Case No: 2010 Folio 0047

Neutral Citation Number: [2011] EWHC 345 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 1 February 2011

BEFORE:

MR JUSTICE HAMBLEN

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BETWEEN:

CLAXTON ENGINEERING SERVICES LIMITED

Applicant/Claimant

- and -

TXM OLAJ-ES GAZKUTATO KTF

Respondent/Defendant

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MS C REFFIN (instructed by Birketts LLP) appeared on behalf of the Claimant
MR S SHACKLETON (instructed by Mundays LLP) appeared on behalf of the Defendant

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Judgment

Introduction

1. MR JUSTICE HAMBLEN: The claimant applies for an injunction restraining the defendant from pursuing an arbitration which it has commenced in Hungary under the rules of the Court of Arbitration of the Hungarian Chamber of Commerce ("HCCI") in reliance upon an alleged arbitration agreement between the parties.

2. The grounds upon which the injunction is sought are that the arbitration proceedings are brought in breach of an English exclusive jurisdiction clause, and despite the fact that, as the English court has already determined, there is no arbitration agreement.

3. The evidence in support is the first witness statement of Mr Matthews, the claimant's solicitor, and the evidence in opposition is the first witness statement of Mr Kean, the defendant's solicitor

Background and History of Proceedings

4. The claimant issued its claim form with brief particulars claim in the Norwich District Registry on 5 November 2009. The claim was for allegedly unpaid debts approaching £2 million for the manufacture and delivery of oil well equipment.

5. The defendant challenged the court's jurisdiction, as a result of which the action was transferred to the Commercial Court.

6. The jurisdictional challenge was heard before Gloster J on 4 August 2010. On 15 October 2010, Gloster J handed down her judgment in which she rejected the jurisdictional challenge.

7. The background to the dispute between the parties and the issues between them as to whether an English exclusive jurisdiction clause or an HCCI arbitration clause were agreed are fully set out in her judgement.

8. The first issue which Gloster J had to decide was who should decide the question of jurisdiction. In this connection, she held as follows, (and then in the transcript of the judgment she set out paragraphs 12 to 18 of her judgment):

> "12. Mr. Stewart Shackleton, solicitor advocate and partner in the firm of SR Shackletons LLP, formerly a partner in Eversheds LLP, the solicitors formerly acting for TXM, submitted that the correct approach was for this court to conduct only a prima facie review of the existence of an arbitration agreement and refer the merits of all objections raised as to the scope, existence and validity of an arbitration agreement to a future Hungarian arbitral tribunal, for it to decide. He submitted that this was consistent with: (i) the United Kingdom's obligations to enforce arbitration agreements under the New York Convention 1 ; (ii) the principle of compétence-compétence, now entrenched in the Arbitration Act 1996 ("the Act"); and (iii) the non-interventionist policy of the Act. He further submitted that the parties' contracts in this case referred to an arbitration agreement in writing. Accordingly, he submitted an arbitration agreement has prima facie been concluded and governed the parties' disputes. On this basis he submitted that the court should grant a stay of proceedings and remit the issue as to whether an arbitration agreement in fact existed to a Hungarian Tribunal.

13. In support of his arguments, Mr. Shackleton relied upon: the decision of Thomas J (as he then was) in Vale do Rio Doce Navagaçao SA and Anr v Shanghai Bao Steel Ocean Shipping Co Ltd and Anr ; [2] the decision of Toulson J (as he then was) in XL Insurance Limited v Owens Corning : [3] and the decision of HH Judge Thornton, QC in Signet Health Care plc v Higgins City Ltd . [4]

14. Mr. Matthew Cook, counsel acting on behalf of Claxton, submitted that, following the Court of Appeal decision in Ahmad Al Naimi v Islamic Press Agency [5], the established position is that, in circumstances such as the present, it is appropriate for the court to decide threshold questions of jurisdiction rather than deferring such questions to arbitral tribunals. He submitted that the cases to which Mr. Shackleton referred related to cases where the issue was whether a contract, that would have included an arbitration clause, had been formed. He submitted that the issue in this case, in any event, is whether the English High Court or a Hungarian arbitral tribunal has jurisdiction. Given that the English High Court is first seized of that issue, and, depending upon the resolution of that issue, may have exclusive jurisdiction to resolve all disputes between the parties, he submitted that there was no basis for the English High Court to defer to an unformed arbitral tribunal to resolve the threshold issue.

15. Both Mr. Cook and Mr. Shackleton agreed that, if it were necessary for the English court to decide the threshold question as to whether the relevant contract between the parties contained a Hungarian arbitration clause or an English court exclusive jurisdiction clause, it could do so on the basis of the evidence before the court on the application, without the need for further evidence or cross-examination. That is because all the relevant communications consist of written or e-mail communications between the parties, save in one or two instances which are not material for the purposes of my determination.

16. In my judgment, the correct approach in circumstances such as these is that set out by the Court of Appeal in Ahmad Al Naimi v Islamic Press Agency [6], which is binding on me. In a case where the issue is whether the underlying dispute is subject to an arbitration agreement at all, the court has a choice whether to decide that issue itself, or to stay proceedings whilst that issue is referred to arbitration. The Court of Appeal approved the approach taken by His Honour Judge Humphrey Lloyd QC in Birse Construction Limited v St. David Limited [7] where the latter identified a number of factors which may influence a court as to what choice it makes. These factors include the circumstances of the application, the clarity of the evidence as to whether an arbitration agreement existed in relation to the particular dispute, the interests of the parties, the avoidance of unnecessary cost and expense, whether it would be more sensible to leave the matter to the arbitrators to decide, and whether an arbitration was going to take place in any event.

17. In the circumstances of this case, where Claxton is contending that the contract is subject to an exclusive English court jurisdiction clause, and TXM is contending that it is subject to a Hungarian arbitration agreement, and both parties have agreed that the matter is capable of being resolved on the basis of the written evidence before me, without cross-examination or further evidence, it seems to me to be wholly appropriate that this court should resolve the threshold issue. The cases cited by Mr. Shackleton relate to very different situations from those in the present case. If Claxton is right, it has an entitlement to have its claim litigated subject to the exclusive

jurisdiction of the English Court, and subject to English law. If TXM is correct, the Hungarian arbitration will proceed in any event and the Hungarian tribunal will be spared the task of determining whether it has jurisdiction. Conversely, were the matter to be remitted to a Hungarian tribunal forthwith, and subsequently a Hungarian tribunal were to decide that it did not have jurisdiction, further time and costs would have been wasted whilst the dispute was resubmitted to the English court.

18. Accordingly I propose to decide the threshold question."

9. Having held that she should decide this "threshold" question, she then went on to consider what were the terms of the contract between the parties relating to dispute resolution and proper law. In essence, this was a battle of the forms case.

10. The claimant was contending that the defendant agreed by conduct to the English exclusive jurisdiction clause which it had put forward. The defendant not only denied that this was the case, but contended that the parties had in fact agreed an HCCI arbitration clause.

11. Gloster J held that (save in respect of one disputed invoice for £88,413 - invoice 861) the parties had agreed an exclusive English jurisdiction clause. Alternatively, if that was wrong no consensus was reached on either clause but the English court nevertheless had jurisdiction, under Article 5(1)(b) of the Regulation, because delivery under the contract was at the claimant's UK works.

12. The English exclusive jurisdiction clause which Gloster J found to be agreed was in the following terms:

> "The agreement shall be governed by and interpreted in accordance with the laws of England and the parties hereby submit to the exclusive jurisdiction of the English courts."

13. Gloster J refused permission to appeal and gave directions without prejudice to the defendant's position on jurisdiction. In compliance with those directions, further statements of case have been served, including a substantial counterclaim, and disclosure given. The CMC is to take place in March 2011. Meanwhile the defendant sought permission to appeal on the ground that Gloster J was wrong to find that there was no arbitration agreement.

14. On 16 December 2010 Longmore LJ refused permission to appeal on paper, though it appears that the application is to be renewed orally on 7 March 2011. In refusing permission to appeal, Longmore LJ stated as follows:

"**Reasons**

a) The judge was correct to follow Ahmed Al Naimi [2000] 1 Lloyd's Rep 522 and determine the matter on the materials before her. She was faced with an action properly brought in England pursuant to Article 5.1(b) of Regulation (EC)44/2001. The defendants sought a stay because they argued that it had been agreed that any dispute should be referred to arbitration in Hungary; the

defendants had therefore to show that such an agreement existed; the separability of the agreement to arbitrate (if it existed) does not help to determine whether any such agreement did, in fact, exist.

b) The judge was likewise correct to determine that no such agreement existed for the simple reason that Ms Claxton made it clear to TXM on 19th June 2006 that she was not prepared to agree any such arbitration.

c) & d) Ms Claxton also made it clear that she wanted both parties to submit to the exclusive jurisdiction of the English courts. Whether or not the parties did so agree does not matter because the English court has jurisdiction pursuant to Article 5.1(b) above.

