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Jurisdiction: Challenging the arbitrator's assertion or denial of jurisdiction

Sections 30, 32 and 72 of the Arbitration Act 1996

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Introduction

Pre-1996

1. The pre-1996 position with regard to challenging the jurisdiction of the arbitrators is covered at length in many of the standard textbooks. It is, therefore, not repeated here.
2. It is worth remembering, however, that the principle of “separability” (now enshrined in section 7 of the 1996 Act) was not fully recognised until just 3 years before the new Act when the hurdle that had been posed by the House of Lords decision in Heyman v Darwins Ltd [1942] AC 356 was finally overcome by the Court of Appeal in Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] 1 Ll Rep 455 where it was held that the main contract and the obligation to arbitrate were distinct undertakings so that any challenge as to the validity of the main agreement had no necessary impact upon the validity of the arbitration clause.
3. This slow process of recognition meant that many of the difficult issues arising out of and resulting from the application of the “separability” principle were not worked out in the pre-1996 Act caselaw.
4. In the context of jurisdictional challenges also, the landscape was different prior to the new Act. Challenges to a ruling on jurisdiction did not arise out of the relevant arbitration legislation but instead were mainly based on the common law principles, most notably that an injunction or declaration could be obtained to restrain a breach of contract. If, therefore, the arbitrators

sought to resolve an issue beyond their competence, they could be restrained from doing so. Likewise, the courts recognised that they possessed an inherent power to set aside an award made in excess of jurisdiction.

5. Furthermore, the common law did not draw a distinction between severability and “*kompetenz-kompetenz*” (see below). The question which arose at common law was usually whether judicial proceedings should be stayed pending a determination by the arbitrators as to the existence or scope of the agreement.
6. In the absence of an agreement between the parties as to the procedure for resolving jurisdictional issues, the options under the old law open to a party contesting the jurisdiction of the arbitrators were¹:
 - a. To refuse to submit to the jurisdiction of the arbitrators by failing to appear before them, and subsequently to contest the validity of any award either in enforcement proceedings or in direct proceedings for an injunction or a declaration or for the court to exercise its inherent jurisdiction to set the award aside;
 - b. To appear before the arbitrator, whilst reserving the right to contest jurisdiction, and subsequently to contest the validity of any award either in enforcement proceedings or in direct proceedings for an injunction or declaration;
 - c. To seek immediate injunctive or declaratory relief aimed at preventing the arbitrators from proceeding with the hearing—appearance without objection;
 - d. To request the arbitrators to make an interim award on the jurisdictional issue only, and to allow that award to be challenged under s 1 of the Arbitration Act 1979 (now s 69 of the Arbitration Act 1996) on the grounds of error of law.

The 1996 Act

7. The 1996 Act expressly confirmed the “separability” principle and also made wide-ranging changes to the regime governing jurisdiction.

¹ See eg section 9 of Merkin, *Arbitration Law* (looseleaf)

8. Although this part of the lecture focuses on sections 30, 32 and 72, it is important that these provisions are seen in the context of the wider scheme set out in the Act.
9. The broad structure under the 1996 Act can be summarised as follows:
 - a. The arbitrators are entitled to proceed to determine their own substantive jurisdiction by means of an award (section 30).
 - b. If they choose to rule on their jurisdiction, and they proceed to an award, whether on jurisdiction alone or on the substance of the dispute, that award may be challenged under the procedure set out in section 67.
 - c. If the arbitrators refuse to determine their jurisdiction, and the seat of the arbitration is England, the question can be resolved only by means of an application to the court with the consent of the other parties or the arbitrators under section 32 of the Act.
 - d. If one party wishes to contest jurisdiction, he has the right either:
 - i. to refuse to participate in the arbitration proceedings. In this regard, section 72 of the Act retains the pre-1996 Act common law right of an (alleged) party to an arbitration agreement to refuse to participate and to call on the Court to make a declaration or grant an injunction (or other appropriate relief). Under this section, the non-participating party also retains the right to challenge the award on jurisdictional grounds under section 67 of the 1996 Act and to contest the enforcement of the award under section 66 of the Act; or
 - ii. to bring judicial proceedings to enforce a right which that party asserts does not for whatever reason fall within the disputed agreement to arbitrate—if there is an application for a stay of the judicial proceedings by the other party, under s 9 of the 1996 Act, the court will in effect be required to determine the jurisdictional question by reason of the fact that a stay of judicial proceedings is to be refused if the court finds that the arbitration agreement is null and void, inoperative or incapable of being enforced. The court plainly has power to

