



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 328 OF 2022(IKJ)

**IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT ACT (1997
REVISION)**

AND IN THE MATTER OF SECTIONS 52, 54 AND 72 OF THE ARBITRATION ACT, 2012

**AND IN THE MATTER OF AN ARBITRATION BETWEEN MR NASSER SULAIMAN H M
AL-HAIDAR (Claimant) AND MR JETTY VENKATA UMA MAHESHWARA RAO (First
Respondent) AND PETRONASH GLOBAL LTD (Second Respondent)**

BETWEEN:

MR NASSER SULAIMAN H M AL-HAIDAR

Plaintiff

v

MR JETTY VENKATA UMA MAHESHWARA RAO

Defendant

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr Liam Faulkner of Campbells LLP, for the Plaintiff

Mr Nicholas Dunne of Walkers (Cayman) LLP, for the Defendant

Heard: 20 February 2024

Draft Judgment Circulated: 4 April 2024

Judgment Delivered: 15 April 2024

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Application to set aside ex parte order granting leave to enforce foreign interim arbitration award-whether arbitration proceeding contrary to agreed procedure-failure to challenge jurisdiction of tribunal to grant interim relief-issue estoppel-competence-competence principle-Foreign Arbitration Awards Enforcement Act (1997 Revision), section 7-Arbitration Act 2012, section 27(1)-(2)

JUDGMENT

Introductory

1. By an Ex Parte Originating Summons dated 23 December 2022, the Plaintiff applied for leave “to enforce the Provisional Award dated 16 November 2022 awarded in DIAC Arbitration No. 60 of 2022 by a Tribunal constituted by Michael Black KC, Sapna Jhangiani KC and Professor Sir Bernard Rix (Presiding Arbitrator), read with the Tribunal’s responses dated 16 November 2022 to the Defendant’s application to discharge, suspend or modify the Provisional Award, and to other requests to modify and/or clarify the Provisional Award, (the “Provisional Award”), in the same manner as a judgment or order of the Court to the same effect”.
2. On 13 January 2023, I granted the relief sought on the Ex Parte Originating Summons (the “Ex Parte Order”) for the reasons given on 3 February 2023. By Summons dated 13 July 2023, the Defendant applied to set aside the 13 January 2023 Order. Directions in relation to the Defendant’s Summons were granted by a Consent Order dated 20 October 2023. Paragraph 1 of the Order provided as follows:

“1. The parties each have leave to instruct one expert witness (together, the “Experts”) to address issues arising from the Set Aside Summons, including but not limited to the following issues which the Defendant considers to be relevant:

- (a) Did the Arbitration Agreement (which is English law governed) incorporate the DIFC – LCIA Rules such that they formed part of the agreement between the parties?*
- (b) Did the referral of the dispute under the Settlement Agreement to the Dubai International Arbitration Centre by Mr Nasser constitute a breach of the Arbitration Agreement?*

(c) *What effect (if any) did Decree No 34 of 2021 Concerning the Dubai International Arbitration Centre have on the Arbitration Agreement?*

(d) *What are the procedural differences between the Dubai International Financial Centre – London Court of International Arbitration Rules and the Dubai International Arbitration Centre Rules?”*

3. When the application to set aside the Ex Parte Order came to be heard, the Defendant did not challenge the finding, explained in my Reasons for Decision of 3 February 2023, that this Court had jurisdiction to enforce a provisional and not simply a final award. Instead, the application was based on the grounds that (1) the arbitration procedure was not in accordance with the parties’ agreement and (2) the Ex Parte Order was liable to be set aside on the grounds of material non-disclosure about that issue.

4. The complaint was summarised in the Defendant’s Skeleton Argument as follows:

“2. The parties contracted that the rules of the Dubai International Financial Centre-London Court of International Arbitration (“DIFC-LCIA”) Arbitration Centre would apply, and that this institution would be the administering authority, for any arbitration that would arise under the Settlement Agreement (as defined below).

3. However, the arbitration was commenced by the Plaintiff (against the wishes of the Defendant) under the auspices of the Dubai International Arbitration Centre (“DIAC”) pursuant to the DIAC Arbitration Rules, without the consent of the Respondent.

4. As such, the arbitral process was not that which the parties had contracted for in the arbitration agreement. That in itself is fatal to enforcement of the Provisional Award, because it was made without jurisdiction.”

