

## **Kaplan Lecture**

### **“The importance of being competent”**

1. It is a very great pleasure to be back in Hong Kong after what I fear has been too long an absence. It is a particular and personal pleasure to have been asked to deliver this distinguished lecture, named after someone who is often referred to as a father of Hong Kong arbitration, but whom I have long been honoured to call a friend. I salute him, and I thank you all for the compliment of your presence here this evening.

2. Arbitration has given me an enormous amount of fun over my professional lifetime. So I celebrate it. I can remember the first arbitration I ever attended, on almost my first day as a pupil barrister. It took place in the old Baltic Exchange, as shipping arbitrations invariably did. My pupil master's leader, the future Lord Justice Staughton, wanted to indicate that the other side's pleadings were not worth the paper they were printed on. So he simply tore them up in front of the astounded arbitrators! I remember the very first arbitration in which I appeared as a barrister: one of the arbitrators, the late Ralph Kingsley, was so offended by some innocent submission I had made, at any rate a submission I had made in all innocence, that he said it was rubbish. And when I looked disconcerted, he said, as he puffed on his own cigar: “never mind, Mr Rix: have a cigar!” Nowadays, of course, you cannot smoke even a cigarette in London unless you go out into the street. I remember my first arbitration case which had come before the London Court of Appeal: I was in front of Lord Denning, but also Lord Justice Templeman, who could be very difficult. He was giving me a hard time. News of the battering I was getting began to spread around the Temple. Neil Kaplan came to see what was happening. He was appalled. That evening he told me: “You should not let yourself be treated like that. Stand up for yourself!” I said: “You don't understand. The tree that bows before the wind, survives the storm”. Huh! Some tree! Nothing survived. I remember my first international arbitration overseas: it took place in Rotterdam, between an Australian company, my clients, and a French company. The arbitration was supposed to take place in English, but all the French witnesses gave their evidence in French, and there was no interpretation. I didn't understand a word of the evidence; but from time to time one of the arbitrators, the great Cedric Barclay, who spoke more languages than Chopin wrote waltzes, fed me a titbit of evidence to be going on with. I was completely at sea. But the arbitrators took pity on

me and found in my client's favour. And I remember my first arbitration case in the House of Lords, with Lord Diplock and Lord Roskill telling me that, since they had drafted the 1975 Arbitration Act, they did not want me to tell them what it meant! Oh yes, I've had great fun in arbitration. But, to business.

3. The subject matter of my lecture is the problem and importance of an arbitral tribunal's competence, that is, its competence to arbitrate: in other words its jurisdiction. And so I have called my lecture, with apologies to Oscar Wilde, the "Importance of being competent". But as Wilde said in his "Importance of being Earnest": "The truth is rarely pure, and never simple." So it is with trying to pin down the essence, the pure and simple truth, of what the law has to say about this important topic.

4. One aspect of this problem is the familiar question of an arbitral tribunal's competence to assess its own competence: hence the familiar phrases *kompetenz kompetenz* (the German and possibly the original phrase) and *competence competence* (the French phrase). There is no catchy equivalent English phrase, unless it is the interrogatory "*Who decides?*" The continental phrases in German and French pithily reflect the immensely theoretical learning which has been devoted to this subject. The English phrase, with its question-mark, suggests not so much the jurist's search for principle, but the practitioner's demand for a pragmatic answer to a real problem.

5. This lecture, as I understand the matter, likes to concern itself with the practical rather than the abstract, and so I will happily adopt that point of view. What I am therefore concerned with and will concentrate on are the practical problems which arise when there is an issue over jurisdiction. For these purposes the catch-phrase *Who decides?* is highly appropriate, as long as one remembers that buried within it are the further questions, *When?*, *How?*, *At what expense?* and *With what consequences?*

6. All arbitration is consensual. States have laws which persons within the range of those national laws must comply with: and states provide courts and judges to judge the issues which then arise. However, arbitration is personal and consensual. If you have not agreed to arbitrate, then you cannot be forced to arbitrate, at any rate that is the theory. And if you have agreed to arbitrate, then you can only be forced to arbitrate within the scope of your agreement, and with arbitrators of the kind you have defined in your agreement, be that lawyers, or commercial men, or members of a particular trade. However, if there is an issue about what you have agreed, or whether you have made any agreement at all, how is

that issue to be resolved? Arbitrators can only truly resolve that issue if there has been agreement, or sufficient agreement. Otherwise they are acting outside their area of competence. But national law, and the courts which are required to apply and uphold that law, do not depend on consent, and therefore can provide an answer, whatever the state of the parties' agreement or dissent. A difficulty remains, however, that if the state courts provide the answer or furnish the means towards an answer, and the answer is that the issue has been agreed for arbitration and ought to be arbitrated, then the courts may have become involved in deciding matters which ought to have been within the province of the arbitrators. And if the arbitrators decide that they do not have jurisdiction, they have *ex hypothesi* decided a question they were never authorised to decide. And even if they decide that they do have jurisdiction, can they give themselves jurisdiction by their own decision? What if they are wrong? This is a vicious circle.

