ADDLESHAW GODDARD

INTERNATIONAL ARBITRATION

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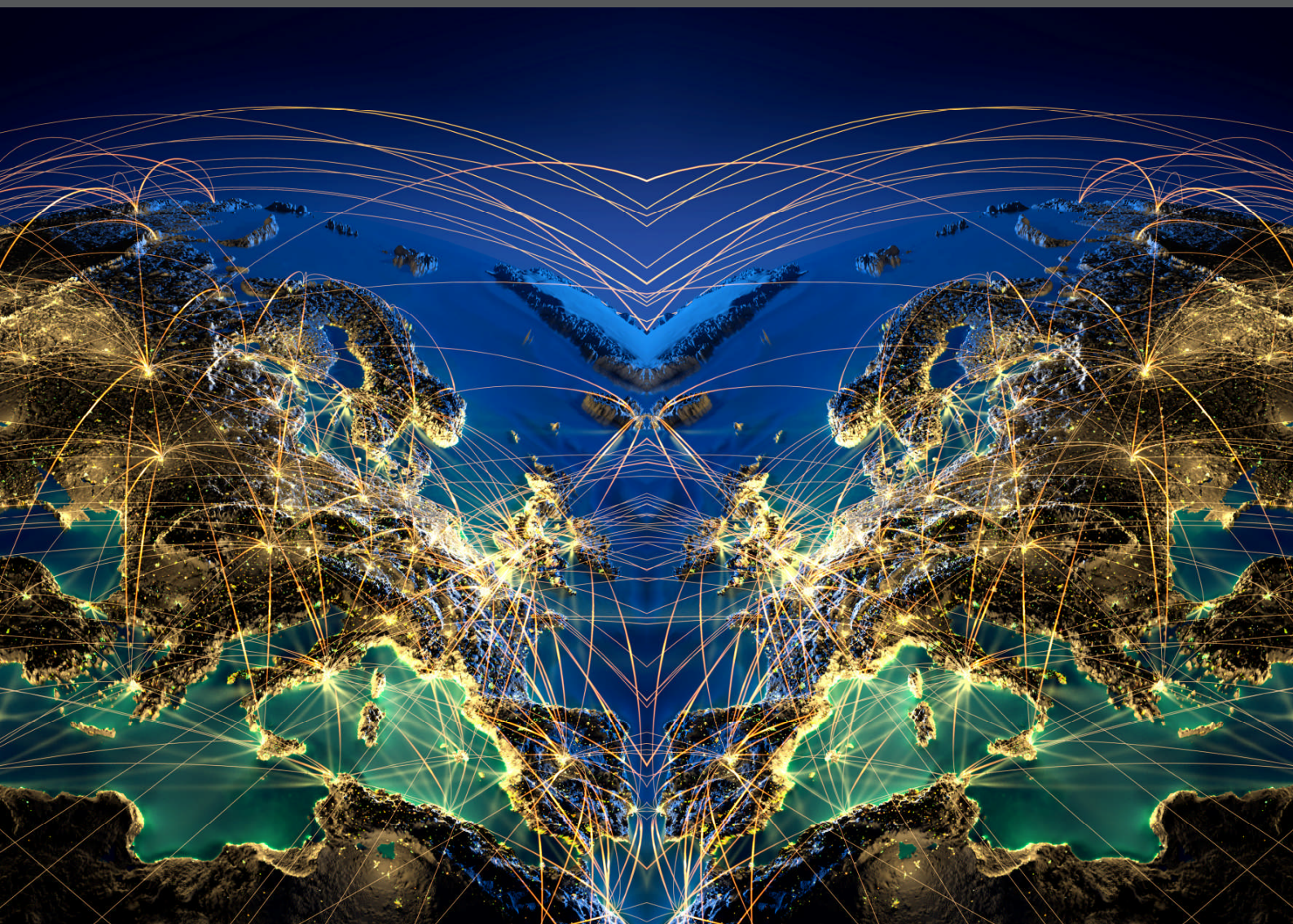

In this Issue...

Welcome to Addleshaw Goddard's International Arbitration Quarterly Review. The aim of this publication is to capture significant arbitration cases and legal developments.

If you have any thoughts and comments on this publication, please contact the editorial team.

ICC Court seeks to improve efficiency and transparency of proceedings

The ICC International Court of Arbitration (ICC Court) has announced two significant policy changes aimed at improving the efficiency and transparency of ICC arbitration proceedings.

The first change will see the ICC Court publish on its website the names and nationalities of arbitrators sitting in ICC cases and specify who the chairperson is, as well as whether the appointment was made by the ICC Court or by the parties. This applies to all cases registered as from 1 January 2016, although parties can opt out by mutual agreement.

The second change relates to delays in submitting awards. Arbitral tribunals are expected to submit awards to the ICC for scrutiny within three months of the last relevant substantive hearing (or the filing of the last submissions, excluding costs submissions). Failure to do this may now lead to reductions in arbitrators' fees, unless the ICC Court is satisfied that the delay is due to exceptional circumstances or that it can be justified by factors beyond the arbitrators' control. The fee reductions will be applied as follows:

ICC ARBITRATORS' FEE REDUCTIONS	
5 to 10%	for draft awards submitted **up to seven months** after the last substantive hearing or written submissions
10 to 20%	for draft awards submitted **up to 10 months** after the last substantive hearing or written submissions
20% or more	for draft awards submitted for scrutiny **more than 10 months** after the last substantive hearing or written submissions

Comment

The publication of arbitrators' names on the ICC website is an interesting development. However, it will take a few years for the ICC to establish an accurate list of all "active" ICC arbitrators as this change applies only to new arbitrations commenced after 1 January 2016. For parties deciding who to nominate as arbitrator, the list will only be a starting point, because it includes no information as to the arbitrators' conduct of the dispute and will not reflect whether they are busy sitting in arbitrations administered by other institutions.

Penalising arbitrators for delays is not entirely new since the ICC Court already takes timeliness of submission of the draft award into consideration when fixing arbitrators' fees (Article 2(2) of Appendix III, which also empowers the ICC Court to go above or below the scales in exceptional circumstances) and it has the power to remove an arbitrator who is not fulfilling its functions within prescribed time limits (Article 15(2)). The above, however,

provides a more transparent system and, arguably, a better incentive for arbitrators to issue awards promptly.

Hong Kong Update

HKIAC opens in Shanghai

The Hong Kong International Arbitration Centre (the "**HKIAC**") opened an office in Shanghai in November 2015. This is very significant as it is the first representative office set up by an international arbitration institution in mainland China: it signals a new chapter for arbitration in that country.

As Mr. Rimsky Yuen, the Secretary for Justice of Hong Kong commented, there are three important aspects to this new venture, as follows:-

1 - It widens the reach of HKIAC. Mr Yuen commented that: "*First, for Hong Kong, it is a business development of the HKIAC and a further introduction of the Hong Kong brand into the legal services market in the Mainland".*

2 - It will bring the expertise of the HKIAC to local businesses. Mr Yuen explained that: "*Second, Shanghai enterprises can make use of the centre's experience in solving business disputes, particularly in the area of international arbitration, when they are facing such disputes"* .

3 - It should strengthen ties between Hong Kong and mainland China. Mr Yuen added "*Third, from the perspective of the country, it can provide further exchange and development opportunities for the legal and arbitration sectors in both places, which subsequently can contribute further to the economic development of China".*

Comment

It will be interesting to see how the HKIAC's caseload in Shanghai develops. In particular, whether it ends up being used mainly by the international arbitration community or by local businesses.

Consultation Paper on Third Party Funding in Arbitration

In recent years the use of third party funding to resolve legal disputes has been on the increase and there has been much talk about the use of third party funding in international arbitration.

However, it is currently unclear whether the doctrines of champerty and maintenance prohibit the use of third party funding for arbitrations taking place in Hong Kong. In 2013, the Chief Justice and the Secretary for Justice asked the Law Reform Commission of Hong Kong (the "**Commission**") to consider this issue.

On 19 October 2015, the Commission released a consultation paper recommending that third party funding be introduced for arbitrations in Hong Kong (the "**Consultation Paper**").

What is Third Party Funding?

Third party funding generally means the funding of some or all of the claimant's legal fees and expenses by a third party in return for a financial benefit. As such, it introduces a "third person" to the proceedings who provides financial assistance to the claimant.

What is champerty and maintenance?

The legal doctrines of champerty and maintenance were developed about 700 years ago in England. Initially, these prohibited any financial support by a third party to any litigation on the grounds of public policy: the idea was to prevent interference with the course of justice.

Likewise, for years the courts of Hong Kong have prohibited the use of third party funding in litigation on the basis that it is both a civil wrong (tort) and a criminal offence. Thus, champerty in Hong Kong jurisprudence has been defined as "*a particular kind of maintenance, namely*

maintenance of an action in consideration of a promise to give the maintainer a share of the subject matter or proceeds thereof, if the action succeeds"[1]; and maintenance as "*the giving assistance or encouragement to one of the parties to an action by a person who has neither an interest in the action nor any other motive recognised by the law as justifying his interference.*"[2]

What are the exceptions to third party funding?

In recent years several common law jurisdictions have relaxed the doctrines of champerty and maintenance to allow third party funding for litigation and arbitration.

...in Hong Kong the courts have developed a narrow exception to allow third party funding to be used in litigation...

Similarly, in Hong Kong the courts have developed a narrow exception to allow third party funding to be used in litigation, with the court's leave, where:

- the third party can prove that it has a legitimate interest in the outcome of the litigation; or
- the court is persuaded by a party that it needs third party funding to have access to justice; or
- in the context of miscellaneous proceedings, including insolvency proceedings[3].

The above exceptions however only apply to litigation and therefore the position for arbitration remains unclear.

The Consultation by the Commission

The Commission is inviting views, comments and suggestions from the public on the Consultation Paper. In particular, the Law Reform Commission has invited submissions on a number of issues including the following:-

1. Whether to amend the Arbitration Ordinance to provide that third party funding for arbitration taking place in Hong Kong is permitted under Hong Kong law;

2. Whether to develop clear ethical and financial standards for third party funders providing third party to parties to arbitrations taking place in Hong Kong and whether and how the standards should address the following matters or additional matters:-

   (a) capital adequacy;

   (b) conflicts of interest;

   (c) confidentiality and privilege;

   (d) extent of extra-territorial application;

   (e) control of the arbitration by the third party funder;

   (f) disclosure of third party funding to the tribunal and other party / parties to the arbitration;

   (g) grounds for termination of third party funding; and

   (h) a complaint procedure and enforcement;

3. Whether the development and supervision of the applicable ethical and financial standards should be conducted by: (a) a statutory or governmental body, whether existing or to be established, and if so, what type of body; or (b) a self-regulatory body, whether for a trial period or permanently and how any ethical and financial standards should be enforced; and

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[1] *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16, at para 10 (per Bokhary PJ).
[2] *Massai Aviation Services v. Attorney General* [2007] UKPC 12, quoted in Winnie Lo v HKSAR (2012) 15 HKCFAR 16, at para 10 (per Bokhary PJ).
[3] See note 1 above and also *Unruh v Seeberger* (2007) 10 HKCFAR 31

4. Whether or not the third party funder should be directly liable for adverse costs order in a matter it has funded.

Interested parties have until 18 January 2016 to send their comments to the Commission. We will report on any further development in this area.

Comment

According to the 2015 International Arbitration Survey conducted by the Queen Mary University of London, arbitration continues to be the preferred method for resolving cross-border disputes, with Hong Kong being one of the most popular arbitral seats in the world (alongside London, Paris, Singapore and Geneva).

If third party funding is permitted under Hong Kong law, this will provide additional financing options for parties who arbitrate there and it may make Hong Kong even more attractive as a venue for international arbitration.

Should the court stay proceedings or allow arbitrators to determine their own jurisdiction?

In *Hashwani and Others v OMV Maurice Energy [2015] EWCA Civ 1171*, the Court of Appeal concluded that when a court is asked to determine whether a tribunal has jurisdiction to hear and determine the matters submitted to it, the court should determine the question unless there is a good reason for not doing so.

The Court of Appeal went on to state that.

...only in exceptional circumstances will a court (...) be justified in using its inherent powers to stay proceedings in order to enable the arbitrators themselves to decide the question [of jurisdiction].

Background

The President of Pakistan (the **President**) granted a Petrol Exploration License to Ocean Pakistan Limited (**Ocean Pakistan**) (a company incorporated in California) and the Government of Pakistan (**Government Holdings**) and the three parties entered into a Petroleum Concession Agreement (**PCA**). Ocean Pakistan and Government Holdings also entered into a Joint Operating Agreement (**JOA**).

The PCA contained a dispute resolution clause which provided that disputes should "*be submitted to the International Centre for Settlement of Investment Disputes (ICSID)*" and that *"if the ICSID fails or refuses to take jurisdiction over such dispute, such difference or dispute shall be finally settled by arbitrators under the Rules of Arbitration of the International Chamber of Commerce*". The Clause continued *"[t]his Article is only applicable in case of a dispute between foreign Working Interest Owners inter se or between foreign Working Interest Owners and THE PRESIDENT, provided that in the event of a dispute between the Pakistani Working Interest Owners and THE PRESIDENT, the arbitration shall be conducted in accordance with the Pakistan Arbitration Act*".

The JOA contained an arbitration clause which stated that any dispute arising out of the agreement should be dealt with "*mutatis mutandis*" in accordance with the arbitration clause in the PCA.

The following year, Ocean Pakistan entered into a Farmout Agreement (**FOA**) with Zaver Petroleum Corporation Limited (**Zaver**) (a company incorporated in Pakistan) and OMV Maurice Energy Limited (**OMV**) (a company incorporated in Mauritius) under which Ocean Pakistan agreed to transfer the bulk of its interests in the venture to Zaver and OMV. Through Deeds of Assignment, OMV and Zaver became parties to the PCA and JOA. The FOA contained a dispute resolution clause which stipulated that disputes should be referred to arbitration in Pakistan.

There were therefore two agreements (the PCA and the JOA) providing for ICSID or ICC arbitration with a carve-out for disputes between Pakistani Working Interest Owners and the

President; and one subsequent agreement (the FOA) providing for arbitration in Pakistan. Those three agreements had varying but related contracting parties.

Issue 1: should the Court or the Tribunal decide the jurisdiction question?

A dispute arose and OMV commenced an ICC arbitration against Zaver and Ocean Pakistan (the ICSID having declined to act). Zaver and Ocean Pakistan proceeded each to issue an application under s.72 of the Act (the **Act**) in the English High Court seeking a declaration that the ICC had no jurisdiction. OMV sought a stay under s.9 of the Act or pursuant to the court's inherent jurisdiction.

In the High Court, the judge found that the ICC did have jurisdiction in relation to the dispute between OMV and Ocean Pakistan. However, he decided to stay Zaver's application, using the court's inherent powers to do so, in order to give the arbitrators the opportunity to decide whether they had jurisdiction to act in the dispute between OMV and Zaver. The judge reasoned that since there would be an arbitration in any event between the other parties (OMV and Ocean Pakistan), the arbitrators could be left to determine the question of jurisdiction for themselves.

Decision

The Court of Appeal overturned the judge's decision. It stated that when an application is made under s.72 of the Act, the court should determine whether or not the tribunal has jurisdiction over the dispute unless there is a good reason for not doing so. The Court of Appeal added that cases in which there were practical reasons for using the courts' inherent power to stay proceedings, and allowing the tribunal to reach a decision before the court finally ruled on the matter would be rare.

The Court of Appeal reasoned that while arbitrators have the power to determine whether or not they have jurisdiction over a particular dispute, the parties are able to challenge the arbitrators' decision under s.67 of the Act. Thus, the decision of the arbitral tribunal cannot properly be regarded as the final word on the topic.

The Court of Appeal added that, in this particular case, the High Court judge did not explain why staying proceedings was in the interests of good case management. In the Court of Appeal's view, it was difficult to see how this could have been the case given that there was a considerable risk that, whatever the arbitrators decided, the court would be asked to resolve the matter.

Issue 2: Jurisdiction of the ICC

Zaver and Ocean Pakistan argued that there was, in reality, only one dispute between OMV, on the one hand, and Ocean Pacific and Zaver on the other, and that the dispute resolution provisions applicable to that dispute were those found in the FOA (which referred to arbitration in Pakistan). OMV argued that, notwithstanding that Zaver and Ocean Pacific were seeking to defend the claims on the same ground, there were two distinct legal disputes in this case. OMV argued that the applicable dispute resolution provisions were those found in the JOA (which referred to the ICC once ICSID had declined jurisdiction).

Decision

The Court of Appeal found that there were two separate disputes – one between OMV and Ocean Pacific and one between OMV and Zaver. While the disputes turned on the same facts, and it was therefore desirable for them to be heard and determined together, the claims were independent both in law and in fact. The Court of Appeal went on to state that if the parties had intended to ensure that parallel disputes of the type arising in this case were treated as a single dispute, they would have been expected to express this intention in clear terms.

The Court of Appeal also found that the JOA was the source of the obligations on which OMV's claims were founded. The dispute resolution provisions in the FOA applied only to disputes arising out of the obligations contained in that agreement. The Court of Appeal concluded that it was highly unlikely that the parties were so concerned about the way in which the dispute resolution procedures in the JOA would operate that they decided to put in place different arrangements when they entered into the FOA.

Having established that the JOA applied, the Court of Appeal concluded that disputes under the JOA were to be resolved in accordance with the dispute resolution provisions in the PCA. The most likely purpose of using the expression "*mutatis mutandis*" was to extend the arbitration agreement to cover disputes between OPL, as a foreign interest working owner, and Government Holdings.

