IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM NO.: BVIHC (COM) 191 OF 2016

BETWEEN:

MPA

Claimant/Respondent

and

[1] TIME, SA
(IN LIQIDATION)

[2] HPI LIMITED

[3] HPH LIMITED

Defendants/Applicants

Appearances:
Mr Matthew Hardwick QC and with him Mr Murray Laing for the Applicants
Mr Ben Quiney QC and with him Mr Justin Davis for the Respondents

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2017: October 31;
November 9.

Arbitration-Setting Aside Registration of Arbitral Award-Test-Principles.

JUDGMENT

[1] **ADDERLEY, J:** This judgment was delivered in November 2017 but is published now in an anonmized form in the interest of open justice as it deals with a topic of public interest.

[2] On February 24 2017 a Convention Award was duly registered in the BVI under section 85 of the Virgin Islands Arbitration Act 2013 ("**the Act**").

[3] A Convention Award means an arbitral award made in a State or Territory which is a party to the New York Convention. The British Virgin Islands ("BVI") is a party. "The New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done in New York on 10th June 1958.

[4] The Applicants are the second and third defendants (hereinafter referred to as "HPI" and "HPH") to that Arbitral Award and question the validity on various grounds permitted by statute. Those grounds are set out in section 86 of the Act which is identical to section 103 of the English 1996 Arbitration Act. The plaintiff is hereinafter referred to as MPA and the first defendant herein as "TIME" which is in liquidation and is not represented.

[5] On the authorities there are two procedures that can be employed to challenge the registration:

Firstly, there can be a full rehearing of the arbitration proceedings (**Dallah Real Estate and Tourism Holding Company (Appellant) v The Ministry of Religious Affairs, Government of Pakistan** [2010] UKSC 46). ("**Dallah"**)

Alternatively, whether or not there is the need for such a full hearing can be determined at a preliminary hearing using the summary judgement test or strike out test. (**Honeywell International Middle East Limited v Meydan Group LLC (formerly known as Meydan LLC**) [2014]1344 TCC)

If after that hearing it is determined that none of the objections raised by the party wishing to set the award aside could succeed as a defence in an application for summary judgment or on a strike out application made by the Claimant that will conclude the issue and the registration will not be set aside. The parties agreed to the alternative procedure.

[6] The hearing took place on 31 October 2017. For the reasons set out below, in the court's judgment, the claimant would not be able to pass the summary judgment or the strike out test on the first issue. Consequently registration of the award is set aside and the matter must proceed to a full rehearing of the arbitration on the merits.

[7] The summary judgment or strike out test in the context of arbitration as pointed out by Mr Quiney QC was set out in **Honeywell** at [69].

[8] The summary judgement test is also set out in CPR 15.2 as follows:

"The court may give summary judgment on the claim, or a particular claim, or on a particular issue if it considers that the-

(a) Claimant has no real prospect of succeeding on the claim or the issue, or
(b) The defendant has no real prospect of successfully defending the claim or the issue."

[9] The strike out test is set out in CPR 26.3(1) which reads as follows:

"In addition to any other power under these Rules the court may strike out a statement of case or part of a statement of case if it appears to the court that-

(c) The statement of case or the part of the statement of case to be struck out does not disclose any reasonable ground for bringing or defending the claim."

[10] The grounds on which the applicant relied are not stated precisely in the terms set out in the Act and in some cases overlap with several grounds but they included:

(1) Invalidity: HPI and HPH were not parties to the Arbitration Agreement and were not capable of entering into the Arbitration Agreement;
(2) Breach of Natural Justice: HPI and HPH were denied proper notice of the claims against them in the arbitration and were unable to present their case;
(3) Excess of Jurisdiction: the extension of liability to the applicants is beyond the scope of the Concession Contract;
(4) Breach of procedural law: As non-parties to the Concession Contract, the applicants never agreed to arbitration;
(5) Breach of Public Policy: Enforcement of the award would be contrary to public policy; and
(6) Award suspended: The award is subject to annulment proceedings and … the Supreme Court of the country of the applicable law has admitted the annulment proceedings and suspended the Award as a matter of the law of that country.

[11] Ground (1) encompasses grounds (3) Excess of Jurisdiction, and (4) Breach of procedural law, so, if I find it necessary to deal with them all I do not intend to deal with them separately.

[12] The Grounds to set aside an award are set out in the Act at section 86.

The grounds are exhaustive being limited to grounds (a) through (f) as set out below:

"86(1) Enforcement of a Convention award may not be refused except in the cases mentioned in this section."

"86(2) Enforcement of a convention Award may be refused if the person against whom it is invoked proves:..."

(a) That a party to the arbitration agreement was, under the law applicable to that party, under some incapacity;

(b) That the arbitration agreement was not valid,
  - **(i) Under the law to which the parties subjected it, or**
  - **(ii) If there was no indication of the law to which the arbitration agreement was subjected, under the law of the country where the award was made;**

(c) That the person
  - **(i) was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings; or**
  - **(ii) was otherwise unable to present his case;**

(d) Subject to subsection(4) that the award
  - **(i) Deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or**
  - **(ii) Contains decisions on matters beyond the scope of the submission to arbitration;**

(e) That the composition of the arbitral authority or the arbitral procedure was not in accordance with,
  - **(i) The agreement of the parties; or**
  - **(ii) If there was no agreement, the law of the country where the arbitration took place**

(f) That the award
  - **(i) Has not yet become binding on the parties; or**
  - **(ii) Has been set aside or suspended by a competent authority of the country in which, or under the law of which it was made**

[13] There are two additional grounds under BVI law Section 86(3):

"**Enforcement of a Convention Award may also be refused if**

(a) The award is in respect of a matter which is not capable of settlement by arbitration under the laws of the Virgin Islands; or

(b) it would be contrary to public policy to enforce the award."

