



Neutral Citation Number: [2020] EWHC 814 (Comm)

Case No: CL-2019-000630

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 06/04/2020

Before :

THE HONOURABLE MRS JUSTICE MOULDER

Between :

**ALEXANDER BROTHERS LIMITED
(HONG KONG SAR)**

Claimant

- and -

**(1) ALSTOM TRANSPORT SA
(2) ALSTOM NETWORK UK LIMITED**

Defendants

Christopher Harris QC and Sarah Tulip (instructed by Charles Fussell & Co. LLP)
for the Claimant

Orlando Gledhill QC (instructed by Enyo Law LLP) for the Defendants

Hearing dates: 25 March 2020

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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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 6th April 2020 at 1030.

THE HONOURABLE MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is the reserved judgement on the defendants' applications to adduce expert evidence and to extend time for filing and exchanging such evidence.
2. Due to the coronavirus, the hearing of this application was held remotely but was published in the court list and was therefore open to the public.
3. The applications before this court relate to an application to set aside (the "Set Aside Application") an order of Teare J dated 15 October 2019 by which permission to enforce an arbitration award dated 29 January 2016 (the "Award") was granted. The hearing of the Set Aside Application is due to be heard in May 2020 (the "May Hearing").
4. In connection with that hearing the defendants have made two applications: the first application (the "Extension Application") dated 28 February 2020 seeks to extend the deadline by which an application for permission to rely on expert evidence can be made and to file and serve such evidence and the second application (the "Permission Application") dated 9 March 2020 seeks permission to adduce expert evidence in French criminal law pursuant to CPR 35.4.
5. In support of the Extension Application the defendants filed the Third Witness Statement of Mr Nicholas Jones, a partner at Enyo Law LLP acting for the defendants, dated 28 February 2020 and in support of the Permission Application the defendants have filed the Fourth Witness Statement of Mr Jones dated 9 March 2020.
6. In light of the Permission Application and the timing of the May Hearing, the Extension Application is not opposed by the claimant.

Background

7. The background to this matter is as follows. The first defendant is a company incorporated in France and the second defendant is a company registered in England. Both are wholly-owned subsidiaries of the Alstom group which is engaged in the supply of railway locomotives and stock.
8. The claimant ("ABL") is a company incorporated in Hong Kong. Its principal acted for ABL as a consultant for the Alstom group in China between 2003 and 2012 pursuant to 5 consultancy agreements. In 2013, ABL brought arbitration proceedings in accordance with the dispute provisions of the consultancy agreements to recover amounts which were alleged to be owing and due by the defendants under the consultancy agreements.

9. The arbitration proceedings were an ICC arbitration under Swiss law in Geneva. ABL succeeded in part and the defendants were ordered to pay the claimant approximately €1.56 million. ABL's position is that the tribunal held (amongst other things) that the defendants had not established the corrupt practices upon which they relied as a defence to the non-payment. The question of what the tribunal decided in this regard is in dispute and is a matter for the May Hearing.
10. The defendants applied to have the Award annulled in the Swiss courts. That application was dismissed on 3 November 2016. The Swiss court held that it was not able to re-examine the allegations of corruption.
11. The claimant then sought to enforce the Award in France and the Paris District Court granted an order on 31 March 2016. However the Paris Court of Appeal on 28 May 2019 held that it would be contrary to French public policy to grant the claimant permission to enforce the Award because it found:

“serious, precise and consistent indicia that the sums Alstom paid to ABL financed and remunerated the bribery of public officials” in China.
12. The Paris Court of Appeal also considered that the Award:

“orders Alstom to pay sums intended to finance or remunerate acts of bribery”.
13. That decision is now being appealed by the claimant to the French Cour de Cassation.
14. The claimant then made its *ex parte* application to enforce the Award in England and that led to the order of Teare J dated 15 October 2019.

