S.18 of the Arbitration Act 1996 – When And How To Use It – Silver Dry Bulk Co Ltd (Claimant) v Homer Hulbert Maritime Co Ltd (Respondent), 13 January 2017.

Kluwer Arbitration Blog
March 8, 2017

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Please refer tot his post as: Jonas Habert, 'S.18 of the Arbitration Act 1996 – When And How To Use It – Silver Dry Bulk Co Ltd (Claimant) v Homer Hulbert Maritime Co Ltd (Respondent), 13 January 2017.', Kluwer Arbitration Blog, March 8 2017, http://arbitrationblog.kluwerarbitration.com/2017/03/08/s-18-arbitration-act-1996-use-silver-dry-bulk-co-ltd-claimant-v-homer-hulbert-maritime-co-ltd-respondent-13-january-2017/

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S. 18 of the Arbitration Act 1996 (the "Act"), on the power of the courts to appoint an arbitrator, has been portrayed in Noble Denton Middle East v Noble Denton International Ltd [2010] EWCH 2574 as a "gateway" provision.

Mr Justice Males further developed this idea in the "Silver Dry Bulk" case and noted that "[s. 18] provides a way of getting an arbitration started, or at least prevents arbitral proceedings from being aborted by a failure in the agreed appointments process, but does so without requiring the final determination of issues affecting the arbitral tribunal's jurisdiction […] (applying the kompetenz-kompetenz principle)." The decision provides an interesting, if unusual, illustration of when and how s. 18 can be used.

Background

Silver Dry, a Maltese company, had purchased a vessel from Homer Hulbert for a price of USD 66.5 million pursuant to a Memorandum of Agreement dated 1 February 2011. Homer Hulbert was a company which had been incorporated in the Marshall Islands for the purpose of this very transaction. It was a 100% owned subsidiary of the Sinokor Group, a Korean ship owner and operator.

Silver Dry claimed that the purchase price it had paid included a secret commission to Hannibal Gadaffi who at the time of the transaction was controlling Silver Dry's holding company, the General National Maritime Transportation Company.

In the notice of arbitration, Silver Dry appointed its arbitrator. Pursuant to the relevant arbitration clause, Homer Hulbert had 14 days to appoint its own arbitrator failing which the arbitrator designated by Silver Dry would become the sole arbitrator to determine the proceedings. This clause,

which may look unusual to non English practitioners, is in fact not uncommon in maritime arbitration and simply reflects the terms of s. 17 of the Act. Homer Hulbert – having been dissolved before the serving of the notice of arbitration – did not respond to Silver Dry's notice and the latter's designated arbitrator therefore became the sole arbitrator.

The arbitration clause did not provide for any arbitral institution such as the ICC or the LCIA to administer the arbitration proceedings. Had the proceedings been governed by institutional rules, these rules would have remedied the issue of the appointment of the arbitrator. Because the arbitration was ad hoc, it was necessary for the parties to introduce an appointment mechanism in the clause.

The sole arbitrator held a procedural hearing which Silver Dry (as claimant) and Sinokor attended (Silver Dry had taken steps to ensure that the notice of arbitration reached Sinokor). The respondent, Homer Hulbert, did not attend. Silver Dry indicated at the procedural hearing that it might later apply to join Sinokor to the arbitration. The sole arbitrator asked Silver Dry to prepare a Memorial addressing the jurisdictional issues and the merits of its case.

Silver Dry then applied to the English courts for an order under s. 18 of the Act that an arbitral tribunal had been validly constituted to determine its dispute with Homer Hulbert.

In the normal course, the purpose of an application under s.18 is to ask the court to facilitate the constitution of the arbitration tribunal. What is unusual in this case is that Silver Dry was seeking confirmation that the appointment of the sole arbitrator was valid, as a preliminary step to joining Sinokor as a party to the proceedings.

The Decision

Justice Males (i) verified whether the arbitral tribunal would have jurisdiction to determine the issue, (ii) confirmed that Silver Dry satisfied the conditions of s. 18 of the Act itself and (iii) assessed whether he was ready to use his discretionary powers under s. 18(3).

Justice Males dismissed Silver Dry's application for an order directing that the tribunal had been validly constituted.