The judge was right, therefore, to dismiss the defendant's application and also the defendant's application that the proceedings be stayed pending any application for permission to appeal. The parties should proceed to have the merits of the dispute determined rather than resorting to unnecessary interlocutory wrangles."

15. After Gloster J had handed down her judgment, a Request for Arbitration was submitted to the HCCI Court of Arbitration on 19 November 2010, seeking what would appear to be the same relief as is sought in the counterclaim in the action, (which was served on the same date) together with damages for the claimant's breaches of the alleged arbitration agreement, and in addition seeking an urgent interim award declaring that the parties are bound by the alleged arbitration agreement, restraining the claimant from pursuing this action, and awarding damages of at least £100,000 for the claimant's breaches of the arbitration agreement, namely its pursuit of this action to date.

16. Under the HCCI rules, the respondent must, within a stated period, designate its arbitrator and submit its statement of defence. The deadline for so doing was extended to Saturday, 29 January 2011, and may now be further extended. The HCCI rules also provide that, "The arbitration court considers the existence of its jurisdiction of its own motion", and it has indicated that it will do so, referring in this connection to West Tankers Inc v Allianz SpA [2009] 1 AC 1138.

Jurisdiction

17. The first point taken by the defendant in opposition to the application is that the court has no jurisdiction to injunct arbitral proceedings taking place in a Member State of the European Union. It is submitted this follows from the ECJ decision in the West Tanker case.

18. Reference was made to the ECJ ruling that:

> "It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."

19. The defendant submits that the ECJ's decision extends to preclude the injunction of arbitral proceedings conducted under the supervisory jurisdiction of another EU Member State. In this application, the claimant is requesting an English court to interfere with or usurp the supervisory functions of the Hungarian courts. It is submitted that the English courts have no jurisdiction to do so.

20. In my judgment, this is a misinterpretation of the ECJ's West Tankers decision. That decision, and the Regulation upon which it is based, applies to court proceedings, not to arbitration proceedings. Arbitration does not fall within the scope of the Regulation, - see Article 1(2)(d).

21. The Regulation requires that the national courts of EU States have the exclusive right to determine their own jurisdiction under that Regulation. Where necessary this involves that a national court seized of a court action which falls within the scope of the Regulation will decide on the existence of an alleged arbitration agreement, even though the imputed arbitration agreement might be governed by the law of some other EU State, or any arbitration commenced purportedly under that agreement might be supervised by the national courts of some other EU State.

22. In the West Tankers case itself, the claimant relied on an alleged agreement for London arbitration and sought an order from the English supervisory court restraining the defendant from pursuing court action in Italy for tort damage, the subject matter of which allegedly fell within the alleged arbitration agreement.

23. The ECJ held that it would be incompatible with the Regulation for the English court to make such an order. The Italian court as the court which would "normally" have jurisdiction under Article 5(3), over the claim for damages must be left to decide on its own jurisdiction under the Regulation including "incidental question" of whether that jurisdiction was ousted by a binding arbitration agreement.

24. There is no such objection to an order restraining proceedings which do not fall within the scope of the Regulation, of which an arbitration is a paradigm example. Anti-suit injunctions are objectionable if they interfere with an EU court deciding on its own jurisdiction under the Regulation, but not if they do not.

25. If there is no court action against which the injunction is directed, then the effectiveness of the Regulation cannot be impaired by it - see, for example, the Advocate General's opinion at page 1147(B)(para 37) and 1156(H) to 1157(E)(para 24-27).

26. I am accordingly satisfied that I have jurisdiction to grant an injunction. That jurisdiction derives from section 37 of the Supreme Courts Act 1981 which provides that:

> "(1)The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so. (2)Any such order may be made either unconditionally or on such terms and conditions as the court thinks just."

