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Same claims, same evidence, different claimant: abuse of process for defendant to raise same defences?

Sabrina Pearson (Lalive) · Tuesday, August 12th, 2014 · YIAG

In the recent case of *OMV Petrom SA v Glencore International AG [2014] EWHC 242 (Comm) (07 February 2014)* ("Petrom v Glencore"), the English Commercial Court was faced with the question of whether issues arising and decided in an arbitration should be treated as settled in subsequent court proceedings brought by a non-party to the arbitration.

The factual and procedural background to this case is particularly interesting and pertinent.

The dispute arose out of contracts for the supply of crude oil to Romania between Glencore, and a commission agent, a company called SC Petrolexportimport SA ("Petex"). Petex alleged that Glencore had supplied crude oil that did not comply with the contractual specifications, more specifically, that the deliveries were made up of blended, cheaper and heavier, crude oils. The arbitral tribunal held that Glencore was in breach of the supply contracts but that Petex itself, as agent, had not suffered any loss and was therefore not entitled to damages. The arbitral tribunal further held that even if Petex was entitled to damages, it would be limited to the smaller amount of the actual value of the cargo supplied, as put forward by expert evidence, rather than the discounted value of the cargo claimed by Petex.

Subsequently, Petex assigned its rights under the supply contracts to its principal, Petrom, who then brought a second arbitration under the same supply contracts against Glencore. Petrom's claim, however, failed on the ground that, as an assignee of Petex, its claim was *res judicata*.

Thereafter Petrom initiated court proceedings against Glencore before the English Commercial Court. Subsequently, Petrom sought an order from the Commercial Court striking out parts of Glencore's defence on the grounds that it was an abuse of process to raise such defences again as these matters had already been decided in the first arbitration.

The Commercial Court acknowledged that the claims, evidence and defences were essentially the same as in the first arbitration and that the main difference was the different claimant. Nonetheless, it held that, on the facts, there was no abuse of process.

The Commercial Court first reiterated the standard to be applied in deciding whether there was an abuse of process. According to the leading case of *Secretary of State for Trade and Industry v Bairstow [2004] Ch 1*, in the event that the parties are not the same in both proceedings, there will be an abuse of process if (i) it would be manifestly unfair to a party to the later proceedings to re-

litigate the same issues or (ii) it would bring the administration of justice into disrepute to permit such re-litigation. The Commercial Court emphasized that the burden lies on the party making the abuse of process argument and that it is an "exacting test".

The Commercial Court then confirmed (as held in the case of *Michael Wilson & Partners Limited v Sinclair [2013] 1 All ER (Comm) 476)*, that abuse of process may be relied on where the earlier decision is that of an arbitral tribunal, rather than that of a court. However, the Court noted that the principle that arbitration proceedings are confidential to the parties to the arbitration will be taken into account when deciding whether or not the subsequent proceedings are an abuse of process and will militate against such a finding.

The Commercial Court went on to apply the abuse of process standard to the facts.

The Court pointed to three factors in favour of a finding of an abuse of process. First, that it may be perceived as unfair on witnesses that they should be subject to further cross examination on the same facts. Second, that one of the witnesses had died since the arbitration. Third, that a significant period of time had passed since the arbitration hearings in 2005.

However, according to the Commercial Court, four factors pointed the other way. First, that – in contrast to the situation where a party has brought proceedings in order to re-litigate the question whether it is guilty of certain charges – a court should be slow in preventing a party from continuing to deny serious charges of which it has already been found guilty. This factor, according to the Court, was sufficient to dismiss the strike out application. Second, Petrom should not be allowed to argue that Glencore should be prevented from rearguing factual issues decided against it but that, conversely, it should be permitted to reargue the findings of the arbitral tribunal on quantum. Third, Petrom raised the strike out application belatedly once the court proceedings were well under way. Fourth, Petrom's application to strike out parts of Glencore's defence submission on the grounds of abuse of process was internally inconsistent and would make its submission incomprehensible. Furthermore, it was unclear from the application which issues would remain to be decided at trial.

Commentary

Given that the claims, evidence and defences were undisputedly the same in both proceedings, it seems a waste of time and money to re-litigate the whole dispute. In addition, as a result of the significant passage of time, the testimonial evidence presented to the Court will be of inferior quality.

However, the threshold for an abuse of process argument to succeed in the event that the parties are not the same in both proceedings is high. The threshold is even higher in cases where the earlier decision is that of an arbitral tribunal due to the principle that arbitration proceedings are confidential to the parties to the arbitration. In the present case, it was the Commercial Court's reluctance to adopt the findings of dishonesty made by the arbitral tribunal which persuaded the Court to reject the strike out application. Understandably, the Court deemed that it would be less unfair if Petrom were required to prove the charges of dishonesty again than if Glencore was prevented from defending itself again against such serious charges.

Interestingly, it was the serious nature of the charges brought against Glencore and not Glencore's status as a defendant that persuaded the Commercial Court to dismiss the strike out application. Indeed, the Commercial Court noted that Glencore's status as a defendant in both proceedings,

although relevant, was not decisive in determining whether there was an abuse of process. In this regard, the Court referred to the case of *North West Water Ltd v Binnie & Partners [1990] 3 All ER 547* in which it was held that it can be an abuse of process for a defendant to seek to reopen issues decided against it as defendant in previous court proceedings. In the latter case, the court held that it was an abuse of process for consulting engineers to continue to deny, in proceedings brought by the water authority, allegations of negligence which had been decided against them in previous proceedings brought by the victims of an explosion of the underground tunnel they had designed.

In the present case, one is left to wonder whether the application would have succeeded if the charges brought against Glencore had been less serious. Given the importance attached by the Commercial Court to Petrom's behaviour, namely, its contradictory stance and its belated and unworkable strike out application, the Court may well have rejected the application on this basis alone. Undoubtedly, however, not only would a great deal of time and money have been saved if the application had ultimately been successful but the risk of contradictory findings on the facts would also have been avoided.

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