter should be decided by the court. With hindsight it seems to me that even if the parties could not agree upon that course, the court would be persuaded to allow such a determination if, of course, the tribunal had given its own permission, which is a sine qua non in the absence of the agreement of the parties. It might be assumed that the arbitrator may have been the more willing to give his agreement inasmuch as the question of jurisdiction in this case involved the prior

question of whether Azov had ever become a party to the agreement as a whole.

As a matter of fact there appears to have been no attempt to secure agreement between the parties and there certainly was no application by either party for such a court determination. So that matter is neutral, save, I suppose, that inasmuch as the Report on the Bill contemplates that the running, on such an application, is primarily that of the party who wishes to arbitrate rather than that of the party who wishes to challenge the arbitration, the burden of the absence of such an application rests upon Baltic rather than upon Azov.

I can quite see that there is an interest in encouraging parties to put their arguments on jurisdiction before the arbitrator himself under section 30. In many cases, and perhaps in the ordinary and normal case of such a challenge, where, for instance, there is simply an issue as to the width of an arbitration clause and no issue as to whether a party is bound to the relevant contract in the first place, the arbitrator's view may be accepted. If it is not, a challenge to the court is likely to be a limited affair raising, essentially, a point of construction on the clause and thus no problem arises. Where, however, there are substantial issues of fact as to whether a party has made the relevant agreement in the first place, then it seems to me that, even if there has already been a full hearing before the arbitrators the court, upon a challenge under section 67, should not be placed in a worse position than the arbitrator for the purpose of determining that challenge. On the particular facts of this case, this seems to me to be a fortiori the position where the arbitrator who did have the benefit of oral evidence has said that he has come to his final decision as to whether Azov is a party to the agreement with uncertainty. It is not as though the court is required to review a challenge to the arbitrator's award on jurisdiction through the eyes of the arbitrator or on his findings of fact. As paragraph 143 of the Report on the Bill makes clear -- "A

challenge to jurisdiction may well involve questions of fact as well as questions on law."

Similarly, the court may well be at a disadvantage in deciding issues of foreign law in the absence of oral evidence and cross-examination of the expert lawyers. Moreover, given that the finding of Mr Davies as to the partisanship of Azov's expert cannot in any way bind the court, it is, I think, desirable, where there may well be submissions before the court as to the helpfulness of that expert's evidence, that the court should have the advantage of hearing his oral evidence for itself.

As for the question of costs and security for costs although Baltic, as claimant in the arbitration, could not be secured for the costs of the hearing below, when, however, it comes to Azov's challenge, Baltic would, I suppose, be entitled to make, if so advised, an application for security for costs that arise on the hearing under section 67. Undoubtedly costs will be increased by an oral hearing and that hearing will take somewhat longer, perhaps some 50 per cent longer than it would have taken without oral evidence.

It may also delay the time when a hearing is fixed to come on, where that hearing may last for, let us say, some three days rather than a day and a half or two days. Nevertheless, and although there may be some prejudice to the expeditious and economical disposal of the application by permitting oral evidence, it seems to me that the justice of the matter requires that I accede to Azov's application. Ultimately a question of justice, where it conflicts with a modest prejudice to expedition or increase in cost, must be given greater weight. For these reasons I accede to Azov's application, that, in what would in any event be a weighty application, oral evidence should be permitted.

MR FLYNN: My Lord, I am very grateful indeed. I would firstly point out the practice direction of Colman J and it seems to me that this judgment is the very one of the judgments that he refers to where "... The judge of the commercial court will endeavour so far as possible to consistency in matters of construction of both the Act and the new order

73. In order to facilitate consistency of approach arrangements have been made for decisions on matters of construction application to be circulated between the judges immediately they are given and then distributing them to practitioners".

MR JUSTICE RIX: Yes.

MR FLYNN: I do not know, my Lord, whether given the judgment of the Court of Appeal in the Imperial Tobacco case whether it is necessary to direct that this judgment be deemed delivered in open court.

MR JUSTICE RIX: No, I think it is the other way now.

