

3 May 2023

Commodities in Focus Weekly – issue 27

Challenge under s. 67 of the Arbitration Act 1996: Commercial Court refuses to set aside the award where the Tribunal found it did not have jurisdiction

In an unsuccessful challenge of an arbitration award under s. 67 of the Arbitration Act 1996 (the "**Act**"), the English Commercial Court concluded in a judgment handed down last week in *Emirates Shipping Line DMCEST v Gold Star Line Ltd* [2023] EWHC 880 (Comm) that the Tribunal was correct in finding that it did not have jurisdiction.

Facts

The question before the Court was whether Emirates Shipping Line ("**ESL**") became a party to a Memorandum of Understanding dated 24 April 2018 (the "**2018 MOU**") between Gold Star Line ("**GSL**") and other ship owning companies. The 2018 MOU was an agreement governing the operation of a container shipping line between India and Far East and contained a LMAA arbitration clause upon which ESL relied to found jurisdiction.

Under the 2018 MOU, each company contributed one or more vessels to the service and in return was entitled to an agreed slot allocation on other vessels, which they could use themselves or release to third parties with the consent of other members. Negotiations took place between GSL and ESL about both ESL joining the consortium as well as purchasing slots on the voyages before ESL added its vessel to the liner service.

On or around 21 October 2019 it was agreed that ESL would phase in its vessel into the liner service on 20 January 2020 and following further discussions regarding price and quantity of slots, on 31 October 2019, an agreement was reached regarding ESL's purchase of slots.

Following a request from ESL, a copy of the 2018 MOU was sent to it on 20 November 2019 and on 15 January 2020 ESL advised that it would need its inclusion in the

liner service to be covered by either a new MOU or an addendum to the MOU. A new MOU was drawn up in February 2020 and signed by all consortium parties and ESL. The 2020 MOU was on materially identical terms to the 2018 MOU.

In parallel to the above, on 30 November 2019, ESL loaded a cargo pursuant to its slot purchase agreement with GSL on the vessel IAN H (the "**Vessel**"). The Vessel was hit by a typhoon on 6 December 2019 and some of the cargo was damaged.

In April 2020, ESL wrote to GSL, referring to the 2018 MOU, advising that pursuant to the terms of the 2018 MOU, GSL was responsible for proper and careful carriage and that a claim had been received from the cargo receivers. ESL suggested that as GSL had all the documentation and liability ultimately rested with GSL, GSL should settle the claim directly, but if GSL wanted ESL to deal with it and then claim indemnity from GSL, ESL would need various documents.

GSL advised in response that the contractual relationship between GSL and ESL was governed by the 2018 MOU and between ESL and the cargo interests by the bill of lading and therefore it would have been more appropriate for ESL to handle the claim directly. Further exchanges took place between ESL's P&I Club, and GSL where references were made to various provisions of the 2018 MOU and where GSL provided ESL with the documents sought.

ESL and the shippers were held jointly liable to cargo receivers in the Chinese courts, and the shippers having paid the cargo receivers sought an indemnity from ESL. On the basis of advice received from its Chinese lawyers, ESL negotiated a settlement with shippers and then commenced LMAA arbitration proceedings against GSL seeking an indemnity.

Contrary to the position previously adopted, GSL denied that ESL was a party to the 2018 MOU, or the arbitration clause, and contented that the Tribunal did not have jurisdiction. Jurisdiction was dealt with as a preliminary issue on the basis of documents available at that time, and the Tribunal held that it did not have jurisdiction as ESL had not established that it was a party to the 2018 MOU and that accordingly it was not a party to the arbitration agreement contained therein.

ESL made an application to the English Commercial Court under s. 67 of the Act, which allows a party to the arbitral proceedings to apply to the Court to challenge any award of the tribunal dealing with whether the tribunal has jurisdiction. An application under s. 67 is a rehearing, as opposed to a review of the Tribunal's decision and as such the award itself does not have any presumptive validity and the Court was also able to have the benefit of additional material submitted to it.

ESL argued that jurisdiction could be established either because there was an express or an implied contract on the terms of the 2018 MOU between ESL and GSL or alternatively, GSL was estopped from arguing that the 2018 MOU and its arbitration clause was applicable to the transaction.

Decision

The Judge, having considered the facts and chronology on an objective basis by reference to the deemed intention of the parties at the date of the contract, concluded that there were two separate agreements, one for the purchase of slots and the other for ESL to join the consortium, each on their own terms. ESL's introduction to the consortium took place later, and was formalised in the 2020 MOU whereas ESL never became a party to the 2018 MOU and when the slot purchase agreement was entered into, ESL had not even sighted the 2018 MOU. The Judge also did not find any intention that the parties had agreed for the terms of the 2018 MOU to apply to the slot purchase agreement nor that the 2018 MOU dispute resolution provision should apply to the slot purchase agreement.

In the context of estoppel, the Judge analysed whether, as a matter of principle, estoppel could be used by a party to rely upon an arbitration clause. It was common ground that an estoppel (a) cannot be used to create a new cause of action or new rights which would not otherwise exist, but (b) can enable a party to succeed in a claim which would otherwise have failed by preventing the other party from relying on a defence. The Judge held this was the case of latter and not the former. The Judge distinguished this case from that of *The Eleni P¹*, where it was held that the claimant could

not rely on an estoppel to found the jurisdiction of an arbitral tribunal, and found that ESL was not trying to rely on estoppel to found jurisdiction, but rather it was using estoppel to establish a contractual framework which happened to incorporate an arbitration clause. The Judge said that in the same way there can be no objection to contracting parties agreeing to incorporate a set of terms containing an arbitration clause which is not specifically or expressly negotiated, there is no reason why one party cannot be estopped from denying the incorporation. However, on the facts, the Judge found that no estoppel was made out.

Comment

The outcome of this case, as with any case where the Court is tasked with establishing the terms of the contract between the parties or whether or not estoppel is made out, is very fact specific, however it is a good illustration of the risks associated with commencing proceedings in the wrong forum. In addition to wasted time and costs, one of the major potential implications, which thankfully did not arise in this case but was discussed in the judgment, of commencing proceedings in the wrong forum is that by the time that tribunal or court has found that it does not have jurisdiction to determine the issue, the party bringing proceedings may find itself out of time to commence proceedings in the correct forum and therefore be unable to pursue its claim. It is therefore of paramount importance, especially where very short time limits are at play, that any proceedings are commenced in the correct forum.

Please click [here](#) for a copy of the full judgment.

Author



Monika Humphreys-Davies

Associate, Dubai

T: +971 4 407 3928

E: monika.humphreys-davies@shlegal.com

Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

¹ [2014] EWHC 4202 (Comm); <https://www.bailii.org/ew/cases/EWHC/Comm/2014/4202.html>