



LEGAL BRIEFING

To arbitrate or litigate?

Nigel Peter Albon (t/a N A Carriage Co) v (1) Naza Trading SDN BHD (a company incorporated in Malaysia) (2) Tan Sri Dato Nasimuddin Amin

Ch D, Lightman J [2007] EWHC 665

The Facts

The claimant claimed relief against the first defendant in respect of a contract that had been entered into between the claimant and the first defendant (the “UK Agreement”).

The first defendant alleged that he had entered into a joint venture agreement with the claimant, which was governed by Malaysian law and provided for arbitration in Malaysia of all claims between the parties (the “JVA”). The first defendant claimed that the terms of the JVA encompassed the resolution of disputes arising under the UK Agreement. Accordingly, the first defendant commenced arbitration proceedings in Malaysia.

The claimant contended that the JVA was a forgery, refused to participate in the arbitration proceedings in Malaysia and commenced legal proceedings in the UK.

The defendants applied for a stay of court proceedings.

The Issues

The issues were as follows:

1. Whether the genuineness or otherwise of the JVA should be determined by the arbitrators in the arbitration proceedings; or
2. Whether the court should determine the issue of the genuineness or otherwise of the JVA.

The Decision

The court held that, on the evidence that had been provided, it could not in any event make a determination on the genuineness or otherwise of the JVA. Accordingly, the court had to consider whether:

1. It should give directions for resolution of that issue by the court;
2. It should grant the stay under the Arbitration Act 1996 (the “AA 96”) so as to enable the issue to be resolved in arbitration; or
3. If no such power to grant a stay existed under the AA 96, whether the court should stay proceedings pursuant to the court’s inherent jurisdiction.

The court held that for a stay of proceedings to be granted under section 9 (1) of the AA 96 it was necessary for the court to determine whether an arbitration agreement had been concluded. Once the court was satisfied that such arbitration agreement had been concluded then it was necessary for the court to determine that the issue in the proceedings was an issue which was covered

by the arbitration agreement. Unless and until the court was satisfied that both these conditions were met, it could not grant a stay under section 9 of the AA 96.

In this particular case, the issue as to whether the arbitration agreement was concluded could not be determined by the court and the court therefore had no jurisdiction under section 9 of the AA 96 to grant a stay.

The court further held that the absence of jurisdiction under section 9 of the AA 96 did not preclude the existence and exercise by the court of its inherent jurisdiction to order a stay. However, the court stated that this power was only to be exercised in exceptional cases and with particular care in the case of issues relating to the existence of an arbitration agreement.

In making its decision whether to exercise its inherent jurisdiction the court stated that it was entitled to take into account whether the commencement of court proceedings preceded the commencement of arbitration proceedings and whether the decision of the arbitrators on the issue was subject to review by the courts.

In light of all of the above, the court held that this was not one of those exceptional cases where exercise of the inherent jurisdiction was called for. In particular, it would not be just in all the circumstances to require the claimant to submit himself to arbitration proceedings in Malaysia unless and until the validity of the JVA has been decided against him. Accordingly, the stay was declined.

Comment

The decision does not seem to sit comfortably with the doctrine of “Kompetenz-Kompetenz” which provides that a tribunal can rule on issues relating to its own jurisdiction and, in particular, of the issue whether or not an arbitration agreement has been concluded. However, the court seemed to justify the departure by stating that the rule of law in general requires that a party should not be barred from access to the court for the resolution of disputes unless the grounds for such bar are established. In this case a bar on the ground of the alleged conclusion of the arbitration agreement was not established unless and until the court had ruled on the issue of whether it had been concluded.

The court also took account of the fact that the court proceedings had commenced before the arbitration proceedings and that the courts in Malaysia had no statutory jurisdiction equivalent to that afforded in domestic arbitration to review or interfere with any decision by arbitrators in Malaysia as to the conclusion of the arbitration agreement.

Iftikhar Khan
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