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‘The parties, not the arbitrators, control the arbitration.’

Anthony Connerty*

This question is approached against the background of a specific recent personal experience as a party-appointed arbitrator on a 3-man Tribunal: a US\$ 200 million oil contract dispute under the UNCITRAL Rules.

The governing law was English law and the place of arbitration London.

It seemed to the Tribunal that there was a potential issue as to whether or not a contractual provision relating to interest constituted a penalty under English law.

Neither party had raised the issue either in pleadings or written submissions.

The Tribunal raised the issue on the first day of the hearing and the matter was then dealt with in oral and written submissions and subsequently by the Tribunal in the award.

Were we as a Tribunal right to take that course, or should we have remained quiet on the basis that it is the party and not the arbitrators who control the arbitration?

We took the view that we were entitled - indeed obliged - to raise the issue so that it could be dealt with. If the provision did in fact constitute a penalty under English law, it would surely have been wrong for the Tribunal to make an award which in that particular respect was invalid and therefore unenforceable.

* Anthony Connerty, MA (Lond), FCI Arb, Barrister: Lamb Chambers, Temple, London and Zenith Chambers, Leeds. Consultant to Cabinet Sefrioui, Paris.

Acts as Counsel and Arbitrator in litigation, arbitration and mediation in various jurisdictions around the world.

Panel Member of the China International Economic and Trade Arbitration Commission, Beijing (CIETAC); the UN's World Intellectual Property Organisation, Geneva (WIPO); the Hong Kong International Arbitration Centre; the Cairo Regional Centre for International Commercial Arbitration, etc.

Scenario

1. Take this situation. It is clear to a Tribunal that there is potentially an issue which none of the parties or their lawyers have raised: perhaps one party has not seen the point and the other has, but has chosen not to raise it.
2. Say that it is an issue which might have an impact on the validity of the award (and therefore on the enforceability of the award).
3. Take two examples:
 - (i) limitation
 - (ii) penalty/interest
4. Should the Tribunal:
 - (i) keep quiet, or
 - (ii) raise the matter with the parties and invite them to deal with the point?
5. Say the issue relates to limitation. And say that the claim dates back three years and one month. And say that under the provisions of the relevant governing law the limitation period is three years (but with some exceptions). If the Tribunal does not raise the matter, could it be seriously argued that the Tribunal may make an award which it knows full well is time-barred?
6. Or say the issue is whether an interest provision constitutes a penalty under the relevant governing law. Should the Tribunal simply make an award in those circumstances? Or should the Tribunal raise the matter so that the parties and their lawyers can deal with the matter by way of evidence and submissions?
7. Take the point to extreme lengths: the parties say to the Tribunal: *'we know that this issue is there, but we do not intend to deal with the matter and we do not wish the Tribunal to deal with it either'*.
8. *Do the parties or the arbitrators control the arbitration?*
9. It is submitted that it is the arbitrators who control the arbitration for two reasons (which are linked):
 - (i) the arbitrators are under a duty to deliver a valid award, and
 - (ii) the arbitrators are under a duty to deliver an award which is enforceable.

Valid Awards

10. The expression 'valid award' is used in the sense that the decision of the Tribunal is made in accordance with the provisions of the relevant applicable law.

Laws, etc.

- (i) The UNCITRAL Model Law: Article 28 provides that the Tribunal is to decide the dispute *'in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.'*
- (ii) The Washington Convention: Article 42 requires the Tribunal to decide the dispute in accordance with the rules of law agreed by the parties.

How can it be said that a Tribunal has decided the dispute in accordance with the applicable rules of law if it makes an award which is wholly invalid and therefore unenforceable (say in the case of a limitation issue) or is in part invalid and unenforceable to that extent (say in relation to an interest provision which constitutes an unenforceable penalty)?

- (iii) England

Section 1 of the Arbitration Act 1996 states that the object of arbitration is to *'obtain the fair resolution of disputes'*. Section 33 of the Act provides that the Tribunal has a general duty to *'act fairly'*.

Could it be said that the Tribunal is acting fairly if it makes an award against one party which award the Tribunal knows is invalid and unenforceable?

- (iv) France

Article 1474 of the Code of Civil Procedure states that an arbitrator is to decide the dispute in accordance with the rules of law. In relation to international arbitration, the Code again provides in Article 1496 that the arbitrator is to decide the dispute in accordance with the rules of law chosen by the parties.

Arbitration Rules

(i) UNCITRAL

Article 15 (1) requires the parties to be treated with equality and Article 33 requires the Tribunal to apply the applicable law designated by the parties.

(ii) ICSID

Rule 6 (2) of the ICSID Arbitration Rules requires each arbitrator to sign a declaration that he will *'judge fairly as between the parties, according to the applicable law . . .'*

(iii) LCIA

Article 14.1 (i) provides that it is a general duty of the Tribunal to act fairly as between the parties. Article 14.2 provides that the Tribunal has the widest discretion to discharge its duties under the laws or rules of law.

But more interesting for present purposes are the provisions of Article 22.1 (c) which states that the additional powers of the Tribunal include the power to *'conduct such enquiries as may appear to the Arbitral Tribunal to be necessary or expedient, including whether and to what extent the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable to the arbitration, the merits of the parties' dispute and the Arbitration Agreement.'*

That rule makes it clear that a Tribunal would be entitled to raise and deal with an issue not raised by the parties themselves.

