OIL & GAS:

Drafting for parallel disputes under a PSC, JOA and settlement agreement

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In *RSM Production Corporation v Gaz du Cameroun SA* [2023] EWHC 2820 (Comm), the English High Court considered the relationship between arbitration clauses in a production sharing contract (or participation agreement), joint operating agreement and settlement agreement (straddling both). The outcome illustrates the benefit of giving careful consideration to the interplay between dispute resolution provisions in drafting interrelated upstream contracts.

Facts

On 6 December 2005, RSM Production Corporation ("**RSM**"), an independent oil and gas exploration company, and Gaz du Cameroun SA ("**GdC**"), a Cameroonian company, entered into a Joint Operating Agreement ("**JOA**") regarding the Logbaba hydrocarbons block, under which GdC was designated as operator. The JOA is governed by Texas law and contains an arbitration agreement providing for ICC arbitration seated in Houston, Texas.

Subsequently, on 12 June 2017, the parties entered into a Participation Agreement ("**PA**") with the national oil and gas company of Cameroon, Société Nationale des Hydrocarbures. The PA is subject to the laws of Cameroon and provides, at Article 16, that any dispute arising out of it should be settled

by arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID**"), failing which for whatever reason, the UNCITRAL Arbitration Rules would apply.

On 10 October 2018, RSM commenced an ICC arbitration under the JOA, claiming expenditure due from GdC for the wells being drilled in the Logbaba hydrocarbons block. These claims then became the subject of a separate arbitration commenced by RSM in February 2020 pursuant to the PA, under UNCITRAL Arbitration Rules. A settlement agreement was concluded on 27 September 2021 ("**SA**"), where the parties agreed to dismiss the claims in the UNCITRAL arbitration, under the PA, provided that the dismissal would have no effect on the ongoing ICC arbitration.

The SA is governed by the laws of England and Wales and provides that "*the dispute resolution provisions of Article 16 of the [PA] shall apply to all disputes arising out of the [SA], provided, however, that the parties agree that disputes shall be submitted under the UNCITRAL Arbitration Rules and provided further that the parties agree that any dispute under this [SA] may be consolidated with any dispute that arises under the JOA and/or the [PA] in a single arbitration under the UNCITRAL Arbitration Rules (or, where applicable, the ICSID)*".

On 7 August 2023, GdC's lawyers sent a letter to RSM claiming US$ 48,855,450 under the JOA, contending that since RSM did not consent to the remedial works (which were the subject of the UNCITRAL arbitration), pursuant to an express clause in the JOA, RSM was liable to pay 700% of RSM's Participating Interest share in the operation. Upon RSM's refusal to pay this amount, GdC commenced substantive proceedings in the Cameroon courts.

RSM contended that the Cameroonian proceedings were in breach of the arbitration agreement in the SA and applied to the High Court of England and Wales for an anti-suit injunction which was granted at a hearing without notice on 4 October 2023 before Pelling HHJ. The return date for the anti-suit injunction was 2 November 2023, during which hearing the Court decided to continue the anti-suit injunction.

Issues

At the hearing, GdC resisted the continuation of the anti-suit injunction on four grounds:

1. The dispute RSM sought to enjoin was not a dispute governed by an English-seated arbitration agreement, or at least RSM could not show a high degree of probability that it is;
2. there was no breach of any arbitration agreement because GdC had merely sought and obtained interim relief in Cameroon in support of anticipated arbitration proceedings, and that it is established that seeking such interim relief does not breach an agreement to arbitrate;
3. the English Court has no jurisdiction over GdC; and
4. there was a failure to make a fair presentation at the without notice hearing.

Decision

In his judgment, Butler J focused on each of GdC's grounds of resistance in turn.

As to the first ground, Butler J considered the wording of the arbitration agreement. The judge held that the provision from the SA's dispute resolution clause is not simply one which provides that arbitrations commenced under the JOA and under the SA can be consolidated. The clause states that it is the disputes which may be consolidated in a single arbitration. Furthermore, if there were an arbitration under the JOA (ICC Rules) and also under the SA (UNCITRAL or ICSID Rules) consolidation of the arbitrations could not reliably be assured. Instead, the proper construction of the clause allows a party to refer to arbitration any dispute which arises under the JOA, where a dispute also arises under the SA. In effect a 'one stop shop'.

Further, the language of the provision is that the dispute under the JOA or the PA 'may' be consolidated with a dispute under the SA in a single arbitration. This provides for an option to invoke the clause and have a consolidated dispute in a single arbitration. Such option could be exercised by the commencement of such an arbitration, or by requiring the other party to submit the dispute to such an arbitration by making an unequivocal request to that effect and/or by applying for a corresponding stay of any relevant proceedings.

Therefore, the arbitration provision in the SA was binding on GdC and

applicable to its substantive claims made before the Cameroonian courts.

In relation to the second ground, Butler J also disagreed with GdC's claim that the Cameroonian proceedings were not a breach of any arbitration proceedings since they were intended solely to provide security for a claim to be pursued in ICC arbitration. Notably, GdC had not initiated any arbitration proceedings, and there was no evidence to suggest it was seeking security for a claim intended for arbitration.

GdC's jurisdictional argument, the third ground, the issue was whether GdC had been properly served – such as to invoke the jurisdiction of the English courts. In the SA the parties had agreed that "*any claim form, notice or other document upon GdC for the purpose of any proceedings or disputes begun in England and/or Wales shall be duly served upon it if delivered to its*" parent company's stated address. As such, in dismissing GdC's arguments, Butler J found that this is a contractually agreed method of service within CPR r. 6.11. The Arbitration Claim Form was served in accordance with that agreement on the parent company's address in England. In any event, and although it is unnecessary to consider in detail because of the applicability of CPR r. 6.11, RSM was entitled to serve GdC out of the jurisdiction without permission, by reason of CPR r. 62.5(2A), as the seat of the arbitration pursuant to the SA 'is or will be in England'.

Finally, with respect to the fourth ground, Butler J held there was no merit in GdC's argument concerning lack of full and frank presentation. It was not incumbent on RSM at the hearing without notice to inform the judge that, under one interpretation, the order could prevent GdC from commencing an ICC arbitration. The judge was of the view that this argument was put forward as an afterthought and that GdC should have promptly sought clarification in the first hearing, which it did not.

As such, Butler J ordered the continuation of the anti-suit injunction and the discontinuance of the substantive Cameroonian proceedings.

Comment

This case highlights a few interesting points:

1. The English courts remain committed to enforcing arbitration agreements and restraining parties from pursuing parallel litigation in breach of such agreements.
2. Whilst it may remain open (depending upon the exact wording of the dispute resolution clause and arbitration rules chosen), for a party to seek interim relief from a national court (i) it must be a genuine attempt to seek interim relief rather than a

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substantive final remedy and (ii) the nature of interim relief is that a party should follow up with commencing arbitral proceedings.

3. In oil and gas transactions it is common for the underlying production sharing contract, licence or concession ("**PSC**") granted by the government (or national oil company) to the relevant oil companies to be governed by local law. It may also be subject to ICSID arbitration (or an alternative).
4. As between the oil companies in a joint venture to explore for, develop and produce hydrocarbons under a PSC, such joint venture relationship (as between each other) will usually be structured as an unincorporated joint venture through a joint operating agreement (or 'JOA'). These usually follow industry specific model forms, which are published by the Association of International Energy Negotiators, Offshore Energies UK and other industry bodies.
5. JOAs are usually governed by English law, Singapore law, or the laws of one of the United States' jurisdictions. In turn, in respect of JOAs for operations outside the

About the authors

Phillip Ashley, Partner

Phillip Ashley is a partner who "specialises in contentious matters relating to the oil and gas and power sectors" and has advised on "matters relating to oil and gas investments in every continent except Antarctica" (Global Arbitration Review).

Phillip has extensive experience of international arbitration, commercial litigation, judicial review, expert determination, Competition and Market Authority appeals and regulatory investigations in the energy sector.

He is internationally recognised as being a specialist in high value energy disputes. According to Chambers and Partners he has "extensive experience of ICC and LCIA arbitrations, as well as court proceedings, concerning both oil and gas and conventional power assets" (Chambers Global). As a solicitor-advocate, Phillip regularly appears as counsel in significant energy related commercial arbitrations and expert determinations. He has appeared as counsel in energy related disputes in the High Court in London.

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John leads the CMS Oil And Gas Team in Dubai, advising clients on transactions and projects in the oil and gas sector across the Middle East and North Africa. John focusses his practice on acquisitions and disposal of oil and gas assets, hydrocarbon sales and transportation, supply chain contracting and general legal and commercial matters relating to joint ventures and granting instruments.

John has an excellent understanding of E&P companies' commercial and legal drivers having spent four years on secondment in the legal teams of the Abu Dhabi National Energy Company (TAQA) (as their Iraq legal manager), BG Group (now Shell) and Repsol-Sinopec.

US or UK, it is also more usual to incorporate a dispute resolution clause that provides for ICC, LCIA or SIAC arbitration, seated in one of the main arbitral seats.

6. Where a dispute arises under the PSC, on one hand, and the JOA, on the other, there is a potential for parallel proceedings. That said, this will usually be rare due to the different obligations under the respective documents.
7. As a result, if any document has the potential to create a dispute that 'straddles' the JOA and PSC, careful consideration should be given as to the appropriate consolidation provisions. That is particularly the case with a settlement agreement. In this case, the 'optional' consolidation provision was found to have fulfilled its commercial purpose.

Parties engaged in international transactions should be aware of and consider jurisdictional issues that may arise from inconsistent arbitration agreements, and how that inconsistency is best managed. Additionally, this case demonstrates the power of anti-suit injunctions to protect a party's rights under an arbitration agreement – and along with it the value of those arbitration agreements.

Emma Nierinck, Legal Director

Emma is a dispute resolution lawyer based in the Dubai office. Emma has a focus on disputes arising in the energy sector, particularly commercial disputes in the oil & gas, renewables and power industries. Her experience also includes acting on construction and engineering disputes arising from major infrastructure projects, particularly in the waste to energy sector.

She has acted as counsel in commercial litigation proceedings, adjudications, expert determinations and other forms of ADR, as well international arbitrations conducted under institutional bodies such as the ICC, LCIA, LMAA and ad hoc arbitrations under the UNCITRAL rules.

Admitted as a solicitor in England & Wales, Emma has completed in-house secondments with Shell, ExxonMobil and AIG and has obtained her Higher Rights of Audience.

David Rutherford, Partner

David Rutherford is a Partner at CMS, London, with 13 years of experience working in the oil & gas, energy transition and maritime sectors, having joined the firm as a trainee in 2009.

Experience covers a range of disciplines within those sectors, including procurement, supply chain, project and infrastructure development and bespoke financing arrangements.

His clients include oil majors, state energy companies, independents, contractors and vessel owners. He has been on long-term secondments to Maersk in Copenhagen, BP in Aberdeen, BG and Shell in Thames Valley Park and GDF Suez (now Neptune) and OMV in London.

He is very familiar with: vessel chartering, drilling contracts, wells goods and services contracts, subsea construction, EPC (and its variants), CITAs, TPAs, TPOSAs and JOAs.