7. The practical answer in a situation like this, where one would otherwise be like a dog which is constantly chasing its own tail, is that the state, through its national law, here its arbitration law, makes provision as to how such issues are to be resolved. And so it is that under the UNCITRAL Model Law which has strongly influenced the law in Hong Kong and is appended as a backbone to the modern Hong Kong Arbitration Ordinance 2011, article 16 provides that "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement." The article then goes on to lay down rules as to how any such objections are to be raised; to state that the arbitral tribunal may rule on such objections either as a preliminary question or in an award on the merits; to require a challenge from a preliminary ruling to the court to be made within 30 days; and to permit the tribunal meantime to continue with the reference.<sup>1</sup> Section 34 of the Hong Kong Ordinance goes on to provide that a decision by an arbitral tribunal that it does *not* have jurisdiction is final and cannot be appealed, but that in such a case the Hong Kong court, if it has jurisdiction, "must decide that dispute".<sup>2</sup> As for final awards, article 34 of the Model Law (see section 81 of the Hong Kong Ordinance) permits a challenge to the court to be made only within 3 months and only on a narrow range of grounds not connected with the merits, but which include jurisdictional issues of various kinds.<sup>3</sup>

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<sup>1</sup> UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, article 16 (*Competence of arbitral tribunal to rule on its jurisdiction*).

<sup>2</sup> Hong Kong Arbitration Ordinance 2011 (Cap.609 of the laws of Hong Kong), section 34 (*Article 16 of UNCITRAL Model Law (Competence of arbitral tribunal to rule on its jurisdiction)*)

<sup>3</sup> *Ibid.*, section 81 (*Article 34 of UNCITRAL Model Law (Application for setting aside as exclusive recourse against arbitral award)*).

8. The English Arbitration Act 1996 has similar provisions, although it takes its own path without enacting the Model Law. Thus section 30 says that, unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, albeit any such ruling may be challenged by procedures available under the Act.<sup>4</sup> Section 31 states that objections to jurisdiction must be taken no later than the first step to contest the merits.<sup>5</sup> Section 32 states that a preliminary point of jurisdiction may be taken to the court, but only with *either* the agreement of the parties *or* the permission of the tribunal *and* the consent of the court: the court itself has to be satisfied that determination by the court will be likely to produce substantial savings in costs and that there is good reason why the matter should be decided by the court.<sup>6</sup> Where it is the arbitral tribunal which has ruled on jurisdiction, that decision can be challenged within 28 days by application to the court, but only if the applicant has objected to the arbitrators' jurisdiction.<sup>7</sup> Alternatively, if a party simply stands aloof from participation in the arbitration, it may apply at any time to the court on a question of jurisdiction (see section 72).<sup>8</sup> Thus a party who participates must object or lose the right to go to court; but a party who does not participate may simply go to court at any time.

9. Indeed, it may safely be said that the right of arbitrators to determine their own jurisdiction is accepted as part of the so to speak international law of arbitration: but it is also accepted internationally that, within certain limits, the final word on jurisdiction lies with the court.

10. Is this a happy thing? Parties resort to arbitration to avoid having their disputes decided by the courts. In some parts of the world, happily not Hong Kong or England, courts are not regarded as sufficiently expert, or even, as it is sometimes complained, sufficiently impartial. That is why there has traditionally been support for the arbitrators themselves deciding questions of their own jurisdiction. Indeed, some institutional rules, such as those of the ICC in Paris, provide (see article 6) that the institutional court of the ICC itself should decide whether it is *prima facie* satisfied that an arbitration agreement under its Rules exists: if it does, then any decision as to the jurisdiction of the arbitral tribunal shall be taken by the tribunal itself. If the ICC Court is not so satisfied, only then

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<sup>4</sup> Arbitration Act 1996 (1996, c.23), section 30 (*Competence of tribunal to rule on its own jurisdiction*).

<sup>5</sup> *Ibid.*, section 31 (*Objection to substantive jurisdiction of tribunal*).

<sup>6</sup> *Ibid.*, section 32 (*Determination of preliminary point of jurisdiction*).

<sup>7</sup> *Ibid.*, section 70(3) (*Challenge or appeal: supplementary provisions*).

<sup>8</sup> *Ibid.*, section 72 (*Saving for rights of person who takes no part in proceedings*).

can it go to the national courts.<sup>9</sup> However, even provisions of this kind cannot, it seems to me, break the vicious circle where there is a real issue as to whether the parties have ever agreed to arbitrate at all. That said, it may in practice be the case that such is the parties' fear of being dragged into national courts, that they are content with the arbitral tribunal's decision about questions of its own jurisdiction. If so, it is enough that the arbitrators have the power or competence to decide such questions for themselves. If, however, the parties are not content, and wish to go to court, then the problem of the extent to which arbitrators have a final say about their own jurisdiction arises in full force.

11. Indeed, it is important to realise that there are three courts which may speak about the arbitrators' jurisdiction. There is the court of the country whose law governs the arbitration, or what the Model Law defines as the law of the country in whose territory the arbitration takes place (but the New York Convention refers more broadly to "the law to which the parties subjected it or, failing any indication thereon,...the law of the country where the award is made"); there is also the court of any country in which an arbitral award is sought to be enforced; and there is thirdly the court of any country which is asked to stay litigation in it which a defendant says has been agreed to be arbitrated and therefore should be referred for arbitration. Thus article V of the New York Convention permits a party to resist recognition or enforcement of an award if it can prove inter alia that the arbitration agreement was not valid under the applicable law, or that it deals with a difference outside the scope of the parties' arbitration agreement or submission to arbitration, or that the composition of the tribunal was not as was agreed.<sup>10</sup> Similar language reflecting article V of the Convention provides the grounds on which an award can be challenged under article 34 of the Model Law, and thus under section 81 of the Hong Kong Ordinance.<sup>11</sup> And the New York Convention, whose language is reflected in the Model Law and the English Act, requires a court to "refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed".<sup>12</sup> (I remark in passing that the concept of an arbitration being "incapable of being performed", which might also be described as the issue of arbitrability, was, as some of you may recall, the subject

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<sup>9</sup> International Chamber of Commerce, 1998 Arbitration Rules (in force between 1 January 1998 and 31 December 2011), article 6 (*Effect of the Arbitration Agreement*).

