Neutral Citation Number: [2017] EWHC 3417 (Comm)

Case No: CL-2017-000494

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice,
Rolls Building Fetter Lane,
London, EC4A 1NL

Date: 21 December 2017

Before :

MR JUSTICE PHILLIPS

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Between :

A **Claimant**

- and –

B **Defendant**

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David Foxton QC and Emily Wood (instructed by **Taylor Wessing LLP**) for the **Claimant**
Nicholas Vineall QC and Gideon Shirazi (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing dates: 25 and 26 October 2017

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Approved Judgment (Anonymised Public Version)

Approved Judgment

Mr Justice Phillips :

1. The issues in this arbitration claim are (i) whether a single request for LCIA arbitration, seeking to refer disputes under two separate contracts (each containing an LCIA arbitration clause), was valid; and (ii) whether, if the request was not valid, the respondent has lost the right to object to such invalidity by failing to take the point until after service of its Response and shortly before its Statement of Defence was due.

2. The respondent in the arbitration, the claimant in these proceedings ("A"), pursues its objection by way of an application under section 67 of the Arbitration Act 1996 ("the 1996 Act"), the arbitral tribunal having decided that the right to object had been lost (but not deciding the merits of the objection itself). It is well established, and common ground, that the application under section 67 requires determination by way of a complete re-hearing.

The background facts and procedural history

3. The defendant in these proceedings ("B") sold two consignments of crude oil to A pursuant to two separate contracts. The contracts were:

   i) a term sale contract dated September 2015 for a single lot of 950,000 barrels (plus or minus 5 per cent at buyer's option) of Crude, delivery FOB: ("the First Crude Contract"); and

   ii) a term sale contract dated October 2015 for a single lot of 950,000 barrels (plus or minus 5 per cent at buyer's option) of Crude Oil, delivery FOB ("the Second Crude Contact").

   Each contract was governed by English law and contained an LCIA arbitration clause. Each contract also incorporated B's General Terms and Conditions, including an LCIA arbitration clause.

4. Both consignments were re-sold by A to a third party ("C") by separate contracts on terms which mirrored (save for a mark- up of 5 cents per barrel) those of the First Crude Contract and the Second Crude Contract respectively, including the incorporation of LCIA arbitration clauses.

5. B claims that A failed to pay the price due under the contracts. On 23 September 2016 B commenced the LCIA arbitration against A ("the Arbitration"), delivering a single Request for Arbitration ("the Request) accompanied by payment of a single registration fee. B claimed full purchase price due under the First Crude Contract and full purchase price due under the Second Crude Contract.

6. On 31 October 2016 A served its response to the Request ("the Response"), denying liability and also (i) stating that the Response should not be construed as submission to any arbitral tribunal's jurisdiction to hear the claim as currently formulated; and (ii) reserving A's rights to challenge the jurisdiction of the LCIA and any arbitral tribunal appointed. A included similar statements and reservations in correspondence with the LCIA and the Tribunal concerning procedural matters on 28 March, 4 April and 11 April 2017.

7. On 31 October 2016 A also commenced a separate LCIA arbitration against C, mirroring B's claim against A ("the Sub-Arbitration").

8. The LCIA appointed the Tribunal for the Arbitration on 8 February 2017, consisting of Ian Glick QC as presiding arbitrator, David Mildon QC and William Rowley QC.

9. On 23 March 2017 C challenged the jurisdiction of the Tribunal in the Sub-Arbitration on the grounds that A's request for arbitration was invalid. That challenge was upheld on 11 May 2017[1].

10. On 24 May 2017 A challenged the validity of the Request (under s.30 of the 1996 Act and Article 23 of the LCIA Rules 2014) on the ground that, by purporting to refer claims under both the First Crude Contract and the Second Crude Contract, the Request failed to identify the particular dispute and the particular arbitration agreement to which it related. The challenge was made shortly before the date on which A's Statement of Defence was due on 2 June 2017. A duly served its Statement of Defence on that date, doing so expressly without prejudice to its challenge to the jurisdiction of the Tribunal.

