

What's in a Name? Of Misnomers and Nullities in Arbitration

Kluwer Arbitration Blog

July 19, 2021

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Please refer to this post as: Iris Ng, 'What's in a Name? Of Misnomers and Nullities in Arbitration', Kluwer Arbitration Blog, July 19 2021, <http://arbitrationblog.kluwerarbitration.com/2021/07/19/whats-in-a-name-of-misnomers-and-nullities-in-arbitration/>

Where C commences an arbitration against a non-existent entity E, and D defends the arbitration in the guise of E, can an award rendered in favour of E be enforced by D against C?^[fn] This article is written in the author's personal capacity. The opinions expressed are entirely the author's own, and do not reflect the views of the Singapore Attorney-General's Chambers.^[/fn] This was the key question in *National Oilwell Varco Norway AS (formerly known as Hydralift AS) v Keppel FELS Ltd (formerly known as Far East Levingston Shipbuilding Ltd)* [2021] SGHC 124 ("**Judgment**").

Facts

In 1996, a dispute arose under a contract between the defendant and a company named Hydralift. In 2004, Hydralift merged with its parent company and was struck off from the Register of Companies. The same year, the merged entity merged with, and took the name of, the plaintiff.

In 2007, the defendant commenced arbitration in Singapore against Hydralift. It claimed not to have known that Hydralift no longer existed. In the name of Hydralift, the plaintiff defended the claim and counterclaimed. In 2019, the tribunal ruled against the defendant ("**Award**").

The plaintiff then commenced enforcement proceedings in the Singapore High Court ("**Court**") under s 19 of Singapore's International Arbitration Act. The

defendant resisted enforcement.

Decision

The Court set aside leave to enforce the Award on three grounds.

First, because the tribunal objectively intended to and did issue the Award in favour of Hydralift, the court had no power to allow the plaintiff to enforce the Award. This followed from the policy of minimal curial intervention and the “*mechanical approach*” to enforcement, under which the court would only grant leave to enforce an award and enter judgment “*in terms which mirror, precisely and mechanically, the dispositive terms of the award*”.[fn]Judgment at [39]-[53].[/fn]

Second, the Award was a nullity incapable of being enforced because the arbitration was a nullity from the outset. An arbitration commenced against a non-existent legal person was a nullity unless the use of the name could be characterised as a misnomer. On the facts, there was no misnomer. Both parties objectively intended Hydralift’s name to refer to Hydralift: the defendant because it genuinely did not know of Hydralift’s merger, and the plaintiff because it intended to conceal the fact that Hydralift no longer existed.[fn]Judgment at [145].[/fn]

Third, the plaintiff was estopped from denying that Hydralift was the respondent.[fn]Judgment at [188].[/fn]

Discussion

The Judgment raises numerous interesting issues. This section explores a few of them.

Setting aside versus resisting enforcement

First, would the outcome have differed if the defendant had attempted to set aside the Award, rather than resist enforcement? The court explained that in an application to enforce an award, it is appropriate to take the award as the starting point and “*move backwards*” in time, rather than take the arbitration agreement as the starting point and “*move forwards*”.[fn]Judgment at [15]-[17].[/fn]

On the latter approach, there would arguably have been no basis for impugning

the arbitration agreement. The most promising ground for setting aside would be the ground of incapacity of a party under Art 34(2)(a)(i) of the Model Law. However, it has been held that a party's incapacity must be assessed as of the time the parties concluded the arbitration agreement.[fn]G Born, *International Commercial Arbitration* (Kluwer Law International, 3rd Ed, 2021) at p 3486.[/fn] Given that Hydralift ceased to exist only *after* the arbitration agreement was entered into, this ground could not have applied.