resolve the jurisdictional question when it arises in this way even though it falls within the competence of the arbitrators;

- iii. to participate in the arbitration proceedings, having raised an objection to the jurisdiction of the arbitrators. Such objections must be made before he has taken a step in the substantive proceedings or as soon as he is aware of a jurisdictional issue (section 31 of the Act). If the objection is not made at the proper time, and the tribunal refuses to enlarge time under its power to do so in section 31(3), the objection is invalid and the party is deemed to have waived the jurisdictional issue under section 73(1).

Where there has been an objection in due time, the arbitrators may, under section 31(4), deal with the matter in one of two ways:

1. They may make a preliminary award. If they do so, there can be an appeal against the award on the basis of want of jurisdiction, under s 67, and a failure to appeal against the award within the time limits laid down for applications under s 67 will deprive the applicant of any right of challenge.
 2. The arbitrators may proceed with the arbitration and deal with the issue by means of an award on the substance as well as jurisdiction. Once again, section 67 is available to challenge the validity of the award on jurisdictional grounds.
- e. The parties, or the arbitrators, may agree to a preliminary ruling on jurisdiction by the court under section 32.

Section 7 – the Separability of arbitration agreements

10. As set out above, the principle of “separability” is now enshrined in section 7 of the Act in the following terms:

“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement.”

11. This principle is distinct from the question and does not dictate whether it is the court or the arbitral tribunal which has the power/right to determine any question that arises as to whether the alleged arbitration agreement is binding on the parties.

Section 30 – the Arbitrators’ power to rule their own jurisdiction

12. The answer to that question is (in part) provided by section 30 of the Arbitration Act which adopts the principle of *Kompetenz-Kompetenz* whereby the arbitrators are empowered (at least in the first instance) to rule on their own substantive jurisdiction.
13. Section 30 also defines what matters are considered to constitute the Tribunal’s substantive jurisdiction (though there is some uncertainty as to whether this is an exhaustive list²):

“Jurisdiction of the arbitral tribunal

Competence of tribunal to rule on its own jurisdiction

(1) Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to—

- (a) whether there is a valid arbitration agreement,*
- (b) whether the tribunal is properly constituted, and*
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.*

(2) Any such ruling may be challenged by any available arbitral process of appeal or review or in accordance with the provisions of this Part.”

14. Generally, the scope of this section has caused little difficulty, the main problem arising where one party alleges for whatever reason that there is no agreement (as to which see below). Thus, it is clear, for instance, that where the arbitrator exceeds his powers in the conduct of the arbitration, this is not

² See eg Merkin & Flannery, *Arbitration Act 1996*, 4th ed, page 77

seen as a jurisdictional issue but is procedural only (see eg Lesotho Highlands Development Authority v Impreglio SpA [2005] 2 Ll Rep 310).

15. The power conferred under section 30 is also subject to any contrary agreement by the parties – as is clear from the opening words.
16. Thus, reference in each case must be made to the relevant arbitral rules or any other relevant terms of the arbitration agreement. In this regard the main bodies' standard terms do not seek to limit the Tribunal's powers and, therefore, this issue is likely to arise in the relatively rare cases where there is an express exclusion of jurisdictional issues or where only certain matters are referred to the Tribunal.

Challenging the Tribunal's Decisions on Jurisdiction

17. Having outlined above the statutory confirmation of the *Kompetenz-Kompetenz* principle, the question arises how the Tribunal's assertion of jurisdiction or (less commonly) its refusal of jurisdiction may be challenged.
18. The basic scheme is outlined above and a more detailed discussion follows. For the purposes of this paper, the situation where the party objecting to jurisdiction participates in the arbitration is dealt with separately from the situation where it does not.