MR FLYNN: Yes, I think it probably is. But if it is necessary I would ask your Lordship to direct it under order 32 rule 13 .

My Lord, the second point is costs. This is a discrete issue, we would ask for our costs in this application. The only other question is the further directions. Your Lordship indicated that, as I understood it, that it might be helpful, given my indication that we would like to lead in chief, would that be put in -- the leading be put in writing, if that is the case, obviously, we will need some time to do that. Subject to that, what we would say is 21 days to do that, then the normal directions apply, apart from reply evidence, which we would ask for an extension from seven to 21. But those are the only submissions I have.

MR SMITH: My Lord, in reverse order, I have been thinking about it while I have been listening to my learned friend, if we are both calling evidence again, the first time round was exchange of evidence, and if we are going to, as it were, put our questions in chief in those supplementary statements, it may be more appropriate, and it may not be contentious, but what there should be is an exchange of supplementary witness statements followed by an exchange of supplementary experts' reports, so it takes direction --

MR JUSTICE RIX: Was there supplementary evidence from the factual witnesses as well as the expert witnesses?

MR SMITH: Yes, my Lord, briefly. If may be appropriate if the matter as my learned friend has fairly described, effectively, as a rehearing, as a trial, the directions took effect as they would do then, so that there should simply be an order for mutual exchange of supplementary witness statements followed by a mutual exchange of supplementary experts' reports.

MR JUSTICE RIX: I would like to think that is right.

MR FLYNN: We are very content with that.

MR JUSTICE RIX: I am inclined to give the shortest possible sensible times for that since this is a run that you have already done. I am inclined to say 14 days for factual...

MR FLYNN: My Lord, the only thing I would say is I know that my solicitor would be very anxious because he took the statements last time round by actually going to the Ukraine and we would ask for 21 days.

MR SMITH: My Lord, I think that is -- 21 and then 21 again.

MR JUSTICE RIX: Could one do factual and expert at the same time or would you want to have a...

MR FLYNN: We would want to have a break.

MR JUSTICE RIX: 21 plus 21?

MR FLYNN: Yes.

MR JUSTICE RIX: So be it. 21 days mutual exchange, factual supplementary statements, 21 days after that mutual exchanges of experts' supplementary statements. Otherwise automatic directions, in effect, are they not?

MR SMITH: My Lord, on reporting, I think we are with your Lordship on that, it is not necessary to make an order, but we certainly would not oppose if it was necessary. My Lord, on costs, I appreciate there has been a discrete issue here today, but there would have had to be a directions hearing in any event. I appreciate we have lost, but what we do say to your Lordship is that it is an appropriate case where it has troubled your Lordship, it is a new point, it was a point that was proper to be ventilated, but it should be costs in the application.

MR JUSTICE RIX: Do you want to say anything further about that?

MR FLYNN: My Lord, it is not a run of the mill directions application. The time was extended at Baltic's request. Your Lordship has given a very reasonable judgment, we have succeeded, they have lost, we would ask for costs.

MR JUSTICE RIX: I will say costs in the application.

MR SMITH: My Lord, can I briefly and finally trouble your Lordship on one matter, echoing what my learned friend said about the desirability of emanating this judgment, my Lord, we would ask your Lordship for leave to appeal on what does seem to us to be a fundamental point of principle under the new Act as to the effect of not availing yourself of the section 72 option and whether that really does, as we say, mean that you have limited yourself. We do say, as your Lordship said in giving a slightly longer judgment than normal, it is a very important point that would be appropriate for consideration.

MR FLYNN: My Lord, on that point I am not sure, I was looking up myself whether if we lost we could appeal. I am not sure it is possible, my Lord, but I will not take that point, because if your Lordship deals with the application it is not possible then it certainly saves time. What I would say is even if it is possible to appeal from this judgment this ought to be a matter to be dealt with by the Court of Appeal. If they consider

that your Lordship's judgment requires any interference then they can give leave themselves.

MR JUSTICE RIX: That is my view. If it is possible to appeal I refuse leave and you will have to go to the Court of Appeal.