Neutral Citation Number: [2021] EWHC 1094 (Comm)

Case No: CL-2020-000832

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2021

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

ARMADA SHIP MANAGEMENT (S) PTE LTD	**Claimant**
- and -	
SCHISTE OIL AND GAS NIGERIA LTD	**Defendant**

- -
- -

Samar Abbas Kazmi (instructed by **CMS Cameron McKenna Nabarro Olswang**) for the **Claimant**
The Defendant did not appear and was not represented

23 April 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE COCKERILL DBE

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:15 AM on 28 April 2021.

Mrs Justice Cockerill :

Introduction

1. This is a slightly unusual case in which the Claimant makes an application under section 32 of the Arbitration Act 1996 (the "**Act**") for an order declaring that:

> "(1) Mr Jonathan Lux … has jurisdiction to hear and determine the disputes which have arisen under a charter party dated 31 August 2016 for the offshore service vessel "Armada Tuah 101" (the "**Charterparty**");
>
> (2) The appointment by the London Maritime Arbitrators Association ("**LMAA**") of Mr Lux as sole arbitrator to determine disputes under the Charterparty is valid and effective; and
>
> (3) The effect of clause 34(a) of the Charterparty is that, in the absence of agreement between the parties as to the choice of a sole arbitrator, the power to appoint a sole arbitrator rests with the President of the LMAA."

2. It comes before me for decision on the documents following a submission via the Court's electronic filing system. Usually such a decision would not attract a written judgment, but given the nature of the dispute and the relative rarity of section 32 applications it has seemed to me appropriate to produce one. I should say that I am very grateful to Mr Kazmi, who produced a most helpful skeleton argument on behalf of the Claimant to assist in my consideration of this issue.

The Underlying Dispute

3. The Claimant is a company carrying on the business of, among other things, chartering and managing of ships and vessels. The Defendant is a company carrying on the business of providing marine & offshore support services.

4. On 31 August 2016, the parties entered into a contract (the "**Charterparty**"), pursuant to which the Claimant time chartered to the Defendant the "*Armada Tuah 101*", International Maritime Organization number 9387293, from a delivery date of 1 September 2016.

5. The Charterparty was in the BIMCO Supplytime 2005 form, which is one of the many standard forms of time charterparties for offshore service vessels. As with other such forms, it consisted of two main parts: Part I setting out the specific terms agreed between the parties; and Part II setting out the standard terms of contract from which the parties were free to (and did) choose those terms which they considered applicable and strike out those terms which they did not.

6. The Charterparty provided for an initial hire period of 2 months from the date of delivery, with options to extend under certain circumstances. It was extended on a number of occasions and the charter period was ultimately completed on 7 September 2017.

7. The Claimant's case is that a number of invoices issued under the Charterparty remain unpaid despite having become due in 2016-2017. In total, a sum of USD 973,310.03 – representing nearly half of the USD 1,961,853.70 invoiced by the Claimant is said to remain outstanding.

8. Difficulties arose when the Claimant started the process of arbitration provided by the Arbitration Agreement contained in the Charterparty. As to this:

   (1) Part I of the Charterparty, at Box 34, provides for dispute resolution by arbitration as follows: "*(a). London under English law*".

   (2) This is further elaborated in Part II, Clause 34, of the Charterparty which – after a number of bespoke amendments in the standard form – states in relevant part:

> "34 BIMCO Dispute Resolution Centre
>
> (a) This Charterparty shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this Charterparty shall be referred to arbitration in London in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause. The arbitration shall be conducted in accordance with the London Maritime Arbitration Association (LMAA) **and UNICITRAL** [sic] Terms current at the time when the arbitration proceedings are commences.
>
> The reference shall be to ~~three~~ a single arbitrator~~s~~. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party ~~requiring the other party to appoint its own arbitrator~~ within 14 calendar days of that notice and stating that it will appoint its arbitrator as sole arbitrator unless the other party appoints its own arbitrator ~~and gives notice that it has done so within the 14 days specified. If the other party does not appoint its own arbitrator and give notice that it has done so within the 14 days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party~~ accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.
>
> Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.
>
> In cases where neither the claim nor any counterclaim exceeds the sum of US$50,000 (or such other sum as the parties may agree) the arbitration shall be conducted in accordance with the

> LMAA Small Claims Procedure current at the time when the arbitration proceedings are commenced."

