Case No: 2010 Folio 47

Neutral Citation Number: [2010] EWHC 2567 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 October 2010

Before :

MRS JUSTICE GLOSTER, DBE

- -

Between :

CLAXTON ENGINEERING SERVICES LIMITED	**Claimant/ Respondent**
- and -	
TXM OLAJ–ÉS GÁZKUTATÓ KFT	**Defendant/ Applicant**

- -
- -

Mr. Matthew Cook, counsel (instructed by **Birketts LLP**) for the Claimant/Respondent
Mr. Stewart Shackleton, solicitor advocate (instructed by **Mundays LLP)** for the Defendant/Applicant

Hearing date: 4 August 2010

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Judgment

Mrs Justice Gloster, DBE:

Introduction

1. This is an application by the defendant, TXM Olaj–és Gázkutató Kft ("TXM"), for a stay of proceedings issued by the claimant, Claxton Engineering Services Limited ("Claxton"), pursuant to section 9 of the Arbitration Act 1996 ("the Act"), or, in the alternative, pursuant to Article 2 of Council Regulation (EC) 44/2001, namely the Jurisdiction and Judgments Regulation ("the Regulation"), on the grounds that Article 2 requires that TXM be sued in the courts of Hungary, the State of its domicile.

2. Disputes between the parties have arisen in relation to a number of contracts ("the disputed contracts") for the manufacture, sale and delivery of engineering equipment manufactured by Claxton in England, and sold to TXM pursuant to purchase orders raised by it. Delivery was ex-Claxton's works in Norwich, although, pursuant to separate transport agreements, Claxton arranged for transport to TXM's requested destination, priced on the basis of costs incurred plus 15%.

3. Claxton issued a claim form in the Norwich District Registry on 5 November 2009 claiming the sum of £2,061,451.20, alleged to be the balance due for goods ordered by, and manufactured for, TXM pursuant to some 19 invoices raised by Claxton in the period from 29 February 2008 to 29 April 2008. The date of the referable purchase orders raised by TXM range from 2 June 2006 to 19 July 2007, although Claxton claims that one TXM purchase order (referable to invoice number 8682) was raised verbally. Claxton also claimed interest and compensation pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 at the rate of 13.5% per annum, amounting to interest of £427,621.84 as at the date of issue of the claim, and at the daily rate of £762.45, and compensation of £100.

4. Following service of the proceedings, TXM indicated that jurisdiction would be contested. TXM applied for the proceedings to be transferred to the Commercial Court. That transfer was effected by an order of Tomlinson J dated 15 January 2010.

5. On 14 January 2010, TXM applied for a stay of proceedings on the grounds set out in paragraph 1 above. Its primary contention is that all of the disputed contracts, and the disputes arising from them, are governed by an arbitration agreement in writing set out at section 14 of TXM's General Terms and Conditions, and that accordingly all disputes between the parties should be resolved by the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry, Budapest ("the Hungarian Tribunal").

6. Claxton's position is that, as a result of exchanges in June 2006, the parties agreed to certain amendments to TXM's terms and conditions proposed by Claxton, which deleted the arbitration clause and incorporated an English exclusive jurisdiction clause instead.

The parties

7. Claxton is a private company established under the laws of England and Wales, and operating from Great Yarmouth. It manufactures specialist engineering equipment for

exploration and extraction of natural resources. It provides engineering, services and equipment for well systems, pipelines and structures.

8. TXM is a wholly-owned subsidiary of Falcon Oil and Gas Limited, a Canadian incorporated company, which owns TXM through an American subsidiary, Mako Energy Corp. TXM is a private company established under the laws of Hungary, with its domicile, seat of business and principal operations in Budapest.

9. TXM is Falcon's Hungarian investment vehicle in relation to an oil and gas exploration project in the Mako Trough Basin, in Hungary. At all material times, TXM, together with others, including Falcon, and Exxon Mobil, were engaged in drilling and exploration in the Mako Basin.

10. For the purposes of its exploration and drilling works, TXM ordered and Claxton manufactured and supplied various well head and drilling equipment and parts over a period of time.

The issues

11. In the light of the submissions which have been put forward on behalf of the parties, the issues which arise on this application can be summarised as follows:

    i) Whether this court, or an (as yet) unconstituted Hungarian arbitral tribunal, should decide the threshold question whether an arbitration agreement was reached between the parties.

    ii) If this court is indeed the correct forum to decide the threshold question of jurisdiction, whether, as a result of exchanges between the parties in June 2006, the parties agreed to do business on TXM's unamended terms and conditions (including the Hungarian arbitration clause), or subject to the amendments proposed by Claxton (which deleted the arbitration clause and incorporated an English exclusive jurisdiction clause instead).

    iii) If there was no arbitration agreement between the parties, whether Article 2 of the Regulation requires TXM to be sued before the courts of Hungary.

    iv) In any event, even if Article 2 does not so require, whether a stay should be granted on the grounds that the Hungarian courts are the more appropriate forum.

Issue i): Who should decide the question of jurisdiction?

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-

[1] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

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

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2 [2000] 2 Lloyd's Rep 1, at 11.
3 [2000] 2 Lloyd's Rep 500 at 509.
4 (2000) 16 Const. LJ 394 at 399.
5 [2000] 1 Lloyds Rep 522.
6 Supra , at pages 525 -526, per Waller LJ; and at pages 527 - 528 per Chadwick LJ.
7 [1999] BLR 194.