5. Whether the Tribunal had jurisdiction over the dispute or not had not yet been determined by the Tribunal, as would normally have occurred when the award being enforced was a final one. In this instance, the jurisdictional challenge was heard on 11-12 October 2023 (just over a year after the Provisional Award was made), and the Tribunal was, on 20 February 2024, expected to give its ruling by the end of April 2024.

6. The Plaintiff had a potentially straightforward answer to the first limb of the present application. In the Plaintiff's Skeleton Argument it was submitted:

“In his Answer to the Plaintiff's Request for Arbitration (“RFA”) [HB/3/17-28], the Defendant did not raise any jurisdictional objections to the Tribunal. Materially, even when the Plaintiff had filed his application for interim relief (the “Interim Relief Application”), which led to the issuance of the Provisional Award, the Defendant did not specifically raise any jurisdictional objections; not in his Answer to the Interim Relief Application filed on 29 August 2022, his skeleton submissions in respect of the Interim Relief Application filed on 29 August 2022, or at the hearing of the Interim Relief Application on 3 October 2022. The Defendant was instead content to meet the Interim Relief Application on its merits, which was decided in favour of the Plaintiff, and which led to the issuance of the Provisional Award.”

7. The present application accordingly turns on the following key questions:

- (a) where a provisional arbitral award is made on an *inter partes* basis without the respondent challenging the Tribunal's jurisdiction, should enforcement of that award be refused on the basis of a subsequent challenge to the tribunal's jurisdiction? The Plaintiff described this question as the “Jurisdiction Point”; and
- (b) should the Ex Parte Order be set aside on the alternative material non-disclosure ground because the Plaintiff did not identify the difference between the arbitral tribunal contracted for and the Tribunal which made the Provisional Award?

8. The Plaintiff additionally invited the Court, if the Jurisdiction Point was decided in the Defendant's favour, to proceed to consider the merits of the procedural validity point (the “Arbitration Procedure Point”). At the end of the hearing, my provisional view was that I should avoid if possible considering the Arbitration Procedure Point due to the fact that the Tribunal was (a) seised of the issue and (b) likely to shortly render its decision.

Findings: the Jurisdiction Point

The factual matrix

9. The Plaintiff's Request for Arbitration was dated 2 April 2022 and addressed to the Dubai International Arbitration Centre ("DIAC").
10. However, in the Defendant's Statement of Defence dated 8 September 2022, he challenged the jurisdiction of the Tribunal to conduct the Arbitration under the DIAC Rules. The Arbitration Agreement provided for arbitration under DIFC-LCIA Rules. However, as a result of Decree No.34 of 2021 Concerning the Dubai International Arbitration Centre, DIFC-LCIA arbitrations commenced after were administered under the DIAC Rules.
11. The Defendant's 'Answer to the Request for Arbitration' dated 18 May 2022 did not challenge the jurisdiction of the Tribunal at all. It merely indicated that the 2nd Respondent to the Arbitration would challenge the jurisdiction of the Tribunal over it, on the grounds that it (the 2nd Respondent) was not a party to the Arbitration Agreement.
12. On or about 3 August 2022, the Plaintiff applied for interim relief in the form of a Freezing Order to the Tribunal, which had been constituted with the cooperation of the Defendant who had not at that juncture foreshadowed that he would raise any jurisdictional challenge. On 29 August 2022, the Defendant filed his Answer to the interim relief application and the application proceeded on a contested *inter partes* basis.
13. The Defendant in his Statement of Defence dated 8 September 2022, objected to the jurisdiction of the Tribunal on the grounds that an arbitration under DIFC Rules had not been agreed.
14. The Provisional Award dated 16 November 2022, which ran to 37 pages (excluding attachments), granted a Freezing Order over specified assets of the Defendant in his capacity as 1st Respondent. It is clear that the Defendant did not challenge the jurisdiction of the Tribunal to make the Provisional Award, because the Tribunal did explicitly consider the jurisdictional challenge of the 2nd Respondent, declining to grant interim relief against it on the grounds that, *inter alia*, "it objects to the Tribunal's jurisdiction" and "it is not itself the object of a firm complaint against it of any wrongdoing" (paragraph 95). In paragraph 22 of the Provisional Award, reference is made to other issues being dealt with in Phases 1 and 2 of the Arbitration and footnote 2 reads as follows:

“It may be a matter for consideration whether the First Respondent’s jurisdictional objection to an arbitration conducted under the DIAC Rules, first made after the directions for Phase 1 and phase 2 had been given, should be brought within the Phase 1 hearing.”