9. While it is clear from the parties' bespoke changes that they intended to reflect an agreement on the appointment of a sole arbitrator instead of three arbitrators, the manner in which some parts of Clause 34(a) were struck through and others were not meant that there is lack of clarity on the face of the Clause as to exactly how the said sole arbitrator is to be appointed. In particular, the mechanism provided by the resulting language on its face contradicts the LMAA Terms which are said to apply.

10. Further, it was not clear whether and how the additional reference to the "*UNICITRAL Terms*" was supposed to interact with the LMAA Terms, given that Article 8 of the UNCITRAL Arbitration Rules provides a different appointment mechanism to that set out in the LMAA Terms.

11. On 20 April 2020, CMS Holborn Asia issued a Reference to Arbitration to the Defendant on behalf of the Claimant. This Reference proposed Mr Nevil Phillips of Quadrant House, 10 Fleet Street, London EC4Y 1AU, to be appointed as sole arbitrator, and requested the Defendant to indicate its agreement to Mr Phillips' appointment.

12. On 25 April 2020, the Defendant's Managing Director, Mr Kunle Ajayi, responded to the Reference to Arbitration. However, having "*noted*" the Reference to Arbitration, the Defendant did not engage with the substance of it. Notably, he did not deny the existence of the arbitration agreement, nor did he dispute the possibility of the appointment of a sole arbitrator. On the contrary, he explicitly referred to "*the arbitral proceedings envisaged in the Charterparty Agreement*" whilst asking for the "*enforcement of the said Agreement*" to be "*stayed pending reasonable improvement of the unfortunate state of crisis thrust upon us all*".

13. After attempts in April and May 2020 to seek engagement from the Defendant, on 20 May 2020, CMS Holborn Asia sought confirmation of Mr Phillips' ability to accept the appointment. This was provided by email the same day.

14. In subsequent correspondence, Mr Phillips wrote observing that the provision in Clause 34(a) of the Charterparty "*is confused*" and expressing his concern that its wording "*coupled with the potential effect of paragraph 11 of the LMAA Terms 2017 and ss 16-18 of the Arbitration Act 1996, leaves the status of [his] appointment and (accordingly) the existence and scope of [his] jurisdiction unclear*".

15. Further correspondence followed between Mr Phillips and the Claimant, in which Mr Phillips remained of the view that he did not presently have jurisdiction; that there were a number of steps which needed to be taken before he could accept jurisdiction; and that "*(by reason of the opaque nature of Cl. 34(a)) the Claimants bear the risk that even then the tribunal lacks jurisdiction*" because the starting point for the appointment of a sole arbitrator in an arbitration under the LMAA Terms was by the President of the LMAA.

16. Consequently, on 25 August 2020, the Claimant applied directly to the President of the LMAA for the appointment of a sole arbitrator pursuant to section 11 of the LMAA Terms.

17. On 27 August 2020, the President of the LMAA appointed Mr Jonathan Lux as the sole arbitrator. In appointing Mr Lux, the President expressly considered the potential conflict between the different parts of the arbitration agreement contained within the Charterparty and concluded that:

> "The President takes the view that if the UNCITRAL Rules are of relevance here it is not appropriate to employ the Article 8 list approach, and on that basis whether the LMAA Terms or the Rules prevail, or if they can be read together, he has the power to appoint a sole arbitrator and has therefore done so…"

18. Once Mr Lux was appointed, the Claimant took prompt steps to progress the matters, including filing its Claim Submissions on 24 September 2020. By his response of the same date, Mr Lux, inter alia, directed the Defendant to serve its Defence (and any Counterclaim) Submissions within the next 28 days (i.e., by 22 October 2020). The Defendant did not do so.

19. The day after the deadline, i.e., on 23 October 2020, the Claimant wrote to the Defendant about its continued non-participation and invited it to confirm that it did not take any issue with the appointment of Mr Lux as sole arbitrator or, alternatively, if it did take any such issue to do so now. Given the uncertainty highlighted by Mr Phillips, the Claimant further stated that:

> "…it would be in the interest of the parties and the arbitral process for there to be a preliminary determination of the Tribunal's jurisdiction, among other things so that the parties do not waste costs in the event that such issue is substantiated.
>
> Certainly a proper way of doing so would be to invite the English courts to do so under section 32 of the English Arbitration Act 1996.
>
> In the circumstances, kindly let us know whether you would agree to ASMPL making such an application, for a determination by the English Courts as to the question of the substantive jurisdiction of the Tribunal."

