

**JUDGMENT : Mr. Justice Teare :** Commercial Court. 6<sup>th</sup> November 2008

### Introduction

1. This is an application by the Claimant for an order pursuant to section 67 of the Arbitration Act 1996 challenging an award of an arbitration tribunal as to its substantive jurisdiction. The Defendant says that no such order should be made because the decision which is sought to be challenged is not an award as to the tribunal's substantive jurisdiction. If, however, the decision is an award the Defendant says that the tribunal had the necessary substantive jurisdiction. In response the Claimant says that the Defendant is not able to take the point that the decision is not an award. There are therefore three issues before the court as follows:
  - i) Is the Defendant able to argue that the decision of the tribunal is not an award as to its substantive jurisdiction ?
  - ii) If so, is the decision of the tribunal an award as to its substantive jurisdiction ?
  - iii) If so, did the tribunal have substantive jurisdiction to make the award ?

### The material events

2. The Claimant provides legal services in Kazakhstan. Mr. Michael Wilson is a director and shareholder of the Claimant. The Defendant was a partner in the English firm of solicitors, Richards Butler. By an Agreement dated December 2001 between the Claimant and the Defendant it was agreed that the Defendant would join the Claimant as a director and shareholder. Their strategy was to create the leading independent legal and business consultancy in Kazakhstan. It was agreed that in effect the Claimant and the Defendant would function and operate as a quasi-partnership and that the parties would have and observe the usual partnership obligations and duties to each other. The Defendant was to have a 33% profit sharing interest. Clause 5.2 provided as follows:

*"This Agreement shall be governed by and interpreted in accordance with the laws of England and Wales and all and any disputes shall be referred to and subject to arbitration in London before a tribunal of three arbitrators with one arbitrator to be appointed by each Party and the chairman of the tribunal to be appointed by the president of the Law Society."*
3. The Agreement came to a premature end. An arbitration was commenced by the Claimant pursuant to the provisions of clause 5.2. The Defendant counterclaimed against the Claimant. The arbitration hearing is due to commence on 10 November 2008.
4. On 23 July 2008 the Defendant served an amended counterclaim in which reliance was placed on an agreement or understanding made in or around February 2005 between Mr. Wilson, on his own behalf and on behalf of the Claimant, and the Defendant. In the original counterclaim the Defendant had claimed relief based upon the terms of the December 2001 agreement. In the amended counterclaim he claimed relief based upon the terms of the February 2005 agreement. The Defendant sought permission to make that amendment. That application was opposed by the Claimant in written submissions dated 4 July 2008. Three points were taken. The amendment was late, the new counterclaim was not within the jurisdiction of the tribunal and the amendment was hopelessly vague and unparticularised. The Defendant put in written submissions in response dated 14 July 2008. It was said that the amended counterclaim was within the arbitration clause and therefore the arbitrators had jurisdiction to consider it. A reply to those written submissions was put in on behalf of the Claimant dated 16 July 2008.
5. The tribunal considered the parties' written submissions and issued a decision entitled "Sixth Procedural Order" on 24 July 2008. It was signed by one of the arbitrators, Christopher Berry, on his own behalf and on behalf of the other two arbitrators Ms. Valerie Davies and Lord Millett. The decision dealt not only with the application to amend the counterclaim but also with an application by the Defendant for specific disclosure (which, it is said, relates to the amended counterclaim).
6. The arbitrators said that they took the view that the dispute raised by the amended counterclaim fell within the arbitration clause and that although the application was late it was not so late or embarrassing that it should not be allowed. The application to amend was accordingly granted. An order for specific disclosure was also made.
7. Following service of the application notice for an order from the Court pursuant to section 67 of the Arbitration Act 1996 the Defendant applied for an order from the tribunal pursuant to section 67(2). That sub-section provides as follows:

*"The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction."*
8. A skeleton argument in support of the application before the tribunal prepared by counsel for the Defendant (not the same counsel who represented the Defendant before me) described the case as a "classic case" for an order under section 67(2) of the Act. A hearing took place before the arbitrators and on 12 September 2008 the tribunal issued a decision entitled Seventh Procedural Order. The tribunal made a  
*"Continuation Order .....under section 67(2) in relation to the amended Defence and Counterclaim. Any Defence to the Amended Defence and Counterclaim is to be served by 12 noon on 24 September 2008 or the Claimant is to be debarred from defending the claims in the amendments to the Counterclaim. Any such pleading is without prejudice to the Claimant's contention that such amendments are outside the ambit of the Arbitration and should be struck out by the High Court."*

9. A witness statement made by the Defendant's solicitor in the proceedings before the court stated that "clearly it would be open to the Court to rule that the Tribunal had no jurisdiction to determine the issue raised in the Amended Counterclaim."
10. The tribunal also made an Eighth Procedural Order dated 28 September 2008 in which further procedural orders were made concerning the amended counterclaim.
11. The Defendant first took the point that the decision of the tribunal under challenge was not an award as to its substantive jurisdiction in Counsel's Skeleton Argument served shortly before the hearing of the application before this Court.
12. The Claimant sought permission to amend its application so that it encompassed not only the material part of the Sixth Procedural Order but also the orders made in the Eighth Procedural Order which related to the amended counterclaim. I have decided to allow that amendment since it raises no new issues beyond those raised by the original application.

**Issue 1. Is the Defendant able to argue that the decision of the tribunal was not an award ?**

13. It was submitted on behalf of the Claimant that in circumstances where the Defendant and the tribunal have proceeded on the footing that the Sixth Procedural Order is an award the Defendant cannot turn round and say that the Claimant's challenge is misconceived.
14. In my judgment the fact that the Defendant sought and obtained from the tribunal a continuation order pursuant to section 67(2) of the Arbitration Act 1996 does not amount to a concession that the Sixth Procedural Order was an award by the tribunal as to its substantive jurisdiction and therefore susceptible to challenge under section 67. My reasoning is as follows. The Defendant was faced with an application under section 67 and wished to ensure that preparation for the hearing continued, in particular, that any defence to the amended counterclaim was served. The Defendant chose to make an application under section 67(2) but he did not thereby abandon any arguments which he subsequently might wish to deploy at the hearing of the Claimant's application under section 67. There was no express abandonment of any such arguments and it is not necessarily to be inferred from the making of an application under section 67(2) that the Defendant conceded that the tribunal's decision was an award as to its substantive jurisdiction. All that can be necessarily inferred is that the Defendant understood that the Claimant had made an application which the Claimant maintained was properly made under section 67. Whether it was properly made was a matter for the court to decide having heard the arguments of the parties. Similarly, I do not regard the witness statement of the Defendant's solicitor as abandoning such legal arguments as counsel for the Defendant might wish to deploy at the hearing of the Claimant's application.
15. I therefore conclude that the Defendant is able to argue that the decision of the tribunal was not an award.