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.

Issue ii): What are the terms of the contract between the parties relating to dispute resolution and proper law?

Evidence relied upon

19. In order to resolve what is effectively a "battle of the forms", it is necessary for me to summarise the commercial dealings between the parties leading up to the non-payment of the relevant invoices. I do so based on the documentation which has been produced by way of exhibits; and the witness statements of: Laura Claxton, the managing director of Claxton, who at the time was Commercial Manager; Michael Sumpter, TXM's Project Manager, who supervised TXM's purchasing agent, Lahbib Agoudan, during the period from December 2005 onwards; Garry Lavold, Falcon's on-site manager in Hungary from October 2007; and Mr. Shackleton himself. So far as the last deponent is concerned, I regard it as highly unsatisfactory that the advocate presenting the defendant's case should have seen fit to produce the first witness statement on its behalf in support of the application. In particular, many paragraphs in the witness statement assume direct personal knowledge of the events which have taken place, in circumstances where clearly Mr. Shackleton had no such knowledge. However, be that as it may, for present purposes, I have disregarded contentious statements in both sides' evidence, as well as subjective statements as to what each side considered were the relevant terms applying to the contractual dealings between them, since that latter evidence is inadmissible. I have based my decision as to this preliminary point effectively on the written communications passing between the parties, the non-challenged evidence and the non-contentious evidence. It is not necessary for me to express any view as to the respective underlying merits of the dispute.

Summary of commercial dealings between the parties

Period October 2005 to April 2006

20. In early October 2005, following several months of preliminary discussions, Claxton was asked to quote for the supply of well head equipment for exploration wells being set up by Falcon in the Mako Basin. On 10 October 2005 Claxton provided a quotation to Falcon under the reference CESQ 3650-05. Section 5 provided so far as material as follows:

> "**Terms and conditions**
>
> The placement of a written order in respect to a quotation, bid or proposal from [Claxton], will result in the terms and conditions stated below being deemed to be reasonable and enforceable and to form part of the contract between the client and contractor, unless where expressly agreed otherwise in correspondence between the parties:-
>
> …
>
> 9. No order will be processed prior to receipt of written instructions/purchase order, a faxed or e-mail copy is acceptable. …"

The terms also included a number of provisions relating to e.g. delivery ex-works, arrangement for transportation costs, certification, retention of title, payment in sterling etc. that are not necessary to quote for present purposes. No express provision was made in the terms and conditions in relation to the method of resolution of disputes or as to the proper law.

21. In my judgment it is clear from the wording of paragraph 9 that a formal purchase order was not required prior to "processing of an order"; written instructions, whether sent by fax or e-mail to Claxton were sufficient.

22. After issuing the quotation, there followed various changes to the technical specifications, as a result of which Claxton issued three revised versions of its first quotations. By the time of the fourth revision ("Rev 4") issued on 22 October 2005, Claxton had been told that the contracting party would be a Hungarian subsidiary of Falcon, namely TXM. Accordingly Rev 4 was addressed to TXM. In response to Rev 4, two purchase orders, numbered H-05-1001 and H-05-1002, and dated 23 October 2005 were received from TXM. These purchase orders stated in small print at the bottom, both in English and in Hungarian:

> "1. Please notify us immediately if you are unable to meet the required delivery date.
>
> 2. The Seller, by acceptance of this order, expressly agrees to all of the terms and conditions on the face of the order, and on any accompanying pages incorporated therein and made a part of this order."

23. According to Ms Claxton's evidence (and there is no evidence to the contrary from any deponent who was operating on the TXM side at the time), there were no accompanying pages sent with, or incorporated in, the purchase order or made part of the order and TXM had not provided Claxton with any standard terms and conditions at this point. Moreover, although the purchase orders were signed on behalf of TXM, and included a space for signature by Claxton, Claxton were not asked to sign the purchase orders or return a signed copy to TXM and did not do so. Upon receipt of the purchase orders, Claxton accepted them and proceeded to start to manufacture the equipment.

24. In November 2005, TXM contacted Claxton with proposed variations to the specifications, as a result of which changes were made to the equipment that was already being manufactured. Ms Claxton deposed that no revision was made to the documentation until some time later, because Claxton was happy to proceed on the basis of the written e-mail variations to the original purchase orders. She deposed that TXM had a disorganised approach to administrative matters, that Mr. Agoudan of TXM had no technical experience, and that consequently many of the purchase orders contained technical errors. As a result, although Claxton initially started off working to orders which had been formally placed by a purchase order, the documentation quickly fell behind the instructions being given by TXM. As a result, on the basis of TXM's written instructions, Claxton began producing equipment different from that set out in TXM's original purchase orders and also producing equipment for which no formal purchase orders, but merely e-mail instructions, had been given. She also deposed to the fact that, at TXM's request, and as a result of a separate agreement, arrangements were made to transport the equipment on the basis of TXM paying for the full costs of transportation +15%. She also referred to the fact that it was only in April 2006, long after delivery of the revised equipment during the period November 2005 to February 2006, that a formal revised quotation was issued to reflect the changes requested by TXM in November 2005, and that correspondingly amended purchase orders were not provided by TXM until June 2006, months after the equipment had actually been supplied.

