Kluwer Arbitration Blog

Interpreting Section 9(1) of the Arbitration Act 1996: Lombard v GATX

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Thursday, May 24th, 2012 · WilmerHale

A recent decision of the English Commercial Court (*Lombard North Central plc & Anor v GATX Corporation* [2012] EWHC 1067 (Comm)) has provided some insight and clarification into how the English courts will interpret and implement Section 9(1) of the Arbitration Act 1996. Section 9 is how English law has complied with Article II(3) of the New York Convention, which provides for the dismissal or stay of proceedings in national courts brought in breach of an agreement to arbitrate. Generally speaking, all major common law systems (including England) expressly provide for a stay of litigation brought in violation of a valid arbitration agreement, whereas courts in civil law jurisdictions do not merely stay pending litigations, but dismiss them entirely. [1)]

In *Lombard* Andrew Smith J considered an application to stay proceedings under Section 9(1). Section 9(1) states as follows:

> "(1) 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…"

In *Lombard*, the parties (Lombard and GATX) had entered into a train financing agreement, under which GATX could in some circumstances force a sale of the trains and thereby realise any profit share. Subsequently, the parties entered into a second agreement, which contained a reference to arbitration. The essence of this second arrangement was that GATX agreed to give up its right to force a sale of the trains, and the parties agreed they would establish a joint venture (JV) by a specified date that would arrange the leasing and sub-leasing of the trains, and share any profits arising from the JV. If a JV could not be established by that date, the parties agreed to negotiate in good faith to achieve their objectives through other means at the earliest opportunity. The arbitration clause in the second agreement provided that any dispute relating to the creation of the JV that could not be resolved by the good faith efforts of the parties would be referred to, and finally resolved by, arbitration in London. It was common ground between the parties that no JV was established by the specified date in the second agreement.

There was a dispute between the parties as to the scope of the arbitration clause in the second

agreement. Lombard contended that it was intended only to resolve disputes about how the prospective JV should be constituted, rather than disputes about the second agreement itself. On that basis, Lombard brought proceedings in the Commercial Court against GATX seeking (*inter alia*) a declaration as to the unenforceability of the parties' agreement to negotiate in good faith.

GATX sought a stay of the proceedings under Section 9(1), and, alternatively, under the court's inherent jurisdiction at law. GATX submitted that the proceedings were "in respect of" a referred matter under Article 9(1), and should be stayed because Lombard's claim of non-enforceability would draw a referred matter (the scope of the arbitration agreement) into the legal proceedings. Smith J agreed with GATX's submissions, and granted GATX's application to stay the proceedings.

In reaching his determination on the Section 9(1) issue, Smith J considered the meaning of the phrase "in respect of" in Section 9(1), noting that "[t]here is no judicial authority of which counsel or I know that directly considers the meaning of 'in respect of' in section 9(1) or how the court determines whether proceedings are in respect of a referred matter."

Smith J held that: "the question of course depends upon the nature of the claim (or claims) made in the legal proceedings, but not, I think, only on the formulation of it (or them) in the claim form and any pleadings. That would allow a claimant to circumvent an arbitration agreement by formulating proceedings in terms that, perhaps artificially, avoid reference to a referred matter, knowing that any application to stay them must be made before a defence is pleaded. In considering a Section 9(1) application, the court should therefore consider what questions will foreseeably arise for determination in the proceedings and whether they include referred matters."

Smith J rejected a narrow approach that proceedings are "in respect of" a referred matter only when they are "mainly or principally" resolving a dispute about a referred matter. He held that this was consistent with the Court of Appeal's approach in *Fulham Football Club (1987) Ltd v Richards and another* [2011] EWCA Civ 855, where the CoA had considered that a question whether proceedings under section 994 of the Companies Act 2006 asserting unfair prejudice should be stayed depended upon whether the arbitration agreement was inoperative under section 9(4) rather than upon whether the proceedings were covered by section 9(1).

In *Fulham Football Club*, Patten LJ had held that "Section 9(1) is concerned only to identify the existence of an arbitration agreement which in terms covers ***the matters in dispute*** as the preconditions (sic) for the making of the stay application". Smith J held that he did not understand Patten LJ to mean that it is a precondition to a stay application that ***all*** the matters in dispute be referred matters.

Smith J's decision in *Lombard* raises two pertinent issues. First, whether proceedings are "in respect of" a matter referred to arbitration depends on the nature of the claim, but not on the formulation of the claim in the claim form or pleadings. Therefore, lawyers cannot avoid the risk of a stay under Section 9(1) through clever drafting.

Secondly, Section 9(1) may bite if there is a referred "matter" in issue, even if there are other "matters" in dispute before the court that are not included within the scope of the arbitration agreement. In such a scenario, the court can adopt one of two approaches. It may stay the entire proceedings pending the outcome of the arbitration, or alternatively, it may allow the general court proceedings to carry on, but stay only the discrete arbitral matter. The key issue for the court is in

determining how peripheral the arbitral issue has to be to the dispute as a whole before it will order a general stay of proceedings. That will depend on the specific facts of each case.

In the *Lombard* case, Lombard accepted that, if GATX was entitled under Section 9(1) to a stay of its first claim, then a second, related claim should also be stayed under the court's inherent jurisdiction, if not Section 9(1). Accordingly, Smith J did not appear to feel required to consider whether the related claim should also be stayed. He did say however that had be been required to do so, he would have stayed the related claim in any event as this would have been demanded by sensible case management.

Where, as in *Lombard*, the parties agree to refer to arbitration only certain disputes that might arise from their contractual relationship (in this case, only disputes relating to the creation of a future joint venture), the risk of fragmentation of proceedings with the attendant cost and delay is inherent in the agreement, even in the post-*Fiona Trust* legal landscape where English courts are required to interpret arbitration agreements expansively.

Written by Gary Born and Charlie Caher

References

?1 *See* Born, *International Commercial Arbitration*, Kluwer Law International, 2009, vol. 1 at 1024 to 1026.

This entry was posted on Thursday, May 24th, 2012 at 12:48 pm and is filed under Arbitration Act, Arbitration Proceedings, English Law
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.