Campbell Johnston Clark

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No jurisdiction where no contract exists

*The Commercial Court recently held, on an appeal of an arbitration award under s. 67 of the Arbitration Act 1996 that the Tribunal was correct in finding that it did not have jurisdiction to hear a dispute, on the basis that the claimant was not a party to the relevant arbitration agreement. **Lucinda Roberts**, Senior Associate, explains the importance of commencing claims in the correct forum*

The facts

Gold Star Line Ltd ("**GSL**"), together with three other ship-owning companies (of which Emirates Shipping Line DMCEST ("**ESL**") was not one), was part of a consortium (the "**Consortium**") which operated a container liner service in India and the Far East, pursuant to the terms of a Memorandum of Understanding dated 2018 (the "**2018 MOU**"). Each member contributed one or more vessels to the service, entitling them to an agreed allocation of space on other vessels. These slots could be released to other members or to third parties.

The Consortium originally operated with six vessels, three of which were provided by GSL. GSL agreed to provide a fourth vessel, but subsequently decided to withdraw it. Consequently, GSL agreed to purchase slots on all other vessels, and look for potential new joiners to the Consortium. ESL was one of the companies approached.

There followed a period of negotiation between GSL and ESL, which culminated in the execution of a new Memorandum of Understanding dated 2020 (the "**2020 MOU**") between ESL and the other Consortium members. The terms of the 2020 MOU were materially similar to those of the 2018 MOU. In the meantime, in late 2019, prior to i) the execution of the 2020 MOU, and ii) ESL providing a vessel to the Consortium (although it had already agreed in October 2019 that it would do so in January 2020), ESL had loaded cargo pursuant to its slot purchase from GSL (under the 2018 MOU), and had paid GSL for the slot. Unfortunately, the vessel was hit by a typhoon, damaging some of the cargo.

A dispute ensued between GSL and ESL as to who had liability to respond to the receivers' claim. ESL and the shippers were ultimately found by the Chinese courts to be jointly liable to receivers. The shippers paid receivers and sought an indemnity from ESL. ESL settled with shippers and commenced LMAA arbitration against GSL, seeking to rely on the arbitration agreement contained in the 2018 MOA to found jurisdiction for an indemnity claim against GSL.

The Arbitration

GSL refuted that the Tribunal had jurisdiction, on the basis that ESL was not a party to the 2018 MOU or the arbitration clause. The Tribunal dealt with the contested jurisdiction as a preliminary issue on the basis of documents available at that time.

The Tribunal found that it did not have jurisdiction to resolve the underlying dispute between the parties because ESL had commenced arbitration proceedings against GSL pursuant to the arbitration clause of the 2018 MOU but, the Tribunal found, ESL had not established that it was a party to the 2018 MOU. As such, ESL was not permitted to rely on the arbitration agreement contained within the 2018 MOU.

ESL appealed to the Commercial Court under s.67 of the AA 1996. This provision effectively permits a full re-hearing of all issues, rather than merely a review of the Tribunal's Award, such that it is afforded no presumption of validity. The practical effect of this was that ESL was able to advance new arguments and adduce evidence (including oral witness evidence) not previously before the Tribunal.

The Appeal

ESL contended that, either expressly or impliedly, it was a party to the 2018 MOU. Alternatively, it was ESL's case that GSL was estopped from asserting that ESL was not a party to the 2018 MOU, on the basis of a promissory estoppel or an estoppel by convention or an equitable duty to speak.

Conversely, GSL asserted that there was no agreement that ESL would be a party to the 2018 MOU. Rather, ESL had simply purchased the service slots as a third party, and there was no intention that the terms of the 2018 MOU (including the arbitration clause) would apply to that slot purchase agreement. GSL accepted that it had been agreed that ESL would join the Consortium at a future date, which had not occurred by the time of the cargo damage. GSL rejected ESL's estoppel argument on the basis that i) an estoppel was being used to create a cause of action, which was impermissible, and ii) in any event none of the requirements of the forms of estoppel relied upon were met.

Judgement

GSL successfully defended the appeal. Mrs Justice Dias held that ESL was not a party to the 2018 MOU at the material time. Further, that there were two separate agreements: one for the purchase of slots, and the other for ESL to join the Consortium, and each was on its own terms.

The slot purchase agreement between GSL and ESL was for the purchase of slots by ESL as a third party, and did not contain, neither expressly nor impliedly, the terms of the 2018 MOU and/or the arbitration clause contained therein. While an agreement in principle to ESL joining the Consortium was a precondition to ESL purchasing the slots from GSL, this took place later and was formalised in the 2020 MOU.

As to estoppel, Mrs Justice Dias distinguished this case from The Eleni P, in which it had been held that a claimant could not rely on estoppel to found the jurisdiction of a tribunal. She found that ESL was not seeking to found jurisdiction (i.e., a cause of action) by way of estoppel, but rather it was using estoppel to establish a contractual framework which incorporated an arbitration clause. However, this was irrelevant, as she agreed that none of the estoppels ESL sought to rely on could be established.

Accordingly, the Tribunal had no jurisdiction and ESL's s.67 application failed.

Comment

While the issue before the Court was "deceptively simple" (whether ESL was a party to the 2018 MOU), it ultimately required detailed examination of the facts and the underlying contract law principles. The case provides useful guidance on the applicable considerations when there is ambiguity as to what terms, if any, apply to the relationship and dealings between two or more commercial parties.

The case also serves as a reminder to parties and their legal advisors of the importance of commencing proceedings in the correct forum, not only to avoid wasted time and costs. This also guards against the risk that the time spent in pursuing a claim in the wrong jurisdiction could result in the claim becoming time-barred in the correct forum.

S.67 applications are currently part of the Law Commission's consultation into potential reforms of the AA 1996. There is a proposal that s.67 applications should be by way of an appeal rather than a re-hearing, such that i) evidence which was not before the Tribunal would not be permitted in the appeal, and ii) the Court's input would go no further than a review of the Tribunal's Award. It will, therefore, be interesting to see whether the s.67 appeal procedure could be significantly modified in the near future.

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