Vasanti Selvaratnam QC, instructed by Clyde & Co LLP, acted on behalf of Emirates Trading Agency LLC.

In Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd [2015] EWHC 1452 (Comm), Popplewell J considered a number of issues arising from the alleged failure of the claimant to engage in friendly discussions prior to commencing arbitration. Unfortunately, the judgment does not significantly develop the law relating to multi-tiered dispute resolution clauses, but does include some helpful clarification of issues that might arise upon the reconstitution of an arbitral tribunal.

The dispute between the parties arose in connection with a long term contract for the sale and purchase of iron ore fines. Alongside an arbitration clause providing for ICC arbitration in London, the contract contained a termination clause which provided that “the Parties shall seek to resolve any dispute or claim arising out of or under [this contract]...by friendly discussion”. The termination clause went on to provide that, if no solution could be arrived at “for a continuous period of three (3) months”, then the arbitration clause could be invoked.

It will immediately be noted that these dispute resolution provisions were very similar to those considered by Teare J in the previous case of Emirates Trading LLC v PMEPL [2014] EWHC 2104 (Comm). In that case, Teare J held that the obligation to conduct friendly discussions was an enforceable precondition to the tribunal’s jurisdiction. The decision has given rise to some criticism, essentially because, in the arbitration context, construing such provisions as conditions precedent to the tribunal’s jurisdiction can give rise to uncommercial consequences. It has been forcefully argued that, while such clauses should be upheld as enforceable procedural requirements (to be ruled upon by the tribunal within the reference), they should not be generally construed as affecting tribunal’s jurisdiction 1.

In the case before Popplewell J, arbitration was commenced pursuant to the ICC arbitration clause. ETA objected to the tribunal’s jurisdiction, arguing that the claimant had failed to engage in friendly discussions for three months, as required by the termination clause, and that therefore the tribunal lacked jurisdiction. The tribunal issued a partial award rejecting this argument and confirming its jurisdiction. Crucially, the partial award was not challenged.

Subsequently, two arbitrators resigned and were replaced by the ICC Court. The tribunal as reconstituted went on to consider whether any part of the proceedings should be repeated pursuant to Article 12(4) of the ICC Rules (1998). ETA argued that its jurisdictional objection should be reconsidered, but the tribunal declined to do so, on the basis that the issue had already been disposed of in the partial award.

The tribunal proceeded to a final award. In connection with the argument relating to the “friendly discussions” it held that, in so far as this argument was an objection to jurisdiction, it was bound by the partial award which had already disposed of the issue. ETA challenged the final award under section 67, arguing that the tribunal lacked substantive jurisdiction because of the respondent’s failure to engage in friendly discussions for three months.

Unfortunately for those practitioners awaiting further definitive clarification of the law in this area Popplewell J declined to decide whether or not the “friendly discussions” requirement was an enforceable condition precedent to the tribunal’s jurisdiction. He found that the jurisdictional issue had been disposed of in the partial award, which was final and binding on the parties and the tribunal. The partial award had never been challenged under Article 12(4) of the ICC Rules (1998), ETA argued that its jurisdictional objection should be reconsidered, but the tribunal declined to do so, on the basis that the issue had already been disposed of in the partial award.

The final award contained no fresh decision on jurisdiction that could be challenged under section 67. That was the short answer to the application.

Nevertheless, the decision does contain some points of interest:

First, while declining to decide whether the “friendly discussions” clause was an enforceable condition precedent, Popplewell J did consider what sort of discussions might qualify under the provision, assuming it to be enforceable. In his view, discussions

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1 See, eg, Flannery and Merkin, Emirates Trading, good faith, and pre-arbitral ADR clauses: a jurisdictional precondition?
that took place before the claimant’s quantified claim had been put forward could qualify. The friendly discussion clause required only a discussion seeking to resolve a “dispute or claim”. As long as the dispute subsequently referred to arbitration had been the subject of discussions, the clause would be satisfied – there would be no need to show that each particular or quantified claim within that dispute had been discussed. Further, he rejected the argument that the discussions fell outside the clause because they did not touch upon defences subsequently raised by ETA in the arbitration. Such a construction of the clause would be contrary to principle (because the majority of the tribunal who made the final award were not party to the partial award) and that there had been no ruling by an “arbitral tribunal” for the purposes of the loss of the right to object under section 73(2). Both arguments were based on an impermissible elision between the identity of the tribunal and the identity of the individual members thereof.

His treatment of these arguments suggests, perhaps, that even if a friendly discussions provision is held to be a condition precedent to arbitral jurisdiction, the court will take a commercial, even robust, view of whether that condition precedent has been discharged.

The judgment also provides some helpful clarification of the nature of a reconstituted tribunal. The tribunal is an institution and remains a single entity throughout the course of the reference, regardless of changes in the individual membership. On this basis, Popplewell J rejected arguments that there was no binding issue estoppel (because the majority of the tribunal who made the final award were not party to the partial award) and that there had been no ruling by an “arbitral tribunal” for the purposes of the loss of the right to object under section 73(2). Both arguments were based on an impermissible elision between the identity of the tribunal and the identity of the individual members thereof.

Finally, Popplewell J also clarified that Article 12(4) of the ICC Rules (1998) does not entitle a reconstituted tribunal to re-open previous decisions. Like section 27 of the Arbitration Act 1996, Article 12(4) confers a discretion to repeat part of the proceedings where the tribunal is reconstituted. But that discretion is limited to matters that remain to be determined in the reference. Any other conclusion would be contrary to the policy of speedy and final determination of disputes.

Overall, then, a case with some points of interest for arbitration lawyers, but those awaiting development of the law on multi-tiered dispute resolution clauses will have to await further clarification.

Vasanti Selvaratnam QC

Vasanti Selvaratnam QC is Joint Head of Stone Chambers. She practices in all aspects of international commercial litigation and arbitration, including shipping (wet and dry), commodities, banking and finance, conflict of law and jurisdiction disputes, all forms of interim urgent relief including freezing orders and anti-suit injunctions, and civil fraud. She is particularly noted for her user friendly “hands on” approach to cases and for her ability quickly to get to grips with disputes raising complex factual and technical issues which require a sound grasp of expert evidence and mastery of detail.

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