25. There is no dispute that Claxton's invoices in relation to these transactions have been paid by TXM.

26. Subsequently, on 27 February 2006, Claxton was asked to quote for some equipment, which it did by e-mail on that date; TXM instructed Claxton to proceed with the order by e-mail instructions on 28 February which it duly did in the absence of any formal purchase order. Subsequently, after it had started manufacturing the equipment, Claxton was sent a formal purchase order raised by TXM, dated 28 February 2006 (although probably not received on that date) and numbered H-06-1091. Claxton was not asked to sign or return the purchase order and did not do so. Claxton produced the equipment and invoiced it, on 31 March 2006. The invoice referred both to the e-mail correspondence and to the TXM purchase order number. The invoice was duly paid. However, the purchase order for the first time contained an amended paragraph 2, which read as follows:

> "2. The Vendor, by signing this Purchase Order, expressly acknowledges that it has read the Purchaser's General Terms and Conditions and that it accepts them as binding upon it; further the Vendor expressly waives

its rights to use its own general terms and conditions in connection with this order."

Ms Claxton's evidence, which is not challenged by any deponent on evidential grounds, is that she is quite certain that Claxton was not provided with TXM's general terms and conditions at this point. For the purposes of this application I accept that evidence.

27. It is common ground that in April 2006 two further quotations were provided by Claxton for further equipment required for a well called the Mako 6 well, and that Ms Claxton signed and returned two purchase orders containing the wording set out in the previous paragraph. The first purchase order was forwarded on 5 April and signed by Ms Claxton on 7 April and returned to TXM; it appears that the second purchase order was forwarded on 6 April and signed by Ms Claxton shortly thereafter and likewise returned to TXM. The invoices were in the relatively small sums of £15,874 and £3360 and were paid. Again, Ms Claxton's evidence, which I accept, is that at this stage Claxton had not been provided with TXM's standard terms and conditions. It is not however necessary to consider whether these orders were governed by TXM's standard terms and conditions including the arbitration clause, since no dispute arises in relation to those orders which were duly paid.

Period February to June 2006

28. In the period from February to June 2006 Claxton was asked by TXM to quote for the supply of wellhead equipment for a number of wells, which it did under various quotation numbers. In relation to each of these quotations, the evidence shows that during this period, as indeed previously, TXM frequently instructed Claxton to commence the manufacture of the equipment, as soon as the specification for each stage of it had been finalised by TXM's drilling engineers, usually through the medium of informal instructions given by e-mail. Indeed on some occasions, Claxton was instructed to begin work before any quotation had even been issued; and sometimes the instruction would be in response to an earlier quotation. In such circumstances, Claxton would respond in an e-mail confirming that manufacture was proceeding on the basis of the instructions received. Although there was an expectation that formal documentation would subsequently be agreed, it is clear that there was no indication on either side's part that there was to be no binding contract until the formal documentation had been agreed.

29. Accordingly, I accept Mr. Cook's submission that the conduct of the parties, certainly up until June 2006, demonstrates that the contract for each order was concluded once Claxton received TXM's written instructions to proceed with the manufacture of equipment, as per Claxton's earlier quote, or, at the latest, once Claxton confirmed that it was starting to manufacture the equipment. I reject Mr. Shackleton's submission that until Claxton had received a formal TXM purchase order, and had formally accepted it, no contract was concluded between the parties and that it remained open to Claxton to accept or reject such formal purchase order. Such an analysis is wholly inconsistent not only with the express terms of paragraph 9 of Claxton's quotations, but also with what actually happened in practice, namely: (i) a quotation or previous quotation from Claxton; (ii) a written informal instruction from TXM to proceed forthwith with the manufacture of the equipment as per its e-mail;

(iii) Claxton immediately proceeding to manufacture, and indeed sometimes ship, the equipment, even prior to receipt of a formal TXM purchase order.

30. By May 2006, although Claxton had received written e-mail instructions from TXM in the period February to May 2006 to supply certain items of equipment for various wells, and had started work on manufacturing the equipment, it had not received formal purchase orders from TXM in respect of this. In addition, Claxton had not received revised formal purchase orders from TXM in relation to revisions that had been made to equipment that had been ordered in November 2005 for certain other wells and indeed had already been shipped. Although Claxton had operated on the basis described above, namely that as soon as a written instruction had been received from TXM, a contract had been concluded, the absence of purchase orders, or more specifically purchase order numbers which could be quoted on Claxton's invoices, was causing administrative difficulties in relation to invoicing and therefore delaying payment, and, in some cases, shipment. The reason for the delay in producing formal purchase orders appears to have been that Mr. Agoudan, TXM's purchasing agent, was not aware precisely what instructions had been given by TXM representatives and therefore did not know exactly what equipment had been ordered or delivered.

31. On 9 June 2006, Mr. Agoudan sent Claxton five formal TXM purchase orders for equipment which was already in production or had been shipped some months previously, pursuant to various quotes provided by Claxton, and subsequent written interactions from TXM. These were in the new format which I have set out at paragraph 26 above. Two of the purchase orders relate to two of the disputed contracts (purchase orders H-06-1156 and H-06-1157). I accept Ms Claxton's evidence that TXM did not attach its standard terms and conditions to these five purchase orders. Her evidence is that she read the purchase orders and, given that the level of business between Claxton and TXM was now significant, considered it prudent to review the standard terms and conditions that were referred to in the five purchase orders received and which Claxton was being asked to accept. She accordingly instructed her colleague, Sonja Skoyles, to ask Mr. Agoudan for a copy of TXM's standard terms. Ms Skoyles duly did so on 9 June and Mr. Agoudan sent through a copy on the same day.