The Court of Appeal found that the dispute between OMV and Ocean Pacific fell straightforwardly within the terms of the arbitration clause in the PCA because they were both and Zaver within the arbitration clause because it made no express provision for disputes between foreign and Pakistani Working Interest Owners.

Given that the PCA, the JOA and the OMV Deed of Assignment all provided for arbitration in accordance with the dispute resolution provisions in the PCA, and that Zaver had ratified and confirmed these documents, the Court of Appeal concluded that the parties could not have intended that disputes between OMV and Zaver would fall outside the arbitration clause. It was clear that the parties had intended that disputes involving foreign Working Interest Owners would be resolved outside Pakistan. Therefore, effect could be given to the expression "*mutatis mutandis*" such that disputes between Zaver and foreign Working Interest Owner would be referred to arbitration abroad and disputes between Zaver and a Pakistani Working Interest Owner would be referred to arbitration in Pakistan.

The best option remains to ensure that all dispute resolution clauses in related agreements are consistent.

Comment

This decision clarifies that English courts will only stay proceedings to allow the tribunal to decide on jurisdiction in rare cases. Parties seeking to enforce arbitration agreements should be reassured to know that English courts will take a view on jurisdiction so as to allow the arbitration to proceed without undue delays and challenges.

This case also illustrates the complexities involved when parties seek to apply the same arbitration clauses in multi-party and multi-contract disputes. The Court of Appeal took a pragmatic view but this is not guaranteed to happen every time. The best option remains to ensure that all dispute resolution clauses in related agreements are consistent.

Contractual limitation: extending the time for commencing arbitration

The Judgment of Mr Justice Burton in *Expofruit SA and Others v Melville Services Inc and Lavina Corporation [2015] EWHC 1950 (Comm)* (***Expofruit SA***) illustrates the attitude of the English courts to applications under s.12 of the Arbitration Act 1996 (the **Act**) to extend contractually agreed limitation periods for commencing arbitration proceedings. In particular, it serves as a reminder to parties that they must consider carefully at the outset whether they are bringing proceedings in the correct forum and that the saving provision afforded by s.12 of the Act is intended to be an exceptional remedy.

Limitation and the Act

S.13 of the Act provides that the various English law Acts concerning limitation (including the Limitation Act 1980 and the Foreign Limitation Periods Act 1984) apply equally to arbitrations as to court proceedings. However, parties are also free to agree between themselves that shorter limitation periods for the commencement of proceedings will apply to disputes between them.

Where the dispute resolution forum chosen by the parties is arbitration, upon an application by one of the parties, s.12 of the Act gives English courts the power to extend the time for the commencement of that arbitration (or for the taking of steps required prior to the commencement of that arbitration, for example in a hybrid / tiered clause) beyond the agreed shortened period *"for such period and on such terms as it thinks fit"* (s.12(4)). Importantly, it does not allow the Court to extend the time for commencement beyond the statutory limitation period which would otherwise apply.

S.12 is a mandatory provision, meaning that parties cannot contract out of it, but a number of cases have shown that this does not mean that it is to be viewed as anything other than an exceptional remedy. Specifically, the Court may only make an order extending the contractually agreed time limit where one or both of the requirements of s.12(3) of the Act are met:

- The circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and it would be just to extend the time (s.12(3)(a)).

- The conduct of one party makes it unjust to hold the other party to the strict terms of the limitation or time bar provision (s.12(3)(b)).

A number of cases prior to *Expofruit SA* have considered the application of s.12 of the Act and it is helpful to have in mind, in headline terms, some of the points from these authorities:

- S.12 of the Act is intended to be more restrictive in its scope than s.27 of the Arbitration Act 1950 had previously been. In particular, it is not open to a court applying s.12 to extend time simply because it concludes it would be just to do so (*The Catherine Helen [1998] 2 Lloyd's Law Rep 511* and *Thyssen v Calypso Shipping [2000] 2 Lloyd's Law Report 243*).
- Mere silence or failure to alert the claimant to the need to comply with the relevant time limit does not render the barring of the claim unjust (*Harbour & General v Environmental Agency [2001] Lloyd's Law Rep 65* and *The Catherine Helen*).
- There must be some conduct by the other party that is causative of the failure to comply with the time limit, albeit that conduct need not be blameworthy or sufficient to constitute an estoppel (*The Lake Michigan [2010] 2 Lloyd's Law Rep 141*).

The Judgment in *Expofruit SA*

In *Expofruit SA* the Claimants brought an application in the English Commercial Court for an extension of time for commencing arbitration proceedings against the Defendants beyond the one year limitation period that applied under the Hague / Hague Visby Rules (incorporated into the Charter Party by virtue of the relevant Bills of Lading) (the **Application**). In making the Application the Claimants relied on s.12(3)(b).

s.12 of the Act is intended to be an exceptional remedy (...) there must be some conduct by the other party that is causative of the failure to comply with the time limit...

The Claimants had originally brought their claim for damage to a consignment of fresh pears in the Belgian Courts. The relevant facts can be summarised as follows:

- On 17 February 2010 the Claimants commenced proceedings in the Belgian Courts against the Defendants. The Defendants fully participated in those proceedings and a Court Surveyor was appointed.

- The Defendants' participation in the proceedings included contributing to the Court Surveyor's interim report dated 19 May 2011. A final report was then issued by the Court Surveyor dated 13 February 2012.

- The Defendants served their Defence on 14 November 2012 and it was at that point that, for the first time, they objected to the jurisdiction of the Belgian Courts.

- It was common ground between the parties that as a matter of Belgian law the jurisdictional challenge did not need to be made any earlier. The Defendants were entitled

to participate in the Court Surveyor procedure and await his report (which favoured the Claimants), and it was only at the time their Defence was served that they were required to take any jurisdictional point.

- The Claimants instead sought to argue that as a matter of Belgian law the arbitration clause did not apply. However, on 24 June 2015 the Belgian Court found in favour of the Defendants and held that the dispute was required to be resolved by arbitration.

- An appeal against that decision was lodged on 19 September 2014. At that point the Claimants also issued a Notice of Arbitration and subsequently, having been unsuccessful in seeking a stay of the Arbitration, on 22 April 2015 the Application was made for an extension of time of 3 years and 8 months.

There was a disagreement between the parties during the course of the Application as to the receipt and status of certain communications in which the Defendants claimed to have expressly reserved their right to challenge jurisdiction. However, it was resolved that no such evidence would be admitted. Nor would any further evidence concerning instructions given by the Defendants to their lawyers in this regard be considered, on the basis that the Claimants would not allege that the Defendants had deliberately concealed an intention to challenge jurisdiction. In his Judgment Mr Justice Burton therefore described the question for him to resolve as follows:

"The issue is thus simply whether there was as between the Claimants and the Defendants conduct by the Defendants which made it 'unjust to hold the other party to the strict terms' of the time limit".

In dismissing the Application by the Claimants, Mr Justice Burton set out the authorities in relation to s.12 of the Act and held as follows:

- It was clear that the Claimants had formed a *"firm view"* that the arbitration clause did not apply as a consequence of Belgian law and that this drove their conduct of the proceedings. This included continuing with the Belgian proceedings when the jurisdictional point was ultimately taken, with arbitration only being considered when the Court in Belgium found arbitration to be the proper forum.

- Further, whilst an application for an extension in November 2012 was unlikely to have succeeded, the Claimants had delayed in not making their application until 2015.

- S.12(3)(b) of the Act requires that it is the conduct of the Defendants which must make it unjust to hold the Claimants to the time limit. There was no conduct by the Defendants upon which the Claimants were entitled to rely in making their assumption that a jurisdictional point would not be taken.

Comment

Parties should carefully consider the correct forum for bringing any claim before expiry of the relevant time limit.

In *Expofruit SA* the Claimants formed a mistaken view as to the relevant forum for the dispute, but they also seemingly failed to take any positive steps prior to expiry of the time limit to try to protect their position. This would have been particularly important in circumstances where it was likely the jurisdictional point would be taken, as the reference to arbitration in the Bills of Lading was apparent to both parties. For example, the position taken by the parties in correspondence on the issue was unclear and/or inadmissible and the Claimant did not appear to have considered that it may be wrong on the question before the time limit had expired and the Belgian Court ruled on the question.

Silence does not amount to conduct for the purpose of s.12 of the Act.

The Judgment in *Expofruit SA* reinforces the intentionally restrictive interpretation of s.12 that is clear from the existing authorities, some of which are referred to above. The Claimants could not succeed in their Application in the absence of some conduct by the Defendants –

beyond mere silence or the absence of an express reservation of the position on jurisdiction – that was causative of the Claimants' failure to commence arbitration before the contractually agreed time limit expired.

Clause out: the Commercial Court rules on conflicting dispute resolution clauses

In the recent Judgment in *Exmek Pharmaceuticals SAC v Alkem Laboratories Ltd,* the Commercial Court assessed the validity of coexisting clauses referring to both "UK courts" and "UK arbitration".

Background

In 2005 Exmek and Alkem entered into a distribution agreement (the **Agreement**) which contained the following dispute resolution clauses:

Article 13: "The proper law of this Agreement is the law of the UK, and the parties submit to the exclusive jurisdiction of the Court of the UK"; and

Article 14: "All disputes and differences which will at any time hereafter arise between the parties in relation to this Agreement ... shall be referred to arbitration before any legal proceedings are initiated. The arbitration shall be conducted in the UK in accordance with the provisions of the law in the UK in effect at the time of the arbitration".

In 2008, Exmek terminated the Agreement alleging breach of contract by Alkem. Exmek requested that the dispute be referred to arbitration. Alkem indicated that it would be willing to submit to arbitration in the UK; however, following discussions with the LCIA, arbitration was not formally commenced.

In January 2011, Exmek brought a court claim against Alkem in Peru for damages for breach of the Agreement. Alkem was incorrectly advised that it was out of time to challenge the jurisdiction of the Peruvian courts and participated in proceedings (although nevertheless it objected to the Peruvian court's jurisdiction by reference to the arbitration clause, and asserted the reliance on UK law provided for by the Agreement). The Peruvian court ruled that Alkem had waived reliance on the arbitration clause by failing to challenge its jurisdiction within time.

This Judgment offers further evidence of the English Courts' support for arbitration.

In February 2014, Alkem commenced arbitration in London. Following a jurisdictional challenge by Exmek, a Tribunal (appointed by Alkem) issued an award confirming its jurisdiction. Exmek then made an application to the English courts to set aside the Tribunal's award under s.67 of the Arbitration Act 1996 (the **Act**).

Decision

The key issue was whether there was a valid arbitration agreement in place between the parties. Exmek argued that Articles 13 and 14 were fundamentally inconsistent and irreconcilable. In addition, it argued that Article 13 was ambiguous as there is no such thing as "UK law" or "UK courts" – the UK in fact has three different legal systems. Exmek also argued that Article 14 was ineffective as it was not expressed to be final and binding.

Exmek also raised a secondary issue by asserting that the Tribunal should be precluded from acting because the sole arbitrator was the same nationality as Exmek and this is prohibited under various institutional rules.

In the Commercial Court, Burton J rejected Exmek's s.67 challenge.

Burton J found that Articles 13 and 14 were not irreconcilable and could be read together, with the effect that disputes were to be referred to arbitration, and the procedural law would be "UK law" and the "UK" courts would have supervisory jurisdiction.

With respect to the ambiguity in the reference to the "UK" legal system, as the Agreement related to international trade, and the jurisdiction of England and Wales was regularly used for

resolving international legal disputes, Burton J held that references to "UK" law and courts should be construed as references to English law and courts. It did not matter that there were no factor indicating a specific connection with England or London.

Burton J held that it was irrelevant that there was no express provision for the arbitration to be final and binding, as he was satisfied that the parties intended it to be so. In any event, he noted that s.58(1) of the Act (which provides that, unless otherwise agreed, an award pursuant to an arbitration agreement is final and binding) applied. He also commented that although it is possible to expressly or impliedly abandon an arbitration, mere "radio silence" by Alkem in relation to the 2008 failed arbitration proceedings was not enough to prove this.

In relation to the Peruvian proceedings, Burton J decided that even though Alkem had advanced arguments on merits in the Peruvian court proceedings, it had preserved its jurisdiction argument by taking its case on UK law to the Peruvian Supreme Court, and therefore had not submitted to the Peruvian court's jurisdiction.

Having concluded that the parties had agreed a binding arbitration clause, Burton J rejected the suggestion that if an application were made under s.18 Act, the English courts would not sanction the appointment of a sole arbitrator of the same nationality as one of the parties. In any event, this was not a jurisdictional issue, and the challenge should have been brought under s.68 of the Act.

Comment

This Judgment offers further evidence of the English courts' support for arbitration. In particular, it suggests that the English courts are prepared to offer parties some leniency in deciding if an arbitration agreement is valid – attempting to discern the parties' intentions (even if the legal wording used is ambiguous), and trying to reach a construction under which all provisions can be understood as valid and reconcilable.

Parties would therefore be advised to carefully consider the dispute resolution clauses used in its commercial contracts, but may be reassured by the pragmatic approach taken by the Commercial Court in this case.

The Judgment also further develops the principle that where a defendant in foreign proceedings reserves its position on jurisdiction, making parallel submissions on the merits in the foreign proceedings will not necessarily amount to a submission to the foreign jurisdiction.

Anti suit injunctions - don't delay in applying

In *Essar Shipping Ltd v Bank of China* [2015] EWHC 3266 (Comm), the English Commercial Court refused to grant an anti-suit injunction for breach of an arbitration agreement on the grounds of delay. Anti-suit injunctions (**ASIs**) are an equitable and discretionary form of relief, so delay alone can constitute a strong reason to decline to grant an ASI.

Background

The Respondent granted a letter of credit to a third party to fund the purchase of a cargo shipped on a vessel, MV Kishore. Ownership of the cargo was evidenced by a bill of lading, which was held by the Respondent as security for the letter of credit. The Applicant had time-chartered the vessel under a charterparty governed by English law which provided for disputes to be arbitrated in London under the rules of the London Maritime Arbitrators' Association. The bill of lading incorporated the charterparty terms and conditions.

The third party failed to repay the Respondent in accordance with the letter of credit and the cargo was seized by the authorities in China in respect of other debts of the third party. The Respondent brought a claim against the Applicant in China in September 2014, pursuant to the bill of lading, and obtained an order from the Chinese Court to arrest the vessel.

The Applicant unsuccessfully challenged the jurisdiction of the Chinese court. The substantive proceedings had (apparently) not progressed at all during that challenge. In July 2015 (more than 9 months after the Chinese claim was started), the Applicant issued a claim form in the Commercial Court in London for an ASI to prevent the Respondent prosecuting the claim in China.

Relevant principles

Where parties have agreed to resolve disputes by arbitration, the courts will generally enforce that agreement by granting an ASI to prevent the Respondent continuing with the foreign proceedings brought in breach of the arbitration agreement. The injunction is directed at the party bringing the foreign claim, not at the foreign court. However, the grant of an ASI is an equitable, and therefore discretionary, form of relief. An injunction will not be granted if there are "strong reasons" not to do so.

Recent case law on delay

There has been some debate about whether delay is a "strong reason" to refuse an ASI. Earlier this year, in *Ecobank Transnational Incorporated v Tanoh [2015] EWHC 1874* (reported in our previous edition), it was argued by the Respondent that (1) periods when jurisdiction was being challenged in the foreign courts do not constitute delay; (2) delay alone was insufficient to decline to order the injunction; and (3) detriment to the Respondent caused by the delay (such as incurring significant wasted cost in the foreign proceedings) was necessary. Despite this, Mr Justice Knowles held in that case that delay alone could be a strong reason. However, *Ecobank* related to an anti-enforcement injunction, rather than an ASI so could be distinguished from the *Essar* case. Also the injunction had already been granted at a without notice hearing, so the decision for the court was whether to continue it. It was not clear that *Ecobank* was good authority for the proposition that delay would inevitably lead to the application being refused.

An application made promptly is likely to be inherently less complicated.

Decision

Mr Justice Walker refused the application in *Essar,* citing *Ecobank*. Each case should be decided on the facts, in accordance with the discretionary nature of anti-suit relief, he said. However, there is a strong public interest in requiring that those seeking an ASI should act promptly. An application made promptly is likely to be inherently less complicated. Whilst ASIs are directed at the party in breach rather than at the foreign court itself, a delay will increase the danger that they will be seen as inappropriately interfering with the foreign court's jurisdiction. Delay and the substantive progress of the foreign proceedings can be independent considerations. Delay alone is sufficient to justify refusal. There is no obligation to challenge the jurisdiction of the foreign court first, and it is not always necessary to demonstrate that the delay has caused detriment to the Respondent.

Comment

An ASI can be powerful in helping to enforce contractual rights to arbitrate. Where foreign proceedings have been issued in breach of an arbitration agreement, the court is likely to grant an injunction unless there are strong reasons not to. However, the applicant will need to move quickly to obtain such relief. Consideration should be given, and local advice taken, as to whether also to engage in the foreign proceedings, in order to challenge jurisdiction. Doing so will not prevent an application for an ASI succeeding, but the longer the wait and the more the foreign proceedings progress (even if just in relation to jurisdiction, rather than substantively), the less likely the English courts will be to grant a ASI. Since Essar, the Court of Appeal has upheld Mr Justice Knowles' decision in Ecobank ([2015] EWCA Civ 1309), confirming the increasingly compelling line of authorities on delay.

KEY CONTACTS

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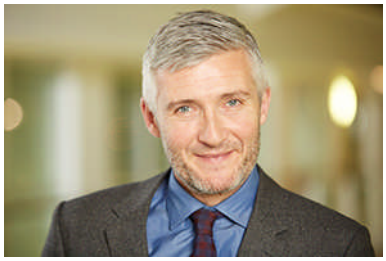

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