Option open to a Participating Party

19. As outlined above, where a party participates in an arbitration, there are two or three principal options. The first is to seek a determination by the Court under section 32. The second is to participate in the process leading to an Award and then to appeal any unfavourable decision under section 67. The third is, of course, to start proceedings in whichever Court would have jurisdiction in the absence of an arbitration agreement.
20. The position under section 67 is dealt with elsewhere but, by way of general comment, a party wishing to make use of either section 32 or 67 must be careful to protect its position so as not to be taken to have waived its right to object under section 73.
21. In this regard, section 31 provides clear guidance:

“ Objection to substantive jurisdiction of tribunal

(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.

(4) Where an objection is duly taken to the tribunal's substantive jurisdiction and the tribunal has power to rule on its own jurisdiction, it may—

(a) rule on the matter in an award as to jurisdiction, or

(b) deal with the objection in its award on the merits.

If the parties agree which of these courses the tribunal should take, the tribunal shall proceed accordingly.

(5) The tribunal may in any case, and shall if the parties so agree, stay proceedings whilst an application is made to the court under section 32 (determination of preliminary point of jurisdiction)."

22. Section 73 then provides

"Loss of right to object

(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.

...”

23. Notwithstanding the apparent clarity of these provisions, issues have arisen.
24. In the recent decision in UR Power v Kuok Oils [2009] 2 Ll Rep 495, an issue arose in relation to a tiered arbitration and whether the failure to raise the jurisdictional objection at the first tier meant that the right to appeal was lost.
25. In this case, the applicants did not raise any jurisdictional issues before the first tier arbitral tribunal but asserted lack of jurisdiction at the second tier (the FOSFA Board of Appeal) level. The applicants then made a section 67 application to the court and argued that they were not debarred from doing so because the matter had been raised and dealt with at the second tier level (they argued in the alternative that the Board had exercised its discretion to admit a jurisdictional challenge out of time).
26. Whilst not coming to a final decision on the question whether a jurisdictional issue has to be raised before a first tier tribunal, failing which it cannot be raised before a second tier tribunal, Gross J favoured the view that the right time to make a jurisdictional challenge was before the first tier tribunal merely saying

“the prudent course for a party contemplating a jurisdictional challenge in a two tier arbitration scheme, is to advance such objections before the first tier arbitrators. If not, it may well be at risk of losing that right”.

27. The alternative route (but once again subject to the requirements of section 31) is for the relevant party to apply to the Court under section 32 of the Arbitration Act.
28. Section 32 provides as follows:

“Determination of preliminary point of jurisdiction

(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question as to the substantive jurisdiction of the tribunal.

A party may lose the right to object (see section 73).

- (2) *An application under this section shall not be considered unless—*
- (a) *it is made with the agreement in writing of all the other parties to the proceedings, or*
 - (b) *it is made with the permission of the tribunal and the court is satisfied—*
 - (i) *that the determination of the question is likely to produce substantial savings in costs,*
 - (ii) *that the application was made without delay, and*
 - (iii) *that there is good reason why the matter should be decided by the court.*

(3) *An application under this section, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the matter should be decided by the court.*

(4) *Unless otherwise agreed by the parties, the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.*

(5) *Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.*

(6) *The decision of the court on the question of jurisdiction shall be treated as a judgment of the court for the purposes of an appeal.*

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question involves a point of law which is one of general importance or is one which for some other special reason should be considered by the Court of Appeal."

29. It should be noted that section 32 provides not for an appeal or review of the Arbitral decision but for an application to be made to the Court before any such decision or Award.

30. The DAC report expressly states that section 32 is intended to be the exception rather than the rule (see DAC report paragraphs 141 & 147) and the Courts are encouraged to use it sparingly. It is for this reason that it is narrowly drawn.