11. On 7 July 2017 the Tribunal made a partial award on jurisdiction ("the Award") dismissing A's challenge to its jurisdiction on the grounds that it was brought too late.

12. A commenced these proceedings on 4 August 2017.

The validity of the Request

13. Section 14 of the 1996 Act provides as follows:

> "*Commencement of arbitral proceedings.*
>
> *(1) The parties are free to agree when arbitral proceedings are to be regarded as commenced for the purposes of this Part and for the purposes of the Limitation Acts.*
>
> *(2) If there is no such agreement the following provisions apply.*
>
> *(3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.*
>
> *(4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.*
>
> *(5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter.*"

14. Article 1 of the LCIA Rules makes provision for the commencement of an LCIA arbitration, constituting an agreement within the meaning of section 14(1), in the following terms:

> "*1.1 Any party wishing to commence an arbitration under the LCIA*

[1] I have not seen the award in the sub-arbitration due to the confidential nature of those proceedings. I am told that A has brought a challenge to the award under s.67 of the 1996 Act.

> *Rules (the "Claimant") shall deliver to the Registrar of the LCIA Court (the "Registrar") a written request for arbitration (the "Request"), containing or accompanied by:*
>
> …
>
> *(ii) the full terms of the Arbitration Agreement (excepting the LCIA Rules) invoked by the Claimant to support its claim, together with a copy of any contractual or other documentation in which those terms are contained and to which the Claimant's claim relates;*
>
> …
>
> *(iii) a statement briefly summarising the nature and circumstances of the dispute, its estimated monetary amount or value, the transaction(s) at issue and the claim advanced by the Claimant against any other party to the arbitration (each such other party being here separately described as a "Respondent");*
>
> *(iv) a statement of any procedural matters for the arbitration (such as the arbitral seat, the language(s) of the arbitration, the number of arbitrators, their qualifications and identities) upon which the parties have already agreed in writing or in respect of which the Claimant makes any proposal under the Arbitration Agreement;*
>
> …
>
> *(vi) confirmation that the registration fee prescribed in the Schedule of Costs has been or is being paid to the LCIA, without which actual receipt of such payment the Request shall be treated by the registrar as not having been delivered and the arbitration as not having been commenced under the Arbitration Agreement; …*
>
> *1.4 The date of receipt by the Registrar of the Request shall be treated as the date upon which the arbitration has commenced for all purposes (the "Commencement Date"), subject to the LCIA's actual receipt of the registration fee.*"

15. A contends that:

    i) it is plain from Article 1 that a request for arbitration must identify "the dispute" to which it relates and the particular arbitration agreement which is being invoked, reflecting the references in section 14 to "the arbitration agreement" and to "a matter";

    ii) the Request in this case impermissibly refers to two disputes, governed by two distinct arbitration clauses, rendering it impossible to determine which dispute and which arbitration clause are properly the subject matter of the purported arbitration;

    iii) the Request has therefore failed to commence an arbitration in relation to an identified dispute. There remains an undecided question as to whether the Request could be amended so as to refer to one dispute only, but in its present form it is invalid and ineffective.

16. B does not dispute that an arbitration can only encompass a dispute arising under a single arbitration agreement. Its answer to A's contentions is that the Request validly

and effectively commenced two separate arbitrations, one in relation to the dispute under the First Crude Contract and one in relation to the dispute under the Second Crude Contract.

17. The difficulty with that argument is that Article 1.1 of the LCIA Rules provides that commencement of "*an arbitration*" requires delivery of "*a written request*", going on to set out in Article 1.1(ii) the details which the request must include about "*the Arbitration Agreement ... invoked by the Claimant*". The subsequent provisions set out the rules and procedures applicable to the single arbitration so commenced, including the payment of fees and the formation of the arbitral tribunal.