<sup>10</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the "New York Convention"), article V.

<sup>11</sup> Hong Kong Arbitration Ordinance 2011, section 81.

<sup>12</sup> New York Convention, article II (3).

matter of the second lecture in this series of Kaplan Lectures, given by Michael Pryles a few years ago.<sup>13</sup>)

12. This therefore is the context in which a large number of practical questions start to arise, of which I mention the following:

- (1) What counts as a dispute which goes to jurisdiction? Are all such disputes of the same kind, with the same consequences?
- (2) If the parties have a dispute which goes to jurisdiction, is it better to stand aloof, or to arbitrate the question without objection, or to arbitrate the question subject to objection, or to take the matter as soon as possible to the court, or to take the matter to the court after a decision from the arbitrators, or to await enforcement and then take the point?
- (3) If one party litigates, and the defendant seeks to stay for arbitration, and the claimant who wishes to litigate disputes any relevant arbitration agreement, what test does the court use to decide whether the parties ought to arbitrate? Does it decide the issue finally, or does it decide on some provisional test, such as a good arguable case, and then leave the disputed jurisdictional argument to the arbitrators?
- (4) If a party litigates in one country, let us suppose in the country of its domicile, and the other party wants to obtain an anti-suit injunction in the country of the place of arbitration, can it go to court for an anti-suit injunction, or is it required to start an arbitration first?
- (5) What if the parties agree to give the arbitrators a final say over questions of jurisdiction: is it still possible for a party to take a jurisdictional challenge to the court?
- (6) What if an arbitral tribunal decides it has jurisdiction and makes an award on the merits, the respondent challenges the arbitrators' jurisdiction in the courts of the place of arbitration and succeeds, or fails, as the case may be, but the award holder still seeks to enforce the award in another country?

(1) *What counts as a dispute which goes to jurisdiction? Are all such disputes of the same kind, with the same consequences?*

13. So, disputes as to jurisdiction come in all shapes and sizes, and it may be important to appreciate the differences between the various categories

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<sup>13</sup> Michael Pryles, *The Kaplan Lecture 2009 – When is an Arbitration Agreement Waived?* (2010) 27 *Journal of International Arbitration*, pp 105-139.

of such disputes. For instance, most fundamental of all is a dispute as to whether any agreement of any kind whatsoever has ever been agreed between the parties. It is true that there is a well recognised theory that the arbitration agreement is separate from the underlying agreement to which it is attached. Indeed, this is sometimes given as the theoretical explanation for how it is that arbitrators may have the jurisdiction to decide their own jurisdiction. Thus, in article 16(1) of the Model Law, immediately after the statement that the arbitral tribunal may rule on its own jurisdiction, it is stated that “For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract.” However, it seems to me that this can be only a partial explanation. If no agreement was ever entered into, it is most unlikely that the theory of the separate nature of the arbitration agreement can nevertheless support the independent existence of an arbitration agreement. An arbitration agreement within a contract which never existed cannot have a life of its own. Oscar Wilde said that “*To lose one parent may be regarded as a misfortune, but to lose both looks like carelessness.*” Well, whether misfortune or carelessness, I think that if there never was an underlying contract, then there would be no arbitration agreement either. The loss of one is the loss of the other.

14. What, however, I think the doctrine of the separateness or independence of the arbitration agreement is dealing with is the case where an underlying contract did at one time exist, but it has ceased to exist: for instance because it has been rescinded for fraud or misrepresentation, or because it has been terminated or cancelled, or because it has been repudiated and the repudiation has been accepted. In such cases, the fact that the underlying contract has ceased to exist does not mean that the arbitration agreement has ceased to exist. It is a clause which, whether the contract says so or not, is regarded as surviving the ending of the underlying contract. And that of course may always happen: a contract may provide that some at least of its terms are to survive termination, such as a confidentiality clause. A hybrid case may be one where a contract is said to be void for illegality. If the contract was agreed but arguably void, there is good reason for thinking that its arbitration clause should survive in full force.

15. Another category of dispute is as to the scope of an arbitration agreement: for instance, does it cover torts which occur in the course of the performance of the underlying agreement? Does it cover a dispute as to the circumstances which led to the making of the underlying agreement, such as fraud or misrepresentation, or mistake? That depends in part on the width of the language of the arbitration clause. Thus if the

clause only covers disputes “under the contract”, could that be narrower than a clause which covers any disputes “arising out of the contract” or disputes “in connection with the contract”?