15. On 13 July 2023, the Defendant’s arbitration attorneys, Al Tamimi & Co, wrote to the Tribunal complaining of an extremely aggressive campaign launched by the Plaintiff to enforce the Provisional Award in multiple jurisdictions after the breakdown of settlement discussions between the parties, which had commenced in November of the previous year. However, the Tribunal was reassured that:

“we write on behalf of the 1st Respondent to make clear his willingness to comply with the terms of the Provisional Award...the First Respondent is seeking to set aside without notice orders made in these jurisdictions...The Tribunal will be fully aware of the debate as to the extent to which interim measures made by an arbitral tribunal ...are capable of recognition and enforcement...the First Respondent has not sought to challenge the Provisional Award itself...”

16. This further confirms that the Defendant did not challenge the jurisdiction of the Tribunal to make the Provisional Award.
17. In HC/OA 882/2022, the Singapore High Court (Chua Lee Ming J) in an oral judgment delivered on 6 February 2024, held that:

- (a) the Arbitration Agreement had been frustrated by the cessation of the agreed DIAC/LCIA procedure;
- (b) the Defendant had clearly submitted to the Tribunal’s jurisdiction in relation to the interim procedures hearing, so the application to set aside the Singaporean Court’s order granting leave to enforce the Provisional Award would be dismissed with costs to the Plaintiff; and
- (c) the Tribunal should be left to decide the jurisdictional dispute before it in the main arbitration proceedings. If the Defendant’s jurisdictional challenge succeeded, the Freezing Order would be dismissed and the Plaintiff would be liable for any costs occasioned under his undertaking.

Legal findings

18. The Defendant's application essentially rested on the proposition that the Court should decline to enforce the Provisional Award based on the fact that his substantive challenge to the Tribunal's jurisdiction, the Arbitration Procedure Point, applied with equal force to the Provisional Award. It was implicitly contended that it mattered not whether the Tribunal's jurisdiction to make the Provisional Award had previously been challenged.
19. Mr Dunne was unable to articulate any convincing reason as to why the law should operate in such a curious manner in all the circumstances of the present case. By filing his Defence, the Defendant had clearly not submitted to the jurisdiction of the Tribunal on the merits. Indeed, it was properly conceded in the Skeleton Argument for the Defendant that the Court could in its discretion enforce an award where an established breach of procedure had been waived:

“27. The Court's power to refuse to enforce an arbitration award under section 7(2) of the FAAEA is a matter of discretion but such discretion is not at large. It must be exercised upon a principled basis. Where an application is made on this basis, the Court may assess:

(a) the degree of prejudice (if any) caused to the Defendant by the arbitration not being conducted in accordance with the Arbitration Agreement; and

(b) if the Defendant waived breach of the Arbitration Agreement;

when considering how to exercise its discretion in this regard.”

20. Section 7(2) of the Foreign Arbitral Awards Enforcement Act (1997 Revision) (“FAAEA”) provides that enforcement of a convention Award may be refused if the respondent proves:

“(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place;...”

21. Obviously, there must be a sufficient nexus between the award which the Court is being asked not to enforce and the relevant complaint. To take an extreme example, imagine parties A and B are involved in two separate arbitration proceedings under the same agreement which result in final awards in favour of A against B. In the first proceeding, no complaint about the jurisdiction of the

tribunal is raised and the validity of the award is not challenged in the curial court of the place of arbitration. In the second case it is contended that the procedure was not what the parties agreed. The respondent could not credibly invite this Court to refuse to enforce the first award because of a jurisdictional challenge that was only raised in the second proceedings. Such an application would properly be refused, although it might well be in abstract terms a potentially valid one, because the overarching policy of the Act is that awards which are valid under the law of the place where they are made should be enforced. The legislative policy of swift enforcement on narrowly circumscribed grounds could all too easily be undermined if respondents had the unfettered right to raise new points before foreign enforcement courts which were never in issue before the tribunal but which could and should have been raised.