18. Mr Vineall QC, counsel for B, recognises that such wording, on its face, appears to require a separate written request for each and every arbitration commenced. He argues, however, that it is permissible to commence two arbitrations by a single request, as references to an arbitration (in the singular) can and should be read as including arbitrations (plural). In this regard he relies on section 61 of the Law of Property Act 1925, which provides:

> *"61. In all deeds, contracts, wills, orders and other instruments, made or coming into operation after the commencement of the Act, unless the context otherwise requires –*
>
> …
>
> *(c) The singular includes the plural and vice versa ...*"

19. In my judgment there is no merit whatsoever in that argument for the following reasons:

    i) It is entirely plain that the LCIA Rules treat a single request as giving rise to a single arbitration, the payment of fees for one arbitration and the formation of a single arbitral tribunal. Perhaps conclusively in this regard, Article 22.1(ix) gives an arbitral tribunal (once formed) the power to consolidate the arbitration with one or more other arbitrations into a single arbitration, but only where all parties agree (reflecting the statutory restriction on consolidation of arbitration proceedings under section 35 of the 1996 Act);

    ii) B's contention that it commenced two arbitrations forces it also to argue (a) that it was nevertheless entitled to pay only one registration fee and (b) that the Tribunal was appointed in respect of both arbitrations and made the Award in both. However, it is (a) inconceivable that the LCIA Rules could be read as permitting a party to pay only one fee when commencing multiple arbitrations and (b) undoubtedly impermissible to read them as giving rise to consolidated proceedings without the consent of all parties;

    iii) It is therefore clear, for the purposes of section 61 of the Law of Property Act, that the context of the LCIA Rules requires that the term "an arbitration" in Article 1.1 should not be read as including the plural;

    iv) But even if (contrary to my conclusion above), section 61 is applied to Article 1.1 so that "an arbitration" includes "arbitrations", it is unclear why the references to "a written request" would not also include "written requests". Exactly how the rules would work if read in this way is unclear, but what is entirely clear is that the result could not be the consolidation or concurrent hearing of more than one arbitration without the agreement of all parties.

20. Mr Vineall QC also relied on *The Biz* [2011] 1 Lloyd's Rep 688, in which cargo interests gave notice commencing arbitration in respect of claims under 10 bills of lading, each containing a London arbitration clause. In considering whether the notice was valid and effective, Hamblen J (as he then was) stated:

> "*(1) When asking whether the requirements of section 14 have been complied with, one should interpret section 14 'broadly and flexibly' avoiding a strict or technical approach, especially when the notice has been drafted by non-lawyers. (2) The requirements of section 14 will generally be satisfied if the notice sufficiently identifies the dispute to which it relates and makes clear that the person giving notice is intending to refer the dispute to arbitration; and (3) In considering whether these requirements are met, one should concentrate on the substance rather than the form of the notice and consider how a reasonable person in the position of the recipient would have understood the notice given its terms and the context in which it was written.*"

21. Applying those principles, Hamblen J held that the notice commenced 10 separate arbitrations and was therefore valid. Mr Vineall submits that the same approach should be taken in the present case, looking at the substance of the request and not its form, with the same conclusion as to the commencement of separate arbitrations under each separate contract.

22. However, whilst I entirely accept that the approach set out in *The Biz* is correct and adopt it in full, that was a case where no arbitral rules were applicable, let alone the LCIA Rules. In the present case the Request was prepared and submitted on behalf of B by Norton Rose Fulbright LLP in the context of the LCIA Rules. In my judgment, and given the analysis of the LCIA Rules and their effect above, a reasonable person in the position of the recipient would have understood the Request as starting one single arbitration. The Request makes no reference to the commencement of more than one arbitration, but refers throughout to "the Arbitration Agreement". The Request also claims one single amount of damages, refers to "the seat of the arbitration", "the language of the proceedings", "the governing law of the arbitration agreement" and payment of "the fee prescribed by the Schedule of Cost", being a reference to the fee for a single arbitration. It is entirely clear that the intention was to commence a single arbitration and no reasonable reader would conclude otherwise. Indeed, the LCIA itself regarded it as commencing just one arbitration.

