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Court of Appeal rules that law of arbitration agreement determines who is bound by that agreement

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MARIE BERARD

ERIN LEE

Introduction

In *Lifestyle Equities CV and another* v *Hornby Street (MCR) Ltd and others*,[1] the Court of Appeal dismissed an appeal against a decision to grant a stay of court proceedings under section 9 of the Arbitration Act 1996. In doing so, the Court confirmed that the question of who is party to an arbitration agreement was to be determined in accordance with the governing law of that agreement, which in this case was Californian law. It further held by a majority (with Snowdon LJ dissenting) that the same law governs the question of whether a non-signatory is bound by the arbitration agreement. The Court of Appeal also found that section 9 does not necessarily require that an application for a stay of proceedings be made only against another party to the arbitration agreement – an application under section 9 may be made against non-parties provided that such party is bound by the arbitration agreement.

Background

Under section 9 of the Act, a party may seek a stay of proceedings commenced in the English courts in breach of an arbitration agreement. This section, which applies to arbitrations seated in, and outside, England, provides as follows:

> *A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*[2]

Upon such application, the court will grant a stay unless the arbitration agreement is null and void, inoperative or incapable of being performed.[3]

Facts

The appellants were the registered proprietor and licensee of a trademark (the trademark), which was assigned to them through a series of assignments by a Californian entity called BHPC Marketing Inc. Prior to assignment, BHPC Marketing Inc entered into a "co-existence agreement" (the 1997 agreement) with one of the respondents, who owned and used a similar logo as that of the trademark. The 1997 agreement, which was governed by Californian law, allowed both parties to use their own mark and register further marks with worldwide application. It also included an agreement to arbitrate any disputes arising from it in Los Angeles (the arbitration agreement).

In 2020, the appellants brought a claim in the English courts for the infringement of the trademark by the respondents with respect to the respondent's goods sold in the United Kingdom and the European Union. However, the claim was stayed upon a successful application by the respondents under section 9. The order to stay proceedings was made on grounds that:

- the appellants had become parties to the 1997 agreement under English law;
- the appellants were bound by the arbitration agreement under Californian law; and
- the appellants were precluded from denying that they were bound by the arbitration agreement under Californian law principles of equitable estoppel.

The appellants appealed the decision.

Decision

The Court of Appeal dismissed the appeal, finding that while the appellants were not parties to the 1997 agreement, they were still bound by the arbitration agreement under Californian law. The Court considered the following issues in reaching its conclusion:

- which law determines who is party to an arbitration agreement;
- which law determines who is bound by an arbitration agreement even if not party to it; and
- the scope of section 9 – against whom an application to stay proceedings can be brought.

Law determining parties to arbitration agreement

The Court of Appeal reiterated English conflict of laws principles, as applied by the Supreme Court in its recent decision in *Kabab-Ji*,[4] that the parties to an arbitration agreement are to be determined in accordance with the governing law of the putative agreement (ie, the main agreement containing the agreement to arbitrate).[5] As the governing law of the 1997 agreement was Californian law, the Court held that Californian law must determine whether a person was party to the arbitration agreement.

In the present case, the Court held, there should have been expert evidence on the question of if and how the appellants had become

parties to the arbitration agreement under Californian law. In the absence of such evidence, and particularly where it had not been suggested by the respondents that the appellants were parties to the 1997 agreement, the judge should not have expressed his view as to this matter, or as to what the position would be under English law.

Moreover, even if English law had been applicable, the judge was wrong to conclude that the appellants had become parties to the arbitration agreement. Under English law, absent an express provision for accession, a person could only become party to an existing agreement with the consent of all other parties (ie, by novation or the making of a new agreement), which was not the case here.

Law determining who is bound by arbitration agreement

The Court of Appeal recognised the:

> *clear conceptual distinction between the question of whether a person is party to an arbitration agreement, and the question of whether a non-party is bound in some other way by that agreement.*[(6)]

In light of its conclusion on the former question, the Court of Appeal was left to decide whether the appellants were bound by the arbitration agreement as non-parties. In determining this issue, the Court of Appeal considered between two sets of rules set out in Dicey, Morris and Collins:[(7)]

- rule 135, which states that "the validity and effect of an assignment of an intangible may be governed by the law with which the right assigned has its most significant connection"; and
- rule 64, which states that "the material validity, scope and interpretation of the arbitration agreement are governed by its applicable law, namely . . . the law expressly or impliedly chosen by the parties".

Should rule 135 have applied, UK or EU (where the trademark was registered and enforceable) law would determine whether the appellants were bound as non-parties, but if rule 64 applied, the relevant law would be Californian law.

