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Case No: CL-2015-000333

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**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

The Rolls Building  
Fetter Lane  
London  
EC4A 1NL

Date: 18 May 2016

**Before:**

**MR JUSTICE LEGGATT**

**Between:**

**SOPRIM CONSTRUCTION SARL**

**Claimant/**  
**Respondent**

**- and -**

**REPUBLIC OF DJIBOUTI**

**Defendant/**  
**Appellant**

**Mr Christopher Butcher QC and Mr Keir Howie (instructed by Byrne and Partners LLP)**  
**for the Claimant**

**Ms Jennifer Haywood (instructed by Gibson Dunn & Crutcher) for the Defendant**

**Hearing date: 17 May 2016**

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Mr Justice Leggatt:**

1. The claimant, Soprim Construction SARL, has applied under section 67 of the Arbitration Act 1996 to challenge an interim arbitration award on an issue which goes to the jurisdiction of the tribunal. The respondent in the arbitration and defendant to this claim is the Republic of Djibouti, which I shall refer to as "the Republic". Soprim is a construction company which, in 2008, was a sub-contractor working on a project in Djibouti to build a new container terminal. Starting in October 2008, the Republic seized equipment belonging Soprim and imposed on Soprim various restrictive measures. The Republic has claimed that this was done to enforce tax debts. Soprim claims that it was politically motivated interference with its business which had no lawful justification.
2. To seek compensation for losses caused by these actions, Soprim commenced arbitration proceedings against the Republic in July 2012. The arbitration was brought under a Concession Agreement dated 30 October 2006. Under that agreement, the Republic granted a concession to construct and operate the new container terminal to a Djibouti company called Doraleh Container Terminal SARL, established for the purpose of the project and referred to in the agreement as "the Concessionaire". The Concessionaire was owned as to two thirds by the Republic and as to the remaining one third of its share capital by a Dubai company which invested in the project and was also appointed as its manager.
3. The Concession Agreement was subsequently amended by an Addendum dated 22 May 2007. Both the Concession Agreement and the Addendum are governed by English law. In addition, the Concession Agreement contains an arbitration clause, which provides for arbitration in London.
4. Soprim's claim is based on Article 12.1.3 of the Concession Agreement which provides, in relevant part, as follows:

"The Grantor [ie, the Republic] agrees that the Concessionaire, its Shareholders, Contractors, sub-concessionaires, managers, sub-contractors, their agents and expatriate personnel shall at a minimum be entitled to the following exemptions and benefits throughout the concession period."

A list of some 18 exemptions and benefits is then set out. Soprim relies particularly on paragraph 2:

"...exemption from any direct or indirect taxation including income tax..."

paragraph 7:

"...exemption from nationalization or any restrictive measures with respect to ownership of private property and the guarantee of private ownership of the concession's assets."

paragraph 15:

"The entry of the national gendarmerie and/or the local police force into the site will be upon request by the Concessionaire, except due to reasons of national safety and security..."

and paragraph 16:

"...freedom for the project to remain open without interruption, including public holidays, 24(twenty four) hours a day."

5. The other contractual provision which is crucial for present purposes is Article 1.2.5(a) of the Addendum. That states:

"Except as provided in this Addendum, the Original Concession Agreement, or the Amended Concession Agreement, the terms of this Addendum and those Agreements may be enforced and enjoyed only by Parties to this Addendum and those agreements and the operation of the Third Parties Act is excluded."

6. The arbitrator, Sir Gordon Langley, directed a hearing of preliminary issues in the arbitration. The preliminary issues included two issues referred to as the "sub-contractor issue" and the "addendum issue". They were: "Whether the claimant was entitled to enforce the exemptions and benefits in Article 12.1.3 of the original Concession Agreement pursuant to section 1 of the 1999 Act (the sub-contractor issue); and, if so, whether Article 1.2.5(a) of the Addendum purported to vary the Concession Agreement in such a way as to extinguish the claimant's entitlement so to enforce Article 12.1.3 (the addendum issue)."

7. On 12 March 2015, the arbitrator issued an interim award in which he found in favour of Soprim on the sub-contractor issue but against Soprim and in favour of the Republic on the addendum issue. There is no challenge to the arbitrator's decision on the sub-contractor issue but Soprim has applied to challenge the decision on the addendum issue. It is common ground that, if the arbitrator's decision on that issue is correct, it follows, subject to the effect of exceptions in section 2 of the 1999 Act, that Soprim had no right to invoke the arbitration clause in the Concession Agreement and that the arbitrator has no substantive jurisdiction over the dispute. It is also common ground that a challenge to the arbitrator's jurisdiction under section 67 of the 1996 Act involves a re-hearing of the question of jurisdiction and not merely a review: see e.g. *Azov Shipping Co v Baltic Shipping Co (No 1)* [1999] 1 Lloyd's Rep 68; *Dallah Real Estate v The Ministry of Religious Affairs* [2011] 1 AC 763 at paragraphs 26 and 96. The court's task is, therefore, to decide the addendum issue and to do so without giving the arbitrator's decision any weight independent of the reasons for it.