23. I conclude that the Request was an ineffective attempt to refer separate disputes to a single arbitration. It was accordingly invalid.

Loss of the right to object to the Tribunal's jurisdiction

24. Section 31 of the 1996 Act provides for objections to the substantive jurisdiction of a tribunal as follows:

> "*(1) An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.*
>
> *A party is not precluded from raising such an objection by the fact that he has appointed or participated in the appointment of an arbitrator.*

(2) Any objection during the course of the arbitral proceedings that the arbitral tribunal is exceeding its substantive jurisdiction must be made as soon as possible after the matter alleged to be beyond its jurisdiction is raised.

(3) The arbitral tribunal may admit an objection later than the time specified in subsection (1) or (2) if it considers the delay justified."

25. Section 73 of the 1996 Act provides for the loss of the right to object as follows:

"*(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—*

(a) that the tribunal lacks substantive jurisdiction,

(b) that the proceedings have been improperly conducted,

(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or

(d) that there has been any other irregularity affecting the tribunal or the proceedings, he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection."

26. The LCIA Rules provide as follows:

"*23.3 An objection by a respondent that the Arbitral Tribunal does not have jurisdiction shall be raised as soon as possible but not later than the time for its Statement of Defence; and a like objection by any party responding to a cross-claiming party shall be raised as soon as possible but not later than the time for its Statement of Defence to Cross-claim. An objection that the Arbitral Tribunal is exceeding the scope of its authority shall be raised promptly after the Arbitral Tribunal has indicated its intention to act upon the matter alleged to lie beyond its authority. The Arbitral Tribunal may nevertheless admit an untimely objection as to its jurisdiction or authority if it considers the delay justified in the circumstances.*"

27. The Tribunal, in its Award, considered the meaning and effect of Article 23.3 in some detail, cross-checking its conclusion against the wording of s.73 of the 1996 Act but not, at least expressly, analysing the effect of s.31. The Tribunal rejected A's contention that the effect of Article 23.3 is that a challenge to jurisdiction will not be lost provided it has been raised, at the latest, in the Statement of Defence. The Tribunal held, in §43 to §55, as follows:

i) The words "as soon as possible" mean what they say, the need to raise a jurisdiction objection promptly being particularly acute where (as in this case) limitation periods may expire;

ii) Save in exceptional circumstances, "as soon as possible" ordinarily means (where a respondent knows of an objection from the moment it receives the Request) the service of the Response, due 28 days after the Request;

iii) More generally, a party must object as soon as it knows, or reasonably ought to know, of the facts giving rise to the objection and that those facts arguably give rise to such objection;

iv) Such conclusion is consistent with s.73 of the 1996 Act;

v) A general reservation of a party's position as to jurisdiction does not serve to keep the right to object open.

28. The Tribunal concluded that A should have raised its objection to jurisdiction by 31 October 2016 at the latest, the date of its Response. Further, the Tribunal considered A's delay to be unjustifiable, so refused to admit the objection. The Tribunal did not regard the fact that the mirror objection was not raised in the sub-arbitration until March 2017 (and determined against A in May 2017) as justifying the delay in raising the objection in the Arbitration

29. Mr Vineall put forward similar propositions on this application, stressing that the requirement that an objection is raised "as soon as possible" is an express contractual provision (incorporated into the contracts between A and B) and which must therefore be given effect according to its natural and ordinary meaning. He went even further than the Tribunal, submitting that the requirement to raise a matter as soon as possible entailed that it must be raised before the Response was due if that was possible, envisaging that a represented party in receipt of a Request it believed to be misconceived would have to object immediately (although Mr Vineall suggested that an objection raised within 14 days would for some reason satisfy the requirement). Any unfairness, Mr Vineall submitted, could be removed by the power of an arbitral tribunal to admit an untimely objection if the delay was justified.

30. Mr Vineall further emphasised that there was no obstacle to the parties agreeing, and the arbitrators (and the court) requiring, that an objection be raised as soon as possible: he pointed out that that is precisely the statutory requirement under s.31(2) of the 1996 Act for raising an objection that a tribunal is acting in excess of its powers during the course of proceedings. Further, the concept of a long-stop date for an action to be taken, but with an overriding obligation to act promptly before that date, is well known and understood, an example being the requirement that judicial review proceedings are brought "promptly" but in any event within three months of the impugned decision.

31. In my judgment, however, the starting point in the analysis should be a consideration of sections 31 and 73 of the 1996 Act, those provisions being mandatory, having effect notwithstanding any agreement to the contrary[2]. It is necessary to start with those provisions, not just because they are mandatory, but also because it is highly unlikely that the LCIA Rules were intended to have an effect which materially diverges from such provisions. Indeed, as section 73 adopts the "time allowed" in section 31(1) (as explained below), the crucial provision to consider is the latter.

32. Section 31(1) notably does <u>not</u> impose a requirement that an objection be made as soon as possible, in stark contrast with exactly that requirement in sub-section

[2] See section 4 of and schedule1 to the 1996 Act.

(2). The reason for the distinction seems obvious: an objection during the course of proceedings, possibly in the middle of a hearing, that a tribunal is exceeding its authority plainly must be made at once, so that an otherwise validly appointed tribunal can address the concern and make adjustments if appropriate. Objections to jurisdiction at the outset, relating to whether the tribunal has jurisdiction at all, are more fundamental and unlikely to have immediate consequences which cannot be remedied.

33. In fact, section 31(1) closely follows the text of the equivalent provision in the UNCITRAL Model Law of International Commercial Arbitration (article 16(2)), save that the requirement that an objection is raised no later than the submission of a statement of defence is replaced by the requirement that it must be raised not later than the time the party "*takes the first step in the proceedings to contest the merits*
…".

34. The reason for that change in wording was fully and (in my judgment) definitively explained in the Departmental Advisory Report on the Arbitration Bill published in February 1996, chaired by Saville LJ (as he then was):

> "*Clause 31 Objection to Substantive Jurisdiction of Tribunal*
>
> *In this Clause we set out how a challenge to the jurisdiction can be made, and the circumstances in which it must be made (following article 16 of the Model Law). This reflects much of the Model Law but we have, for example, refrained from using expressions like "submission of the statement of defence" since this might give the impression, which we are anxious to dispel, that every arbitration requires some form of formal pleading or the like.*"

35. It follows that the only requirement of section 31(1) is that the objection is raised by not later than the submission of the statement of defence (where pleadings are required) or the equivalent stage at which the merits are contested (if no formal pleadings are required). Mr Vineall advanced an argument that A "first contested the merits" when it served its Response denying liability, but it is not seriously arguable that the time for making an objection under section 31(1) expires on the service of that predominantly formal document rather than on the service of the Statement of Defence.

36. It can therefore be seen that Article 23.3 of the LCIA Rules follows the structure and effect of section 31(1) and (2) of the 1996 Act very closely, but requires that objections are raised not later than the time for the Statement of Defence, no doubt because the LCIA Rules do require formal pleadings.

37. In that context, the question arises as to whether the addition of the words "as soon as possible" can and should be read as introducing a far stricter requirement than imposed by the mandatory provisions of section 31(1), the UNICTRAL Model Law and the UNITRAL Arbitration Rules.

38. In my judgment it is inconceivable that the intention of the LCIA Rules 2014 (the phrase "as soon as possible" were not in article 23.2 of the LCIA Rules 1998) was to introduce such a new and strict regime for raising jurisdictional challenges, departing dramatically from section 31(1). It would entail that a party could lose the most fundamental of objections (such as that it was not party to the relevant agreement or that there was no LCIA arbitration clause in an agreement to which he was party) without having taken any steps in the arbitration and without even having appointed

an arbitrator (a step which would not, in itself, amount to a waiver of the right to object to jurisdiction).

39. Mr Vineall argued that the prevalence of cases in which there is a one-year time bar explains why the Article was changed: requiring objections to be made as soon as possible prevents a party keeping a jurisdiction point up his sleeve. However, there is no reason to believe that was in truth the reason. Further, the risk of a successful jurisdiction challenge resulting in a time bar defence accruing is inherent in the process and cannot wholly be avoided by a time limit on objections, however short: the primary answer is for a claimant to ensure, in so far as possible, that it commences arbitrations in accordance with a valid arbitration agreement, not to restrict the ability of the respondent to mount a valid objection.

40. In my judgment, the better construction of Article 23.3 is that it excludes "*untimely objections*", that phrase relating back to the requirement that an objection shall be not later than the time for its Statement of Defence. Whilst the Article stipulates that objections shall be raised as soon as possible, it does not state a sanction for non-compliance, the sanction for untimely objections being provided by or implicit in the words "not later than" which apply to the time for the Statement of Defence. Had the intention, in 2014, been to introduce a new and much stricter requirement, complete with heavy sanction, it would surely have been done with far clearer words.

41. The above approach is consistent with that taken to a similar type of clause in a reinsurance contract considered in *AIG Europe (Ireland) Ltd. v Faraday Capital Ltd* [2006] 2 CLC 770, the clause in that case requiring notification of a claim "as soon as reasonably practical and in any event within 30 days". Morrison J rejected the argument that notification as soon as reasonably practical was a condition precedent to liability, stating at §66:

> "*(1) If that had been the intention behind this Draconian clause it should have been spelt out. On the natural reading of the clause a Reinsured would be forgiven for thinking there was one condition only, namely the 30 day provision and the other alleged condition was not a condition precedent because the extent of the obligation would be too uncertain to be workable. The words 'and any event' destroy the point being made …*"

42. It follows that, read in the light of section 31(1) of the 1996 Act, Article 23.3 of the LCIA Rules does not impose a requirement that an objection is made before service of the Statement of Defence. Further, section 73 of the 1996 Act does not impose any stricter requirement (or require Article 23.3 to be read as so providing), but in fact appears to provide a potential relaxation. Although section 73(1) refers to raising an objection "forthwith", that is an alternative to such time as is allowed by the arbitration agreement or any provision of "this Part" of the 1996 Act, which includes section 31(1). It then provides that a party who has not raised an objection by the time so allowed (for instance, under section 31(1)), may not do so unless he did not know and could not with reasonable diligence have discovered the ground for the objection.

43. In the light of the above conclusion, it is not necessary for me to determine whether a time limit imposed by Article 23.3 of the LCIA Rules for raising objections to jurisdiction would be valid and effective if it was shorter than the mandatory provisions of section 31(1). Mr Vineall submitted that, as section 31(1) does not expressly permit objections not later than the time specified, it would not be inconsistent (and would be consistent with the principle of party autonomy) to find that parties are allowed to restrict the time provided.

44. The problem with that argument is that section 73(1) provides the most extended time

limit of all, and appears to do so on the basis of the longer of (a) the limit in the relevant arbitration agreement and (b) the limit specified in section 31(1). It would seem to follow that if the LCIA Rules were construed as imposing a stricter time limit than section 31(1), the limit in that section (and in section 73(1)) would take precedence. If it had been necessary, I would have so decided.

Conclusion

45. For the reasons set out above, I find that the Request was invalid, with the result that the Tribunal did not have jurisdiction to make the Award. I further find that A has not lost the right to challenge the Tribunal's jurisdiction as it objected not later than the time for its Statement of Defence.

46. Accordingly A's claim under section 67 of the 1996 Act succeeds.