31. This has been heeded by the Court (see eg ABB Lummus Global Ltd v Keppel Fels Ltd [1999] 2 Ll Rep 24 and Vale do Rio Doce Navegacao SA v Shanghai Bao Steel [2000] 2 Ll Rep 1) and in light of the confirmation in the Fiona Trust (see below) that the Tribunal ought ordinarily to be the first Tribunal to consider the issue of jurisdiction, its use is likely to be limited. That said, it is hard to see that the Court would refuse to exercise its jurisdiction (eg on grounds of delay) if both the parties were to consent to it doing so.
32. Furthermore, notwithstanding the exhortations of the DAC, the section is not by any means redundant.
33. In British Telecommunications plc v SAE Group Inc [2009] EWHC 252 (TCC) the facts were as follows. The parties entered into an agreement on 14 July 2000 under which SAE agreed to provide equipment, software and services to BT, mainly in respect of BT's outside broadcast operations. BT had the right to determine the policy on notice, subject to SAE receiving certain payments. The agreement was said to contain a clause which SAE asserted was an arbitration clause.
34. BT gave notice of termination on 24 October 2002, and disputes then arose as to the amount payable to SAE. When notified of the appointment of an arbitrator, BT responded by asserting that the arbitrator had no jurisdiction in that the sum in dispute was in respect of additional costs incurred in performing the contract, whereas the alleged arbitration clause was confined to disputes arising out of the provision of software source code to an escrow agent. Some time later, SAE wrote to the arbitrator requesting him to restart the proceedings.
35. The arbitrator invited the parties to reach an agreement on whether or not he possessed jurisdiction, but BT maintained its position that the arbitration clause did not extend to the dispute in question. The arbitrator then suggested to the parties that the jurisdictional issue could be resolved by means of an application to the court under section 32 of the Arbitration Act 1996.
36. BT applied to the arbitrator for permission for the making of a section 32 application, and that permission was duly given.
37. BT then applied to the Court, the application being one for declaratory relief, with three different bases: (a) an application under the general provisions of Part 8 of the Civil Procedure Rules for a declaration that there was no arbitration clause and that the 1996 Act did not apply; (b) an application under section 32 of the 1996 Act for a declaration that there was no arbitration

- clause; and (c) an application for declaratory relief under section 72 of the Act.
38. In relation to section 32, SAE argued that section 32(2)(b) – which prevents the court exercising its section 32 powers unless the determination of the question is likely to produce substantial savings in costs, the application is made without delay and there is good reason why the matter should be decided by the court – was not satisfied.
39. In his Judgment, Ramsey J noted, the competing arguments gave rise to a legal conundrum. The 1996 Act applied only if there was an arbitration clause, but where it was asserted by one party that there was no arbitration clause the very applicability of the Act was in question. Further, section 30 of the Act assumed that any question of jurisdiction should be – in the first instance at least – resolved by the arbitrator himself. In the present case it would have been possible for SAE to have sought a stay of BT’s action for a declaration under CPR Part 8. Had a stay been sought, the court would have been in the position of having to decide whether itself to adjudicate on the existence of the arbitration clause or whether to refer the matter to the arbitrator. Ramsey J approached the question in the same way as if a stay application had been made, seeing no reason to distinguish the two situations.
40. Ramsey J held that he was entitled to hear the declaration proceedings under Part 8, without reference to the 1996 Act. In so deciding he relied upon the Judgments in The Fiona Trust case and the views of the Court of Appeal (implicitly approved by the House of Lords) that the arbitrators should generally be the first tribunal to consider jurisdiction. However, if proceedings were commenced in breach of an arbitration clause and a stay was sought under section 9 of the 1996 Act, then section 72 ceased to be relevant, so that its use was for the most part confined to a case in which the applicant had not commenced judicial proceedings but had gone straight to the court for declaratory relief. Instead, the court had to decide whether:
- (1) to decide on the evidence that an arbitration agreement existed, in which case a stay had to be granted under section 9(4) of the Act;
 - (2) to stay the proceedings by exercising its inherent jurisdiction to stay (the exercise of discretion could not be statutory until it was ascertained that there was an agreement and the 1996 Act applied), so that the matter could be resolved by the arbitrators;
 - (3) not to decide the issue but to make directions under CPR Part 62.8 for an issue to be tried as to whether an arbitration agreement did indeed exist; or
 - (4) to decide that no arbitration agreement existed and to dismiss the stay application.