32. TXM's terms and conditions contained detailed provisions relating to many contractual issues including price delivery indemnity etc. For present purposes the critical provisions are the introductory provisions, clause 2 and clauses 13 and 14 which were as follows:

> "2. THE CONCLUSION OF THE AGREEMENT
>
> 2.1 The Purchaser's orders will only be binding if they are made in writing. Purchase Orders made orally as well as oral agreements between the Parties must be drawn up in writing to be valid and legally binding upon the Parties. Likewise, modifications or supplements to the Agreement must be made in writing in order to be valid.
>
> 2.2 A valid and binding contract between the Purchaser and the Vendor shall be formed by:

(i) the Purchaser's written Purchase Order submitted to the Vendor (constituting a purchase offer); and

(ii) The Vendor's express written acceptance of the Purchase Order by means of sending a signed copy of this Purchase Order back to the Purchaser, which acceptance is to be received by the Purchaser within five (5) days of the Date of the Purchase Order.

Any acceptance by the Vendor which is received later or which differs from the Purchaser's Purchase Order will represent a new purchase offer and must be accepted by the Purchaser in writing. However, the Vendor's general terms and conditions do not become part of the Agreement even in the case of the acceptance of such a new purchase offer.

2.3 The Vendor acknowledges that from among the provisions of these General Terms and Conditions the Purchaser expressly draws its attention on sections 2.4, 3.1, 3.3, 4.4, 10 and 11.

2.4 The Vendor shall examine the Purchaser's purchase order – especially the Description and the Intended Purpose of the Purchase Order Items – and the Purchaser's instructions with the diligence that can be expected from an entrepreneur with appropriate professional knowledge, and if they are unreasonable, unprofessional, inconsistent or unlawful, it shall inform the Purchaser thereof without delay in writing.

…

13. INTERPRETATION AND SAVINGS CLAUSE

13.1 The Agreement shall be governed by and interpreted in accordance with the substantive laws of Hungary, excluding the application of Decree No. 13 of 1979 on International Private Law. Further, the Parties expressly include the application of Decree No. 20 of 1987 on the promulgation of the United Nations Convention on the International Sale of Goods, dated Vienna, April 11, 1980.

13.2 If any provision herein, or the application thereof to any person or circumstances becomes invalid, the invalidity shall not affect any other provision or application of the Agreement which can be given effect to without the invalid provision or application.

The Parties agree to substitute the invalid provision with such a valid provision which comes closest to the legal and commercial content of the invalid provision.

14 DISPUTE RESOLUTION, GOVERNING LANGUAGE VERSION

14.1 The Parties will attempt to reach an amicable settlement with each other regarding any legal dispute arising out of the Agreement. A dispute between the Parties of any nature whatsoever, shall not entitle the Vendor to stay the performance of the Agreement or to withhold delivery. If an amicable settlement is not reach within a reasonable period of time, but within not longer than 30 (thirty) calendar days from the commencement of the dispute, the Parties agree to submit the resolution of their legal dispute arising from or in connection with the Agreement, its breach, termination, validity or interpretation, to the exclusive competence of the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry, Budapest, in accordance with its own Rules and Proceedings. The language to be used in the arbitral proceedings will be Hungarian, and the number of arbitrators will be three.

14.2 These General Terms and Conditions will be attached to the Purchase Order in one Hungarian and one English language version. In the case of any discrepancy between the Hungarian and the English language version, the Hungarian version will prevail."

33. On 12 June 2006, Ms Skoyles sent an e-mail to Mr. Agoudan thanking him for certain purchase orders that had been sent and saying

> "I have checked over them and they all look okay, I have noticed that is no provision for any transport charges and the cost for the Service Engineers time, travel and expenses, does this come in a separate purchase order. Please advise".

Mr. Shackleton contended that this amounted to approval of TXM's terms and conditions; in my judgment that was clearly not the case. All Ms Skoyles was doing was confirming that she had looked at the purchase orders, not that she was approving the terms and conditions.

34. On 19 June 2006 Ms Claxton sent Mr. Agoudan an e-mail in the following terms:

> "Further to the TXM terms and conditions which you sent through to my colleague, Sonja Skoyles.

> Our contracts department has now reviewed these and we attach:-
>
> 1) Our exceptions to the general Terms and conditions
>
> 2) A Modified set of conditions to be used in conjunction with the general set of conditions.
>
> It is my understanding that these then cover a variety of services e.g. Manufacturer, rental and labour. Payment terms detailed in each quotation and subsequent purchase order.
>
> Please advise if this is acceptable."

35. The e-mail attached first, a document on Claxton writing paper headed

> "Modified or Supplementary Conditions. To be read in conjunction with General Terms and Conditions of TMX [sic]"

That document went on to state that:

> "The following modifications to be General Terms and Conditions of [TXM] shall apply to this Purchase Order …"

and there then followed detailed deletions, insertions, modifications and substitutions to almost every single clause of TXM's terms and conditions. In particular, in relation to clauses 13 and 14, the Claxton modified conditions stated as follows:

> "13. INTERPRETATION AND SAVINGS CLAUSE
>
> 13.1 Delete this Section in its entirety and substitute:
>
> '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.'
>
> 14. DISPUTE RESOLUTION, GOVERNING LANGUAGE VERSION
>
> Delete this Section in its entirety."