**Issue 2. Was the decision of the tribunal an award ?**

16. In *Ranko Group v Antarctic Maritime SA*, a decision in the Commercial Court dated 12 June 1998, Toulson J. had to determine whether a decision of an arbitrator was an award as to his jurisdiction for the purposes of section 67 of the Act. In resolving that question Toulson J. asked himself whether the decision would have been understood by its recipients as intended to be the arbitrator's adjudication on the disputed question of his jurisdiction. In that case the parties had requested that the arbitrator rule on his jurisdiction pursuant to section 30 of the Act. He was requested to render "an award." In response he wrote a letter in which he stated that he made certain "rulings" concerning his jurisdiction. Toulson J. held that the letter was an award as to the arbitrator's jurisdiction notwithstanding that the letter was not described in terms as an award.
17. In the present case Counsel for the Claimant submitted that the point as to jurisdiction had been squarely raised before the tribunal and that the tribunal had clearly decided the point as to jurisdiction. An award was a final determination of a particular issue and such a determination was to be found in the tribunal's Sixth Procedural Order. That determination was therefore an award and the tribunal could not deprive the court of its jurisdiction under section 67 by calling its award an order.
18. Counsel for the Defendant accepted that whether or not a decision is an award is a question of substance and not of form. He pointed out that the tribunal's decision had been issued following an application for permission to amend. Neither party had requested the tribunal to issue an award as to jurisdiction. It was submitted that that context would lead the recipients of the decision to conclude that the decision was a procedural decision and not an award finally determining the question of jurisdiction. He therefore accepted that the Claimant, if it wished, would be free to argue the jurisdiction issue before the tribunal at the hearing of the arbitration. Whether or not the Claimant chose to do so he would be able, after the tribunal had published its award on the merits, to seek an order, pursuant to section 67(1)(b), declaring as of no effect such part of the award as determined claims based upon the February 2005 agreement.
19. I therefore ask myself how the reasonable recipient of the tribunal's decision would have viewed it. He would know that the tribunal had been invited to determine two procedural questions, one of which was whether the Defendant was entitled to permission to amend his counterclaim. He would also know that one of the reasons advanced by the Claimant against the application for permission to amend was that the tribunal had no jurisdiction to determine claims based upon the February 2005 agreement. He would observe that the contents of the decision consisted of the answer to the two procedural questions, that the decision of the tribunal was described as the Sixth Procedural Order and that the part of that order in question was entitled "*The Respondent's Application to Amend his Counterclaim*". He would also observe that the tribunal, after describing the dispute in

question, expressed "the view" that the dispute fell within the arbitration clause. He would note that the language used was not the formal language usually to be found in an award finally determining a dispute as to jurisdiction.

20. In my judgment the reasonable recipient of the arbitrator's decision would conclude that the tribunal's decision consisted of an answer to two procedural questions. He would not regard the decision, or any part of it, as an award as to jurisdiction. He would reach that conclusion because of the contents of the order (the resolution of two procedural disputes, namely, amendment and disclosure), because of the tribunal's own description of the decision (the Sixth *Procedural Order* – emphasis added) and because the language in which the tribunal expressed its view of the jurisdiction issue was not the formal language to be expected of a final and binding decision. He would appreciate that if the tribunal maintained its view as to its jurisdiction which it had expressed in a few words in the Sixth *Procedural Order* and, after the arbitration hearing, issued an award on the merits concerning the disputed claim the Claimant would have, at that stage, the opportunity to seek an order declaring that part of the award to be of no effect pursuant to section 67(1)(b) of the Act.
21. I have therefore concluded that the decision of the tribunal was not an award of the tribunal as to its substantive jurisdiction.
22. In those circumstances it was not disputed that the Claimant's application pursuant to section 67 must fail; see *K/S A/S Bill Biakh v Hyundai Corporation* [1988] 1 Lloyd's Rep. 187 at 189 per Steyn J. and *The Smaro* [1999] 1 Lloyd's Rep. 225 at 247-8 per Rix J.

**Issue 3. Did the tribunal have substantive jurisdiction to make the award ?**

23. It is unnecessary for me to decide this issue. I have nevertheless been asked to do so in case an appeal from my decision is successful. However, I consider that it would not be appropriate for me to express a view upon the issue when it is not necessary to do so. The jurisdiction issue, at least initially, is a matter for the tribunal. The tribunal has not yet expressed a decision on that issue in the form of an award. The tribunal may be unlikely to alter the view it has so far expressed but it could, in theory, do so. In those circumstances this court should be wary of expressing its view on the issue when it is unnecessary to do so.

**Conclusion**

24. The Claimant's application pursuant to section 67 of the Arbitration Act 1996 is dismissed because the arbitral tribunal has not issued an award as to its substantive jurisdiction.

Anthony Boswood QC and James Drake (instructed by Holman Fenwick and Willan) for the Claimant  
Michael Black QC and Ian Meakin (instructed by Michael Robinson) for the Defendant