41. Ramsey J, applying this approach, held that the issue before the court was whether the 1996 Act applied. That would be the case only if there was a valid arbitration clause. Given the refusal of the Court of Appeal to stay the proceedings in The Fiona Trust case, where there had been judicial proceedings followed by an application for their stay, the same principle should be applied in a case where no stay was sought. Ramsey J thus proceeded to decide whether there was or was not an arbitration clause, in the exercise of his powers CPR Part 8, so that either a declaration would be granted or it would be refused. Either way, that would determine the jurisdictional issue.
42. Ramsey J held that there was no arbitration agreement covering the dispute, essentially due to the fact that he considered that the arbitration clause had not progressed beyond the stage of a draft agreement which BT had not accepted, was in fact an expert determination provision to an arbitration clause and did not extend to the dispute in question.
43. The Judge went on to discuss the operation of sections 32 and 72 of the 1996 Act had those provisions been applicable to the case.
44. With regard to section 32, Ramsey J held that its requirements had been satisfied. An early determination by the court was likely to have produced substantial savings in costs, in that allowing the arbitrator to determine jurisdiction would have led to an appeal under section 67.
45. Further, the matter was already before the court. The application had been made without delay: although it was not made until 20 November 2008, and the first objection had been taken in July 2006, the intervening period included an agreed stay of the arbitration proceedings, and they were not revived until 14 October 2008. The intervening period could not be classified as delay, and the one-month period at the end was perfectly reasonable.
46. Finally, the matter was one that should be determined by the court, given that the suggestion for a section 32 reference came from the arbitrator himself. Ramsey J rejected the argument that BT had waived its right to object by reason of the operation of section 73, in that it did not proceed with an application for over two years. However, the court's view was that all that was required was that an objection was made to substantive jurisdiction: once that objection had been made, there was no obligation on the objecting party to bring immediate proceedings. Indeed, it was stated in section 31(4) of the 1996 Act that it was for the arbitrators to decide whether to deal with the objection in its award on the merits

47. Given that the jurisdictional requirements of the sections were met, the final question was whether the court should – had the question arisen – exercise its discretion to hear the jurisdictional issue. Although the cases suggested caution in respect of both sections, Ramsey J saw no reason not to go ahead. Nothing had happened in the arbitration, the very existence of the agreement was in issue and there were no facts to be determined which would be better suited to the arbitral process.

Options Open to Non-Participating Party

48. As set out above, the 1996 Act expressly confirms the right of a party not to take part in the arbitral process but yet to protect its position by making an application to the Court.

49. Thus, section 72 provides

“(1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—

- (a) whether there is a valid arbitration agreement,*
- (b) whether the tribunal is properly constituted, or*
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief.*

(2) He also has the same right as a party to the arbitral proceedings to challenge an award—

- (a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or*
- (b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him;*

and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.”

50. Thus, the non-participating party is afforded a series of options – to make an application for a declaration or injunction, to challenge any Award under section 67 or section 68 or to challenge enforcement under section 66(3).

51. Once again, section 67 and 68 are dealt with separately.

52. With regard to enforcement, this is not dealt with at length but leaving any

objection to this stage is likely to be risky if there is any chance of enforcement outside this country.