8. The starting point in law is the doctrine of privity of contract. That is the general rule of English law that a contract may only be enforced by or against a party to it and may not be enforced by or against a non-party. To that general rule, a substantial exception has been created by the 1999 Act. Section 1 of the Act provides:

**"1. Right of third party to enforce contractual term.**

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a “third party”) may in his own right enforce a term of the contract if—

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract."

9. The Concession Agreement does not expressly provide that any third party may in his own right enforce any term of the agreement. Section 1(1)(a) of the Act is, therefore, not applicable in this case. It is common ground, however, that before the Concession Agreement was amended, the third parties identified in Article 12.1.3 had rights to enforce that clause by reason of section 1(1)(b) of the Act. That was so because Article 12.1.3 purports to confer benefits on third parties who are expressly identified in that clause and there was nothing in the Concession Agreement to indicate that the parties to it did not intend the clause to be enforceable by those third parties.
10. As it was argued before the arbitrator, the sub-contractor issue turned on whether Soprim was a sub-contractor within the meaning of Article 12.1.3. The arbitrator held that Soprim was such a sub-contractor and was therefore entitled to enforce the exemptions and benefits in Article 12.1.3 of the original Concession Agreement. That conclusion has not been challenged.
11. Mr Butcher QC, who appears for Soprim, submitted that the importance of the benefits conferred by Article 12.1.3 and of the third party rights to enforce those benefits is underlined by the context in which the Concession Agreement was made. That context included concerns that the rule of law was not respected in Djibouti. Soprim's evidence refers to various contemporaneous reports from international organisations which ranked Djibouti very low in terms of respect for the rule of law and included criticisms that:

"...the courts cannot be considered independent of the Government..."

and that:

"...political manipulation undermines the credibility of the judicial system."

Against that background, it is understandable that the parties to the Concession Agreement would want to create an environment which protected contractors and others involved in the project and made it more attractive for them to participate and to do so on competitive terms. That goal would be advanced if the benefits and exemptions specified in Article 12.1.3 of the Concession Agreement were made enforceable by the third parties themselves.

12. The question then becomes how, if at all, those third party rights to enforce Article 12.1.3 of the Concession Agreement were affected when the agreement was amended by the Addendum. The divergence between the parties' positions is stark. Soprim contends that Article 1.2.5(a) of the Addendum preserves the rights of third parties to enforce Article 12.1.3. The Republic's case is that it removed those rights.
13. Article 1.2.5(a) of the Addendum can be divided into two parts. It starts with an exception or saving provision. There then follows the main or substantive part of the clause which is subject to the exception. Although the clause has of course to be read as whole, it is logical to identify first what its effect is intended to be apart from the exception. The operative words are:

"the terms of this Addendum and those Agreements [i.e., the original Concession Agreement and the Concession Agreement as amended by the Addendum] may be enforced and enjoyed only by Parties to this Addendum and those agreements and the operation of the Third Parties Act is excluded."

Taking those words alone, they naturally mean that no term of the Concession Agreement or Addendum is enforceable by any third party and that any enforceable rights that would otherwise arise by operation of the 1999 Act are excluded.

14. One then turns to the exception in the opening words to see what third party rights are not excluded by this clause. On behalf of the Republic, Ms Haywood submitted that the words "except as provided" at the start of the clause should be interpreted to mean "except as expressly provided" and that the intention of the saving provision is to preserve only third party rights which arise under section 1(1)(a) of the Act and not rights arising under section 1(1)(b). On behalf of Soprim, Mr Butcher emphasised that the word "expressly" is not used. He submitted that the effect of the saving provision is to preserve third party rights which arise either under section 1(1)(a) or section 1(1)(b) of the Act. As a matter of language, he argued, one can properly say that the Concession Agreement provided for Article 12.1.3 to be enforceable by a third party, even though it did not do so expressly. That is the effect of Article 12.1.3, read together with the choice of English law as the governing law and the absence of any expression of intention in the agreement that Article 12.1.3 should not be enforceable by third parties.
15. It seems to me that Soprim's construction is a possible meaning of the words and that there is no clear or meaningful distinction in this context between contractual rights and statutory rights. A third party which has a right to enforce a term of the contract pursuant to section 1(1) of the 1999 Act has such a right as a result of what the contract

provides and of what the Act provides. A combination of the two is necessary. That is so just as much where section 1(1)(a) applies as where section 1(1)(b) applies. The fact that the contract expressly provides that a third party may enforce a term does not, by itself, give a third party the legal right to enforce that term and, without the Act, the third party would not have such a right.

