The Ghost of Christmas Past PreArbitral Requirements

By Markus Esly | December 14, 2021

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In December 1862, the English scientist, John Henry Pepper appeared to conjure a ghost in a demonstration at the London Polytechnic. This was sadly not, of course, the Ghost of Christmas Past but an illusion. The technique used became known as ‘Pepper’s Ghost’. It was developed for the stage and soon became the main attraction in numerous plays where the audience was seemingly able to interact with a ghostly apparition. The ‘ghost’ was an actor hidden in a booth beneath the stage. Light projected through an angled pane of reflective glass enabled the image of the ‘ghost’ to appear on stage, a little like a three-dimensional hologram.

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From late October 2021, audiences in Las Vegas have been watching a life-like hologram of the late Whitney Houston perform. The technology involved in bringing the singer back to the stage does not rely on the 'Pepper's Ghost' technique, but rather computer-generated face-mapping and a body double. The final moving image so created is projected onto a screen by a military-grade laser. The effect is uncanny. Such holograms could have a wide range of applications in the entertainment industry. A dispute about patents for the underlying technology has now also led to a decision in the Commercial Court, in *NWA & Anor* v *NVF & Ors* [2021] EWHC 2666 (Comm), on the effect of dispute resolution clauses that require the parties to mediate before they can go to arbitration. Do such compulsory mediation provisions limit the jurisdiction of arbitral tribunals, or are they just another illusion?

The English legislative framework

The English Courts support arbitration through exercising supervisory powers under the Arbitration Act 1996. One area where the English Courts have such powers is the jurisdiction of the arbitral tribunal. Section 67 of the Arbitration Act 1996 gives a party to arbitral proceedings the right to challenge "*… any award of the arbitral tribunal as to its substantive jurisdiction;*". During the arbitration itself, the arbitral tribunal is entitled to rule as to its own substantive jurisdiction, as confirmed by Section 30(1) of the Arbitration Act. The English Courts' ability to review and finally decide the question of jurisdiction is thus only available at the end of the arbitral proceedings. Section 30(1) also contains the statutory definition of what constitutes "*substantive jurisdiction*", namely (i) whether there is a valid arbitration agreement, (ii) whether the tribunal is properly constituted, and (iii) what matters have been submitted to arbitration in accordance with the arbitration agreement.

The Arbitration Act 1996 imposes three key statutory limits on a party's ability to bring a jurisdictional challenge under Section 67. The first is that the arbitral process must have been exhausted (including any right to have an arbitral institution review the tribunal's jurisdiction through its supervisory body, such as the ICC's International Court of Arbitration). That duty to exhaust the arbitral process applies provided that the party in question has taken part in the arbitration (see Sections 70(2) and 72(2) of the Arbitration Act 1996). The second is that any application under Section 67 to have the English Courts review the tribunal's jurisdiction must be brought within 28 days of the award, or the outcome of arbitral review process or appeal (see Section 70(3) of the Arbitration Act 1996). Finally, and perhaps most importantly, the right to object can be lost. Section 73(1) requires that jurisdictional objections must be raised "*forthwith*" (unless a specific time limit applies to the arbitration, for instance by virtue of the relevant procedural rules or the arbitration clause). As Clarke J said in *C* v *D1* [2015] EWHC 2126, the purpose of Section 73 was:

> "*… to ensure that if a person believes he has grounds for objecting to the constitution of the tribunal or the conduct of the proceedings, he raises those objections as soon as he is aware of them or ought to be aware of them. It would be unfair if he took part in arbitration yet kept an objection up his sleeve and only attempted to deploy it later…*"

The agreement between the parties

Clause 10 of the contract between the parties in *NWA* v *NVF* stated that:

> "*(a) In the event of a dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity, termination, interpretation or effect, the relevant parties to the dispute shall first seek settlement of that dispute by mediation in accordance with the London Court of International Arbitration ("LCIA") Mediation Procedure … Any mediation shall take place in London.*
>
> *(b) If the dispute is not settled by mediation within 30 days of the commencement of the mediation or such further period as the relevant parties to the dispute shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules.*"

Another notable feature of the dispute resolution clause was that the parties had agreed that their disputes should be resolved swiftly. They had stated expressly that any arbitration should be concluded within just three months of the LCIA receiving a Request for Arbitration, with an award to be issued within a further month thereafter. That is an ambitious timescale which, as will be seen, was not met.

Jumping the gun?

On 18 April 2019, the two individuals who were the defendants in the Commercial Court, referred to below as Parties A, sent a Request for Arbitration to the LCIA. The judgment provides little detail about the nature of the underlying dispute or the claims, beyond noting that the contract required the parties – five individuals – to reorganise their commercial dealings concerning 3D holograms, with particular focus on who would be the holder of certain patents, and who stood to benefit if pending patent applications proved to be successful.

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Parties A said that the dispute needed to be resolved urgently and asked the LCIA to expedite the matter, probably relying on the tight contractual timescale for any arbitration in Clause 10. Parties A also requested that the arbitration, once 'commenced' by the LCIA, be stayed immediately – so even before the appointment of the arbitral tribunal. Such a stay was necessary, they said, to enable a mediation to take place "… *as required*" by Clause 10.2. Parties A thus acknowledged that there was a binding requirement to mediate, but wanted the arbitration to be on foot so that it could proceed as quickly as possible if the mediation came to nothing.

On 25 April 2019, the LCIA served the Request for Arbitration on the three respondents in the arbitration, who would become the claimants in the Commercial Court (further referred to below as Parties B). That Request elicited no response from Parties B. The LCIA nevertheless continued to administer the arbitration, as it is entitled to do where a party does not participate. On 13 June 2019, a sole arbitrator was appointed. The parties were notified of this. Again, Parties B remained silent. Parties A then swiftly informed the sole arbitrator of the need to hold a mediation. At this point, one of the two Parties B raised their head above the parapet, to say that they had a limitation defence to the claim and did not want to give this up by agreeing to a mediation (which they would not have done in any case). Parties A responded by reiterating their offer to mediate, to no avail. A month later, the second Party B wrote in, stating that it did not consider itself to have become a party to the underlying contract at all, and was thus under no obligation to mediate. On 30 September 2019, for reasons that are not explained in the judgment, the LCIA then appointed a replacement sole arbitrator.

It was not until almost a year later, on 7 September 2020, that the sole arbitrator issued a partial award dealing with the question of his own jurisdiction, as he was entitled to under Section 30 of the Arbitration Act 1996. It seems that, by that stage, Parties B had participated in the arbitration, at least sufficiently to allege that the arbitrator lacked jurisdiction. He disagreed, finding that Clause 10.2(a) was not sufficiently clear and certain to be enforceable as a condition precedent to arbitration. The arbitrator also considered that, in any event, Parties A were not in breach of Clause 10.2(a) because they had made efforts to hold a mediation, which had proven fruitless. As regards Clause 10.2(b), he held that for it to have 'business efficacy', it should not be read literally – it would not make commercial sense to require a mediation before either party was free to refer their claims to arbitration. Neither did the provision contain a clear negative stipulation preventing the commencement of arbitration proceedings without a mediation.

Taking the question of jurisdiction to the Commercial Court

Parties B challenged that Partial Award in the Commercial Court, under Section 67 of the Arbitration Act 1996. They argued that Parties A had breached the arbitration agreement in Clause 10 by issuing a Request for Arbitration and then asking the LCIA to stay the proceedings for 30 days so that a mediation could take place. By doing that, Parties A had, it was alleged, failed to "… *first seek settlement of the dispute by mediation*". On that argument, it followed that the arbitrator had no jurisdiction at all, and could not even stay the arbitration once commenced to enable a mediation to take place. There was simply no claim over which the tribunal had jurisdiction that could be stayed. Carver J described the position adopted by Parties B as "*highly unattractive*", considering that they had shown absolutely no intention to mediate in the face of successive invitations to do so. Nonetheless, if such was indeed the effect of Clause 10, then the award would have to be set aside for want of jurisdiction.

Importantly, Carver J also noted that the question might not be one of jurisdiction at all, but one of admissibility. The admissibility of claims is a procedural matter that falls within the sole purview and power of an arbitral tribunal. Such determinations cannot be reviewed by the English Courts under the Arbitration Act 1996, save where there was a serious violation of due process. Section 68 of the Arbitration Act 1996 offers redress where a serious procedural irregularity caused a party to suffer a substantial injustice. Challenges under Section 68 rarely exceed in practice, perhaps a testament to the impartiality and judiciousness of arbitral tribunals sitting in England.

The jurisdiction of arbitral tribunals is governed by the scope of the arbitration agreement, since arbitration is contractual and consensual in nature. Carver J turned to the construction of Clause 10, to determine whether the parties had truly agreed to exclude from the remit of the arbitral tribunal all claims that had not been submitted to mediation. He found that they had not. The judge noted the short period of 30 days within which a mediation would have to take place, as well as the compressed timetable that the parties had agreed to. English law construes arbitration clauses widely and will seek to uphold the purpose of such an agreement wherever possible. In *Premium Nafta Products Limited* v *Fili Shipping Company Limited* [2007] UKHL 40, the House of Lords noted that:

> "*In approaching the question of construction, it is therefore necessary to inquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international*

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> *contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction*."

