INTERNATIONAL ARBITRATION
English Court rejects ICC Majority Tribunal's Jurisdictional Determinations in the context of New York Convention Proceedings
Ricky Diwan QC

HIGH COURT JUDGMENT IN J (LEBANON) v K (KUWAIT) [2019] EWHC 899
Judgment of 29 March 2019

Summary. In this case the award creditor commenced proceedings in this jurisdiction under the New York Convention (section 100 et seq. of the Arbitration Act 1996) to enforce an ICC Award rendered by a Majority Tribunal (***the Award***), seated in Paris, with respect to a Franchise Development Agreement (***the FDA***) in respect of the grant of marketing, preparation and sale of Middle-Eastern food products. Ricky Diwan QC, representing the award debtor, successfully established that the Award was jurisdictionally flawed and that the Majority Tribunal had incorrectly applied principles of separability.

The Award. By the Award, the Majority Tribunal (Mr Bruno Leurent and Dr Mohamed Abdel Wahab) concluded on the basis of a purported application of separability principles: (1) French law governed the validity of the arbitration agreement as the seat of the arbitration and that as a matter of French law principles of extension the arbitration agreement had been validly transferred to the award debtor (the parent of the original party by conduct; (2) English law governed the substantive rights and obligations (as expressly provided) but that the contract had nevertheless been varied by a form of novation to add the award debtor as an additional party to the FDA's substantive rights and obligations on the basis that the strict writing requirements contained in the FDA for any variation could be disregarded by the application of the obligation of good faith contained in the FDA. On the basis of those jurisdictional determinations, the Majority Tribunal awarded substantial damages to the award creditor for alleged breach of the FDA; (3) K (Kuwait) did not have a capacity defence under Kuwait law (the Civil Code requiring arbitration agreements to be authorised by special power of attorney) because French law did not apply conflict of laws and would not apply Kuwait law.

Klaus Reichart SC dissented in a strongly worded Dissent concluding that it was impossible that the substantive rights and obligations were transferred to the award debtor given the requirements under the FDA for any such transfer to be expressly in executed written documents and that good faith was not some form of elastic concept that could be used to alter the plain effect of other terms of the FDA.

A conceptual problem of separability. The Majority Tribunal's approach demonstrated a flawed approach to separability. As is well established, when the issue in question is contract formation i.e. consent to contract in the first place, questions of separability will rarely if ever arise. The parties either consent to the contract or they do not. Separability does save the arbitration agreement from a lack of consent and it would be rare, if ever, that parties specifically consented to an arbitration agreement absent the substantive contract. Indeed, such a scenario is not what commercially minded people would expect, giving rise to the possibility of a shipwrecked arbitration agreement i.e. an arbitration agreement detached from the existence of substantive rights and obligations. That same issue of consent arises in the context of a transfer of the arbitration agreement or a variation of the contract so that a new party becomes a party to the contract. See Born, International Commercial Arbitration (2nd Edition), Vol. I at p 1479:

> "…the purpose of virtually all arbitration agreements is to provide means of dispute resolution for a particular substantive contractual (or other relationship). Thus, just as execution of the underlying contract will virtually always automatically result in the conclusion of the associated agreement to arbitrate, so the assignment or transfer of the underlying contract (or its rights and obligations) will presumptively result in the automatic transfer of the arbitration agreement; the separability of the arbitration agreement does not alter that conclusion.… If the assignment of the underlying contract and the arbitration clause are in violation of a contractual restriction, then the putative assignee arguably has no rights under the arbitration clause" (Emphasis supplied)

The New York Convention proceedings. The flaws in the Majority Tribunal's approach were successfully exposed in New York Convention proceedings. The proceedings involved the ***unusual*** procedural posture of the award creditor seeking to adjourn its own enforcement proceedings when faced with a jurisdictional defence under Article V(1)(a) that English law applied and the award debtor never became a party to the FDA under English law. The award creditor sought to adjourn the English enforcement proceedings in favour of the French Court where the award debtor had commenced proceedings to set aside the Award.

The award debtor resisted the adjournment application, seeking the determination of certain preliminary issues under Article V(1)(a) by the English Court on the basis that if the award debtor was right that English law applied to the jurisdictional questions arising it was more appropriate for the English Court to address those English law questions and that there should be no question of reverse engineering an issue estoppel on English law questions through a French Court decision. The Court acceded to the application for preliminary issues and found in favour of the award debtor on all of the preliminary issues, which raised issues of interpretation under the New York Convention.

In particular, the Court concluded that:

- On the proper interpretation of the arbitration agreement, it contained an express English law governing clause.

- Applying Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969), Article V(1)(a) of the New York Convention, by its reference to the word "indication" and having regard to the travaux préparatoires, encapsulated both an express and implied choice of law governing the arbitration agreement.

- If there was no express English governing law clause, then there was an implied English governing law clause, applying Sul America v Enesa Engenharia [2012] 1 Lloyd's Rep 671, being the conflict of law rule applied by the English Court to determine whether or not there was an implied choice.

- There was no case advanced that the arbitration agreement was consented to independently of the substantive obligations and therefore there was only one question being whether or not there had been a transfer or variation of the entire relationship.

- As a matter of English law, neither good faith nor the Unidroit principles could simply abrogate the express requirement in the FDA for any variation to be in executed writing and that writing requirement had not been satisfied on the evidence before the Court

(though the Court left open the possibility that it described as "very slim" that there may be other evidence, not currently before the Court, that the award creditor could point to).

- Under Article V(1)(a) of the New York Convention, capacity was governed by the personal law of party in issue, which was determined by the forum's conflicts of laws.

- There was no basis for granting security to the award creditor under Article VI of the New York Convention given its merits prospects were very slim and it had put forward no evidence of any risk of prejudice from the adjournment that it was seeking.

- The Court, having reached, the above conclusions on the preliminary issues, adjourned the proceedings, leaving it to the French Court to avoid any alleged risk of inconsistent judgments:

> "It is common ground that there is no risk of issue estoppel here because the French Court is not bound by this judgment, but I would hope that the firm opinion that I have expressed and am expressing as to the effect and impact of English law will not go unnoticed in the French courts, given that on any basis English law is central to decision."

Further comment. Comity plays an important role in the English Court's approach to the New York Convention, though it is not necessarily shared by other jurisdictions. However, as this case demonstrates, comity does not mean that English law questions should be determined by a foreign court. The same rationale for generally preferring a foreign court to determine foreign law questions applies in the context of English law questions. The Court left open a further question raised by the award debtor, being that where an award creditor applies for an adjournment of its own enforcement proceedings, on the proper interpretation of Article VI of the New York Convention, there is no power to grant security because the award creditor is then not seeking enforcement as required under Article VI.