Expert report

15. The defendants seek to adduce an expert report in French criminal law produced by Sebastien Schapira, a partner in the French law firm Shapira Associates.
16. His report (which runs to some three pages) expresses the view that, in light of “facts and circumstances” in the Paris Court of Appeal ruling, any payment made to ABL pursuant to an English court ruling enforcing the Award would:

“create an obvious risk of prosecution in France and expose [the defendants] to severe criminal charges”.
17. In his opinion the relevant offence does not require that the payment precedes the “official act” and thus there is an “obvious risk” that an investigating French criminal judge could consider any new payment made by the defendants fell within the scope of the French Criminal Code relating to the proffering of bribes.

Relevant legal principles

18. CPR 35.1 provides:

“Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings.”

19. Both parties relied on various passages in the decision in *British Airways v Spencer* [2015] EWHC 2477 (Ch). The approach which is often cited in this context is at [68] of the judgment:

“[68] ... it is necessary to look at the pleaded issues and, unless and until a particular issue is excluded from consideration under CPR 3.1(2)(k), the court must ask itself the following important questions:

(a) The first question is whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it seems to me that it must be admitted.

(b) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it (just as in *Mitchell* the court would have been able to resolve even the central issue without the expert evidence).

(c) Since, under the scenario in (b) above, the court will be able to resolve the issue without the evidence, the third question is whether, in the context of the proceedings as a whole, expert evidence on that issue is reasonably required to resolve the proceedings...”

20. In addition, I note the following principles derived from that judgment:

- i) the underlying policy objective of this rule is to reduce the incidence of inappropriate use of experts to bolster cases (at [22]);
- ii) what is reasonably required is informed by the overriding objective and the court should not be over-zealous in excluding evidence in order to save time and cost (at [25]);
- iii) a judgment needs to be made in every case and, in making that judgment, it is relevant to consider whether, on the one hand, the evidence is necessary (in the sense that a decision cannot be made without it) or whether it is of very marginal relevance with the court being well able to decide the issue without it, in which case a balance has to be struck and the proportionality of its admission assessed (at [63]);
- iv) in striking that balance, the court should be prepared to take into account disparate factors including the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence

would entail (particularly delay which might result in the vacating of a trial date) (at [63]);

- v) it is only at the trial that it will become apparent what issues actually need to be decided. Accordingly, it cannot be said, at present, that it will not be necessary to decide any particular pleaded issue in order to resolve the proceedings. It must follow that, if expert evidence is reasonably required to resolve a pleaded issue, it will also be reasonably required to resolve the proceedings (at [64]);
- vi) the question is whether the court would be assisted by such evidence (assuming in the first place that such evidence is not necessary to any pleaded issue) and if the evidence might be helpful, the Court must determine whether it then falls within CPR 35.1 in accordance with the applicable principles.

21. Counsel for the claimant also referred the court to the decision in the *RBS Rights Issue Litigation* [2015] EWHC 3433 (Ch). Counsel for the claimant referred in particular to the warning at [52] of the judgment that the evidence rather than being useful within the second limb of the test in *Spencer* (set out above) could be a “confusing distraction”.

The Set Aside Application

22. The order of Teare J granting permission to enforce the Award was made pursuant to section 101 of the Arbitration Act 1996 (the “Act”). As it was made *ex parte* on the papers, it contained the usual provision that the defendants could apply to set aside the order (within 21 days). The Set Aside Application is made on two grounds: firstly, a failure by the claimant to give full and frank disclosure and secondly, pursuant to section 103 of the Act, that recognition or enforcement of the Award would be contrary to public policy. The first ground is not relevant to the issue of expert evidence before this court.

23. Section 103 of the Arbitration Act 1996 provides (so far as material):

“103. Refusal of recognition or enforcement.

(1) Recognition or enforcement of a New York Convention award shall not be refused except in the following cases.

...

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award.”

24. It was common ground before me that section 103(3) involves a two-stage process: firstly the court must determine whether it would be contrary to public policy to recognise or enforce the award, and secondly, if it would be contrary to public policy, whether the court should exercise its discretion to recognise or enforce the award.

