Client Alert | International Arbitration

Separate Requests essential in multi-contract LCIA arbitrations

February 2018

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A recent English High Court decision is a cautionary tale for claimants under the 2014 LCIA Rules. The Court held that a Request for Arbitration is invalid if it relates to more than one arbitration agreement. Claimants must file a separate Request for each arbitration agreement.

The decision also considers when jurisdictional objections must be raised. It concludes that an objection will be valid even if raised only in a Statement of Defence. This means that, in some cases, a jurisdictional objection may not emerge until months into the arbitration.

Decision: *A v B* [2017] EWHC 3417 (Comm)

Facts

B sold two shipments of crude oil to A under two separate contracts. Each contained an LCIA arbitration clause.

B commenced arbitration against A for non-payment under the contracts. It filed a single Request for Arbitration with the LCIA, setting out its payment claims under each contract. It paid a single registration fee.

More than six months after filing its Response, and a week before its Statement of Defence was due, A challenged the validity of B's Request for Arbitration. A argued that, since the Request referred to both contracts, it failed to identify the particular dispute and the particular arbitration agreement to which it related. The Request was therefore invalid under the LCIA Rules, and the tribunal had no jurisdiction.

The tribunal dismissed A's objection on the grounds that it was made too late. A applied to the English High Court to overturn the tribunal's decision.

Issues

The court considered two key questions:

I. Was the Request for Arbitration valid?

II. Did A raise its jurisdictional objection too late?

Decision

The court found that the tribunal lacked jurisdiction because the Request was invalid. A had made its jurisdictional objection in time.

The Request was invalid

The court closely analysed Article 1 of the LCIA Rules. Article 1 requires Requests for Arbitration to identify 'the full terms of the Arbitration Agreement' and to give 'a statement briefly summarising the nature and circumstances of the dispute'.

B accepted that an arbitration under the LCIA Rules could only encompass a dispute arising under a single arbitration agreement. It argued, however, that its single Request for Arbitration had commenced two separate arbitrations – one under each contract.

The court rejected this argument. Article 1 of the LCIA Rules refers to the 'Arbitration Agreement' and 'the dispute' in the singular. The LCIA Rules do not envisage several arbitrations being commenced under a single Request. The Court therefore refused to interpret Article 1 as referring to 'Arbitration Agreements' or 'the disputes' in the plural.

In support of its conclusion, the Court observed that:

- It was 'inconceivable' that the LCIA Rules would permit a claimant to pay only one registration fee but commence multiple arbitrations.
- The LCIA Rules allow consolidation where the parties consent. B could not bypass the need for A's consent by commencing two arbitrations under one Request.[1]
- If the words 'Arbitration Agreement' include 'Arbitration Agreements', the requirement for a 'written request' might be read to require several 'written requests'. How the LCIA Rules would work in that situation is unclear. It is however 'entirely clear' that the result could not be consolidation, or concurrent hearings in multiple arbitrations, without the parties' consent.

The court also considered the similar case of *The Biz*.[2] In that case, a claimant commenced *ad hoc* arbitrations under ten separate contracts by filing a single notice of arbitration. The court in *The Biz* concluded that the notice was valid, and that ten separate arbitrations had been commenced. The key test was what a reasonable person in the position of the respondent would have understood by the notice.

Here, the court distinguished *The Biz* because it did not involve arbitration under institutional rules. The court found that a reasonable person receiving a Request for Arbitration under the LCIA Rules would understand that a single arbitration had been commenced. That conclusion was supported by the wording of the Request itself, which claimed one single amount of damages, and referred throughout to 'the arbitration'.

A's jurisdictional objection was not made too late

The key issue was the meaning of 'as soon as possible' in Article 23.3 of the LCIA Rules. Article 23.3 provides that jurisdictional objections must be made 'as soon as possible but not later than the time for its Statement of Defence'.