With that in mind, Carver J made a number of observations. Suppose that a party declined to mediate. If that happened, the first sentence of Clause 10.2(b) – if read strictly – could never apply, since the referral to arbitration depends on the "*commencement*" of a mediation:

> "*If the dispute is not settled by mediation within 30 days of the commencement of the mediation or such further period as the relevant parties to the dispute shall agree in writing, the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules …*"

The judge noted that sensible businessmen could not have intended that a refusal to mediate by one party (such that no mediation was ever commenced) would preclude the other from submitting the dispute to arbitration. Pausing here, it can be seen that on a closer reading of Clause 10, the drafting was defective – at least sufficiently so to enable an obstructive counterparty to attack the jurisdiction of the arbitral tribunal.

Carver J noted that the claim, whether it was mediated or not, remained one that was patently arbitrable. It simply concerned whether contractual obligations had been complied with. The issue was not therefore one of jurisdiction (whether the tribunal could hear the claim because of its subject matter, or because of the circumstances in which the tribunal had been appointed), but one of procedure (was the claim admissible despite the potential failure to comply with a procedural requirement). The judge cited a number of learned commentaries on international arbitration, all taking that same view. By way of example, the authors of *International Commercial Arbitration*, *Born, 3rd Edition* suggested that:

> "… *absent clear contrary contractual text, the following generalizations should apply: (a) negotiation and mediation provisions should generally be regarded as unenforceable (like agreements to agree), imposing only limited, non-mandatory obligations; (b) non-compliance with pre-arbitration procedural requirements should ordinarily be capable of being excused; (c) pre-arbitration procedural requirements should be characterized as procedural or substantive (not jurisdictional) and the consequences of non-compliance should be non-jurisdictional; (d) the interpretation and application of pre-arbitration procedural requirements should be matters for arbitral tribunals, not national courts; and (e) arbitral tribunals' rulings on the application of pre-arbitration procedural hearings should be subject to deferential judicial review in annulment and recognition proceedings."*

The judge agreed that because of the inherently procedural nature of any pre-arbitral steps contained in tiered dispute resolution clauses, their relevance, and sanctions for non-compliance, should be decided by the arbitrators, along with all other procedural matters relating to the arbitration. That view, widely supported by academic commentators internationally, also gave effect to the commercial purpose of the arbitration agreement.

Is the arbitration agreement inoperative until the parties have mediated?

Parties B had not, however, put all their eggs in just the one basket. They also argued that the arbitration agreement itself was invalid, or would only become operative once the condition precedent – to mediate – had been performed. In support of this, counsel cited a decision of the High Court of Singapore, following what it considered was the effect of a decision of the English Courts. In *International Research Corp PLC* v *Lufthansa Systems Asia Pacific Pte Ltd* [2012] SGHC 226, the High Court of Singapore noted that:

> "*Where an agreement is subject to a condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance under the agreement: Chitty at paragraph 2-150. A dispute resolution clause, which may be multi-tiered in nature, should be construed like any other commercial agreement. … Therefore, until the condition precedent to the commencement of arbitration is fulfilled, neither party to the arbitration agreement is obliged to participate in the arbitration. In the same vein, an arbitral tribunal would not have jurisdiction before the condition precedent is fulfilled: see Smith* v *Martin [1925] 1 KB 745.*"

Carver J held that this rationale (derived from a 1925 decision) could not apply to an arbitration clause for the purposes of Section 67 of the Arbitration Act 1996. Even if the requirement to mediate were a true condition precedent in Clause 10, this would still be a procedural point concerning admissibility, and as such was a matter solely for arbitrators to decide. The English Courts' supervisory jurisdiction under Section 67 of the Arbitration Act 1996 was not engaged for this reason, either. As an aside, the position in Singapore would now appear to be the same following the Court of Appeal decisions in *BBA* v *BAZ* [2020] 2 SLR 453 and *BTN* v *BTP* [2020] SGCA 105). In order to dispose of all the points raised by Party B, the judge also found that if the mediation requirement had been a true condition precedent that

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could have prevented arbitration, then Party B had breached it by declining the offers to mediate, and could not now rely on its own breach to stymy a claim being brought against it before an LCIA tribunal.

A matter of time?

The arbitration clause in *NWA* v *NVF* on its face required the "*commencement*" of a mediation before any arbitration. Other tiered dispute resolution provisions require a 'cooling off' period during which negotiations are meant to, or at least could, take place, before formal proceedings may be brought. Earlier this year, the Commercial Court had occasion to consider a jurisdictional challenge that was premised on a failure to observe such a time limit. In *Republic of Sierra Leone* v *SL Mining Ltd* (Rev 1) [2021] EWHC 286 (Comm), the parties had agreed to the following ICC arbitration clause:

> "*b) The parties shall in good faith endeavour to reach an amicable settlement of all differences of opinion or disputes which may arise between them in respect to the execution performance and interpretation or termination of this Agreement, and in respect of the rights and obligations of the parties deriving therefrom.*
>
> *c) In the event that the parties shall be unable to reach an amicable settlement within a period of 3 (three) months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement, either party may submit the matter to the exclusive jurisdiction of a Board of 3 (three) Arbitrators who shall be appointed to carry out their mission in accordance with the International Rules of Conciliation and Arbitration of the … ICC. …*"

It is one thing to find that the commercial purpose of an arbitration agreement would be frustrated by insisting on compulsory mediation. However, should a cooling off period be treated differently? Is it 'uncommercial' to hold the parties to their agreement that they simply had to wait for a time before referring their dispute to a panel of ICC arbitrators? After all, waiting is less onerous than mediating. In *Republic of Sierra Leone* v *SL Mining Ltd*, the arbitration was commenced within the three months' time period. The respondent challenged this before the tribunal. The arbitrators held that they had jurisdiction, as the objection was procedural and went to admissibility. The respondents in the arbitration brought a Section 67 challenge. The Commercial Court came to the same conclusion as the arbitrators and Carver J. Sir Michael Burton found that whether the claim had been brought too early was a question of admissibility, and was to be decided solely by the tribunal, without a review by the English Courts under Section 67. The respondents had placed particular reliance on Section 30(1)(c) of the Arbitration Act 1996, which states that:

> "*Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to – …*
>
> *(c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*"

Counsel argued that it followed from this that whether a claim had been submitted within, or without, a time limit set out in the arbitration agreement had to relate to the substantive jurisdiction of the tribunal – because only claims submitted after the three months were "*submitted in accordance*" with the contract. Sir Michael Burton disagreed, holding (in line with the views adopted by the leading commentators) that Section 30(1)(c) was only concerned with whether a claim was arbitrable due to its subject matter:

> "*The issue here is not whether the claim is arbitrable, or whether there is another forum rather than arbitration in which it should be decided, but whether it has been presented too early. That is best decided by the Arbitrators*."

Conclusion

NWA v *NVF* and *Republic of Sierra Leone* v *SL Mining Ltd* provide welcome confirmation that the arbitral tribunal can decide all matters that might be required of the parties by virtue of a tiered dispute resolution clause. This should extend beyond a requirement to mediate or a cooling off period to the content and timing of notices of dispute, to the making available (or not) of senior party representatives for discussions, and to any other hoops that a would-be claimant may be contractually expected to jump through. However, parties should not take these decisions as encouraging them to dispense with potentially unwelcome pre-arbitral steps. If the tribunal finds that the claims are inadmissible, then that is likely the end of the matter. The supervisory jurisdiction of the English courts cannot be prayed in aid to review this. As against that, if there is a true jurisdictional objection, then Section 67 of the Arbitration Act 1996 will lead to full re-hearing of the matter before an English judge. A decision by the tribunal as to its own jurisdiction will be taken into account, but it will by no means be determinative – and it remains open to the High Court to come to a different conclusion than the arbitrators.

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It might be thought that the jurisdictional objections, and assertions that pre-arbitral requirements have not been met, are among the tactical tools deployed by obstructive respondents who would like nothing more than to delay – or better yet, entirely derail – an arbitration against them. What can be done to rein in such an arbitration Grinch? At the outset, consider carefully whether a tiered dispute resolution clause is really necessary. If the parties end up in a dispute, will a contractual requirement that there should be settlement discussions or negotiations (unenforceable under English law in any event) really bring them back to the table? How productive will negotiations be if the parties have not yet been required to set out their claims in a logical and considered manner, as they will have to do once an arbitration is on foot? If one party has unrealistic expectations or views, those may only be changed or dislodged when the arguments have been set out starkly in written submissions. Long and complicated dispute resolution clauses may give a difficult opponent arguments to make – Clause 10 in *NWA* v *NVF* is a good example of this. Keeping the arbitration clause short and to the point is probably preferable. Arbitrators, too, can do their part. Tribunals should always seek to deal with challenges that are plainly tactical or intended to be disruptive at an early stage. To give some practical examples, there is no reason, for example, why the timetable to the preparation of substantive pleadings cannot run in parallel to that for the determination of challenges to the tribunal. It may also be unnecessary to have detailed written submissions if an objection is going to be the subject of a hearing. If the objection fails on an obvious ground, the tribunal's written decision could focus on that. Lengthy partial awards on admissibility or jurisdiction should, it is suggested, be avoided wherever possible. Finally, it is not possible to exclude the right to bring a (true) jurisdictional challenge under Section 67 of the Arbitration Act 1996 by contract. The provision is a mandatory one and the parties cannot agree to give up their right in principle to have jurisdiction reviewed by the English Courts, as the Court of Appeal confirmed in *Minister of Finance (Incorporated)* v *International Petroleum Investment Company and another* [2019] EWCA Civ 2080. Like Christmas adverts in October, the odd challenge to arbitral tribunals will therefore continue to be a fact of life. However, the English Courts can be trusted to hand out the judicial equivalent of a lump of coal.

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