53. With regard to an application for a declaration/injunction, a number of issues arise.
54. The first (which applies to any relief under section 72) is whether the relevant party can be said to have taken "*no part in the proceedings.*"
55. The question here is different to that which arises where a party is considering whether it has submitted to the jurisdiction of the Court under the provisions of the CPR.
56. In fact, any party wishing to rely on section 72 must be very careful not to be taken to have taken part.
57. In his recent decision in Broda Agro Trade v Alfred Toepfer [2010] 1 Ll Rep 39 Teare J considered what constituted "*taking part*".
58. Whilst recognizing that each case must turn on its facts, the Judge referred to and relied upon Caparo Group Ltd v Fagor Arrastate Sociedad [2000] ADRJ 254 and Law Debenture Trust Corp v Elektrim Finance BV [2005] 2 Ll Rep 755 to express the general guidance that

"A person may inform a tribunal of his view that the tribunal lacks jurisdiction without being held to have taken part in the arbitration proceedings. But if he makes submissions to the tribunal for it to take into account when exercising its jurisdiction under section 30 of the Arbitration Act 1996 to rule on its own substantive jurisdiction he risks being held to have taken part in the arbitration proceedings."

59. On the facts of that case, the Judge found that in context (ie where the objecting party had started proceedings in Russia to decide the issue of jurisdiction) a letter to the Tribunal forwarding the Russian judgment and stating that "*the reasoning of the Court should play an integral part in the decision by GAFTA to decline jurisdiction in this case*" was not sufficient to constitute taking part in the proceedings. It is submitted that this must have been very close to the line and that other Judges may have viewed the matter differently.
60. The case does, however, illustrate the need for the objecting party not to be

drawn into debating the jurisdictional position in any detail least it be taken to have taken part in the process of challenging jurisdiction.

61. The Judge also rejected the somewhat optimistic submission that taking part on the merits did not amount to taking part in the arbitration proceedings for the purpose of section 72.
62. Similarly, in British Telecommunications plc v SAE Group Inc [2009] EWHC 252 (TCC) (facts set out above) SAE argued that BT could not rely upon section 72 because BT had taken part in the proceedings; alternatively, BT had lost its right to challenge jurisdiction under the waiver principle set out in section 73 of the 1996 Act.
63. Albeit obiter, Ramsey J addressed the position under section 72 and noted that it had been established by The Fiona Trust that section 72 should be used sparingly. However, on the facts of the case, he found that its jurisdictional requirements had been met. He was satisfied that BT had not taken any part in the arbitration proceedings. It had not agreed to the appointment of an arbitrator, and it had raised an immediate objection when informed of the appointment. There was no time limit for an application under section 72 for judicial relief: the only relevance of delay was that it went to the discretion of the court, which could refuse relief to a dilatory applicant.
64. The second question arises out of the fact that, contrary to other provisions of the Act (such as section 31 or 73), section 72 is untrammelled by any pre-conditions to its application. Does this mean that the party may apply at any time and without precondition? If not, what are the principles which guide the Court as to its application?
65. The first thing that is clear is that the section provides the Court with a *discretion* to hear such an application and it is clear that delay, for instance, would be an obvious reason to refuse to hear such an application (see eg BT v SAE (op cit)).
66. In Zaporozhye Production Aluminium Plant, Open Shareholders Society v Ashly Limited [2002] EWCH 1410, Tomlinson J found (perhaps unsurprisingly) that the balance of convenience was overwhelmingly against the grant of an interim injunction to restrain arbitration proceedings that were due to be started the next day.
67. In his Judgment, he highlighted (though did not have to decide) a number of

difficult issues including whether the grant of an interim injunction preventing the pursuit of the arbitration pending a decision under section 72 was compatible with the policy and scheme of the Act. In this regard, he referred to and relied upon the views of the editors of *Mustill & Boyd* (2001 companion) that, though it was not clear how the courts would react, it was unlikely that they would grant an interim injunction restraining an on-going arbitration.