16. If Article 1.2.5(a) of the Addendum were to be construed entirely in isolation, I would, nevertheless, consider the Republic's interpretation to be the better interpretation of the clause. That is because drawing a distinction between third party rights arising under section 1(1)(a) and section 1(1)(b) would, in many contexts, be a rational purpose to attribute to the parties. On the other hand, treating the saving provision as preserving third party rights arising by virtue of section 1(1)(b) as well as section 1(1)(a) appears entirely to negate the main part of the provision and to deprive the clause of any effect at all.
17. It is axiomatic, however, that contractual provisions are not to be construed in isolation but must be understood in their context, including most immediately their contractual context. When one looks at the terms of the Concession Agreement, both in its original form and as amended by the Addendum, the Republic's interpretation of Article 1.2.5(a) of the Addendum encounters an objection which is similar to and seems to me just as potent as the objection to Soprim's interpretation. The objection arises because the Concession Agreement and Addendum do not contain any express provision that any term of those agreements may be enforced by a third party. On the Republic's interpretation, therefore, the saving provision is completely empty and the effect of the clause is completely to exclude all third party rights. But if that was the intention, rational parties would simply have said so. They would not have included a saving provision which saves nothing and serves no purpose.
18. The answer given by Ms Haywood to that objection depends on drawing a distinction between enforcement and enjoyment of third party rights. She submitted that, even though the Concession Agreement does not expressly provide that any third parties may enforce any of its terms, it does expressly provide for benefits to be enjoyed by third parties – in particular and most relevantly by the terms of Article 12.1.3. The saving provision in Article 1.2.5(a) of the Addendum has the effect, she submitted, of preserving the entitlement of third parties to those benefits, although it does not reserve rights of third parties to enforce that entitlement themselves. In relation to Article 12.1.3, they would have to rely on the Concessionaire to do so.
19. I do not consider this to be a tenable interpretation. In the first place, as Mr Butcher emphasised, the clause does not refer to enjoyment of benefits but to the enforcement and enjoyment of the terms of the agreement. Moreover, the Republic's interpretation would require the clause to be read as meaning that, aside from the saving provision, the terms of the agreement should not be taken to confer any benefits on third parties, whether enforceable by the third parties themselves or by the parties to the agreement. That would involve writing out of the Concession Agreement all the benefits conferred on third parties by Article 12.1.3 before bringing them back in again through the saving provision, though only as enforceable by the parties to the agreement. That seems to me to be an absurd reading of the clause, which is clearly not concerned to prevent the conferring of benefits on third parties but is concerned with third party rights.

20. An alternative explanation suggested by Ms Haywood was that the wording of Article 1.2.5(a) was standard boilerplate wording which may have been incorporated without consideration of the fact that in this particular case the saving provision at the start of the clause was unnecessary. Even if it were to be assumed, however, that Article 1.2.5(a) was based on some standard form of wording used in other contracts, that does not solve the question of how it should be interpreted in this particular context. There is also a more fundamental point engaged here. The process of interpreting a contract in English law is an objective exercise in the sense that it does not involve trying to guess what, if anything, was actually in the minds of the parties but in making the best sense that the court or other interpreter can of the language of the contract understood in its context. To do that, the court treats the parties as rational agents who have the aims that reasonable people in their situation would have had and intend the consequences that such agents would have intended the language of the contract to have.
21. Applying that approach, there are, in my view, strong reasons for rejecting the interpretation of Article 1.2.5(a) of the Addendum contended for by the Republic. Having chosen – as it must be assumed that the parties' to the Concession Agreement did when they entered into the agreement – to confer rights on the third parties identified in Article 12.1.3 to enforce the terms of that clause, there is no apparent reason why rational parties in their position would or even might have chosen to take away the third party rights which they had given only a few months previously. In particular, there is nothing in the genesis of the Addendum or in the surrounding circumstances to suggest any possible reason for doing so; rather, the opposite is true.
22. The origin and object of the Addendum are expressed in its recitals and, in particular, in recitals C and D. They state:

"C. The Concessionaire has been in discussions with potential financiers for the project but requested that certain amendments be made to the Original Concession Agreement in order to facilitate the financing of the project on a non-recourse basis.

D. Pursuant to their mutual obligations under Clause 6.1 of the Original Concession Agreement and having agreed that the amendments requested by the potential financiers to the Project are reasonable and in the interests of obtaining financial assistance for the project on a non-recourse basis, the parties agree to amend the provisions of the original Concession Agreement in accordance with the terms of this Addendum."
23. The amendments made to the Concession Agreement by the Addendum included adding the financiers to the third parties specified in the opening sentence of Article 12.1.3 and expanding paragraphs 2 and 3 of that provision so as to add further exemptions for the benefit of the financiers. It is difficult to conceive of why the financiers should have requested that they be added as third party beneficiaries of Article 12.1.3 and yet, at the same time, have sought to restrict the effect of Article 12.1.3 so as to deprive all the specified third parties, including themselves, of the right to enforce it.