Apart from the lack of an applicable ground for setting aside, there is a more serious problem. A setting aside application is premised on there being an award to set aside. But if proceedings are a nullity due to the involvement of a non-existent entity, they cannot lead to any "award" capable of being set aside; attempting to set aside a nullity is a contradiction in terms. Therefore, counsel rightly decided not to mount any setting aside application, quite apart from the reason for this identified by the court (that there was no breach of natural justice).[fn]Judgment at [190].[/fn]

Proceedings commenced by or against non-existent persons

Second, should proceedings *against* non-existent persons be treated differently from proceedings commenced *by* them? The Court decided they should be regarded as equally invalid. It rejected the argument that the former should be valid because they only lacked a target, rather than lacking legal foundation altogether. The contrary view would mean that a party could be sued even without legal personality, stripping a key feature of legal personality (the capacity to sue and be sued) of meaning.[fn]Judgment at [62]-[66].[/fn]

This analysis is arguably correct. Apart from the reason given by the Court, it is also artificial to regard proceedings as valid or invalid depending on who commenced proceedings because that would make little sense once counterclaims - in which the roles of initiator versus target of the complaint are reversed - come into the picture. Not only would it be messy to have proceedings that are partially valid and partially invalid, there is also an element of chance that goes into determining which is the claim and which is the counterclaim. In a case where both parties have complaints, it may simply be fortuitous which party happens to sue first. Determining validity on this basis would be unsatisfactory.

The test for identifying a misnomer

Third, is a bilateral or unilateral test preferable for identifying a misnomer? The Court's formulation was bilateral, in asking to whom each party intended to refer to when it used the non-existent legal person's name. The alternative it rejected was a unilateral formulation, which identifies whether there is a misnomer solely from the perspective of the party opposite the misnamed person.

Prima facie, English case authorities suggest a unilateral test. In *AMB Generali Holding AG v SEB Trygg Liv Holding AB* [2005] EWCA Civ 1237 ("**Trygg**"), the English court held that the test was "*who would reasonably have been understood by the party against whom the claim was asserted to be the entity bringing the claim?*" [emphasis added].^[fn]At [51].^[/fn] A similar approach was adopted in *Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd* [2006] 2 Lloyd's Rep 263.

The Judgment distinguished *Trygg* on the basis that the test was framed as a unilateral one only because the party who introduced the mistaken name into the arbitration and the party who was better placed to correct the mistake were the same person (an "*overlapped roles*" situation), such that it was fair to assess the matter from the perspective of only the party who was not notionally at fault.^[fn]Judgment at [80]-[81].^[/fn] Where, however, one party introduced the mistaken name and the other was better placed to correct this (a "*split roles*" situation), a unilateral test would lead to an "*incomplete analysis*".

The reasoning here is not entirely convincing. It is not always the case that "*notional responsibility for misnaming*" falls neatly along the lines of the introducing party or the better-placed rectifier. One could envision a case where the introducing party only used the mistaken name because it had been taken in by a misrepresentation and is thus relatively blameless, despite it technically having introduced the error. On balance, it may be preferable to avoid prescribing whether a bilateral or unilateral test should apply depending on whether the situation involves split or overlapped roles, and to instead apply the bilateral test across the board. To assuage concerns over the unfairness of a party relying on an error it induced, introduced or perpetuated to nullify proceedings, it is worth recalling that the analysis of intention is objective. In some circumstances, it may well be that a party cannot objectively have intended anything but a certain outcome by virtue of its conduct.

That said, a bilateral test works best when the parties' intentions are aligned. If the

parties both intended to refer to the named entity, there is no misnomer, because they meant what they said (this arose on the facts of Hydralift). If they both intended to refer to (the same) “someone else”, there would be a misnomer. Where difficulties arise is in cases involving no discernible common intention. Rather than attempting to choose between perspectives by going back to considerations of relative fault, the more principled alternative might be to reject the potential application of the misnomer doctrine entirely in such cases. After all, as stated in *Trygg*, “if... **it was clear who the party was**, but there was simply an error in naming him, the proceedings were not a nullity and the error can, in appropriate circumstances, be corrected” [emphasis added]. Where parties’ intentions differ, there is unlikely to be the requisite clarity.

The Judgment is presently on appeal. Pending decision by the Singapore Court of Appeal, the practical takeaway is to always do proper background checks before commencing or responding to an arbitration, to avoid wasted time and effort.