(i) Would the arbitration tribunal have jurisdiction to determine the issue?

Justice Males had first to decide between conflicting cases on the standard of proof required to establish a valid arbitration agreement for the purposes of a s. 18 application. One set of case law led by the case of Noble Denton required that a good arguable case had to be proven (or an arguable case in Man Enterprise Sal v Al-Waddan Hotel Ltd [2013] EWHC 2356). A more recent case however held that a lower threshold would be more appropriate with regards to the principle of kompetenz-kompetenz (Crowther and another v Rayment and another [2015] EWHC 427).

Mr. Justice Males followed the decision of the High Court in Noble Denton regarding the standard of proof required in an application for the appointment of an arbitrator under s. 18 of the Act. Where there is an issue as to whether a tribunal has jurisdiction, the court has the power to make the orders listed in s. 18(3) of the Act if the applying party can show that it has a "good arguable case" that a tribunal would have jurisdiction to hear the case. Mr. Justice Males explained that a good arguable case is a case that is "more than merely arguable but need not be one which appears more likely than not to succeed".

Applying this principle, Justice Males held that there was a good arguable case that Homer Hulbert continued in existence for the purpose of being a respondent in the arbitration proceeding and

therefore a good arguable case that a tribunal would have jurisdiction to determine the issue. His main reason for reaching this conclusion was based on submissions made by Silver Dry in an expert report produced by a former Attorney General of the Marshall Islands who "[appeared] to be well qualified to express that opinion which has not been tested by cross-examination". Underlining the low threshold required to make a successful application under s. 18, despite his reliance on the expert report, Justice Males noted that the arguments put forward in the expert opinion faced "formidable difficulties".

(ii) Are the conditions required under s. 18 satisfied?

This is where Silver Dry's application failed. Under s. 18 of the Act, the powers vested in the courts relating to the appointment of an arbitrator can only be exercised if there has been "a failure of the procedure for the appointment of the arbitral tribunal". Justice Males held that no such failure had occurred. It was not material that Homer Hulbert had not cooperated or appointed its own arbitrator since the arbitration clause itself provided its own solution to this. The clause expressly provided that in the event of a respondent not appointing its own arbitrator within 14 days of the claimant appointing its arbitrator, the claimant's arbitrator would become the sole arbitrator. The arbitration clause had operated in the way it was intended to since Silver Dry's appointed arbitrator had automatically been appointed sole arbitrator.

(iii) Discretionary power of the court

Despite reaching the conclusion that the conditions under s. 18 had not been satisfied, Justice Males went on to explain why, had he held that a failure had occurred, he would not have used his discretionary power under s. 18 of the Act in any event. Justice Males commented that there was no need for an arbitrator to be appointed or for any appointment to be revoked. The sole arbitrator had been conducting the proceedings since his appointment. By means of its application, Silver Dry was attempting to obtain an endorsement from the courts of its position (i.e. that the arbitral tribunal had been validly constituted) with a view to later joining Sinokor into the arbitration proceedings. Justice Males commented that a court order determining whether or not the tribunal had been validly constituted would depend upon whether Homer Hulbert continued to have sufficient existence to be a party to the arbitration. Issuing an order holding the arbitral tribunal had been "validly constituted" would go beyond the "good arguable case" test. To hold that the arbitral tribunal had been validly constituted was therefore, an issue which needed to be decided by the arbitral tribunal.

Conclusion and remarks

A few important guidelines on s. 18 can be drawn from this decision:

– A suitably compelling expert opinion provided by a party applying to the court can be sufficient to show a "good arguable case" that a tribunal would have jurisdiction to determine the issue. Justice Males explained that Silver Dry's arguments faced formidable difficulties but still held that there was a "good arguable case". This also shows that the threshold is still relatively low and answers some of the worries regarding the principle of kompetenz-kompetenz expressed in Crowther v Rayment (see above).

– A failure to appoint an arbitrator in ad hoc proceedings may not amount to a failure in the appointment procedure if the arbitration clause is well worded or pre-empts the failure and provides a workable solution which was the case here.

– In any case, the courts will usually respect the power of the arbitral tribunal to decide on its own jurisdiction. s. 18 of the Act should not be used to seek a court ruling which may assert whether or not

a tribunal has been validly constituted.