36. The e-mail also attached a three-page schedule, on Claxton writing paper, headed "EXCEPTIONS TO PROPOSED TMX [sic] GENERAL TERMS AND CONDITIONS". This set out once again the proposed deletions and modifications etc. to TXM's terms and conditions, and detailed reasons why Claxton did not agree to them.

37. On 20 June, whilst waiting for a response from Mr. Agoudan, Ms Claxton sent back to TXM two of the five purchase orders (H-06-1158 and H-06-1159), dated 2 June 2006, which she had received on 9 June 2006, as Claxton was keen to receive payment in relation to these orders, in respect of which the equipment had been

delivered some months before. These purchase orders had endorsed on them, underneath Ms Claxton's signature, the added words, also in her writing, "N.B.: TXM Terms & Conditions currently under review 20/6/06". The invoices were sent out the following day and were duly paid.

38. On the same date Ms Claxton signed and endorsed the other three purchase orders dated 2 June 2006 (H-06-1155, H-06-1156 and H-06-1157) in similar terms. These were not returned to TXM. However, they were scanned into Claxton's electronic project files, and when Claxton sent out invoices for TXM in relation to these remaining three purchase orders, the purchase order, with the manuscript note endorsed upon it, accompanied the invoice. Two of these purchase orders relate to disputed contracts: purchase order H-06-1157 and H-06-1156. However, it was not until April 2008, when Claxton issued the relevant invoices, that the purchase orders relating to these two contracts were returned to TXM, as part of the documentation accompanying the invoices, in accordance with the method which I have described above. Purchase order H-06-1155 was paid pursuant to an invoice set out on 30 June 2006. Further invoices were sent out in relation to purchase order H-06-1159 in the period July 2006 to April 2007, which also attached the purchase order with the relevant note, and these were likewise paid.

39. However no response to Ms Claxton's e-mail dated 19 June 2006 was received by Claxton, either from Mr. Agoudan or anyone else at TXM. Claxton, itself, did not chase up the matter, with the result that the subject of the terms and conditions was not raised again until some time after TXM had started in April 2008 to dispute liability to pay invoices.

Period to July 2006 to October 2007

40. In August 2006 Ms Claxton signed and returned a TXM purchase order (H-06-1196) with the same endorsement. This purchase order was returned to TXM after signature, but was the last such an order to be so returned (as opposed to being sent out with Claxton's invoices in a manner which I have described). This order was duly paid by TXM. A further purchase order (8-06-1215) was received by Claxton in August 2006 and was signed by Ms Claxton with the same endorsement but not returned to TXM, other than with the final invoice. This was also paid. Thereafter no purchase orders were signed and returned to TXM as envisaged in clause 2.2 (ii) of TXM's terms and conditions.

41. On 20 October 2006, Ms Claxton signed six TXM purchase orders without any reservation as to the terms and conditions being under review. These were purchase orders H-6-1327, 1328, 1329, 1330, 1331 and 1332 and relate to disputed contracts. However these were not sent back to TXM until the invoices were sent out by Claxton in April 2008, again as a scanned attachment.

42. The correspondence shows that during this period Claxton continued to receive orders to provide wellhead equipment and ancillary equipment from TXM and that the arrangements continued in much the same way as they had prior to June 2006. The evidence shows that there was never any suggestion that the signing by Claxton of purchase orders, and their return to TXM, was regarded by either side as a necessary precondition to the conclusion of a binding contract. Claxton were asked to advise on equipment design and provided quotations for relevant work. TXM then instructed

Claxton to proceed with the work. Claxton was often advised of further changes that were required as the manufacturing process proceeded. A formal purchase order would generally only be provided some extended period after written e-mail instructions for the order had been placed by TXM and accepted by Claxton, often at Claxton's own prompting, since it needed a purchase order number in order to ensure that its invoices were paid promptly. Sometimes, invoices would refer to a number of different purchase orders; in other cases, there would be a succession of invoices relating to the same purchase order number, because items within a Claxton quotation, might be invoiced in stages, as and when the work was completed. It was not the case that each purchase order could be matched to a single invoice. Often when the purchase orders finally arrived, they would be overtaken by yet further modifications and design specification. Throughout this period Claxton neither signed nor returned the purchase orders that TXM provided (save for those signed in October already referred to above). This did not appear to present a problem as during the period October 2006 to August 2007, Claxton received over 30 purchase orders, none of which were returned signed to TXM. Nonetheless, during the same period TXM paid numerous invoices for equipment in relation to which no purchase orders were ever signed by Claxton.

43. In relation to Claxton invoice number 8682, which is one of the disputed invoices, no formal purchase order was ever sent by TXM. There is a dispute about this invoice, TXM claiming that it knows nothing about this alleged order, and Claxton contending that written instructions were given by e-mail on TXM's behalf to manufacture the relevant equipment. That is not an issue which I need to decide on this application.

