LUXURY SUPERYACHT ARBITRATION RELAUNCHED FOLLOWING RARE SECTION 45 APPLICATION TO THE ENGLISH COURT

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In a recent decision, *Goodwood Investments Holdings Inc. v Thyssenkrupp Industrial Solutions AG [2018] EWHC 1056 (Comm)*, the English court has considered a section 45 request for a ruling on a preliminary point of law. Requests of this nature are permissible under the Arbitration Act 1996, but are comparatively rare in practice. This was arguably a textbook example of a preliminary issue properly put before a court: did the parties' without prejudice correspondence – which the arbitrators should not review in any event – constitute a binding settlement agreement?

Context - potential settlement in *"without prejudice save as to costs"* correspondence

Goodwood Investment Holdings Inc. (the "Purchaser") and Thyssenkrupp Industrial Solutions AG (the "Builder") were in dispute regarding the workmanship on a luxury superyacht and certain Builder's warranties. The Purchaser commenced arbitration, seeking (i) declaratory relief and (ii) specific performance or, in the alternative, damages. A 5-week arbitration hearing was fixed.

The parties exchanged various without prejudice communications. The Purchaser's position was that a binding settlement had been reached. The Builder disagreed.

Section 45 application to the English court

The parties agreed to refer this issue to the court, but could not agree on the precise formulation of the issue to be determined. The Tribunal, therefore, formulated the issue and gave permission to approach the court under section 45(2)(b). The Purchaser then raised two further questions for the court's consideration, with which the Builder agreed. Notwithstanding the parties' agreement, the judge embarked on an independent assessment of whether he had jurisdiction to determine them and whether it would be appropriate to do so. He concluded that he had the necessary jurisdiction and that it was appropriate to proceed, since the reference to the court should finally dispose of the issue.

The Court's analysis: no settlement

After setting out extracts of the relevant correspondence (while attempting to preserve the confidential nature – see below), the judge summarised the legal principles, which were uncontested between the parties.

On the facts, he found that the parties had not concluded a binding settlement. Instead of finding an instance of offer and acceptance, the judge held that the correspondence constituted various offers and counteroffers, with the introduction of additional and new terms, and "*subject to*" language requiring a formal settlement agreement and board approval. In particular, the judge rejected the argument that the necessary board approval was mere "*rubber stamping*" and ought not to prevent the existence of a settlement agreement. He emphasised a director's duty to exercise independent judgment and to act in the best interest of the company, with the consequence that an agreement subject to board approval

(without the implication that it would be given) was fatal to the notion of a binding settlement having been reached.

The court's answers on all the questions were that there had been no settlement agreement and that the arbitration could, therefore, proceed.

There are two side points to note:

Part 36 analogy in "*without prejudice save as to costs*" correspondence

The judge observed that some offers were said to have been made by analogy with Part 36 of the English court procedural rules (which provisions in court litigation entail costs consequences in certain circumstances), in order potentially to be used in costs submission at the conclusion of the arbitration in apportioning costs. The judge declined to express a view as to the merits of the attempt to make an analogy to Part 36 within an arbitration and whether it could bring about similar costs consequences.

Preserving the "*without prejudice*" nature of correspondence

Noting the public nature of the judgment and, given his conclusion that there had been no settlement, the judge observed that he was careful to confine his account to what was necessary in order to explain and determine the question of law. Excessive detail within the judgment would sit uncomfortably with the "without prejudice save as to costs" nature of certain communications, in the context where the Tribunal was yet to determine the substance of the dispute and properly ought not to have regard to such communication.

Comment

This decision exemplifies the utility of section 45 for questions of law that can properly be carved out of the arbitration proceedings for a preliminary determination that settles an issue, with the result – in this case – that the arbitration may proceed without lingering doubts as to the settlement question. At the same time, the judge was very careful to be mindful of the delicate tension between the publicity of the case and the confidential nature of the communications on the basis of which he had to make his judgment.

Parties considering a section 45 application should bear in mind the following points:

1. if there is no agreement on the formulation of the question for the court, the Tribunal may formulate the question and the court may be happy to adopt that formulation;

2. parties can expand the questions for the court;

3. in any event, the court will embark on an independent exercise to determine whether it has the necessary jurisdiction to determine the questions and whether it is appropriate to determine them, with particular regard to the object of a section 45 application being the final settlement of the issue;

4. the section 45 procedure may be apposite when the answer to the question involves consideration of without prejudice correspondence that would be inappropriate to show to the Tribunal.

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