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1 The court focussed on Article 22(ix) of the LCIA Rules, which empowers a tribunal to consolidate arbitrations under the LCIA Rules if the parties consent. The court did not, however, refer to Article 22(x). Article 22(x) permits the tribunal to consolidate LCIA arbitrations between the same parties under the same or compatible arbitration agreements, even if the parties do not consent. The court's reasoning might nevertheless be extended to Article 22(x) on the basis that a claimant should not be permitted to bypass the need for the tribunal's consolidation order.

2 [2011] 1 Lloyd's Rep 688.

The court's starting point was the mandatory provisions on jurisdictional objections under sections 31 and 73 of the UK's Arbitration Act 1996. The court considered that it was 'highly unlikely' that the LCIA Rules were intended to materially diverge from those provisions.

Section 31 of the 1996 Act does not require jurisdictional objections arising at the outset of the proceedings to be made 'as soon as possible'. Instead, objections must be made no later than the respondent's 'first step in the proceedings to contest the merits of any matter' relating to the objection.

The court rejected B's argument that A first contested the merits in its Response. The court concluded that the Response is a 'predominantly formal document'. It also noted, by reference to reports on the drafting of the 1996 Act, that the 'first step…to contest the merits' was intended to mean the Statement of Defence (or its equivalent in an arbitration not requiring formal pleadings).

The words 'as soon as possible' in Article 23.3 of the LCIA Rules do not alter the position. It was 'inconceivable' that the LCIA Rules intended to impose a strict regime for jurisdictional objections that would depart dramatically from section 31 of the 1996 Act. An absolute 'as soon as possible' requirement would mean that 'a party could lose the most fundamental of objections (such as that it was not party to the relevant agreement or that there was no LCIA arbitration clause in an agreement to which he was party) without having taken any steps in the arbitration'.

Instead, the court found that the words 'as soon as possible' merely excluded 'untimely objections'. An objection would be 'untimely' if it had not been raised by 'the time' of the Statement of Defence, as required by the 1996 Act. If the LCIA Rules had intended to impose a stricter requirement, they would have used far clearer words spelling out the sanction for non-compliance. This approach was consistent with the interpretation of clauses requiring prompt compliance by a longstop date in other contexts.[3]

The court also rejected B's argument that parties can contractually agree to shorten the time limit for jurisdictional objections. Section 73 of the 1996 Act requires jurisdictional objections (among other types of objection) to be made 'forthwith, or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of [Part 1 of the 1996 Act]'. The Court interpreted this to mean that the time limit for jurisdictional objections under section 31 will prevail over any shorter time limit in the parties' arbitration agreement.[4]

Comment

The decision highlights a potential pitfall for claimants commencing LCIA arbitrations under different contracts. Unlike the rules of some other arbitral institutions,[5] the LCIA Rules do not expressly allow disputes under separate arbitration agreements to be started by a single Request for Arbitration. The decision may prompt the LCIA to amend its rules.

The court's message for claimants under the existing LCIA Rules is clear. Separate arbitration agreements require separate Requests for Arbitration. If separate Requests are not used, the arbitration could collapse months after being started – as happened here. This will always mean wasted time and costs. In some cases, it could also mean that applicable limitation periods have expired, such that the claimant cannot start fresh arbitrations. The safest course for claimants is therefore to file separate Requests, and seek their consolidation.

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3 *AIG Europe (Ireland) Ltd. v Faraday Capital Ltd* [2006] 2 CLC 770, involving the interpretation of a notification clause in a reinsurance contract.

4 The court also suggests (at para. 44 of the judgment) that, if an arbitration agreement permits jurisdictional objections to be made *later* than the time limit under section 31, the arbitration agreement will prevail. It is not clear how this would be consistent with the mandatory status of section 31 of the 1996 Act, which provides that jurisdictional objections 'must be raised' by the time limit set out therein.

5 See, eg, ICC Rules (1 March 2017), Article 9; SIAC Rules (2016), Article 6; SCC Rules (1 January 2017), Article 14; HKIAC Rules (2013), Article 29.

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