England and Wales High Court (Commercial Court) Decisions

Neutral Citation No.:[2002] EWHC 2024 (Comm)

Case No: 1993 FOLIO No. 993

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

Chester Civil Justice Centre

28th August 2002

B e f o r e :

His Honour Judge Chambers QC
(sitting as a judge of the Queen's Bench Division)
IN THE MATTER OF SECTION 3 OF THE ARBITRATION ACT 1975
AND

IN THE MATTER OF AN ARBITRATION AWARD DATED 23 JULY 1987

Between:

ABCI
(Formerly Arab Business Consortium of International Finance Company)
(Body Corporate)

Claimant

- and -

BANQUE FRANCO-TUNISIENNE **Defendant**

Charles Haddon-Cave QC (instructed by Linklaters & Alliance) for the Claimant

Joe Smouha (instructed by Herbert Smith) for the Defendant

Hearing date: 21 June 2002

HTML VERSION OF HANDED DOWN JUDGMENT

His Honour Judge Chambers QC:

1. The applications with which this judgment is concerned are made in action 1993 Folio No. 933 (the "Enforcement Action") which is one of a number of actions whose history and background may be found in ***ABCI*** *(formerly Arab Business Consortium International Finance and Investment Co) v Banque Franco-Tunisienne* [2002] 1 Lloyd's Rep 511. I shall adopt the abbreviations used in that judgment.

2. To the history set out in the above judgment may be added the fact that permission has been given to appeal the decisions in respectively the Conspiracy Action and the Settlement Agreements Action.

3. By the present applications **ABCI** seeks permission to add as defendants STB, BCT and MOF ("the proposed defendants") and to serve those parties in Tunisia. Both applications were heard on notice. As was their right, the proposed defendants did not appear. However, the relevant arguments were comprehensively put by Mr Smouha who appeared on behalf of BFT.

4. At my invitation, further written submissions were made which addressed the questions that chiefly concerned me. Mr Haddon-Cave QC, leading counsel for **ABCI**, put the matter with his customary elegance. He started from the unexceptionable position that the discretion to grant permission upon a necessary or proper party was no less wide than the discretion to add or substitute a party (*United Film Distribution v Chhabria* [2001] EWCA Civ 416 (CA). The further argument may be summarised as being to the following effect.

5. STB and MOF, but not BFT, were parties to the settlement agreements which are said to have vitiated the award that **ABCI** seeks to enforce in this action. As matters now stand, if **ABCI** is successful in this action and seeks to enforce its award either here or, more particularly, elsewhere, STB and MOF will have the potential to defeat such enforcement by setting up the settlement agreements in bar. However, if STB and MOF are made parties and are unsuccessful, they will be estopped from doing this. In addition although BCT was not a party to the settlement agreements, it has a capacity for mischief that will be stifled by an adverse declaration. Furthermore, as against all the proposed defendants, there is the opportunity to obtain disclosure that will provide a legitimate procedural advantage.

6. Attractive as these arguments may seem, I consider them to be wrong in principle.

7. By the present action **ABCI** seeks to enforce an award that is governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards as implemented by the Arbitration Act 1975. The cumulative effect of these enactments is to regulate the enforcement of Convention awards within this jurisdiction. This includes the provision for certain defences to be raised against such enforcement. Pursuant to its rights, BFT has raised a variety of defences which include the allegation that the settlement agreements operate to defeat the claim to enforcement. If the defences fail, **ABCI** will be entitled to enforce its award against those assets of BFT that it may find within the jurisdiction. It is fanciful to suggest that, at that stage, any or all of the proposed defendants could take any procedural step within this jurisdiction to prevent such enforcement.

8. While it is correct that doctrines akin to issue estoppel and *res judicata* might assist **ABCI** (if successful) in other jurisdictions, that is not the purpose either of this aspect of the Convention or the Act. The focus is intra not extra territorial. That is how BFT comes to be a defendant within this jurisdiction.

9. Despite the wide meaning of the words “necessary or proper party”, I do not think that they can have the effect of broadening proceedings, whose sole function is to enforce within this jurisdiction an award obtained elsewhere, to become a means of attempting to avoid difficulties that might be encountered outside this jurisdiction.

10. Once it is clear that there is no acceptable reason for joining the proposed defendants in order to found a substantive case against them, it is not possible to rely upon disclosure as a reason for joinder. *Electric Furnace v Selas* [1987] RPC 23 gives no acceptable support for this contention and *Unilever plc v Chefaro Proprietaries Ltd* [1994] FSR 135 (CA) is expressly to the contrary effect. Although the latter case was concerned with the Brussels Convention, the reasoning of the court was derived from the position at common law.

11. There being no justification for serving the proposed defendants in Tunisia, neither is there good reason to add them as parties to this action and the applications must be dismissed.

12. In the circumstances the question of State immunity does not arise.

13. All consequential matters will be dealt with at a time convenient to the parties and any time limits will be extended until then.