ENGLISH HIGH COURT REFUSES TO DETERMINE THE EXISTENCE OF A DISPUTED ARBITRATION CLAUSE PRIOR TO THE COMMENCEMENT OF ARBITRATION PROCEEDINGS

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In a recent decision, the English High Court determined that it would be wrong in principle for the court to determine whether parties to a disputed contract had entered into a binding arbitration agreement in circumstances where one party intended to commence arbitration proceedings on the basis of the disputed arbitration agreement: *HC Trading Malta Ltd v Tradeland Commodities S.L.* [2016] EWHC 1279 (Comm) (click here for the full judgment).

The decision highlights the respect afforded to the arbitral process under the Arbitration Act 1996 ("**the Act**") and affirms that it is only in circumstances where the court is required to "fill a gap", such as with anti-suit injunctions preventing a party from commencing or continuing proceedings in another forum, that it will rule on the jurisdiction of an arbitral tribunal.

Background

The claimant alleged that the parties had entered into a binding contract under which the defendant was to purchase 250,000mt of clinker in bulk from the claimant, to be shipped in a series of parcels. The claimant further alleged that the contract contained a London arbitration clause. The defendant never received any parcels of clinker and denied that there was any contract of sale.

The claimant's solicitors asked the defendant to agree to accept service of an arbitration notice at its London solicitors, but the defendant did not do so. The defendant did not have any claim of its own against the claimant and took the position that it would contest the arbitrator's jurisdiction if the claimant commenced arbitration in London.

The claimant sought a declaration that there was a binding arbitration agreement which was subject to English law and which covered the claimant's intended claims. The defendant applied to set-aside the claimant's claim for declaratory relief on the following bases: (a) the court had no jurisdiction to entertain the claim under the Act; (b) alternatively, even if the court had jurisdiction it would be wrong in principle to do so; and (c) insofar as it was a matter for the court's general discretion it

matter for the court's general discretion it should be exercised against granting any relief.

Decision

The court dismissed the claimant's claim for declaratory relief. However, it did not accept the defendant's principal case that the court was deprived of declaratory jurisdiction under the Act. The judge considered that if it had been Parliament's intention to exclude the court's jurisdiction in that way, it would have been expressly stated in the Act. As the Act was silent on this point, it would be wrong to conclude that the Act impliedly limited the court's jurisdiction. Instead, the judge held that the issue was better considered as a matter of principle.

The judge highlighted the fact that the Act lays down an extensive code for the governance of arbitrations from start to finish, and considered the existence of that scheme to be highly relevant when considering the scope of the court's powers prior to commencement of arbitral proceedings. Although the court had jurisdiction to intervene, the judge accepted that in general terms, the court must be extremely slow to intervene where an arbitration is concerned.

The judge held that respect for the arbitral process includes respect for the scheme of and the principles underlying the Act. That scheme and those principles would be frustrated when an arbitration is on foot or contemplated if the parties were simply able to invoke a general declaratory power of the court, limited only by a broad exercise of discretion. Rather, disputes as to the existence or scope of an arbitration agreement should be determined by the detailed provisions of the Act, and in particular, as a starting point by the power of a tribunal to determine its own substantive jurisdiction under s30 of the Act. The only exception is where the court has to "fill a gap", as with anti-suit injunctions.

It would therefore be wrong in principle for the court to entertain any application for a declaration by a claimant where there are at least the following three factors:

1. the claimant asserts that there is a binding arbitration agreement;
2. the claimant has a claim which it wishes to assert and which therefore (on the claimant's own case) can only be litigated by way of arbitration; and
3. the claimant is clearly able to commence arbitration in pursuance of that agreement whether or not he has yet done so, and whether or not it is imminent.

Finally, even if there was no principled argument against granting the declaratory relief sought by the claimant and it was all a matter of the court's discretion, it would "unhesitatingly" refuse to exercise it in favour of granting relief. The judge's reasons including the following:

1. it was a needless invocation of the court's powers where the arbitral tribunal was capable of making a declaration as to the validity of the arbitration agreement;
2. it could not be said at this stage that it would necessarily be quicker or cheaper to use the court process rather than the arbitrators;
3. there was a very real risk that in deciding the issue of the existence of the arbitration agreement, the court would decide the central issue between the parties of whether there was a binding contract for sale; and
4. there was no practical impediment to the claimant commencing the arbitration straight away.

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