Discretion

27. The grant of an anti-arbitration injunction is a matter of debate and controversy in the international arbitration community - see, for example, the article by Professor Lew in AMU International Law Review 2009, 489, "Does national court involvement undermine the international arbitration process?"; - see also Shearer and Jaynel 2009 International ALR: "Anti-suit and anti-arbitration injunctions".

28. It is nevertheless clear that the English courts have jurisdiction to grant such injunctions. See, for example, Intermet FZCO v Ansol Limited [2007] EWHC 226; Elektrim SA v Vivendi Universal SA Number 2 [2000] 2 Lloyd's Rep 8; J Jarvis and Sons Limited v Blue Circle Dartford Estates Limited [2000] BLRep 439; Albon v Naza Motor Trading SDN BHD [2002] Lloyd's Rep 420 [2008] 1 Lloyd's Rep 1; Cetelem SA v Roust Holdings Limited [2005] 2 Lloyd's Rep 494 per Clarke LJ at paragraph 74; Weissfisch v Julius [2006] 1 Lloyd's Rep 716 per Lord Phillips CJ at paragraph 33; Republic of Kazakhstan v Istil Group Inc (No 2) [2008] 1 Lloyd's Rep 382.

29. Modern examples of the English court granting such injunctions are the Republic of Kazakhstan v Istil Group Inc case and, in respect of an arbitration outside the jurisdiction, the Albon case. The authorities indicate that such injunctions will generally only be granted in exceptional circumstances – see Weissfisch v Julius at paragraph 33; the Republic of Kazakhstan v Istil paragraph 48.

30. This is consistent with the doctrine of Kompétenz-Kompétenz and with the "principles of the law of international arbitration, agreed under the New York convention and recognised by this country in the 1996 Act" – see Weissfisch v Julius paragraph 33.

31. The significance of the provisions of the 1996 Act was addressed in some detail by Aikens J in Elektrim at paragraphs 67 to 73; see also the decision of Coleman J in A v B [2001] Lloyd's Law Rep 237, paragraph 124.

32. The need for caution in the grant of such injunctions is all the greater in relation to arbitrations outside the jurisdiction because such matters are generally best left to the relevant supervisory courts being the courts of the country of the seat of the arbitration.

33. As stated in Naviera Amazonica Peruana SA v Cia International De Seguros Del Peru [1988] 1 Lloyd's Report 116, at page 118 (Kerr LJ):

> " … every arbitration must have a 'seat' or *locus arbitri* or forum which subjects its procedural rules to the municipal law which is there in force. … Prima facie, i.e. in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also the law of the 'seat' of the arbitration. The *lex fori* is then the law of X and accordingly X is the agreed forum of the arbitration. A further consequence is then that the courts which are competent to control or assist the arbitration are the courts exercising jurisdiction at X."

34. In order to establish exceptional circumstances, it will usually be necessary, as a minimum, to establish that the applicant's legal or equitable rights have been infringed or threatened by a continuation of the arbitration, or that its continuation will be vexatious, oppressive or unconscionable, these being the principles which govern the grant of injunctions to restrain proceedings in a foreign court – see Elektrim at paragraph 56. However this may not be sufficient as the Elektrim decision illustrates - see paragraphs 74 and 75.

35. In the present case the claimant can establish that the continuation of the arbitration will be a breach of its legal rights. This court has held that the contract was subject to English exclusive jurisdiction clause and the proceedings brought by the defendant are a clear breach of that contractual agreement. Not only that, but this is a legal right of a nature which the English courts have recognised it is generally appropriate to enforce by way of injunctive relief unless there are "strong reasons for not giving effect to the exclusive jurisdiction clause" Donohue v Armco Inc and Ors [2002] 1 Lloyd's Rep 425, and subsequent authorities summarised by Burton J at paragraphs 14 to 24 in Deutsche Bank AG v Sebastian Holdings Inc [2010] 1 All ER (Comm) 808.

36. This is also a case in which the claimant can establish that it would be vexatious and oppressive to allow the arbitration to continue since this court has already held that there is no arbitration agreement. Allowing the arbitration to continue will therefore not only involve the claimant in duplication of work and needless expense, but it will do so on a jurisdictional basis which this court has already held does not exist.

