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Competing dispute resolution clauses under UK law

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The English court is clear: an arbitration agreement's construction starts from the assumption that, as rational business people, contracting parties are likely to have intended that any disputes between them be resolved by the same tribunal. But where more than one agreement governs the parties' relationship, with competing dispute resolution clauses (court jurisdiction versus arbitration agreement), in deciding which dispute resolution regime a claim is to be determined under, there is no presumption in favour of the arbitration agreement, even if drafted in terms wide enough to cover the claim. The question is entirely one of construction and the court must consider carefully the nature of the claim and the particular agreement out of which it arises.

In *PT Thiess Contractors Indonesia ('Thiess') v (1) PT Kaltim Prima Coal ('KPC'), KPC* challenged the jurisdiction of the English court to hear Thiess' claim, seeking a mandatory stay pursuant to section 9 Arbitration Act 1996, alternatively pursuant to the English court's inherent jurisdiction, on the basis that the claim in the English action must be referred to arbitration.

Blair J dismissed KPC's application holding that the English action raises a discrete claim, related to, but distinct from, the underlying dispute which is the subject of a Singaporean arbitration.

Background

This case arose from KPC's engagement of Thiess to perform mining services in Indonesia. A suite of agreements governs the relationship including an Operating Agreement – Mining Services which regulates the performance of, and entitlement to payment for, the mining services ('the OAMS'). The OAMS contains an escalating dispute resolution clause, including for disputes over pricing arrangements an expert determination, and ultimately, arbitration.

KPC is also party to, and Thiess is entitled to enforce the terms which are for its benefit of, the Cash Distribution Agreement ('the CDA') which, in essence deals with the distribution of the sale proceeds of several mining service agreements. Other parties to the CDA include the 'Account Banks' which administer the bank accounts through which the sale proceeds are distributed.

The CDA requires: (i) Thiess to issue monthly to KPC a Principal Contractor Claim ('PCC') which must include the total payment claimed; (ii) KPC to then issue a responsive Principal Contractor Claim Confirmation ('PCCC') identifying the amount claimed in Thiess' PCC and the amounts which KPC agrees to pay and disputes (the latter being the 'Dispute Amount'); (iii) the PCC and the PCCC to be served on the relevant bank which pays the Dispute Amount into a dispute account in the name of KPC. The sums in the dispute account are only paid out upon receipt by the relevant bank of joint instructions or pursuant to a final judgment or arbitral award.

The CDA contains a non-exclusive jurisdiction clause in favour of the English courts.

The disputes

Thiess and KPC failed to reach agreement on the renegotiation of pricing arrangements under the OAMS and this dispute, after an expert determination, was referred to arbitration in Singapore.

Thiess issued its PCCs claiming the rates as determined by the expert. KPC challenged this and issued PCCCs which Thiess claims are non-compliant with the CDA, i.e., KPC failed to include in its PCCCs the total amount claimed by Thiess and then the amount that KPC considered payable with the difference between the two being identified as the Dispute Amount. Instead, KPC included as the total amount claimed by Thiess the amount KPC considers payable. The result means that the 'Dispute Amount' in KPC's PCCCs is nil and nothing is transferred to the dispute account.

Thiess therefore issued proceedings in England seeking KPC's compliance with the CDA's provisions in regard to security.

The arguments

KPC challenged jurisdiction given the arbitration in relation to the OAMS dispute. KPC contended that the dispute in the English action falls within the wide definition of disputes to be resolved by arbitration.

Thiess submitted that the CDA was not only concerned with account administration and cash management arrangements as KPC contended; its function also includes the provision of security to contractors pending resolution of an arbitral dispute. Thiess' claim in the English action is concerned only with enforcing the CDA security. Thiess argued that if, as KPC contended, it was always necessary to investigate whether a sum claimed in a PCC is legally payable then nothing would ever end up in the dispute account pending a final arbitral award.

There is no overriding rule of policy, Thiess argued, which prevents parties to arbitration agreements from separately agreeing to refer to the court questions concerned with security pending arbitration. Indeed, sometimes this is desirable where there are multi-party transactions including banks which might not wish to become privy to lots of different

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arbitration clauses and arbitration references.

The Judgment

Blair J, applied the principles settled recently by the Court of Appeal in Sebastian Holdings Inc v. Deutsche Bank AG [2011] 1 Lloyd's rep. 106: where there are multiple related agreements, the task of the court in determining whether a dispute falls within the jurisdiction clauses of one or more related agreements, depends on the intention of the parties as revealed by the agreements. This intention is to be considered against the general principles that just as parties to a single agreement do not intend, as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals.

Stating that "there is nothing unusual about submitting a contractual dispute to arbitration whilst referring matters relating to security to the jurisdiction of one or more courts. This is frequently a feature of international transactions, and the choice of jurisdiction in the security agreement may have to do with factors independent of the principal agreement", he agreed with the approach taken in such circumstances by Andrew Ang J in the High Court of Singapore case of Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp [2010] 2 SLR 821, namely that where different but related agreements contain overlapping and inconsistent dispute resolution clauses, the nature of the claim and the particular agreement out of which the claim arises ought to be considered; where a claim arises out of or is more closely connected with one agreement than the other, the claim ought to be subject to the dispute resolution regime contained in the former agreement, even if the latter is, on a literal reading, wide enough to cover the claim.

Accordingly, he went on to hold that "Thiess's claim in the English action is a claim under the CDA concerned with a procedure whereby the sums in dispute are to be set aside until the dispute is determined. It raises a discrete claim, related to, but distinct from, the underlying dispute arising under the [OAMS] which is the subject of the arbitration. There is no reason why the parties cannot be taken to have intended that these claims are to be the subject of different jurisdiction clauses. [...] In my opinion, the parties have not agreed to refer to arbitration the issue in the English action, which issue arises under the CDA. As a matter of construction of the arbitration clause, the substance of the controversy does not arise under or in connection with the [OAMS]. [...] Disputes in connection with the CDA are submitted by the terms of the CDA to the jurisdiction of the English court, and only the English court can decide them. It is possible and commercially rational to do so, even though this may result in a degree of fragmentation in the resolution of the dispute."

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