68. In the years since *Tomlinson J's Judgment*, the position has yet to be fully worked out.
69. Certainly, most commentators suggest that an injunction (particularly an interim injunction) is unlikely and refer to authorities such as *The Choko Star* [1987] 1 LI Rep 508 which confirm that the Courts ought to be reticent to interfere in the arbitral process.
70. As discussed below, the judgments in *The Fiona Trust* have confirmed the primacy afforded to the Tribunal in deciding jurisdictional issues but the only guidance given in relation to injunctions is Longmore LJ's view that "*an injunction would usually be necessary only if there was some indication that the other party was intending not to comply with any declaration which the court might make*".
71. However, in *Law Debenture Trust Corp v Elektrim Finance BV* [2005] 2 LI Rep 755, Mann J highlighted a number of legitimate situations where section 72 might be invoked and thus the prospect of an interim injunction in appropriate circumstances cannot be ruled out.
72. It is certainly the experience of the writer that on more than one occasion such a threat has been made both against the opposing party and the arbitrator.
73. Notwithstanding the judicial statements that the scope of section 72 is limited, the precise limits on its use and the availability of interim injunctions are of potential importance, not least because there is authority that a party relying on section 72 is not barred from taking part in the arbitration subsequently should it lose its challenge: see *Hackwood Ltd v Areen Desing Services Ltd* [2005] EWHC 2322.
74. Thus, in the context of international disputes where one party may argue that the jurisdiction to determine a dispute lies with the courts of another country, it is arguable that both the primacy of the Tribunal and the requirements

provided for in section 31 etc may be circumvented.

75. Further difficult issues arise out of the distinction between matters which go to the existence of an arbitration agreement and those which go only to the validity of the underlying agreement. As highlighted above, the issue of separability is distinct from the question of which Tribunal is to decide whether the arbitral Tribunal does, indeed, have jurisdiction.
76. However, since it is in the context of section 72 that this issue has been most comprehensively addressed, it is dealt with here.
77. In The Fiona Trust, the allegation was that the charterparty in which the arbitration clause was contained was void or voidable by reason of the defendant's alleged fraud in the form of bribery. The Court of Appeal [2007] 2 Ll Rep 267 held that this did not prevent the operation of the severability doctrine. The only question was whether the assertion of invalidity went to the arbitration clause or to the charterparty: because it went to the latter, and there was no independent ground for impeaching the arbitration clause, the arbitrators possessed the necessary jurisdiction to rule on the validity of the charterparty.
78. The reasoning was confirmed by the House of Lords [2008] 1 Ll Rep 254. Lord Hoffmann (@ 258) expressed the principle in the following way:

"18. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration... [The argument that] but for the bribery, the owners would not have entered into any charter with the charterers and therefore would not have entered into an arbitration agreement...[was] exactly the kind of argument which section 7 [of the 1996 Act] was intended to prevent. It amounts to saying that because the main agreement and the arbitration agreement were bound up with each other, the invalidity of the main agreement should result in the invalidity of the arbitration agreement. The one should fall with the other because they would never have been separately concluded. But section 7 in my opinion means that they must be treated as having been separately concluded and the arbitration agreement can be invalidated only on a ground which relates to the arbitration agreement and is not merely a consequence of the invalidity of the main agreement."

79. In the circumstances, since the arbitration agreement itself was not directly impeached, it was held that section 72 had no application.
80. Thus, if the issue between the parties goes only to the validity of the main agreement, with no challenge being made to the validity of the arbitration clause, then the separability principle governs the position and the arbitrators are free to determine the question of the substantive validity by virtue of section 7 of the 1996 Act. Any appeal against their decision is on a matter of law and thus subject to the provisions of section 69.
81. Often, however, the complaint will be that there is neither a substantive agreement nor an arbitration agreement, and here both sections 7 and 30 come into play: the ruling on the existence of the main agreement is permitted by separability under section 7 of the 1996 Act (and is subject to an appeal on a point of law under s 69), whereas the ruling on jurisdiction falls under section 30 of the 1996 Act and is provisional only pending the determination of any appeal under section 67 or an application under section 72.
82. This is a matter which continues to cause confusion.
83. In UR Power v Kuok Oils [2009] 2 Ll Rep 495, Gross J had to consider the situation where it was argued that there was no binding contract in the first place (ie that negotiations had not yet led to a binding agreement). Whilst acknowledging both the vast literature on this topic and the difficulty of the question posed, he went on to express "some provisional thoughts" on this matter. In so doing he reviewed both the Judgments in The Fiona Trust and Colman J's summary of the principle of separability in Vee Networks Ltd v Econet Wireless International [2005] 1 Ll Rep 192 and expressed the following views