22. The common law doctrine of issue estoppel (*Henderson-v-Henderson* (1843) 3 Hare 100) is designed to prevent this sort of abuse of process, and has been applied by this Court before in relation to issues which could and should have been raised in arbitration proceedings. *In Re Swiss Oil Corporation, Imbar Maritima A.S.A et al* [1988-89 CILR 277], which Mr Faulkner placed before the Court, an objection to enforcement of a Convention Award based on a legal argument which could and should have been raised before the arbitration tribunal was firmly rejected on *Henderson-v-Henderson* grounds. Admittedly in that case the relevant points were not jurisdictional in character. But that does not, in my judgment, impact on the application of the same principles to the circumstances of the present case. Collett CJ held (at page 285):

“Both parties were represented before the arbitrators by experienced French advocates. I readily appreciate that the benefit of the award of \$6m plus interest was not assigned by SOC to the plaintiffs until well after that award was rendered: nevertheless, it was common knowledge between the parties before the arbitral hearing that the claims which have resulted in this award had been assigned by the shipowners to SOC by a fiduciary assignment.

It seems to me in light of this that I have no option but to hold the doctrine of res judicata in its wider sense to be applicable to the circumstances here. The result is that, having failed to raise the issue of a compensation before the Arbitral Tribunal, the Republic is not entitled to raise that issue now before this court.

The conclusions and rulings at which I have arrived on those two submissions have the effect of disposing of the issues in this originating summons and in the result the plaintiffs are entitled to the relief they seek. It becomes unnecessary for me to enter into

a consideration of the interesting arguments advanced to me by counsel as to the proper characterisation of the issue of compensation for the purpose of deciding whether it is procedural or substantive in character. Any remarks of mine as to that issue would in the circumstances be purely obiter and I refrain from entering upon it.” [Emphasis added]

23. In *Re Swiss Oil Corporation*, Collett CJ declined to consider the merits of the enforcement ground relied upon because the respondent was estopped from raising a point it could have raised before the arbitral tribunal but elected not to pursue before the relevant award was made. Chua Lee Ming J, dealing with the same challenge to the same Provisional Award being enforced in Singapore had little difficulty in reaching the same conclusion on 6 February 2024, albeit that he also recorded findings in favour of the Defendant on the merits of the Arbitration Procedure Dispute.
24. The principle of “competence-competence” is a part of modern international arbitration law, embodied in Article 16 of the UNCITRAL Model Law and incorporated into the domestic arbitration laws of many countries: *Betamex Ltd-v-State Trading Corporation* [2022] UKPC (at paragraph 18.4). This principle was mentioned fleetingly in a local case placed before the Court, *Gol Linhas Aereas SA-v- MatlinPatterson Global Opportunities Partners (Cayman) II LP and others* [2022] UKPC 21 (at paragraph 59). *Gol Linhas* is most significant in broader terms for confirming (at paragraph 21) that the grounds for refusing enforcement should be narrowly construed. The point presently being considered is a narrower one. I find that it is appropriate to take into account the fact that the competence-competence principle forms part of Cayman Islands law when considering whether to decide the Arbitration Procedure Dispute. The Arbitration Act 2012 provides in salient part as follows:

“27. (1) The arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement.

(2) For the purpose of subsection (1), an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract...”

Merits of application

25. Applying the above legal principles to the factual matrix of the present case, the Defendant is clearly estopped from challenging the jurisdiction of the Tribunal to make the Provisional Award in the present enforcement proceedings. I decline to decide the Arbitration Procedure Dispute

which I consider should be left to the Tribunal, subject to the supervision of the curial court, to decide.

Findings: the material non-disclosure

26. I summarily dismiss the material non-disclosure complaint. The fact that the Defendant proposed to challenge the jurisdiction of the Tribunal to deal with the merits of the dispute was not material to the Plaintiff's *ex parte* leave application in circumstances where there had been no challenge to the Tribunal's jurisdiction to make the Provisional Award itself. The jurisdictional point was irrelevant, not simply immaterial, to the *ex parte* application.

Conclusion

27. The Defendant's Summons seeking to set aside the Ex Parte Order granting the Plaintiff leave to enforce the Provisional Award is dismissed. Unless either party applies within 21 days of delivery of this Judgment to be heard as to costs, the Defendant shall pay the Plaintiff's costs of the present application to be taxed if not agreed on the standard basis. As Justice Chua Lee Ming of the Singaporean High Court has sagely observed in a parallel context, should the Provisional Award be set aside by the Tribunal and the competent court, the Defendant is protected by the undertaking apparently given by the Plaintiff for the Freezing Order it obtained.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT