Court confirms tribunal's jurisdiction while related foreign proceedings ongoing

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Introduction

Under Section 32 of the Arbitration Act 1996, parties to an arbitration may request the court to make a preliminary ruling on whether the arbitral tribunal has substantive jurisdiction to hear the dispute before it if all parties agree to the application being made or the arbitral tribunal grants permission. The court will consider the application only if:

- the determination of jurisdiction would substantially save costs;
- the application is made without delay; and
- there is a good reason for the court (rather than the arbitral tribunal) to determine the question and such grounds are set out in the application (Sections 32(2)(b) and 32(3)).

In the recent case of *Toyota Tsusho Sugar Trading Ltd v Prolat SRL*(1) the court held that an arbitral tribunal did have jurisdiction, even though the underlying arbitration agreement was unsigned by one of the parties to the arbitration.

In reaching this decision, the court briefly considered the EU Brussels I Regulation (44/2001), which deals with the jurisdiction of EU member state courts, and also commented on the implications of the recast Brussels Regulation (1215/2012), which came into force on January 10 2015. Article 1(2)(d) of the Brussels I Regulation states that it does not apply to arbitration. The scope of this arbitration exception has been the subject of much case law. Among the amendments in the recast Brussels Regulation is an addition recital in the preamble which seeks to clarify this issue. The new Recital 12 states (among other things) that nothing in the regulation should prevent a member state court from determining whether an arbitration agreement exists or whether another member state has ruled on this issue already. This in effect reverses the decision of the Court of Appeal in *National Navigation Co v Endesa Generacion SA* ('*The Wadi Sudr*').(2)

Facts

Toyota and Prolat entered into a sugar sale and purchase agreement governed by English law and providing for arbitration. A dispute arose in relation to non-payment of the purchase price by Prolat for sugar delivered by Toyota. Prolat argued that it had not signed the sale and purchase agreement and denied that Mr Dibranco, who was directly involved in negotiations and conclusion of the contract, had acted on its behalf when signing the agreements. Toyota commenced arbitration proceedings in London for non-payment, while Prolat initiated court proceedings in Naples against Toyota on different grounds (which were nonetheless related to the dispute). Toyota challenged the jurisdiction of the Naples court, which has not yet ruled on this point. After receiving permission from the arbitral tribunal, Toyota applied to the English court for a declaration as to the existence of the arbitration agreement and the jurisdiction of the arbitral tribunal. Prolat chose not to participate in the proceedings.

Issues

Were the requirements under Section 32 of Arbitration Act met?
The court found that the requirements under Section 32(2)(b) of the Arbitration Act were met: there had been no delay in the application and there were significant costs savings in making it. In particular, the arbitral tribunal, in giving permission, acknowledged that there were "factual issues to be resolved in determining the jurisdiction dispute and an appeal might well follow a Tribunal decision on the matter".(3) As such, it was cheaper to ask the court to determine the issue in the first place. The court also referred to the Italian proceedings as presenting a good additional reason for the court taking jurisdiction over this issue, but did not elaborate on why this was the case.

Was the arbitration agreement binding on Prolat?
On the basis of the evidence served, the judge held that Dibranco had both actual and ostensible authority to act on behalf of Prolat to sign the relevant documents. Under the Arbitration Act, a valid arbitration agreement can be either written or evidenced in writing. Section 5(4) of the Arbitration Act specifically provides that "an agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement ". In these circumstances, the judge held that the requirements of the act were clearly satisfied.

Did parallel proceedings and Brussels I Regulation prevent the English court from deciding the matter?
The judge gave short thrift to the question of whether, in light of the Italian proceedings, the Brussels I Regulation prevented the court from ruling on the validity of the arbitration agreement. An application regarding the existence of an arbitration agreement does not fall within the Brussels I Regulation. The court observed that the position would be the same under the recast Brussels Regulation, since Article 1(2)(d) is simply more fully explained in the new Recital 12. The court distinguished this case from the infamous *West Tankers* judgment of the European Court of Justice,(4) which prevents the court of one EU member state from issuing anti-suit injunctions against another in all circumstances. It reasoned that the case at hand concerned a determination as to the existence of an arbitration agreement; the court was not asked to "interfere with the functions of the Italian court as no form of anti-suit injunction is being sought against Prolat".(5) As such, both the court and the tribunal were "free to consider matters relating to arbitration even though the Italian court is also seised with a dispute of identical, similar or related nature".(6)

Accordingly, the court granted the declaration sought by Toyota that the arbitral tribunal had jurisdiction over the dispute.

Comment

The decision has a number of interesting implications. First, it is a reminder that a party can still be bound to a contract (and to the arbitration agreement that it contains), even where it had not signed the contract, if it has agreed to its terms through an authorising agent acting on its behalf.

Second, the case is something of a rarity, since Section 32 applications are uncommon – less still successful ones. As was clearly the intention of the Departmental Advisory Committee on Arbitration's Report on Arbitration Bill 1996, Section 32 should be used only in exceptional cases, where a ruling from the court would be cheaper and quicker. The circumstances in this case fell within that narrow category of cases.

Lastly, the case is the first to consider the effect of the recast Brussels Regulation, which came into effect in January 2015. The court had no difficulty in deciding that this application fell within the arbitration exception and therefore fell outside the scope of the regulation, recast or otherwise.

It is significant that the application was made swiftly. At the time of judgment, no decision had been made by the Italian court as to whether it had jurisdiction or whether an arbitration agreement existed between the parties. Had the Italian court done so – and since this judgment fell under the Brussels I Regulation (not the recast regulation) – the English court may have been required to apply the decision in *The Wadi Sudr* and decline the application.

It is not yet clear what course the Italian courts will take or whether there is a possibility of parallel court and litigation proceedings and, ultimately, conflicting judgments. Regardless, an early decision by the English court as to the binding effect of the arbitration agreement will prove helpful if, once an award has been rendered, enforcement proceedings in relation to the award are taken in England.

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Endnotes

(1) [2014] EWHC 3649 (Comm).

(2) [2009] EWCA Civ 1397.

(3) *Supra* note 1, at Paragraph 2.

(4) *West Tankers Inc v Allianz SpA* [2012] EWHC 854 (Comm).

(5) *Supra* note 1, at Paragraph 15.

(6) *Supra* note 1, at Paragraph 17.

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