"On the facts of the present case, my provisional inclination is to prefer [the view that the principle of separability applies]. In summary:

(i) To my mind, the wording of section 7 of the Act makes it plain that even though the underlying contract never came into existence, the arbitration agreement may still be binding. In this regard, it is worth underlining the wording in section 7 "or was intended to form part of" and "or did not come into existence". ...It is in any event at least a tenable view that, in this context,

too much can sometimes be made of the distinction between a contract which is void and one which never came into existence....

(ii) So far as concerns authority, even if Lord Hoffmann's observations at para 18 of his speech in Fiona Trust (supra) are obiter, they are, with respect, of very great persuasive force. Moreover, they are very much in point. For my part, I do not read anything said by Colman J in Vee Networks (supra), as telling against the provisional conclusion to which I am attracted; the observations of Colman J at the end of para 19 were directed at a somewhat different situation.

(iii) In principle, therefore, an arbitration agreement may be binding even though the underlying contract has not come into existence...[However,] it does not follow that in every case where pre-contractual negotiations have not resulted in a binding (underlying or matrix) contract, an arbitration clause discussed in the course of those negotiations would be binding. Whether it is or not will necessarily be a question of fact and degree, depending on the circumstances of the individual case.

(iv) In the present case, by 25 October and even more so by 27 October 2006, there was on any view a very considerable measure of agreement between the parties. By 27 October, as set out in para 6.15 of the appeal award, such agreement extended to: (1) the goods (Nigerian crude palm oil); (2) the quantity (10,000 mt); (3) the cif nature of the transaction, including a nominated load and discharge port; (4) the price (US\$480 per mt); (5) the incorporation of FOSFA 80, so including the agreement to arbitrate (clause 30 of FOSFA 80); and (6) payment by transferable letter of credit to be opened and confirmed after delivery of the POP certificate, with detailed documentary instructions.

(v) Against this background, it is at least strongly arguable that the outline of the agreement of which the agreed arbitration clause (clause 30 of FOSFA 80) was intended to form part, was clear indeed. There was in particular no doubt and had not been since 18 October that the parties intended their disputes arising out of their (intended) contract to be referred to arbitration; the incorporation of FOSFA 80 had been agreed since then. All that remained was the discrete question of whether Kuok's obligation to open a conforming letter of credit was or (on one view) remained a contingent condition precedent and so stood in the way of the parties having entered into a binding contract. There is, to my mind, at least a powerful argument for concluding that the parties must be taken to have intended that discrete question to be referred to arbitration in accordance with FOSFA 80. It is perhaps to be underlined that the question here

went not to the existence of any consensus ad idem but instead to the nature of Kuok's obligation."

84. The thrust, therefore, of the Judgment is that the analysis of separation can be extended to a situation where, notwithstanding the allegation that there was no underlying agreement, there is sufficient consensus to show that if there was an agreement any disputes should be referred to arbitration.
85. Whether this analysis (which is currently *obiter*) will find subsequent support in judicial authority remains to be seen but it highlights the need for caution in the negotiation process lest a party be taken to have agreed to arbitration notwithstanding that no underlying contract has come into existence.
86. Finally, it should be noted that in The Fiona Trust judgments, it was expressly recognised that, pursuant to the Act, it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction over a dispute and that, accordingly, the Court ought to be very cautious about agreeing that the section 72 process should be utilised (see in particular Longmore LJ at [2007] 2 Ll Rep 275).
87. Although in the context of the dispute before the Court, this line of reasoning led to the conclusion that the primary matter for consideration was the application for a stay of English proceedings brought pursuant to section 9, it was recognised that where the party denying the existence of an arbitration agreement did not bring proceedings in England, an application under section 72 would lie (see again Longmore LJ at [2007] 2 Ll Rep 275). As outlined above, the limits on the use of section 72 in such circumstances are still to be worked out.

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