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JURISDICTIONAL ARGUMENTS MUST BE RIGHT FIRST TIME: COURT BLOCKS ATTEMPT TO SWITCH CASE IN S.72 CHALLENGE: ABC v DEF [2025] EWHC 711 (COMM)

A recent judgment from the High Court provides a stark reminder for parties contemplating arbitration: the basis for an arbitral tribunal's jurisdiction must be correctly and fully formulated in the initial Request for Arbitration ("RFA").

In *ABC v DEF* [2025] EWHC 711 (Comm), the Court granted a declaration under section 72 of the Arbitration Act 1996 ("AA 1996"), finding that a claimant could not be joined to an arbitration based on agreements to which it was not a party. Critically, the Court held that a defendant cannot defend a jurisdictional challenge in court by relying on a completely new basis for jurisdiction that was not mentioned in the original RFA.

BACKGROUND

The dispute arose from two contracts for the supply of pharmaceutical products. The contracts were between the defendant, DEF, and two separate subsidiaries of the claimant company, ABC. The claimant, ABC, was the parent company of the subsidiaries but was not itself a signatory to either contract.

Both contracts were on materially similar terms and contained an identical clause providing for all disputes to be resolved by arbitration in London under the LCIA Rules. When disputes arose concerning the performance of the contracts, the defendant (DEF) commenced two separate LCIA arbitrations. In its RFAs, DEF named not only the contractual counterparties (the subsidiaries) but also the parent company, ABC, as a respondent in each case. The jurisdictional basis asserted in the RFAs was that ABC was a party to the arbitration agreements in its subsidiaries' contracts, alleging that the companies operated on an "integrated basis" and that ABC was responsible for the subsidiaries' liabilities.

The claimant (ABC) did not take part in the arbitrations. Instead, it applied to the High Court under section 72 of the AA 1996 for a declaration that there was no valid arbitration agreement between it and the defendant under either of the two contracts.

THE SHIFTING JURISDICTIONAL CASE

The core of the case turned on the defendant's evolving jurisdictional arguments.

- + **The Initial Case (in the RFAs):** The defendant's sole basis for joining the claimant was that, due to the integrated nature of the corporate group, the claimant was a party to the express written arbitration agreements contained in its subsidiaries' contracts.
- + **The New Case (Before the Court):** By the time of the hearing, the defendant had completely abandoned this argument. In its place, the defendant advanced a new theory: that through a course of conduct (specifically, the claimant's alleged performance of its subsidiaries' obligations), a separate, implied contract had come into existence directly between the claimant and the defendant. This alleged implied contract, the defendant argued, contained an arbitration agreement on the same terms as the express ones.

FINDINGS

His Honour Judge Pelling KC, sitting as a Judge of the High Court, granted the claimant's application for the declarations sought.

The judge's reasoning was fatal to the defendant's position. He held that an application under section 72 of the AA 1996 is available in respect of the specific arbitral proceedings that have been initiated. Those proceedings were commenced by the RFAs, which relied exclusively on the arbitration agreements within the express written contracts between the defendant and the claimant's subsidiaries.

The judge found the defendant's original case, as pleaded in the RFAs, to be "impossible" and "bound to fail," noting that the defendant had rightly abandoned it. There was no ambiguity in the contracts as to who the parties were, and the defendant could not simply ignore separate corporate personality.

The defendant's "new" case concerning an implied contract was not mentioned anywhere in the RFAs. It was, in effect, a different claim based on a different, unpleaded arbitration agreement. The judge concluded that this new argument was irrelevant to the current s.72 application. Since the only proceedings on foot were based on arbitration agreements to which the claimant was not a party, the Court granted a declaration to that effect. If the defendant wished to pursue a claim based on an alleged implied contract, it

would have to commence a fresh arbitration reference on that basis.

The Court rejected the defendant's submission that the issue should be left for the arbitrator, distinguishing the case from the principles of caution outlined in *Sodzawiczny v Smith* [2024] EWHC 231 (Comm). While a court should be cautious, section 72 provides a right for a party that has not participated in an arbitration to seek a court determination on jurisdiction. It was appropriate to grant the declaration where the defendant no longer sought to uphold jurisdiction on the basis actually contended for in the arbitration reference itself.

COMMENT

This judgment offers a powerful and practical lesson on the critical importance of formulating jurisdictional arguments correctly from the very outset of an arbitration. It confirms that a party cannot commence an arbitration on one jurisdictional basis, and then, when faced with a court challenge, attempt to justify the tribunal's jurisdiction on a completely new foundation.

The Court's power under section 72 is ring-fenced to the arbitral reference as it was initiated. Parties must ensure that the Request for Arbitration comprehensively identifies all parties and the precise legal basis upon which each is said to be bound by the arbitration agreement. An ill-conceived or placeholder argument that is later abandoned may leave a party with no defence to a s.72 application, as the defendant discovered here. The Court refused permission to appeal, deeming the proposed appeal "unarguable".

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