20. On 12 November 2020, having heard nothing further from the Defendant, the Claimant sought Mr Lux's consent to making the application under section 32 of the Arbitration Act.

21. By his email of 16 November 2020, Mr Lux granted permission for the Claimant to make its application if the Defendant did not clarify its position by close of business (London time) on 19 November 2020, noting inter alia:

> "It is correct that clause 34 of the Charterparty is confusing – providing for a sole arbitrator in one sentence and then for a three arbitrator tribunal in the next sentence. If the former takes precedence then you have adopted what appears to be the correct course by requesting the President of the LMAA to make the appointment of the sole arbitrator. However, it is not certain that

> the first sentence does take precedence and therefore there is an element of doubt relating to the all-important issue of correctly constituting the Tribunal which of course goes to jurisdiction.
>
> All this could no doubt be cured by a short email from the Respondents confirming either a) that they accept the entitlement of the President of the LMAA to make the appointment and therefore the jurisdiction of the sole arbitrator appointed by the President (myself) to proceed with the reference; or, alternatively, b) that the Respondents maintain that it should be a three arbitrator tribunal; or, alternatively, c) that they consider clause 34 too confusing to decide and therefore agree your proposal to make a section 32 application to the Court."

22. By email dated 27 November 2020, the Claimant made a still further attempt to engage the Defendant, giving it until "*close of business (London time) on Tuesday, 1 December 2020*," to clarify its position.

23. There was no response, and on 18 December 2020, the Claimant commenced the present proceedings through an Arbitration Claim Form, accompanied by an Application Notice seeking permission to serve all documents in these proceedings (including the Arbitration Claim Form and the Application Notice) outside the jurisdiction directly and/or by alternative methods. Both the Arbitration Claim Form and the Application Notice were supported by the witness statement of Ms Ciara Simmons and a paginated Exhibit. On 22 December 2020, the Court made an Order permitting service of the documents out of the jurisdiction directly or by alternative methods.

24. On 30 December 2020, the Claimant effected service by a number of means permitted by the Order, including:

    i) Directly at the Defendant's principal place of business being No.1, Justice Rose Ukeje Street, Lekki Scheme 1, Lagos State, Nigeria by hand delivering the documents to Mr Endurance Emmanuel, the Defendant's Security Officer; and

    ii) By post to both the addresses approved by the Order, including its principal place of business and an alternative address, 19, Association Road, Lekki, Lagos State, Nigeria.

    Mr Emmanuel informed the Claimant's service agent that the alternative Association Road address was no longer in use by the Claimant and that the Justice Rose Ukeje Street address is now the only address for the Defendant.

25. Further, on 4 January 2021, the Claimant gave notice of the proceedings in the manner permitted by the Order by emailing the Defendant's Managing Director, Finance & Accounts Manager and Business Development Coordinator.

26. The communications referred to above included an Acknowledgement of Service form and the accompanying Notes for the Defendant making it clear to the Defendant that it had 22 business days to respond. On 6 January 2021, the Claimant filed a certificate of service and accompanying evidence with the Court.

27. The requisite 22-day period for filing an acknowledgment of service elapsed with no engagement from the Defendant. In fact, as at the time of writing, the Defendant has neither filed an Acknowledgment of Service nor provided any response to the notice given of these proceedings.

28. The Claimant therefore now seeks determination of its substantive application. As noted above that application was made on the documents on the CE Filing system. As the Defendant had not responded to the Claim Form, I considered it appropriate for this to be dealt with on the documents.

Applicable Legal Principles

29. Section 32 of the Act provides an avenue for the parties and/or the Tribunal to seek the Court's determination of a preliminary point of jurisdiction. It provides that:

> "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) …."

30. In short, there are two routes under which an application under section 32 might be made: either by the agreement of all the parties or with the permission of the Tribunal. In the latter instance, the Court needs to be satisfied of the criteria set out at s.32(2)(b)(i)-(iii), and the application is required to state the grounds on which it is made (s.32(3)).