24. For the Republic, Ms Haywood submitted that there were other ways in which the financiers could obtain protection for their interests – for instance, by persuading the Concessionaire to agree to enforce exemptions set out in Article 12.1.3 when they benefitted the financiers. I have no doubt that is true but the fact that the financiers could seek to protect their interests in other ways does not provide any reason for them voluntarily to forego protections available to them. Nor does it provide any reason to remove enforceable rights which had previously been granted to contractors and others involved in the project, especially when on the face of it the grant of such rights helped to create a more secure legal environment which was calculated to make participating in the project more attractive. I can see no reason why the financiers might have wanted to undermine that position.
25. Ms Haywood also submitted that a decision to exclude third party rights would have the benefit of certainty and was a perfectly rational choice for the parties to have made. I would have accepted that submission if the question of interpretation had been one of identifying what bargain the parties had made at the outset. But in circumstances where the parties had already decided to confer enforceable rights on third parties, reasons which might have explained a different choice at the outset do not seem to me to provide a credible explanation for viewing the parties as having removed those rights without a clear and unequivocal expression of intention to do so.
26. In these circumstances, I think it irrational to attribute to the parties to the Addendum the intention, by including Article 1.2.5(a), of removing the rights to enforce the terms of Article 12.1.3 of the Concession Agreement which they had previously conferred on third parties. Faced with the two possible interpretations of Article 1.2.5(a) that I identified earlier, I reject the interpretation which would have that effect.
27. This still does not answer the objection also mentioned earlier that Soprim's interpretation of the clause gives it no sensible purpose and treats it as having no real effect. Soprim's answer to that objection, as articulated by Mr Butcher, was that Article 1.2.5(a) should be seen as drawing a distinction between (1) terms which were intended to be enforceable by third parties and (2) terms which merely had the incidental effect of conferring benefits on third parties but were not intended to be enforceable by them. The latter, Mr Butcher suggested, were excluded by the clause as the saving provision preserved only the former. Mr Butcher further suggested that the case of *Prudential Assurance Company Ltd v Ayres* [2007] 3 All ER 946, decided not long before the Addendum was concluded, could have been thought to give credence to a view that a term which had the incidental effect of benefitting third parties was presumed to be enforceable by them, even if it was not a purpose of the parties' bargain to provide for the third parties to benefit from the term in question, unless it could be positively demonstrated that the parties did not intend the term to be enforceable by third parties.
28. Reference was made by Mr Butcher to various other terms of the Concession Agreement which he suggested might arguably fall into this category. For example, Article 5.1 of the agreement made provision for the employment at the new container terminal of existing port employees. The Concessionaire was not obliged to offer employment to current employees but, if it did so, it agreed, for example, to offer financial terms which were no less favourable than those enjoyed by the port employees under their previous employment. The Concessionaire also agreed in Article 5.2.2 to make best efforts to recruit Djiboutian nationals for the purposes of the project; and



there are other clauses which refer to third parties who stood to benefit from performance of the obligations undertaken in the agreement.

29. I do not consider, however, that any of those clauses, on their proper construction, conferred enforceable rights on the third parties mentioned in the clauses before the Addendum was entered into. That is because, even if some of the clauses were intended to benefit third parties – for example, existing port employees – I think it can be clearly inferred that the clauses were not intended to be enforceable by the third parties concerned. That would not prevent the inclusion of an interpretation clause in the Addendum for the avoidance of doubt, but the distinction suggested on behalf of Soprim to explain Article 1.2.5(a) of the Addendum is an extremely subtle one which parties who really had it in mind could and would reasonably be expected to express much more clearly and directly. I think it strained to interpret Article 1.2.5(a) as seeking to make that distinction and I do not find Soprim's interpretation, ingenious as it is, a plausible interpretation of the clause.
30. Ultimately, the choice comes down, as I see it, to one between two possible meanings of Article 1.2.5(a) of the Addendum, each of which is unsatisfactory. On one interpretation, the clause achieves nothing useful at all. On the other interpretation, it had the effect of removing, by a side wind, rights which had intentionally been conferred on third parties without any intelligible reason for doing so, while at the same time putting in some futile words which give a false impression that some such rights had been saved. Faced with this choice, I prefer the first interpretation as the lesser of two evils and the one which rational parties would be less unlikely to have intended. Accordingly, in respectful disagreement with the arbitrator, I decide the Addendum issue in favour of Soprim and hold that Article 1.2.5(a) of the Addendum did not vary the Concession Agreement in such a way as to extinguish Soprim's right to enforce Article 12.1.3. It follows that, subject to any other issues, the arbitrator does have substantive jurisdiction over the dispute.