44. Following delays in the payment of invoices, on 14 November 2007, Mr. Sumpter sent an e-mail to Claxton apologising for the delay in responding to deal with the issue of certain outstanding invoices previously raised by Claxton. He referred to the fact that Falcon was in the process of pursuing investment funding, so as to be able to satisfy any outstanding obligations of TXM, and asking for Claxton's patience in the meantime. According to Ms Claxton's evidence, during this time Claxton saw little point in pressing TXM further because of TXM's financial position. When TXM subsequently paid certain outstanding invoices in February 2008, Claxton then, in the period February to April 2008, drew up and issued the remaining invoices for equipment which it had manufactured, pursuant to written instructions given by TXM. There is or may be a dispute as to whether any of the equipment subject to the disputed invoices has been delivered to TXM. It is not an issue which I need to resolve.

45. In April 2008, TXM, by Mr. Lavold, for the first time sought to dispute TXM's liability to pay certain of the invoices and thereafter correspondence continued between the parties in which TXM raised various points in support of its challenge to the 19 outstanding invoices.

Submissions of the parties

46. Mr. Shackleton submits that no contract between the parties was concluded until TXM's formal purchase orders had been signed by Claxton and returned to TXM; that accordingly upon receipt of a formal purchase order it remained open for Claxton to accept it or reject it. He submits that each contract was formed on the basis of Claxton's acceptance of TXM terms and conditions, since that is what the formal

purchase order provided, with the added stipulation that Claxton waived its own terms and conditions; that Claxton accepted the purchase orders either by signature of some of them and in all cases performance without objection. He submits that there was an invariable practice of concluding contracts subject to the same arbitration agreement contained in TXM's terms and conditions. He submits that Claxton would have expected international transactions to be governed by an arbitration clause. Whilst Claxton sought to amend TXM's terms and conditions in June 2006, this remained a proposal only which was not followed up and the parties' conduct continued unchanged. He relies upon the well-established principle that arbitration clauses are separable from the main contract, and that an agreement is not required to be in writing, that can be agreed by conduct, by reference to written provisions.

47. Mr. Cook, on the other hand, submits that contracts were concluded on receipt by Claxton of written e-mail instructions from TXM following Claxton's quotations. He submits that the five formal purchase orders provided by TXM on 9 June 2006, in the new format, related to equipment already in production or shipped, and in relation to which contracts had already been concluded between the parties. He submits that Claxton rejected TXM's standard terms and conditions, once they had been supplied to Claxton, which proposed Hungarian arbitration and Hungarian law, and made a counter-offer proposing an English exclusive jurisdiction clause and an English proper law clause. He submits that Claxton sent back to TXM purchase orders signed but with the caveat that the terms and conditions were still under review and issued invoices in respect of those two transactions as well as in respect of two further purchase orders, which were also signed with the same caveat and returned with the relevant invoices. TXM did not reject those invoices, but paid them; nor did TXM reject or challenge Claxton's proposed alternative terms. On the contrary submits Mr. Cook, TXM acted in such a way as to confirm that it accepted Claxton's position by accepting its invoices and paying them, and continuing to trade with Claxton. Therefore, he submits, the agreement by conduct between the parties was that all further dealings between the parties would be on the modified terms proposed by Claxton by way of its counter offer. That position was not altered by the internal action on Claxton's behalf, when Ms Claxton signed five purchase orders, without reservation, on 20 October 2006, given that those actions were unknown to TXM the time. In the circumstances the correct legal analysis, submits Mr. Cook, is that TXM accepted Claxton's counterproposal by conduct, and consequently the contracts between the parties are governed by an exclusive jurisdiction clause in favour of the English court.

48. Neither counsel addressed argument as to whether the position might be different in relation to the contract reflected in invoice number 8671, where the relevant quote was apparently issued on 14 April 2006 (according to the schedule attached to the particulars of claim), i.e. prior to Claxton's e-mail dated 19 June 2006, and where, according to Ms Claxton, the contract was concluded prior to submission of TXM's formal purchase order H-06-1157 on 2 June 2006. Nor did either counsel present argument as to whether Article 5.1 of the Regulation applied.

Analysis of the contractual position

49. Upon the evidence available to the court on this application, which is necessarily limited, since I do not have copies of the complete set of quotations, nor the complete

correspondence between the parties, I conclude on the balance of probabilities that the position up until 19 June 2006 was as follows:

i) The parties' course of dealings demonstrates that binding contracts were concluded between them when TXM gave written instructions by e-mail to Claxton to proceed with the manufacture of the equipment specified in Claxton's prior quotation, or in prior e-mail exchanges between the parties, or, at the latest, when Claxton confirmed by e-mail that it was proceeding with the manufacture of such equipment in accordance with the instructions given by TXM.

ii) Accordingly, TXM's subsequent formal purchase orders, which were not submitted by TXM until after binding contracts had been formed, were not operative contractual documents, in the sense of either being documents which constituted, or comprised part of, an offer or acceptance, or of being documents upon the terms of which the parties were contracting prior to 2 June 2006 in such a way as to alter Claxton's terms and conditions, as set out in its quotations.