31. Even though section 32 forms part of the mandatory provisions of the Act (see Section 4(1) and Schedule 1 of the Act), it is considered a "*relatively rarely used tool*" because

"*the primary scheme of the Act is to allow the arbitrators to decide their jurisdiction first and if the parties are dissatisfied with the decision they can challenge it under s.67*": Russell on Arbitration paragraph 7-160.

32. However, there is some guidance in the cases of *VTB Commodities Trading Dac v JSC Antipinsky Refinery* [2019] EWHC 3292; *Toyota Tsusho Sugar Trading Ltd v Prolat S.R.L* [2014] EWHC 3649; and *British Telecommunications plc v SAE Group Inc* [2009 EWHC 252 as to the circumstances in which the conditions of section 32(2)(b) are met. These include:

(1) As to "*substantial savings in costs*": the likelihood of a section 67 challenge to the Tribunal's determination of its own jurisdiction and the possible wastage of costs if the matter has to be relitigated in courts after having been ventilated before the Tribunal: *VTB* at [28]; *Toyota Tsusho* at [2]; *British Telecommunications* at [61].

(2) As to "*delay*": considering the precise reasons why the application was made when it was and whether it could "*reasonably*" have been made earlier: *VTB* at [29]-[31]; *British Telecommunications* at [62]-[64].

(3) As to "*good reason why the matter should be decided by the court*":

i) the reasons given by the Tribunal itself and whether permission was granted "*based on efficiency and resulting finality*": *VTB* at [33]; *Toyota Tsusho* at [2].

ii) the stage of the proceedings at which the application is made and whether the "*very existence of any arbitration agreement is in issue*": *British Telecommunications* at [64].

iii) Whether the jurisdictional point arises out of a standard form agreement and might arise in other situations: Russell at paragraph 7-162.

33. The Claimant submits that these principles are squarely engaged in the present instance. It says that:

(1) It has now been well over three years since the current total outstanding sum became due.

(2) Not only is the Claimant entitled to a swift resolution of this dispute, it has a need to minimise the costs in the proceedings, including those arising from any future arguments on substantive jurisdiction.

(3) Given that, despite numerous invitations and opportunities, the Defendant has failed to engage with the Claimant or the tribunal in respect of the proceedings, including on the question of substantive jurisdiction, there are genuine concerns about wasted costs and efforts should a challenge to the Tribunal's jurisdiction be made by the Defendant down the line.

(4) As such, the determination of the issue of substantive jurisdiction is likely to produce substantial savings in costs. In particular:

(1) The determination of the question by the court will turn upon a short question of construction, which the court has the necessary expertise to decide.

(2) Determination by the court will avoid the possibility of the point having to be argued repeatedly: before Mr Lux, before the court pursuant to section 67 of the Arbitration Act and/or before the enforcement court in the event of an award in the Claimant's favour.

(3) Further, this application has been made without delay: as the chronology set out above shows, the Claimant has made a series of efforts from the beginning of the process to engage with and involve the Defendant and, having exhausted those attempts, expeditiously sought permission from the Tribunal. It then issued the Arbitration Claim form within 4 weeks of permission having been granted.

34. The Claimant submits that there are a number of good reasons why this matter should be decided by the court. These include:

(1) Both Mr Phillips and Mr Lux have commented on the "*confusing*" nature of the wording of clause 34 and on the associated risks to this arbitration.

(2) Mr Lux has, for this very reason, granted permission to apply for an order determining the question of jurisdiction; the very fact that he has done so is "*itself a good and cogent reason for the court to decide the question of jurisdiction*" (*VTB).*

(3) Clause 34 of the Charterparty represents a bespoke amendment to a standard term commonly used in time charters, and the court's decision on its proper construction will help promote legal certainty.

Discussion: Does section 32 apply?

35. On one view there are two steps to determining this application. First, the Court has to be satisfied that the section 32 conditions are met. Second, the Court has to be satisfied that the declarations sought concern questions of "substantive jurisdiction" and that the position in that respect is as the Claimant contends it to be. I consider these steps in turn below. However there is a threshold question which it has seemed to me requires to be considered first. That is the interrelationship of this section with section 72 of the Act, and whether the section is designed to operate in circumstances such as these, where one alleged party is not participating in proceedings. This is a point which was not dealt with in the paper application and on which I invited submissions from the applicant before me. I have been much assisted by the submissions of Mr Kazmi in this regard.

