THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

COMMERCIAL DIVISION

Claim No. BVI HC (COM) 2014/001

Between:

HERMES ONE LTD.

Claimant

and

EVERBREAD HOLDINGS LTD.

First Defendant

ANZEN LTD.

Second Defendant

LUND 3 APS

Third Defendant

TRAVELLAB GLOBAL AB

Fourth Defendant

Appearances: Mr James Dixon for the Applicants
Mr Robert Nader for the Respondents

JUDGMENT

[2014: 26 February; 6 March]

(Arbitration Act s 6(2) – whether binding agreement to arbitrate or option to refer to arbitration – party applying for stay arguing in earlier proceedings that no binding agreement to arbitrate – whether precluded from arguing on present application that agreement is binding – whether change of stance an abuse of process - US doctrines of equitable and judicial estoppel considered)

[1] **Bannister J [Ag]:** This is an application by the second, third and fourth Defendants (respectively 'Anzen,' 'Lund' and 'Travellab,' together 'the Applicants') to strike out the claim on the basis that it is an abuse of process, as having been commenced in breach of an arbitration agreement; or, alternatively, for a stay pursuant to section 6(2) of the Arbitration Act (Cap 6) ('section 6(2), 'the Act').

[2] The Claimant, ('Hermes') is a minority shareholder in the first Defendant ('the Company'). Each of the Applicants is also a minority shareholder in the Company, but together the applicants control over 60% of its voting shares and, it is alleged, have been acting in concert to the detriment of Hermes. The claim alleges breaches of three successive shareholders agreements, each containing substantially the same essential terms, but each of the second and third containing provisions in addition to or varying those embodied in its immediate predecessor. As well as these contractual claims, the grounds of claim[1] allege unfair prejudice, deceit practiced upon Hermes, and breaches of contracts between Everbread and/or its subsidiaries on the one hand and, on the other, persons who are not even parties to the proceedings.

[3] Hermes claims a bewildering variety of relief. It claims, first, upon what basis is not disclosed, the grant of an unrestricted non-exclusive licence to all of the Company's intellectual property. In addition, or in the alternative, to that, it asks for an order that the Applicants be ordered to pay at least €11.7 million to the Company or to Hermes. In addition, or in the alternative to one, the other, or both of the first two heads of relief, it asks that the Company be wound up on the just and equitable ground pursuant to the Insolvency Act, 2003.

[1] the claim is brought, in breach of the CPR, by way of fixed date claim form

[4] The Company and Anzen are incorporated here and, I assume, have been served with the proceedings. Lund and Travellab are incorporated overseas. I was not told whether they have been served.

[5] The third, and current, shareholders agreement ('SHA') was executed in around August 2012. The parties to it include Hermes and the third Applicants, as well as certain other members of the Company who are not made party to the present proceedings. The individuals behind Hermes are also party to the third SHA, even though they hold no shares in the Company. Clause 19.5 of the third SHA ('clause 19.5') is in the following terms:

> 19.5. This Agreement shall be construed in accordance with English law, without reference to its conflicts of law principles. If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, any Party may submit the dispute to binding arbitration. Such arbitration will be conducted by a sole arbitrator designed by the International Chamber of Commerce ("ICC") and will be in accordance with the ICC's arbitration rules. The arbitration will be held at a neutral site in London, England. The arbitrator will determine issues of arbitrability, including the applicability of any statute of limitation, but may not limit, expand or otherwise modify the terms of the Agreement. The arbitrator's decision and award will be in writing, setting forth the legal and factual basis. The arbitrator may in appropriate circumstances provide for injunctive relief (including interim relief). An arbitration decision and award will only be subject to review because of errors of law. Each party will bear its own expenses in connection with the arbitration, but those related to the site and compensation of the arbitrator will be borne equally. The Parties, other participants and the arbitrator will hold the existence, content and result of arbitration in confidence, except to the extent necessary to enforce a final settlement agreement or to obtain and enforce a judgment on an arbitration award. The language to be used in the arbitration procedure shall be English.

The second SHA of 28 September 2010 contained a provision in identical terms and it appears likely, from the terms of a Letter of Intent dated 29 June 2009, that the first SHA, of 24 November 2009, contained provisions to the like effect.

[6] At the outset of the hearing Mr Dixon, who appeared for the Applicants, abandoned the strike out/abuse of process application. The matter was therefore argued on the basis of section 6(2) of the Act, which is in the following terms:

Section 6(2)

> "6(2) If any party to an arbitration agreement, other than a domestic arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative and incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

[7] It seems to me that clause 19.5, while arguably amounting to an arbitration agreement within the meaning of section 2 of the Act,[2] confers no more than a right upon any party to the third SHA to submit a dispute arising under or relating to the SHA to arbitration. Clause 19.5 does not oblige a party to the SHA to refer disputes arising out of or relating to it to arbitration. It entitles it to do so. The other parties agree that, if a party exercises that right in respect of a dispute falling within clause 19.5, the subject matter of the dispute is to be settled by way of arbitration, but until a party exercises the right it is impossible to say that the parties have agreed that disputes arising out of or relating to the SHA shall be referred to arbitration. The right is in the nature of an option and is outwith section 6(2).