iii) For this reason, and despite the fact that Claxton signed the 4 and 6 April 2006 purchase orders, without endorsement, and subsequently returned these to TXM in April 2006, I do not consider that the context shows that, by doing so, Claxton was agreeing that, in relation to all its *subsequent* contracts and dealings with TXM, it was prepared to contract exclusively on TXM's terms. At that stage, Claxton had not even seen TXM's terms and conditions; there was no consideration for any such agreement; and Claxton's subsequent conduct in June 2006, when it did see TXM's terms and conditions, was wholly inconsistent with any such agreement arising as a result merely of its conduct in signing unrelated purchase orders. Moreover, the fact that the purchase order contained a so-called acknowledgement at paragraph 2 that Claxton had read TXM's terms and conditions and that "… it accepted them as binding upon it …"; and "… expressly waives its rights to use its own general terms and conditions in connection with *this* order …" (emphasis supplied), does not in my view in the circumstances of this case amount to a contractually binding waiver or estoppel in relation to future orders.

iv) In any event this point only directly affects invoice 8671 (purchase order reference H-06-1157), where, as I have said, the relevant quote was apparently issued on 14 April 2006 and where, according to Ms Claxton, the contract was concluded prior to submission of TXM's formal purchase order H-06-1157 on 2 June 2006, as a result of written instructions given by TXM to Claxton to proceed with the manufacture of the relevant equipment, and accepted by the latter. I conclude that this contract was not subject to any arbitration agreement as a result of Claxton's conduct in the period prior to 19 June 2006.

v) On proper analysis, Claxton's counterproposal, by its e-mail dated 19 June 2006 amounted to a counter offer to that proposed in TXM's submitted terms and conditions for governing the parties' relationship going forward. The terms of Claxton's e-mail clearly indicated to TXM on any objective basis that Claxton was not prepared to accept a Hungarian arbitration clause or a Hungarian proper law clause, and was proposing that the terms on which the

parties should do business thereafter should expressly be governed by an exclusive English jurisdiction clause and an English proper law clause. What representatives of TXM may have subjectively thought at the time as to which terms were governing their continued relationship with Claxton, after receipt of Claxton's e-mail, is irrelevant (as indeed are Claxton's subjective views).

vi) On any basis therefore, Claxton was, as at 19 June 2006 making it clear that it did not accept the Hungarian arbitration clause and Hungarian proper law clause.

50. The critical question is what is the correct legal analysis of the parties' conduct after 19 June 2006. Is the correct view, as TXM submits, that Claxton's counter offer was no more than a proposal, which it did not follow up, and which it subsequently abandoned by its subsequent conduct in signing, albeit internally only, six purchase orders without any endorsement, and by continuing to receive TXM's purchase orders with their stated terms, and accordingly was thereby agreeing to contract on TXM's terms and conditions in relation at least to arbitration and proper law; or is the correct view, as Claxton submits, that in the absence of any response to Claxton's counter offer as set out in its e-mail, when the ball, metaphorically speaking, was fairly and squarely in TXM's court, TXM's continued trading with Claxton, without any rejection of Claxton's proposal, is be taken as acceptance of Claxton's counterproposal? A further alternative is, of course, the analysis that there was simply no contractually binding agreement in relation to the arbitration and proper law terms, because in fact the parties could not agree in relation to these matters.

51. There is a helpful discussion of the approach which a court should take in the Court of Appeal's decision in *Tekdata Interconnections Ltd v Amphenol Ltd*[8] referred to in Mr. Shackleton's submissions, but which was not the subject of any oral argument in front of me. I refer in particular to paragraphs 10 to 12 in the judgment of Longmore LJ where he said at paragraph 11:

> "… The way in which I would put it is to say that the traditional offer and acceptance analysis must be adopted unless the documents passing between the parties and their conduct show that their common intention was that some other terms were intended to prevail."

I also refer to paragraphs 23 to 25 in the judgment of Dyson LJ (as he then was) where he said as follows:

> "23. The so-called 'last shot' doctrine has been explained in *Chitty on Contracts* (30th edition) at para 2-037 as meaning that where conflicting communications are exchanged, each is a counter-offer, so that if a contract results at all (e.g. from an acceptance by conduct) it must be on the terms of the final document in the series leading to the conclusion of the contract. This doctrine has been criticised in *Anson's Law of Contract* (28th edition) at p 39 as depending on chance and

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being potentially arbitrary as well as on the ground that, unless and until the counter-offer is accepted, there is no contract even though both buyer and seller may firmly believe that a contract has been made.

24. The paradigm battle of the forms occurs where A offers to buy goods from B on its (A's) conditions and B accepts the offer but only on its own conditions. As is pointed out in *Cheshire, Fifoot & Furmston's Law of Contract* (15th ed.) at p 210, it may be possible to analyse the legal situation that results as being that there is (i) a contract on A's conditions; (ii) a contract on B's conditions; (iii) a contract on the terms that would be implied by law, but incorporating neither A's nor B's conditions; (iv) a contract incorporating some blend of both parties' conditions; or (v) no contract at all.

25. In my judgment, it is not possible to lay down a general rule that will apply in all cases where there is a battle of the forms. It always depends on an assessment of what the parties must objectively be taken to have intended. But where the facts are no more complicated than that A makes an offer on its conditions and B accepts that offer on its conditions and, without more, performance follows, it seems to me that the correct analysis is what Longmore LJ has described as the 'traditional offer and acceptance analysis', i.e. that there is a contract on B's conditions. I accept that this analysis is not without its difficulties in circumstances of the kind to which Professor Treitel refers in the passage quoted at [20] above. But in the next sentence of that passage, Professor Treitel adds: 'For this reason the cases described above are best regarded as exceptions to a general requirement of offer and acceptance'. I also accept the force of the criticisms made in *Anson*. But the rules which govern the formation of contracts have been long established and they are grounded in the concepts of offer and acceptance. So long as that continues to be the case, it seems to me that the general rule should be that the traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships."