37. Since this court has already held that there is no arbitration agreement, the reliance sought to be placed by the defendant on the New York Convention is misplaced. Reference was made to Article II (3) which provides:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

38. In the present case there is no question of there being a prima facie or arguable case that there is an agreement to arbitrate. The court has held that there is not.

39. Many of the arguments addressed at the hearing as to why it was appropriate to leave the issue of whether there was an arbitration agreement to the HCCI Arbitration Tribunal involved a reprisal of the arguments already made to and rejected by Gloster J.

40. She specifically addressed the issue of who should decide the question of jurisdiction, and decided that this court should. As she observed, the present case does not simply involve a dispute about whether there was an arbitration agreement, it also involves a dispute about whether there was an English jurisdiction clause, an issue that is clearly an appropriate one for the English court to decide.

41. In many of the cases which concern whether an anti-arbitration injunction should be granted there is an issue as to whether there is any or any valid arbitration agreement. One can well understand why it would generally be appropriate for that issue to be left in the first instance to be determined by the arbitration tribunal. Here, however, not only has it already been decided by this court that there is no such agreement, but this court has also held there is a governing English exclusive jurisdiction clause.

42. I am satisfied that these are sufficiently exceptional circumstances to justify the grant of an injunction. Alternatively, if these are not properly to be characterised as exceptional circumstances, that in my judgment a broader approach is justified where this court has held the claim is subject to an English exclusive jurisdiction clause and/or that there is no arbitration agreement - see Raphael "The anti-suit injunction" paragraph 11. 20.

43. An analogous situation arose in Huyton SA v Peter Cremer GmbH and Co [1999] 1 Lloyd's Rep 620. In that case it was held there was an agreement not to arbitrate, and in light of that determination the court granted an injunction preventing the defendant from pursuing its claim in arbitration.

44. That case involved an English arbitration and I am conscious of the consideration that in relation to arbitrations outside this country, the supervisory court is the court of the seat of the arbitration. However, I am bound by the decisions already made by this court on jurisdiction, and in the light of those decisions I consider that it is appropriate for this court to do what it can to prevent those decisions from being flouted. Further, in the context of any Regulation proceedings before the Hungarian court, one would anticipate that this court's decision that there was no arbitration agreement is one which the Hungarian court would be required to recognise as being binding. See National Navigation Co v Endesa Generacion SA (The "Wadi Sudr") [2010] 1 Lloyd's Rep 193.

45. The defendant further argued that the application for an injunction had been made too late. Whilst delay in making the application may be an important consideration, it is not so on the facts of this case. The claimant sensibly sought to find ways either by order or by agreement of ensuring that the arbitration was not progressed pending the appeal in the present proceedings, but this has not proved possible.

46. Faced with the imminent need to appoint an arbitrator and intention to serve a statement of defence, it has made the present application. I do not consider that it has delayed unreasonably in doing so. In any event, the arbitration is at such a nascent state that any delay is of no practical significance.

47. Finally, I should note that the defendant asked for an adjournment on the grounds that there is no real urgency, given their willingness to agree that a joint approach be made to the Arbitration Tribunal to put back the timetable of any service of defence in the arbitration, and that they should have further time to prepare for the hearing. However, I am not satisfied that further time is required. No need for further evidence has been shown. The application turns on matters of argument and the defendant had a week's notice of the hearing. Further, I afforded to the defendant additional time following the hearing to put forward further authorities and written submissions.

Conclusion

48. In conclusion, I am satisfied this is one of those rare and exceptional cases in which it is appropriate to grant an anti-arbitration injunction.

49. The fact of the matter is that the defendant has deliberately taken steps to commence an HCCI arbitration, in the knowledge this was in breach of the contractual agreement which an English court had held to exist, whilst at the same time seeking to appeal that decision. This is a clear breach of the claimant's legal rights as they have been held to be by the English court.

50. The claimant is in a stronger position than most applicants for an injunction in that it has the benefit both of a binding decision that there is the exclusive jurisdiction clause and that there is no arbitration agreement.

51. The defendant is subject to the jurisdiction of the court and should now, as noted by Longmore LJ, proceed to the long delayed determination of the disputes on the particular invoices. An injunction should therefore be granted. It is accepted by the claimant that if the defendant was to succeed in its appeal in March, that position would change.

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