16. A relatively recent decision of the English House of Lords, *Fiona Trust v. Privalov* (2007)<sup>14</sup> concerned charterparties which had been rescinded by the owners for the alleged bribery by the charterers of senior officers in the owners’ group. The owners brought proceedings in the English court, and the charterers sought a stay for arbitration under the charterparties’ arbitration clause. The owners, however, said that but for the bribery they would not have entered into the charterparties and that therefore the arbitration clauses were impeached together with the underlying contracts: there was no true consent to the charterparties, nor to the arbitration clauses within them. The House of Lords, however, held that the doctrine of the separability of the arbitration agreements meant that they survived even the rescission of the charterparties; and that the width of the term defining the scope of the disputes to be arbitrated meant that the arbitrators should get on and decide the disputes in question. For these purposes the fine distinctions which had been made in the past as to the meaning of various phrases defining the scope of disputes to be referred to arbitration was swept away. The meaning of such clauses, and the parties’ intention as to their very survival, was to be construed against the background that the courts should uphold the reasonable expectations of rational businessmen that they are likely to have intended any dispute arising out of the relationship into which they have entered “or purported to enter” to be decided by the same tribunal, viz the arbitrators. It was only where the arbitration clause might itself be directly impeached by something which removed consent, which was an “exacting test”, that the arbitration agreement might be argued not to survive. However, as Lord Hoffmann emphasised, that case was “different from a dispute as to whether there was ever a contract at all...if there was no contract to go to arbitration at all an arbitrator’s award can have no validity” (at [34]).

17. It followed therefore that that was a case where (a) any issue as to the validity of the arbitration agreement and (b) any issue as to the width of the scope of disputes referred to arbitration was settled by the courts in advance of arbitration, upon a challenge to the owners’ commencement of court proceedings. It therefore also followed that any decision of the arbitrators thereafter could not itself be attacked as being without jurisdiction.

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<sup>14</sup> *Fiona Trust and Holding Corp v. Privalov* [2007] UKHL 40; [2007] 4 All ER 951; [2008] 1 Lloyd’s Rep 254.

18. This is an important decision whose ramifications may not as yet have been entirely worked through. It is a decision on the construction of the parties' arbitration clause. What, however, does it tell us about the right of the arbitral tribunal to decide their own jurisdiction free of any challenge in the courts? The significance of that question may be this: if an issue as to the scope and survival of an arbitration clause is simply a matter of the construction of the parties' contract, then it may be that the arbitral tribunal does have an absolute right to decide that question, like any other question of construction which arises under the parties' contract, free of any interference from the courts save to the extent that the applicable law gives a right of appeal. Many countries, such as those which enact the Model Law, give no right of appeal on the merits, others, such as England, give only a limited right of appeal which requires obtaining the permission of the court under a highly stringent regime.<sup>15</sup> If, however, it is a matter which, even if it also depends on matters of construction, nevertheless goes to the arbitrators' jurisdiction and therefore falls within special provisions of the applicable national law relating to issues of jurisdiction, then the position remains as before, and such issues may continue to be taken to the courts under the separate provisions relating to issues of jurisdiction.

19. That question becomes all the more urgent because in the recent UK Supreme Court decision of *Dallah Real Estate and Tourism v. Ministry of Religious Affairs of the Government of Pakistan*(2010)<sup>16</sup> there was reference to the United States Supreme Court decision in *First Options of Chicago Inc v. Kaplan* (1995)<sup>17</sup> That is the leading US case on the doctrine of *competence competence*. The US Supreme Court drew a distinction between the case where the parties themselves had agreed to submit the arbitrability question itself to arbitration, and the case where they had not. In the former case the court should give considerable leeway to the arbitrator, but in the latter case, then the court should decide the question just as it would any other question that had not been submitted to arbitration, namely independently. In a subsequent case in the federal circuit court, *China Minmetals Materials Import and Export Co Ltd v. Chi Mei Corporation* (2003)<sup>18</sup> which concerned an allegation of forgery of the underlying contract with its arbitration clause, the court approached the question of arbitrability independently. That, after all, was

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<sup>15</sup> Arbitration Act 1996, section 69 (*Appeal on point of law*).

<sup>16</sup> *Dallah Real Estate and Tourism v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46; [2011] 1 All ER 485; [2010] 2 Lloyd's Rep 691.

<sup>17</sup> *First Options of Chicago Inc v. Kaplan*, 514 U.S. 938 (US S.Ct. 1995).

<sup>18</sup> *China Minmetals Materials Import and Export Co Ltd v. Chi Mei Corporation*, 334 F 3d 274 (3d Cir. 2003).

a case in which the question raised was whether any valid arbitration agreement had ever existed.

20. So there may well be a difference between cases where the original existence of any arbitration agreement at all is in issue, and a case where it is common ground that the arbitration agreement exists but there is an issue as to its proper scope and construction. However, for the present I suspect that the issue which I have raised is decided, not so much by the arbitration agreement itself, as by the applicable law. Thus the Model Law (article 34), reflecting the wording of the New York Convention as to defences to enforcement, says that recourse may be had to the court not only in cases where the issue goes to the fundamental issue of the validity of the arbitration agreement (language which in *Dallah* was regarded as including an issue as to the original existence of the arbitration agreement) but also in cases where

“the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration...”

and so on.<sup>19</sup> And under the English statute, section 30 defines issues of what is called “substantive jurisdiction” which can be taken to the court under sections 67 or 72, as embracing not only whether there is a valid arbitration agreement, but also whether the tribunal is properly constituted and “what matters have been submitted to arbitration in accordance with the arbitration agreement”.<sup>20</sup>

21. So perhaps, at the end of the day, the importance of *Fiona Trust* is not to remove issues of jurisdiction from the court subject only to an appeal on the merits but to emphasise that certain kinds of disputes as to jurisdiction of the arbitrators would be given short shrift.