[8] If, as here, a party to the SHA chooses not to exercise the right, but instead to commence legal proceedings, another party to the SHA may, before submitting to the jurisdiction, refer the subject matter of the proceedings (assuming it to fall within clause 19.5) to ICC arbitration and, thus, be able to maintain that the claimant in the proceedings has agreed, under clause 19.5, that the dispute should be referred to arbitration. In those circumstances, it seems to me that the party making the reference would arguably be entitled to a stay under section 6(2), although it is not necessary for present purposes for me to decide the point. What a party is plainly not entitled to do is

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[2] *'arbitration agreement means an agreement . . . to submit to arbitration present or future differences capable of settlement by arbitration'*

to shut down legal proceedings, commenced without infringing clause 19.5, without first having referred the identical subject matter to ICC arbitration. Otherwise clause 19.5 is converted, contrary to its express terms, into a binding multilateral agreement that all disputes arising under or relating to the SHA are to be referred to arbitration. That is not what clause 19.5 says.

[9] I referred Counsel in this regard to what is said in the opening part of paragraph 4.31 of the second edition of Jurisdiction and Arbitration Agreements and their Enforcement, by Mr David Joseph QC:[3]

> English courts, alongside a number of common law jurisdictions, have held that an arbitration agreement need not give rise to the mutual right or obligation on each party to refer disputes to arbitration. An agreement to arbitrate can be expressed as conferring a right upon one party only to refer to disputes to arbitration. Likewise, the courts will give effect to an option to arbitrate. Such an agreement will amount to an arbitration agreement for the purposes of s.6 of the Arbitration Act 1996 and likewise for the purposes of legislation based on art. 8 of the UNCITRAL Model Law. Some clauses confer an option upon parties to choose either court or arbitration. Such clause will be treated as a choice of court agreement prior to the exercise of the option. The option can be exercised at any time prior to submission to the jurisdiction of the court. It is not necessary to exercise the option prior to the commencement of court proceedings by the counterparty.

I asked Mr Dixon whether he would like time to consider the point in the light of the text and/or the cases there cited,[4] but the offer was not taken up.

[10] For the reasons which I have given in paragraphs [6] and [7] above, it seems to me impossible on the facts as they stand to say that Hermes has agreed to refer the subject matter of its claim, or any part of the subject matter of its claim, to arbitration. Section 6(2) is therefore not available and the application fails on that short ground alone.

Other issues

[11] That is sufficient to dispose of this application. Mr Nader, for Hermes, raised other objections to the application. It is not necessary for me to deal with any but one of them.

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[3] Thomson, 2010

[4] Not reproduced above

[12] Mr Nader submitted that the Applicants were estopped from arguing that clause 19.5 had more than a permissive effect. This submission was based upon the conduct of Anzen in relation to a claim which it made against Hermes under a so-called Investment Agreement dated January 2010 ('the Investment Agreement'). The Investment Agreement contained provisions identical in terms to clause 19.5. In a letter before action, to which no response was made, Anzen's English Solicitors maintained, that that provision was not a binding arbitration agreement, but was merely permissive and that for reasons of economy Anzen proposed to sue Hermes in the English County Court. When Hermes tried, on the basis of the arbitration provision, to challenge the forum after Anzen had commenced the English proceedings, Anzen objected on the grounds that it had failed to object to the English County Court as an appropriate venue despite having had the opportunity to do so.

[13] On these grounds, Mr Nader submits that the Applicants are now estopped from contending that clause 19.5 is other than permissive. He relies upon **Krys and ors v New World Value Fund Limited and ors**;[5] and **OJSC Yuganreft v Abramovitch and ors.**[6]

[14] As to the first of these cases, the estoppel point involved a party which had stated a preference for Court proceedings over arbitration standing on its head after they had been commenced and campaigning instead for the matter to go to arbitration. I held that it was estopped from doing so. The present case does not involve a *volte face* in midstream after agreement reached that a particular matter should be determined in a particular forum and after the proceedings had been commenced.

[15] As to the **Yugraneft** case, that involved a party which had brought an unsuccessful claim here in the BVI attempting to mount an economically identical, but legally inconsistent, claim in the English Courts through its wholly owned subsidiary. On the basis that the original claimant in the BVI was also the real claimant in the English proceedings, that was held, unsurprisingly, to be an abuse of process. In reaching that conclusion Christopher Clarke J mentioned, with apparent approval, a passage from a judgment of the United States Court of Appeals for the Sixth Circuit,[7] in which the Court of Appeals expounded a doctrine referred to as judicial estoppel, the function of which is said to be to prevent intentional inconsistency in order to protect the judiciary from having to preside over successive and inconsistent attempt to litigate what are essentially the same issues. The same Court in the same case referred to equitable estoppel as a species of estoppel preventing a party from contradicting a position taken in prior judicial proceedings. The

[5] BVIHCV (COM) 2013/0026, 19 April 2013
[6] [2008] EWHC (Comm) 2613
[7] **Edwards v Aetna Life and Casualty** 690 F 2 s 595 (1982)

latter type of estoppel may be asserted, according to the Court of Appeals, only if the party asserting it has detrimentally relied upon the opponent's prior stance.

[16] In this case it is true that Anzen, has taken a different stance on the clause 19.5 point in relation to different sets of proceedings. Critically, however, Anzen is not, by the stance taken in relation to clause 19.5 on this application, seeking to relitigate issues decided against it in the English proceedings which, if I understand the passage cited in **Yugraneft**[8] correctly, is the foundation for the United States doctrines of both equitable and judicial estoppel. It is adopting a different position on what is essentially a procedural point. That position fails, not because it was an abuse to adopt it, but because it is simply wrong. None of the features which rendered the **Yugraneft** case abusive is present on this application. In any event, there is no sense in which it can be said that Lund or Travellab are privies of Anzen. They are wholly unconnected legally. Their interests may (or may not) be identical but there is no way in which it can be said that their personalities are to be aligned. There is no estoppel.

Conclusion

[17] This application is dismissed.

Commercial Court Judge
6 March 2014

[8] at paragraph 429