(iv) International Chamber of Commerce

Article 15 (2) of the ICC Rules requires the Tribunal to act fairly. Article 18 (I)(d) empowers the Tribunal to include in the Terms of Reference a list of issues. If it is clear to the Tribunal that there is an issue which the parties have not raised, surely it would not be right for the Tribunal to omit that issue from the list of issues. And even if the Tribunal did decide (it is submitted wrongly) to ignore that issue, what happens when the ICC Court scrutinises the award? Under the provisions of Article 27, the Court is entitled to draw the Tribunal's attention to *'points of substance.'* Clearly a statute-barred claim or a claim which is in part unmaintainable by reason of penalty provisions in the appropriate applicable law is a *'point of substance'*. Indeed, the provisions as to penalties and as to time limits may well come within the public policy provisions of the relevant law and therefore any award falling foul of those provisions would be unenforceable under the New York Convention.

(v) CIETAC

Article 53 of the Arbitration Rules of the China International Economic and Trade Arbitration Commission require the Tribunal to act impartially in making its award, which is to be '*on the basis of the facts, in accordance with the law and the terms of the contracts, with reference to international practices and in compliance with the principle of fairness and reasonableness.*'

That provision surely makes it clear that a CIETAC Tribunal would have to raise an issue of substance such as limitation whether or not the parties themselves had raised that issue.

(vi) American Arbitration Association

Article 16.1 of the AAA International Arbitration Rules requires the Tribunal to treat the parties with equality. Article 28 (1) requires the Tribunal to apply the substantive law designated by the parties as applicable to the dispute.

(vii) Stockholm

Article 24 of the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce provides that the Tribunal is to decide the merits of the dispute on the basis of the law or rules of law agreed by the parties.

(viii) The Netherlands

The NAI Arbitration Rules require the Tribunal in an international arbitrations to make its award in accordance with the relevant rules of law, provided the parties have so agreed: otherwise, the Tribunal is to decide as *amiable compositeur*: Article 45 (2).

(ix) It is interesting to see the IBA's view of the matter: Rule 1 of the International Bar Association's Rules of Ethics for International Arbitrators requires that the arbitrators provide the parties with a '*just and effective resolution of their disputes*'.

A Tribunal which makes an award which, in whole or in part is invalid (and therefore unenforceable) by reason of provisions in the relevant governing law, has not provided the parties with an award which is '*just and effective*'.

Enforceable Awards

11. Time limits and penalties may each fall within the area of public policy and therefore an award made in favour of a party whose claim is time-barred or an award which is in part based upon an interest provision which offends against the relevant applicable law's provisions may be unenforceable.

Laws, etc

(i) UNCITRAL Model Law

Article 34 (2) (b) (ii) provides that an award may be set aside on proof that the award is in conflict with public policy. Article 36 (1) (b) (ii) provides that it is a ground for refusing recognition or enforcement if the award would be contrary to public policy.

(ii) Washington Convention

Article 52 (1) (b) provides that an award may be annulled on various grounds including the fact that the Tribunal has '*manifestly exceeded its powers.*'

A Tribunal which makes an award in favour of a party whose claim is time-barred has clearly done precisely that.

(iii) England

Section 68 (2) of the English Arbitration Act 1996 sets out grounds for challenging awards on the basis of '*serious irregularity*'. Various types of serious irregularity are then set out in what Craig Park & Paulson describe as '*the laundry list of improprieties.*'* For example, Section 68 (2) (a) categorises as a serious irregularity the failure by a Tribunal to comply with the Section 33 duty to act fairly. Section 68 (2) (g) includes as a serious irregularity an award which is contrary to public policy.

Section 69 (3) (c) of the Act provides for an appeal on a point of law where the decision of the Tribunal is obviously wrong.

A Tribunal which makes an award in favour of a party whose claim is time-barred is surely '*obviously wrong*'.

Section 103 (3) of the Act dealing with New York Convention awards provides that recognition and enforcement may be refused if would be contrary to public policy to recognise or enforce the award.

* 'International Chamber of Commerce' (Third Edition) by Craig Park & Paulson at page 543.

(iv) France

Article 1498 of the Civil Procedure Code dealing with awards rendered abroad or in international arbitrations provides that such awards shall be recognised in France provided that the award '*is not manifestly contrary to international public policy*'. Appeals against Court decisions granting recognition or enforcement are only available on limited grounds one of which is where recognition or enforcement would be contrary to international public policy: Article 1502 (5).

Conclusions

12. Provisions in national laws dealing with the recognition and enforcement of international awards are based on and/or have an eye to Article V (2) (b) of the New York Convention, which states that recognition and enforcement may be refused if the award would be contrary to the public policy of the country where recognition and enforcement is sought.
13. In the scenario envisaged earlier the parties - deliberately or otherwise - have not raised a particular issue. The Tribunal considers that it cannot remain silent. The Tribunal's view is that it may - indeed must - raise that issue so that it can be dealt with by the parties by way of evidence and submissions, thus enabling the Tribunal to determine the issue in the award.
14. It is submitted that resolution of the question whether it is the arbitrators or the parties who control the arbitration is to be found by considering:
 - (1) the duty of an arbitral Tribunal to make a valid award in accordance with the relevant applicable law, and
 - (2) the duty of a Tribunal to make an award which is enforceable (with particular reference to the New York Convention).

ANTHONY CONNERTY

anthonyconnerty@lambchambers.co.uk