Section 72

36. Section 72 of the Act states:

> "Saving for rights of person who takes no part in proceedings.
>
> (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."

37. The right conveyed by this section is a very important one, as the authorities make clear. In *Law Debenture Trust Corporation Plc v Elektrim Finance B.V* [2005] EWHC 1412 (Ch) Mann J summarised the kinds of circumstances covered by the section:

> "It is intended to allow a challenge to the jurisdiction of the arbitrators by someone who has not yet participated in the proceedings. He is described as an 'alleged' party because it has not yet been determined whether he has that status. There are a number of reasons why he might not have that status. One is whether he is a legitimate party at all—for example, he might say that he is not a party to the agreement containing what is clearly on its face an arbitration agreement. Another is while accepting he was a party to the agreement, he might wish to say that for some reason he is not a proper party to what are alleged to be arbitral proceedings—for example, because the agreement does not cover the dispute in question and therefore the proceedings are not proper arbitral proceedings (see paragraph (c) of s. 72(1)). A third is the situation where there is no dispute about the arbitration agreement or the fact that it covers the dispute in question, but there is a dispute as to the constitution of the tribunal in question (see paragraph (b) of the subsection). In this situation the proceedings might be said to be only 'alleged proceedings' so that the party can only be an 'alleged' party."

38. In *London Steamship Owners' Mutual Insurance Association Ltd v Kingdom of Spain* [2013] EWHC 2840 (Comm) Walker J said as follows:

> "A concern of the committee was to ensure on the one hand that arbitral proceedings should not be delayed, and awards should not be evaded, by raising points on jurisdiction which could and should have been discovered and raised at an earlier stage. On the other hand, a person who disputes the arbitral tribunal's jurisdiction cannot be put in a position where the law runs roughshod over a genuine entitlement to ignore an invalid arbitral proceeding….

> 83. These considerations lead me to conclude that the provisions in section 72 should be construed with at least a degree of generosity…."

39. The reasoning behind section 72 is stated in the DAC 1996 report (as cited at paragraph 49 of *London Steamship*) as follows:

> "295. To our minds this is a vital provision. A person who disputes that an arbitral tribunal has jurisdiction cannot be required to take part in the arbitration proceedings or to take positive steps to defend his position, for any such requirement would beg the question whether or not his objection has any substance and thus be likely to lead to gross injustice. Such a person must be entitled, if he wishes, simply to ignore the arbitral process, though of course (if his objection is not well-founded) he runs the risk of an enforceable award being made against him. Those who do decide to take part in the arbitral proceedings in order to challenge the jurisdiction are, of course, in a different category, for then, having made that choice, such people can fairly and properly be required to abide by the time limits etc. that we have proposed."

40. The issue which is therefore raised is whether if any order is made under this section in circumstances such as the present it conflicts with section 72 – and indeed runs the risk of denuding s 72 of that important protection which lies at its heart.

41. Having given careful thought to this point I have concluded that the section 32 procedure is unlikely to be appropriate in circumstances where section 72 is engaged.

42. On its face such an application, if made, could result in a determination of the question of jurisdiction against the interests of the person who has the protection of section 72. Under section 32 a party may lose a right to object to jurisdiction if he takes part in the determination; on the other hand if he does not he is not being heard on jurisdiction in relation to a determination which prima facie binds him. That puts the non-participant in an unacceptable position in the light of section 72.

43. Matters might be different if the section 32 procedure were separate from the arbitral process such that section 72 did not apply, and nor did section 73. But on the face of it such an application still forms part of the proceedings in relation to which he has a right not to engage. The wording of the relevant sections indicates this. Section 72 recognises his status as being different from that of a party in referring to him as a "person who takes no part in proceedings" and "a person who is alleged to be a party". Nor is there any clear signal in the drafting of the Act that section 32 sits outside the arbitral process. It follows that it cannot be right that the non-participant is effectively obliged to participate in the section 32 process so as to be bound by it in order to protect his own interests.

44. Mr Kazmi very rightly accepted that the section 32 application could not prejudice the section 72 rights of the non-participant. However he sought to persuade me that I should nonetheless make a determination.

45. Mr Kazmi submitted that it is possible that before proceedings are concluded, the Defendant may well participate in them. He drew my attention to the fact that the only response received from the Defendant to date suggests its openness to participate in due course. In his email of 25 April 2020, having "noted" the Reference to Arbitration, the Defendant's Managing Director explicitly referred to "the arbitral proceedings envisaged in the Charter Party Agreement" and asked for the "enforcement of the said Agreement" to be "stayed pending reasonable improvement of the unfortunate state of crisis thrust upon us all". In such circumstances, it is said there may be engagement by the Defendant with the arbitral process and section 72 may never be engaged. That may of course be the case; but it would be wrong for me to make any assumption in this regard. The determination of this application should proceed on the basis that non-involvement will continue.

46. Secondly, it was submitted that this is an issue in which the Tribunal itself has sought the assistance of the Court and that it would be consistent with the policy of the English Court to provide such assistance. I agree with that point, but only so far. It remains a part of the requirements of the section that "*there is good reason why the matter should be determined by the court*"; the fact that the Tribunal asks for assistance is clearly not determinative.

47. Thirdly, Mr Kazmi says, the application does raise an important point and clarification from the Court would be welcome. That is certainly true, but it does not suggest an answer either way.

48. The main thrust of the submissions was to say that it was not the intention of the Claimant to try and exclude the Defendant's section 72 rights and that section 72 applies notwithstanding any declaration to the contrary. If that is the case an order made under section 32 does not act as a bar to a subsequent application from the Defendant under section 72 to set aside or vary the order. I do not accept this submission. It seems to me that if an order is made in proceedings which on its face creates a determination of rights between named parties there is prima facie an estoppel created. Further section 72 does not provide a means to challenge such a determination, unlike the determination of the arbitral tribunal. The proceedings under section 72 enable a challenge to the arbitral determination by means of an application which would prima facie seek a declaration in direct conflict with the earlier determination of the Court.

49. As a fallback position Mr Kazmi urges me to make the determination, but with the addition of wording to the Order which makes it clear that the Respondent's section 72 rights are not excluded. After the hearing he provided me with a draft which was expressed thus:

> "IT IS ORDERED AND DECLARED THAT:
>
> 1. Subject to the Defendant exercising any of its rights under section 72 of the Arbitration Act 1996 (which, for the avoidance of doubt, remain unaffected by this Order): …."

50. Having given careful consideration to that submission I am not prepared to accede to it. The result would be that if the Defendant did later participate in the arbitration (including with a reservation as to jurisdiction) it would nonetheless find this route of

challenge cut off by a determination in which it had not participated, essentially because it was then standing on its section 72 rights.

51. Further in circumstances where the determination cannot properly bind the Defendant, I cannot consider that there is "good reason" why the matter should be decided by the Court.

52. I am therefore going to decline to determine the question referred by the Tribunal.

The approach if section 72 did not apply

53. However since the point has been put before me and I have considered it, and because a non-binding indication of the decision I would have reached may be of utility to the parties and the Tribunal, I set out below the analysis which I would have applied and an indication of the result I would have reached.

54. As to the first question – whether the section 32 conditions would otherwise be met – absent the section 72 point I would be satisfied that the section 32 conditions are met. The points made by the Claimant are persuasive.

55. But for that issue this would be a case where determining the question of jurisdiction is likely to produce substantial savings in costs.

56. There is a serious question concerning the correct interpretation of Clause 34 of the Charterparty, in particular as to the approach to constitution of the tribunal. While the Defendant has not indicated that it seeks, or will seek, to challenge the tribunal's jurisdiction, given its lack of engagement no particular comfort can be taken from that. The Defendant has not explicitly accepted the tribunal's jurisdiction, and it seems unlikely that it has lost its right to challenge the tribunal's jurisdiction under s. 73(1)(a), so as to preclude future litigation over jurisdiction and any related costs. There is therefore a risk that an award would be set aside on the basis that the tribunal was wrongly constituted and that the matter would have to be reconsidered by a correctly constituted tribunal, entailing substantial wasted costs.

57. I do not think that there has been any delay which ought to trouble me. The Claimant first sought to commence arbitration on 20 April 2020. A section 32 application can only be brought with the agreement of the Defendant or the permission of the tribunal. The Defendant has not replied to correspondence from the Claimant, and therefore the Claimant could not have applied with the agreement of the Defendant.

58. The tribunal was constituted on 27 August 2020. On 12 November, the Claimant sought the tribunal's permission to apply to the court under s.32. On 16 November, the tribunal gave its permission to apply under s.32 if the Defendant had not responded by 19 November. The Defendant did not respond, and the s.32 application was made on 18 December. The only period that might be considered a delay by the Claimant is that between late August and 12 November; it is dubious whether that should be counted as delay at all, but in any event I would not consider it lengthy enough to justify dismissing the s. 32 application. There was no sustained period where the proceedings were dormant or where the Claimant otherwise failed to take any action in this matter. The application itself was made within one month of the tribunal granting its permission.

59. I therefore do not consider that has been delay such as to prevent the court considering the section 32 application.

60. As to good reason why the matter should be decided by the Court there is plainly a concern which a determination of the Court would allay. Both Mr Philips and Mr Lux expressed their concern as to the correct construction of Clause 34 of the Charterparty, with Mr Lux granting permission to apply to the Court under section 32 of the Act. In *VTB Commodities Trading Dac v JSC Antipinsky Refinery* [2019] EWHC 3292, Teare J noted as follows at [33]:

> "Indeed, the circumstance that the arbitral tribunal has permitted VTB to apply for an order determining the question of jurisdiction 'based on efficiency and resulting finality' is itself a good and cogent reason for the court to decide the question of jurisdiction."

61. I would therefore, absent the complication introduced by section 72, consider that there is good reason why the matter should be decided by the Court.

62. Further in my view the declarations sought by the Claimant concern "substantive jurisdiction" within the meaning of the Act.

The substance of the question of law

63. As to the appropriate construction of the Clause 34 of the Charterparty, the Claimant submits that:

(1) Whilst the Charterparty is unclear in certain respects, it is clear that it provides for a London-seated arbitration and contains an express choice of English law as the law governing the Charterparty. Therefore, whichever part of the guidance provided by the UK Supreme Court in *Enka v Chubb* one follows, the only arguable candidate for the law governing the arbitration agreement contained in Clause 34 is English law.

(2) As with any contract governed by English law, the arbitration agreement contained within Clause 34 is to be construed under the ordinary principles for contractual interpretation (as summarised by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd* [2018] EWHC 163). As to this, business common sense militates in favour of an interpretation which gives effect to the arbitration agreement rather than rendering it ineffective; the commercial consequences for the parties to this dispute (and to LMAA charter parties generally) would be quite stark if the arbitration agreement in the Charterparty was rendered unworkable.

(3) As to how the apparent contradictions within Clause 34 are to be reconciled, the Claimant makes the following observations:

i) The starting point must be the parties' conscious decision to expressly choose a sole arbitrator: one can see why, in a Charterparty of this relatively modest value, the parties may have preferred not to involve 3 arbitrators.

ii) One then analyses the effect of this choice as against the mandatory institutional rules chosen by the parties. As to this, there is reference to two possible rules: LMAA Terms and "UNICITRAL [sic] Terms". The latter is understood to be a reference to the UNCITRAL Arbitration Rules.

iii) Given that the Charterparty is in a standard form which is well-known in the shipping industry and provides for LMAA arbitration by default, by maintaining a reference to LMAA Terms the parties must have intended that the LMAA Terms are to primarily apply to the arbitration, with the UNCITRAL Rules acting as supplementary provisions if and to the extent that LMAA Terms are silent on certain points. At the very least, the parties must have intended that references to "*the appointing authority*" in the UNCITRAL Rules are to be read in conjunction with the LMAA Terms as meaning the President of the LMAA.

iv) As such, as to the material significance (or lack thereof) of the reference to the UNCITRAL Rules, the Claimant respectfully adopts the reasoning of the President of the LMAA

Discussion

64. I find this reasoning broadly persuasive.

65. Clause 34 in its unamended form clearly provides for arbitration by 3 arbitrators, except where the responding party does not appoint its own arbitrator. In Clause 34 as it appears in the Charterparty, the word "three" in the third sentence has been struck out and replaced by the words "a single". Furthermore, two references to the other party appointing its own arbitrator in response to the notice of arbitration have been struck out. This makes it clear, to my mind, that the parties intended to amend Clause 34 so that disputes would be determined by a single arbitrator.

66. What is far less clear is how that single arbitrator is to be appointed. In the light of the clear intention of the parties to refer disputes to a single arbitrator, I see the fourth sentence of Clause 34 as being essentially unworkable. At best it can encapsulate a regime for proposals leading to potential consensual appointment of an arbitrator thus:

> "A party wishing to refer a dispute to arbitration shall propose an arbitrator and notify the other party of its proposal in writing, inviting the other party to agree or to propose a different arbitrator within 14 calendar days of the notice."

67. Essentially unless there is agreement to the initial proposal (or any responsive suggestion) the parties are driven back on the earlier part of Clause 34 which provides that the arbitration shall be conducted in accordance with "*London Maritime Arbitration Association (LMAA) and UNICITRAL Terms current at the time when the arbitration proceedings are commenced*".

68. The reference to LMAA Terms is to be taken as a reference to the LMAA Terms 2017 ("**the LMAA Terms**").

69. The "*UNICITRAL Terms*" will almost certainly have been intended to refer to the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) ("**the UNCITRAL Rules**").

70. Article 8(1) of the UNCITRAL Rules provides as follows:

> "1. If the parties have agreed that a sole arbitrator is to be appointed and if within 30 days after receipt by all other parties of a proposal for the appointment of a sole arbitrator the parties have not reached agreement thereon, a sole arbitrator shall, at the request of a party, be appointed by the appointing authority."

71. Article 8(2) provides that the appointing authority shall use the "*list-procedure*" described in Article 8(2)(a) to (d), "*unless the parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case*".

72. Article 6(1) of the UNCITRAL Rules provides as follows:

> "1. Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary-General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority."

73. Clause 11 of the LMAA Terms provides as follows:

> "11. Subject to the terms of the arbitration agreement, where it provides for these Terms to apply and if the tribunal is to consist of a sole arbitrator, if within 14 days of one party calling for arbitration the parties have not agreed upon a sole arbitrator: (a) either party may apply in writing for the appointment of a sole arbitrator by the President of the LMAA; …. (d) the President, having considered the nature of the dispute, shall appoint a sole arbitrator and give notice of such appointment to the parties."

74. Proceeding on the basis that the parties should be taken to have intended to produce a coherent agreement one would naturally interpret the inclusion of both the LMAA Terms and the UNCITRAL Rules as meaning that the parties agreed that the President of the LMAA would be the appointing authority for the purposes of Article 8 of the UNCITRAL Rules.

75. The President of the LMAA, when appointing Mr Lux, expressly considered whether to use the Article 8 list-procedure but found that doing so was "*not appropriate*" in the instant case. He therefore acted in compliance with the UNCITRAL Rules, notwithstanding that he was requested to make the appointment on the basis of paragraph 11 of the LMAA Terms. By adopting this approach he smoothed out the difference between the two clauses.

76. There is of course a "rough edge" in that the mechanism by which the President of the LMAA appoints a sole arbitrator in Term 11 is 'subject to the terms of the arbitration agreement'. Term 11 allows the President to appoint a sole arbitrator where the parties fail to agree on an arbitrator within 14 days of one party calling for arbitration. Term 11 would therefore apply where the parties reject (or ignore) each other's suggested arbitrators. Under the terms of the arbitration clause, a sole arbitrator is initially to be appointed at the suggestion of the Claimant, though it seems the Defendant has the right to object to the suggested arbitrator and to suggest an alternative. However the two mechanisms are at this preliminary stage very close and Term 11 provides the natural means of preventing a stalemate.

Conclusion

77. For the reasons set out above, however, I will not grant the Claimant's application.

78. As for the application for the Claimant's costs it seems to me that these are best treated as costs in the arbitration. Absent section 72 I should have awarded the Claimant its costs. But this does not seem appropriate in circumstances where I have declined to make the application because the Defendant is exercising a right to which it is perfectly entitled under section 72.