

# Legal Business

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## Case Note: Appeal From An Arbitrator's Decision As To His Own Jurisdiction

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## Case Note: Appeal From An Arbitrator's Decision As To His Own Jurisdiction

One of the objectives behind the enactment of the English Arbitration Act 1996 ('1996 Act') was to prevent the arbitration process from being delayed by frequent challenges of the arbitrator's decision in court. A common way in which a party may temporarily stop an arbitration in its tracks is to contend that the arbitrator has no jurisdiction to hear the matter and on that ground, seek a stay of the arbitration until a court pronounces on the arbitrator's jurisdiction finally.

Section 30 of the 1996 Act eliminates such a delay by clearly affirming the common law position that an arbitrator, when faced with an objection raised by either party to his jurisdiction, may rule on the question of his own jurisdiction. However, after such a ruling, he is not bound, under section 31 of the 1996 Act, to proceed with the arbitration and deliver a determination on the dispute. He may suspend the proceedings until a court makes a final determination on his jurisdiction. This is understandable, given that a substantive determination by the arbitrator may eventually be a waste of time should the court eventually hold that the arbitrator has no jurisdiction.

Thus under the 1996 Act, if a preliminary assessment makes it clear that the arbitrator has no jurisdiction due to reasons such as the agreement not being signed or properly executed, the arbitrator should not proceed with the hearing at all. In this respect, sections 30 and 31 are instrumental in preventing delay.

This article discusses the interpretation of sections 30 and 31 by the English Court of Appeal in the case of *LG Caltex Gas Co Ltd v China National Petroleum Company & Anor* [2001] ('*Caltex Gas*'). The decision in *Caltex Gas* clarifies the extent of an arbitrator's power to rule on his own jurisdiction under the 1996 Act.

### Relevance Of The Decision In *Caltex Gas* In Singapore

Sections 30 and 31 of the 1996 Act correspond to article 16 of the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Rules'), which govern any international arbitration conducted in Singapore by virtue of the International Arbitration Act, Chapter 143A and any domestic arbitration where the parties have agreed that their arbitration be governed by the UNCITRAL Rules. In addition, the Arbitration Act governs domestic arbitrations, and it too contains provisions similar to sections 30 and 31 of the 1996 Act. Accordingly, the English decision of *Caltex Gas* on the scope of sections 30 and 31 would be a helpful guide to what the local position would be.

### Brief Facts Of The Case

The facts of the case are somewhat unique. The backdrop of the case is China, where various companies had signed a Memorandum of Understanding ('Memorandum') to import and market liquefied petroleum gas ('LPG') in the country.

Under the Memorandum, the claimants, LG Caltex Gas Company and Contigroup Companies Inc, entered into two contracts. The first was an alleged charterparty with one of the respondents, China Petroleum Technology and Development Corporation, allegedly acting as agents of China Petroleum



Corporation of Beijing. The second was a contract for the supply of LPG to the other respondent - Asia Pacific Petrochemicals Ltd. Both the alleged contracts contained an arbitration clause providing

for disputes to be resolved by arbitration in London. The claimants sued the respondents for breach of contract. The respondents denied being parties to the contracts. This particular contention raised by the respondents is unique in that such an argument is both an objection to the arbitrator's jurisdiction to hear the dispute, as well as a substantive answer to the claimants' suit for breach of contract.

After a lengthy hearing, the arbitrator made two final awards in which he held that the respondents were not parties to the contract.

The claimants subsequently appealed against this decision on the grounds that the award although in effect a decision on the merits, was also a decision of the arbitrator on the question of his jurisdiction. The claimants' argument was significant as the 1996 Act allows the arbitrator's award on his own jurisdiction to be challenged in court on relatively broad terms. In contrast, an arbitrator's award on the merits is subject to the court's review only in limited situations, eg if the award was invalid under the law of the state or against public policy, fraudulent, made in breach of the rules of natural justice, or the arbitration procedure was not what the parties had agreed on.

The difference in approach between a challenge based on jurisdiction and one based on merits is the result of the balancing of two fundamental concepts at the core of arbitration. First, the importance of ensuring that arbitration proceedings should be final and second, the principle that submission of a dispute to arbitration rather than litigation has to be founded on mutual consent.

### **Holding**

The issue before the Court of Appeal was whether the arbitrator's decision that the respondents were not parties to the contract and hence he had no jurisdiction was a substantive issue entitling the claimants to appeal to the courts.

Agreeing with the claimants, the Court held that although the question of whether the respondents were parties to the contracts was a central issue in the dispute as to liability, it was more properly a determination on the jurisdiction of the arbitrator. The Court reasoned that the arbitrator could not decide on the merits, after coming to a conclusion that the respondents were not parties to either contract. Accordingly, the Court held that the claimants were entitled to appeal to the courts.

### **Comment**

The emphatic stand taken by the Court of Appeal that parties are entitled to challenge the arbitrator's decision on his own jurisdiction, has occasioned a seemingly incongruent result in this case whereby the claimants have been accorded 'two bites at the cherry'.

From the commencement of the arbitration against the respondents, the claimants had asserted that the arbitrator had jurisdiction to hear the merits of the case on the ground that the respondents were valid parties to the contracts. However, after the arbitrator had heard full arguments on both the issue of his jurisdiction and the merits and delivered an award disagreeing with the claimants' assertion, the claimants raised a challenge to the arbitrator's decision on his own jurisdiction.



If parties want to ensure finality and eliminate appeal to the courts on the question of the arbitrator's jurisdiction, parties are advised to enter into an ad-hoc agreement. Basically, the agreement should confer on the arbitrator the right to hear arguments on his own authority, and make the arbitrator's ruling as to his own jurisdiction final and binding between the parties.

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