[14] Section 86(2)(b) (Article V(1)(a) of the Convention) deals only with the case where the arbitration agreement is not valid but there is no doubt that it includes the case where the defendant is claiming not to be bound because he was never a party to the arbitration agreement (**Dallah** per Lord Collins at [77]).

[15] Under the Act if any one of the grounds are made out then recognition of the award "may" be refused. However, as pointed out in **Honeywell** referring to Dicey, Morris, and Collins at para 16-

150 English law recognizes an important public policy in the enforcement of arbitral awards and the courts will only refuse to do so under s. 103 [s.86] in a clear case. The grounds are to be construed narrowly, and the burden of proof lies on the person resisting the enforcement.

APPLYING THE SUMMARY JUDGMENT AND THE STRIKE OUT TESTS

(1) INVALIDITY: HPI AND HPH WERE NOT PARTIES TO THE ARBITRATION AGREEMENT AND WERE NOT CAPABLE OF ENTERING INTO THE ARBITRATION AGREEMENT

[16] Mr Hardwick QC described this as the "overarching complaint made in this Application". The complaint is that HPI and HPH were not parties and were incapable of being parties to the Concession Contract which contained the arbitration agreement and never consented to arbitration or assumed obligations thereunder.

[17] The plaintiff's somewhat perfunctory answer to this claim at [25] of its updated submissions was:

> "Under Section 86(2)(b) the applicants must prove that the agreement to arbitrate, being Clause 105 of the Concession Contract was invalid (see Russell para.8-083). There is no allegation that Clause 105 was itself invalid. Therefore this point is not satisfied. Again, the nebulous allegations surrounding the parties to the contract are irrelevant, as they do not go to the validity of the clause."

[18] The applicant relied on the following points which required the Court to read the translation in English:

(1) Utopian Law
Under Utopian Law (which governed the Arbitration), Article 172 of the Modernisation Law Regulations provide that concession contacts must be executed by a Utopian company created for that purpose and within 90 days of the award of the concession. This point was never addressed by the tribunal which was pointed out by the President of the Tribunal in a dissenting Partial Opinion.

Structure
(2) This was reflected in Article 4.1 of the Concession Contract which stated "…the Awardee of the concession shall create a Utopian Corporation within a maximum term of ninety (90) days from the date of the award of the Concession. Such corporation shall execute the Concession Contract with the granting Port Authority…" It was also reflected in other bid documents.

Bidding Process Question 8

(3) MPA expressely confirmed in the course of the bidding process that (1) the bidder (HPI) withdrew from the process after the bid was awarded; (2) the bidder did not sign the Concession Contract and (3) the bidder's liability was therefore limited to "…the amount established in the bid bond…"

Bid affidavits

(4) When HPI submitted a bid for the Concession on a specific date in 2006 the bid included affidavits by HPI (as bidder) and HPH (as holding company) both of which confirmed that it "…*assumes liability to …the MPA.. for any obligation arising [from the submission of the bid] until execution of the contract…"*

[19] The Applicants adopted the extensive arguments made by the President of the Tribunal rejecting MPA's claim and the various arguments which they had propounded at [463] as follows:

> "The foregoing, in addition to the fact that neither HPH nor HPI had legal capacity to execute the Concession Contract in accordance with Utopian law, and with the Bid Bases, which imposed the requirement to execute a contract with a company duly organized under the laws of Utopia, leads to the rejection of the Claimant's argument of having legitimate expectations of being [sic] executing a contract with [HPI and HPH]."

[20] This is a case where the tribunal has assumed jurisdiction over HPI and HPH which they are challenging. Lord Mance makes the observation at [30] of **Dallah** that the tribunal's view as to its jurisdiction has no legal or evidential value when the issue is whether the Tribunal had any legitimate authority over HPI and HPH at all. He further states:

> "The Scheme of the New York Convention, reflected in ss. 101-103 [ss84-86] of the 1996 Act [2013 Act] may give limited *prima facie* credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and s.103 [86]. But that is as far as it goes in law. **Dallah** [MPA] starts with advantage of serve, it does not also start fifteen or thirty love up."

[21] The very fact that there was an extensive dissenting award by the President based on realistic grounds is in my judgment *ipso facto* proof that the defence is arguable, and does not pass the summary judgment or strike out test.

[22] Furthermore, it appears that the dissenting view of the President adopted the correct approached to the issue of jurisdiction by making reference to the intention of each of the parties to be bound by the arbitration contract. The common intention of the parties is the correct legal test to be applied in determining jurisdiction in arbitration agreements as set out in **Dallah**. This is to be discovered by examining "..the subjective intention of each of the parties through their objective conduct (**Dallah** at [19] per Lord Mance referring to a statement by Aikens J). This and the other arguments put forward by the President on which the claimants rely, in my judgment, gives their defence a realistic prospect of success.

CONCLUSION

[23] As in my judgment the evidence on its face would not allow the claimant to succeed on an application for summary judgment or a strike out action, I would allow the application to proceed to a full hearing on the merits.

[24] Accordingly I do not find it necessary to examine the other grounds in detail.

[25] A case management conference should be scheduled in connection with the rehearing.

[26] I will hear the parties on costs, and on the publication of this judgment.

The Hon. Mr. Justice K. Neville Adderley
Commercial Court Judge (Ag)

By the Court

Registrar