52. In my judgment, this is the type of case where it is appropriate to apply the general rule, namely that the traditional offer and acceptance analysis is to be applied to this "battle of the forms" case . As pointed out by Dyson LJ, that has the great merit of

providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships, albeit that there is some artificiality in the concept of an implied agreement to the counteroffer, by non-responsive silence. But more importantly, in my judgment, there is nothing in the documents passing between the parties or their conduct, to show that some other terms were intended to prevail. On the contrary, as Mr. Cook submitted, commercially the ball was fairly and squarely in TXM's court to respond, one way or other, to Claxton's counterproposal. The continued submission by TXM of formal purchase orders, which, as I have held, were post contractual documents, does not amount in my judgment to any sort of statement of rejection or further counteroffer, particularly in circumstances where, as TXM knew, these were not being returned by Claxton prior to contracts being concluded. It was up to TXM to make its position clear, particularly where some of the other terms of Claxton's counterproposal were also material to the contractual terms upon which the parties were operating.

53. It follows that I do not accept Mr. Shackleton's submission that the evidence in this case in any way supports the existence of an agreement to arbitrate before a Hungarian tribunal. I accept the principle that an arbitration agreement can be separable from the main underlying contract, and that parties by their conduct can in appropriate circumstances agree to arbitrate disputes even where there is no, or no valid, underlying contract between them. But that is not the issue here. The issue is whether there was any such agreement to arbitrate, freestanding or otherwise.

54. Accordingly I conclude that, looked at objectively, the correct legal analysis is that, at least so far as the English exclusive jurisdiction clause and English proper law clause was concerned, TXM accepted Claxton's counterproposal by its subsequent performance.

55. However if I am wrong in my approach, and it is not appropriate to apply the traditional offer and acceptance analysis, and thereby conclude an agreement on TXM's behalf to accept an English exclusive jurisdiction clause and proper law clause, or indeed the other terms of Claxton's proposed modifications, then I would conclude, in the alternative, that the parties had not reached any consensus as to these matters.

56. Accordingly I hold that the disputed contracts, with the exception of the contract reflected by invoice 8671:

    i) are not subject to the terms of any agreement to arbitrate disputes before a Hungarian arbitral tribunal;

    ii) are subject to an agreement that the English courts should have exclusive jurisdiction and accordingly Article 23.1 of the Regulation is engaged[9].

57. So far as the contract reflected by invoice 8671 is concerned, I conclude that the English court has jurisdiction, because:

    i) it was not subject to the terms of any arbitration agreement;

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[9] I point out that there was no argument put forward by Mr. Shackleton to the effect that there was no sufficient agreement in writing to satisfy the provisions of Article 23.

ii) notwithstanding Article 2 of the Regulation, this Court has jurisdiction under Article 5.1 (b), because the evidence clearly showed that Claxton's delivery obligation was ex-Claxton's works in Great Yarmouth, albeit that transportation arrangements could have been made (or were made), in a separate contract, to transport the equipment to Hungary.

Issue ii): If there was no arbitration agreement between the parties, whether Article 2 of the Regulation requires TXM to be sued before the courts of Hungary.

58. If I am right in my conclusion that the parties were operating pursuant to an agreement that the English court should have exclusive jurisdiction, Article 2 is not engaged by virtue of Article 23.1. If I am wrong in that conclusion, and there was simply no arbitration agreement between the parties, then I take the view, on the evidence before me, that Claxton' s delivery obligation was to deliver ex its works in Great Yarmouth; see paragraph 8 of Ms Claxton's witness statement and the terms and conditions set out at paragraphs 4 and 5 of Claxton's quotations. In those circumstances, the English court has jurisdiction because Article 5.1 (b) is engaged.

Issue iii): In any event, even if Article 2 does not so require, whether a stay should be granted on the grounds that the Hungarian courts are the more appropriate forum.

59. I do not consider that the Hungarian courts are a more appropriate forum for resolution of the contractual disputes in this case. The contractual documentation is all in English; the relevant witnesses all speak English; the manufacture of the equipment took place in England and delivery was to be ex-Claxton's works in England. Even if my conclusion as to exclusive jurisdiction of the English courts were to be incorrect, I see no reason for this matter to be litigated in Hungary.

60. Accordingly I dismiss TXM's application to stay these proceedings.

Inadequate time estimates given by counsel

61. The estimate given for the hearing of this application was one day, with two hours for judicial pre-reading. That was a wholly inadequate estimate, since in practice the court was required to conduct an analysis of the party's contractual relationship over a period of some years. Mr. Shackleton's skeleton argument (itself running to 39 pages) referred to numerous authorities, and a bundle of some 32 authorities was produced for the court. Given time constraints, during a busy week of vacation sittings, I was only in fact taken to 5 authorities during the course of the actual hearing. During the course of the hearing, Mr. Cook indicated that Claxton might wish to file further evidence and submissions to the court, and I gave him the opportunity of doing so, although it was unclear, at that time, to the court and to Mr. Shackleton whether Mr. Cook would avail himself of that opportunity. On 2 September 2010, I was informed that Claxton had confirmed that it had no intention of doing so.

62. I propose to take these matters into account when considering submissions in relation to costs of this application.

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