While the Court of Appeal agreed on all other aspects of the appeal, the Court diverged on this question. The majority, consisting of Lewison and Macur LJJ, concluded that the question of who is bound by an arbitration agreement is one relating to the scope of that agreement (rather than a question of interpretation, as the judge had found). As a result, rule 64 applied. The Court held that the general proposition, which was that the law governing the validity of an arbitration agreement governs who becomes party to it, should logically also apply to the question of who is bound.[(8)] As Lewison LJ put it, "[t]his is not a question of whose law of trade marks applies. It is a question of whose law of contract applies to the separate agreement embodied in the arbitration agreement".[(9)] Consequently, it followed that Californian law determined whether the appellants should be bound by the arbitration agreement, and the judge was entitled to rely on expert evidence on Californian law in the way he did to determine that they were so bound.

In his dissenting judgment, Snowdon LJ opined that the governing law of an arbitration agreement, which is determined by a contractual consensus between the parties, cannot provide an answer to whether a non-party is bound by the agreement. He noted that there must be some other relevant factor to justify the choice of law, and that the English conflict of laws rules would look to a law connected to that other factor to determine the issue, and not to the law governing the arbitration agreement.[(10)]

Snowdon LJ noted with approval the decision of Burton J in *Egiazaryan* v *OJSC OEK Finance*,[(11)] which concerned a dispute arising out of English law governed agreements containing an agreement to arbitrate in England, entered into amongst others by a Russian party. Snowdon LJ noted that, in deciding that Russian law (under which parent companies are liable for subsidiaries' contractual obligations) could be applied to allow the Russian signatory's parent company to be joined to the arbitration, Burton J was right to identify the limits on applying the governing law of the arbitration agreement to bind non-parties without additional factors to justify it.

In the present case, Snowdon LJ considered the only additional factor that connected the appellants to the arbitration agreement was the fact that the appellants had taken an assignment of the trademark, which is an intangible property right enforceable within the territory it is registered in (in this case, the United Kingdom and the European Union). On that basis, he concluded that UK or EU law (as appropriate) should apply to the question as to whether the 1997 agreement, and the arbitration agreement within it, were binding on the appellants.[(12)]

Lewison LJ, who delivered the majority opinion, distinguished *Egiazaryan* from the present appeal. His view was that Burton J had considered whether it was "permissible" to look beyond the parties' choice of governing law of the arbitration agreement in determining whether a third party was bound. There was no need to go that far in the present dispute, however, as the parties had explicitly chosen Californian law to govern the arbitration agreement.[(13)] Snowdon LJ disagreed, stating that in *Egiazaryan*, Burton J chose to apply a different law other than that of the agreement to determine whether a party could be joined to an arbitration agreement not out of necessity but because it was more appropriate to do so.[(14)] It remains to be seen how this issue will be resolved in future judgments.

Scope of section 9 of Arbitration Act

The Court of Appeal noted that while section 9 entitles parties to an arbitration agreement to apply for a stay, there is nothing in the section (at least on the face of it) which says that the application for a stay may only be made against another party to the arbitration agreement, as opposed to a party to the proceedings.[(15)] As a result, the Court concluded that the application could succeed against the appellants even though they were not parties to the arbitration agreement itself. Because the appellants were bound by the arbitration agreement under Californian law, the arbitration agreement was not inoperative for the purposes of section 9, and the Court was bound to grant the stay. Accordingly, the appeal was dismissed.

Comment

The Court of Appeal's decision is a helpful clarification on the scope of section 9. While the section entitles parties to an arbitration agreement to seek an order for a stay of court proceedings, it does not require that the party against whom the order is sought must necessarily be a party to the arbitration agreement. A section 9 stay may be obtained provided that the respondent is bound by the arbitration agreement.

For further information on this topic please contact Marie Berard or Erin Lee at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com or erin.lee@cliffordchance.com). The Clifford Chance website can be accessed at www.cliffordchance.com.

Endnotes

(1) [2022] EWCA Civ 51.

(2) Section 9(1), Arbitration Act 1996.

(3) Section 9(4), Arbitration Act 1996.

(4) *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] USKC 48.

(5) *Lifestyle Equities,* para 24.

(6) Para 27.

(7) Dicey, Morris and Collins, *The Conflict of Laws*, 15th edition.

(8) *Lifestyle Equities,* para 112.

(9) Para 117.

(10) Para 55.

(11) *Egiazaryan v OJSC OEK Finance* [2017] 1 All ER (Comm) 2017.

(12) *Lifestyle Equities,* para 56.

(13) Para 114.

(14) Para 88.

(15) Para 96.