22. In that respect, it is interesting to note that in a recent decision of the Commercial Court in London, it has been held, under the influence of *Fiona Trust*, that where a charterparty has been guaranteed by a parent of the charterer within the charter itself, the charter arbitration clause which was worded in terms of disputes “arising out of this Charter Party” has been held to embrace disputes arising out of the guarantee. That is *Stellar*

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<sup>19</sup> UNCITRAL Model Law, article 34 (*supra*).

<sup>20</sup> Arbitration Act 1996, section 30 (*supra*).

*Shipping v. Hudson Shipping Lines* (2010)<sup>21</sup> I do not know if that is headed for the court of appeal,

(2 ) *If the parties have a dispute which goes to jurisdiction, is it better to stand aloof, or to arbitrate the question without objection, or to arbitrate the question subject to objection, or to take the matter as soon as possible to the court, or to take the matter to the court after a decision from the arbitrators, or to await enforcement and then take the point?*

23. I express this question as a matter of options for the sake of clarity, but it is not clear that these options are entirely in the hands of the parties.

24. There is no doubt that, given the international acceptance of the doctrine of *competence competence*, there is a general view that issues of jurisdiction should at any rate in the first instance be considered by the arbitrators. A question arises whether this is a rule or only a presumption, and if it is a presumption, what is its strength, and in what circumstances it may be rebutted. The position may differ from country to country. Thus in France the rule is that the arbitrators *must* go first, and a judicial resolution has to be postponed until after the arbitral tribunal has ruled, save only where it is manifestly clear that there is no case for arbitration. However, the Model Law only says that “The arbitral tribunal *may* rule on its own jurisdiction”<sup>22</sup>. Similarly section 30 of the English Act says “Unless otherwise agreed by the parties, the arbitral tribunal *may* rule on its own substantive jurisdiction”. Thus there is no statutory requirement of arbitral priority.

25. However, under section 44 of the English Act there are separate provisions concerning court powers exercisable in support of arbitral proceedings which make it plain that in procedural and interlocutory matters such as the taking and preservation of evidence and the granting of interim injunctions, the court can only be invoked in a case of urgency and otherwise only with the agreement of the parties or permission of the tribunal.<sup>23</sup> That provision has led English courts to doubt whether it is possible to go to court to obtain an anti-suit injunction to prevent foreign litigation in breach of an English arbitration agreement without first constituting an English arbitral tribunal to consider the question, including any dispute as to whether the arbitration agreement is valid. However, in a recent decision of the English court of appeal, *AES Ust-Kamenogorsk Hydropower Plant v. Ust-Kamenogorsk Hydropower Plant*

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<sup>21</sup> *Stellar Shipping Co LLC v. Hudson Shipping Lines*, [2010] EWHC 2985 (Comm).

<sup>22</sup> UNCITRAL Model Law, article 16(1) (*supra*).

<sup>23</sup> Arbitration Act 1996, section 44 (*Court powers exercisable in support of arbitral proceedings*).

(2007), it was held that there was no need to constitute an arbitral tribunal first to consider the issue of the validity of the arbitration agreement.<sup>24</sup>

26. That was a case where there was an agreement between the owners and operators of a Kazakhstan power plant. The agreement was covered by Kazakhstan law, save for an arbitration clause which was governed by English law and provided for arbitration in England. However, tariff questions were excluded from the arbitration agreement and involved a separate procedure involving an expert in Kazakhstan. The owners from time to time commenced Kazakhstan proceedings, and the Kazakhstan courts had decided that the arbitration agreement was invalid under Kazakhstan law because it covered the public interest issue of tariffs. That was a misunderstanding of the arbitration clause, which as I have said excluded tariff disputes. The operators now sought an anti-suit injunction in England to prevent such Kazakhstan litigation and to vindicate the arbitration agreement. The owners argued that the English court could not get involved until there had been an English arbitration and a decision by the arbitrators as to their own jurisdiction, in support of the continued validity of the arbitration agreement. The court of appeal, upholding the decision of the commercial court disagreed. In the course of my judgment I ventured to say the following:

98...[I]t seems to me to be going too far to say that because an arbitral tribunal “*may* rule on its own substantive jurisdiction” (emphasis added), therefore the court ought always to regard the position as though there is an *obligation* on the parties and/or on the arbitrators for the arbitrators to rule on any dispute about their substantive jurisdiction. Anything may happen. The potential dispute may not be pressed. The disputing party may stand aloof and come to court. The parties may join issue in the arbitration, but agree to go to court for a preliminary issue on jurisdiction. The parties may not be able to agree on such a preliminary issue, but an application may be made to the court with the permission of the arbitrators for such a preliminary issue. The court may or may not accept such an application.

99. In such circumstances, I do not with respect agree with an interpretation of *Vale do Rio* which regards it as laying down a rule of jurisdiction that it is in all circumstances necessary for a party who wishes to raise with the court an issue of the effectiveness of an arbitration clause first to commence an arbitration and go

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<sup>24</sup> *AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC*, [2011] EWCA Civ 647; [2011] 2 Lloyd’s Rep 233. This case is currently listed before the UK Supreme Court.

through the procedures and provisions of sections 30-32 and/or section 67 and/or section 72. If, however, that is what Thomas J was saying in *Vale do Rio*, then I would not with respect agree with that view...”

27. In sum, it seems to me that it is not possible, and it is not desirable, to lay down any decisive rules, either for the courts or tribunals, or for the parties seeking their own interests, as to how to proceed when an issue of jurisdiction arises. On the other hand, there are a number of policy interests which should guide the courts, the tribunals and the parties. Some of those policy interests may be in tension, and therefore it makes sense to try to find the best solution in each case. What are those policy interests?

28. First, there is a policy interest in favour of arbitration. The very doctrine of *competence competence* tells you that. That policy or presumption is built into the very framework and language of statutes, such as the Model Law, the Hong Kong Ordinance, and the English Act, by favouring the idea of arbitrators considering their own jurisdiction. Thus under the English Act you can only take a jurisdiction issue from an existing arbitration with the agreement of the parties or the consent of the arbitrators. Legislatures and courts have shown themselves to be concerned to uphold arbitration. So that is the starting point. And it is a good starting point.

29. Secondly, however, there is a policy interest in favour of efficiency, and economy, and the absence of delay. In circumstances where an arbitral tribunal cannot give a *decisive* ruling on their own jurisdiction and where therefore it may be necessary, sooner or later, to go to the courts to resolve the issue, there may be good sense in cutting to the chase, ie getting to the court, sooner rather than later. However, one cannot generalise about this, because issues differ. Thus at one end of the spectrum you have a fundamental issue about whether the parties made any agreement of any kind. Such an issue is likely to involve much factual dispute, particularly if any part of the negotiations took place orally rather than in writing, or if there is an issue about authority or agency, or if, for one or other reason, there is an issue as to foreign law requiring expert evidence from foreign lawyers. We are all familiar with such cases.

30. At the other end of the spectrum is a dispute about the scope of a reference, which may in effect be almost a case management dispute

about the extent of a submission document or the question of whether an amendment is within the cause of action originally in dispute. Such issues are almost entirely within the hands of the arbitral tribunal, which will inevitably have a much better feel for the dispute than a court possibly could. In between these two extremes are cases about the scope of an arbitration agreement, or the composition of the arbitral tribunal. In such cases, it is common ground that an underlying contract with its arbitration agreement has been made, but there is a somewhat technical dispute about how it is to be performed, or about its limits at the margin. Such disputes may be a simple matter of construction, easily and cheaply resolved particularly in the light of an authoritative court decision like *Fiona Trust*, or may be more complex, like the recent decision about the qualifications for an arbitrator to be found in the UK Supreme Court's recent decision in *Jivraj v. Hashwani*(2011) (to which I will refer a little later).<sup>25</sup>

31. In my view, cases at the end of the spectrum concerned with the existence of any contract in the first place are probably best taken to court in the first place (at any rate if that can be done in a court which is trusted by the parties): because the danger is that otherwise the cost and delay of resolving the issue in both arbitration and the courts becomes highly inefficient and uneconomic. Of course one issue which arises in this context is: if the arbitrators go first, is the resolution by the court a form of appeal from the arbitrators which involves only a light review of the arbitrators' decision, seen through the eyes of their findings of fact? Or is it a total rehearing, presenting the evidence anew, and therefore conducted not necessarily even with the same witnesses. In English law, after some initial uncertainty and some continuing grumbling, it is now clearly established by the Supreme Court in *Dallah* that it is the latter, a complete rehearing.<sup>26</sup> It did so by approving the commercial court decision in *Azov Shipping Co v. Baltic Shipping Co* (1999)<sup>27</sup>. That is also the position in France. It may be inefficient, but it is difficult to see how the court can be constrained to see the matter through the eyes of the arbitrators when the issue before the court is whether the parties ever consented to arbitration in the first place.

32. It follows therefore that in my view parties faced with such an issue could be well advised (again, I stress, provided that the parties have confidence in the courts concerned) to agree to go to the courts straightway, or the arbitral tribunal should think seriously about

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<sup>25</sup> *Jivraj v. Hashwani*, [2011] UKSC 40; [2012] 1 All ER 629; [2011] 2 Lloyd's Rep 513.

<sup>26</sup> *Dallah (supra)*, Lord Mance JSC at paragraph 26.

<sup>27</sup> *Azov Shipping Co v. Baltic Shipping Co (No 1)*, [1999] 1 All ER 476; [1999] 1 Lloyd's Rep 68.

permitting, ie requesting, the courts to consider the matter. Moreover, under section 72 of the English Act, a respondent can always force the issue by staying aloof from the arbitration and going to court for a declaration. Section 72 specifically says that in such a case the respondent has no duty first to exhaust arbitral procedures. The court, however, presumably has a discretion as to how to respond to the application, for declarations and injunctions are always discretionary remedies.

33. Such a discretion may arise in the courts at other times. Thus, what is a court to do if one party commences litigation and the defendant seeks a stay for arbitration, but the claimant says that there never was an agreement, or raises some other jurisdictional problem. The New York Convention says “shall...refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed”. Does that mean that the court has to decide the issue, or might it be sufficient for such a reference that there is a good arguable case, or even a serious issue to be tried, in favour of the existence of a disputed agreement? There is some international uncertainty about this, but more recently, perhaps in line with the growth of international recognition of the doctrine of *competence competence*, there has been an increasing acceptance of the possibility of the court leaving the first decision to the arbitral tribunal, where satisfied of a sufficient case in favour of arbitration.

34. Thus in *Al-Naimi v. Islamic Press Agency Ltd* (2000) ,the English court of appeal had to consider whether some building works had been carried out under a contract to which an arbitration clause applied or under another contract which did not contain an arbitration clause.<sup>28</sup> At first instance, the judge had stayed the litigation for arbitration without deciding the issue. On appeal, the parties were agreed that their issue could be decided by the court on affidavit evidence alone: the court’s decision was that the works were covered by the contract with the arbitration clause. So the matter went off to arbitration with that issue resolved. However, the court there approved the guidance given in another case, *Birse Construction v. St David Ltd* (1999), about how such an issue on an application to stay for arbitration might be case managed.<sup>29</sup> It was said that the dominant factors must be the interests of the parties and the avoidance of unnecessary delay or expense. Where the issue was clear, the court should determine it. Even if it was not clear, there was no requirement that it should be left to the arbitrators, whose jurisdiction was

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<sup>28</sup> *Al-Naimi (t/a Buildmaster Construction Services) v. Islamic Press Agency Inc*, [2000] 1 Lloyd’s Rep 522

<sup>29</sup> *Ibid.*, Chadwick LJ at 654; *Birse Construction Ltd v. St David Ltd (No 1)*, [1999] BLR 194.

disputed, to determine it. Efficiency and economy might require the matter to be decided by the court, even if it required a trial which went beyond affidavit evidence. On the other hand, if there was a sufficient case for the establishment of an arbitration agreement and especially where the arbitration agreement issue was bound up with the merits of the dispute, there might be a case for leaving it to the arbitrators in the first instance. The court of appeal agreed that the court should be looking for the most economical way of deciding a dispute about where the real disputes should be resolved.

35. More recently, in a decision in the commercial court, *A v. B* (2010), which is not going to appeal, there was an issue whether a contract had ever been made.<sup>30</sup> The first tier arbitrator decided that it had not. The arbitral board of appeal decided that it had. The losing party went to court under section 67, challenging the jurisdiction of the arbitral tribunal. The winning party sought security for costs under section 70(7). The court declined to grant security. It held that, despite the arbitral decision in favour of arbitration, there was no presumptive validity to such an award, for the section 67 challenge involved a complete rehearing; and that therefore security should only be awarded where the challenge was flimsy or otherwise lacking in substance.

36. In another recent case in the commercial court, there was an application for the appointment of an arbitrator, and the respondent said that there was no arbitration agreement: *Noble Denton Middle East v. Noble Denton International*(2010)<sup>31</sup>. The case has now been settled. The question was whether the court should decide that issue, or appoint the arbitrator so that the arbitral tribunal could decide that issue, provided there was an arguable case in favour of arbitration. The judge decided that the latter was the answer, because he considered that the doctrines of the autonomy of the parties and of *competence competence* meant that the arbitrators “must” decide the jurisdictional issue.<sup>32</sup> I beg to differ: indeed, I do not think that that reasoning could survive the *Kazakhstan* case.

37. So also, in *Jivraj v. Hashwani* , the issue was whether Sir Anthony Colman, a retired English judge, could be appointed as arbitrator under an arbitration agreement which required the arbitrators to be of the Ismaili faith. The respondent said that such a requirement was unlawful because discriminatory. The issue went straight to court with one party seeking a

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<sup>30</sup> *A v.B*, [2010] EWHC 3302 (Comm); [2011] 2 All ER (Comm) 935; [2011] 1 Lloyd’s Rep 363.

<sup>31</sup> *Noble Denton Middle East v. Noble Denton International*, [2010] EWHC 2574 (Comm); [2011] 1 Lloyd’s Rep 387.

<sup>32</sup> *Ibid.*, Burton J at paragraph 8.

declaration that the appointment was invalid and the other party seeking an order that Sir Anthony be appointed under section 18 of the English Act. The case reached the Supreme Court, which held that the clause was valid and that the appointment was invalid: but there was no attempt to get the issue decided by an arbitral tribunal. Indeed, in such a case how could any arbitral panel properly do so?!

38. In sum, I think that where the jurisdictional issue arises in the court prior to the establishment of the arbitral tribunal, it is essentially a matter of discretion whether the court decides the issue for itself, or only satisfies itself that there is sufficient to be said in favour of arbitration to leave at any rate the first decision to the arbitrators. Whether the test is serious issue, or good arguable case, is yet to be resolved. In France, it is only where the alleged arbitration agreement is manifestly invalid or non-existent that the court may prevent the matter going first to arbitrators. In England, it is true that there is something of a presumption in favour of the arbitrators taking the decision for themselves in the first instance, unless either the parties or the arbitral tribunal *and* the court consider it better for the issue to come first to the court. However, that in large part reflects the assumption that the doctrine of *competence competence* provides for efficiency and economy. In many cases, however, it does not. Ultimately, there may be a tension between efficiency and economy and the feeling that as long as there is a possibility that the parties have chosen arbitration, then the court should do whatever it can stay out of the parties' way. This tension has led some important commentators, such as *Born*, to suggest that the issue of *Who decides?* is essentially a discretionary issue analogous to the doctrine of *lis alibi pendens*.<sup>33</sup> However, other important commentators, such as *Gaillard*, reject such an analysis, arguing that the ultimate and dominant danger is that parties use jurisdictional arguments in bad faith to delay and disrupt arbitration. Therefore, as occurs in French law, he argues that only a manifestly bad argument in favour of arbitration should prevent the arbitral tribunal from always having the first word.<sup>34</sup>

39. Well, I suspect that ultimately these differing views reflect different national and legal cultures. For myself, no doubt largely because I come from the common law, which prides itself on pragmatism, I think it is unnecessary to base a principle on an assumption of the widespread

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<sup>33</sup> Gary B. Born, *International Commercial Arbitration* (Kluwer Law International, 2009), pp 1001, 2919-2929 and 2937-2947.

<sup>34</sup> Emmanuel Gaillard and Domenico di Pietro, *Enforcement of Arbitration Agreement and International Arbitral Awards: The New York Convention in Practice* (Cameron May Ltd, 2008), Chapter 8; Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010), pp 86-91.

prevalence of bad faith. It makes no sense to condemn the great majority of parties who dispute in good faith to a principle which necessarily forces them to litigate expensive issues twice, once before the arbitrators and again before the courts. This is particularly problematic in circumstances where the arbitrators do not render a preliminary award on jurisdiction but deal with it as part and parcel of their final award on the merits.

40. To the question: *Who decides?* the answer I would therefore give is: By all means let arbitrators decide, for they are in many cases the tribunal chosen and preferred by the parties, who on no account wish to take any part of their dispute into the courts. But where the issue is whether the parties have ever even contracted, or chosen arbitration, or chosen arbitrators of a certain kind, there is a great deal to be said for saying that efficiency and economy point strongly in favour of going straightway to where the parties may ultimately have to go, that is to say to the courts. I recognise of course that the courts may be exactly what the parties have spent all their efforts trying to avoid: however, by and large parties choose to arbitrate in countries and by reference to laws which they find acceptable. But perhaps I look at the world through rose-tinted spectacles.

41. As for my remaining questions, I have in effect answered them in the course of my discussion so far. To remind you of them briefly:

42. My *third* question, asked about the appropriate test to decide when an issue of stay arises in the courts at the very outset of litigation. I have dealt with that in the course of my discussion of *Al-Naimi* and *Birse*. I have said that the court ought to be flexible and that the test ultimately has not yet been resolved. I would I think prefer a tougher to a more lenient test: that is to say, that if a party wants the litigation to be referred to arbitration in circumstances where there is an issue even whether any contract at all has been made, then, rather than condemn the parties to an endless series of disputes, the court should need to be persuaded that there is a sufficiently good case in favour of arbitration, and that the jurisdictional issue will be more economically conducted there.

43. My *fourth* issue asked whether you can go to the courts in the country where the parties have agreed to arbitrate to get an anti-suit injunction against litigation in another country in breach of the arbitration clause, without first getting the arbitral tribunal to confirm their jurisdiction where that is disputed. My answer there, based on the *Kazakhstan* case, is Yes: provided of course that the circumstances for such an injunction are suitably made out, including considerations of comity. It would not be in

support of arbitration, but in derogation from it to have to say: no injunction until the arbitrators have confirmed their jurisdiction.

44. My *fifth* question, asked whether the parties can have resort to the court where they have themselves agreed to vest the arbitrators with jurisdiction finally to decide questions of jurisdiction. This may happen by means of the institutional arbitration rules which the parties incorporate into their arbitration agreement. That of course still begs the question of whether the parties have ever agreed to arbitrate anything. On the assumption, however, that they have, I think my answer would be that the arbitrators' answer must be treated as if it were an answer on the merits: so that the parties can only appeal to the court where an appeal on the merits could be obtained: and that may be not at all, or only in very limited circumstances.

45. My *sixth* and final question was as to what happens at the time of enforcement. Well *Dallah* shows that, of course, on enforcement the court is faced anew with a question such as whether there had ever been contractual consent for any agreement, let alone an arbitration agreement. The case is an object lesson of the difficulties inherent in the concept of such a jurisdictional issue, and also demonstrates that you cannot ultimately avoid the issue of jurisdiction going to court, even if you have to wait until enforcement to get there. Hence of course the importance of being competent! In *Dallah* a Saudi contractor and a statutory Pakistani corporation made an agreement containing an arbitration clause. In the background was the Government of Pakistan, but the Government never became a party to the contract, or at any rate that was the issue. The arbitration clause provided for ICC arbitration in Paris, but there was no express choice of law. The arbitrators adopted a transnational law as the law of the contract. They issued two awards: the first saying that the Government of Pakistan was a party, and the second finding it liable. The Government of Pakistan stood aloof throughout. The Saudi contractor sought to enforce the award in England. The commercial court, the court of appeal and the Supreme Court all found that under French law, the law of the place where the award was made, the Government of Pakistan had proved that it had never been a party to the contract, with the result that the award should not be enforced against it. Subsequently, however, there were enforcement proceedings in France, where the Paris court of appeal nevertheless upheld the award!<sup>35</sup> Well, it may not be altogether surprising that an English court and a French court may have different views about what French law requires: but it is an unhappy conclusion. In any event it

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<sup>35</sup> *Government du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate and Tourism Holding Company* (Case No. 09/28533).

is not clear to me at present why the English court's decision was not an estoppel which prevented a different result in Paris.

46. At any rate, the lesson, I suppose, is that this kind of difficulty could only be avoided if an arbitral tribunal's decision about its own jurisdiction was always finally binding. However, no one, I think, is saying that, unless the parties consent to it. So we shall have to agree to differ. Or, as Oscar Wilde said, and to return to where I began: *The truth is rarely pure, and never simple.*

47. Thank you very much.

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