Submissions

25. Counsel for ABL submitted that unlike the position in *Spencer* where the judge had careful regard to the pleaded issues to determine whether the expert evidence was necessary to decide a particular pleaded issue, there is no such equivalent in this case nor is there any route by which a strikeout of issues could be sought. It was therefore submitted that (in effect) the court should give greater scrutiny to the arguments advanced by the defendants to see whether the defendants merely sought to adduce the expert report in order to bolster a weak case.

26. It was submitted for the claimant that the basic policy underlying both the New York Convention and the Act is to favour enforcement of New York Convention awards and that the English courts have construed the exceptions to enforcement in section 103(3) narrowly. It was submitted that the defendants had not identified any authority in which an English court had held that evidence of risk of prosecution abroad is a relevant factor for the court to take into account in determining whether it would be contrary to English public policy to permit enforcement of an arbitral award in England. The claimant relied on the Court of Appeal decision in *Westacre Investments Inc v Jugoinport-SDRP Holding Company Limited* 1999 WL 477322 where it was said that:

“it seems to me that if all that can be said of a contract is that performance in a foreign country will be contrary to the domestic public policy of that state, enforcement will only be refused if performance would be contrary to the domestic public policy in England.”

Accordingly it was submitted for the claimant that if the English court does not take account of the domestic public policy of the place of performance (in this case China) it is difficult to see how the potential consequences of enforcement in a third country (France) could bear upon the court’s assessment of English public policy. It was submitted that the defendants are mounting a "collateral attack" on the Award and seeking to undermine the Award by asking the English court to refuse enforcement on the basis of a decision of the Paris court of appeal.

27. Counsel for ABL submitted that the court should examine the merits of the argument both in relation to the exercise of the court's discretion under section 103(3) and in relation to public policy. In relation to the former it was submitted that it was “extraordinarily difficult to imagine” that if the defendants were to succeed in establishing that enforcement would be contrary to public policy, that the defendants would then need to rely on the French expert evidence in order to avoid the result that the court might decide in the exercise of its discretion under section 103(3) to permit enforcement of the Award notwithstanding the public policy.

28. It was not submitted on behalf of the defendants that the expert evidence was "necessary" in order to resolve the issue of the exercise of the court's discretion but it was submitted that it "might assist".

29. It was submitted for the defendants that whilst it could not at this stage anticipate the detailed submissions that might be made for the claimant to persuade the court not to exercise its discretion under section 103(3) in circumstances where the defendants had

succeeded in persuading the court that it would be contrary to public policy to recognise or enforce the Award, the defendants would seek to rely on the expert report that if enforcement were to be ordered, this created the "obvious risk" of prosecution in France and exposed the defendants to "severe criminal charges". Counsel for the defendants said that the second defendant is dormant with "far less in the way of assets than would be required to meet the Award" and payment would therefore have to be made by an employee in France.

30. It was submitted for the claimant that the submission that enforcement would lead to payment being made by a French employee and that the second defendant does not have the assets to make the payment was not in evidence before the court (although it was accepted that the submissions of the defendant were made on instructions). Counsel for the claimant however focused his submission on the proposition that it was unlikely that the court would need to consider the exercise of discretion separately from the issue of public policy if in fact it found in favour of the defendants on the issue of public policy and the narrowness of the public policy exception as shown by the authorities.

Discussion

31. Accepting that the court hearing the Set Aside Application will apply a two stage test under section 103, I propose to deal firstly with the exercise of the discretion, the second stage.
32. In my view, this court cannot say that it will not be necessary for the court at the May Hearing to address the second stage of section 103(3), the issue of whether to exercise its discretion. The court must therefore ask whether it is necessary for there to be expert evidence before that issue can be resolved or if the evidence is not necessary, whether it would be of assistance to the court in resolving that issue. (On the principles referred to above, it must follow that if expert evidence is reasonably required to resolve the issue of the exercise of the discretion it is also reasonably required to resolve the proceedings.)
33. Applying the approach in *Spencer* in order to decide whether the evidence is reasonably required, the court has to carry out a balancing exercise having regard to the factors such as the value of the claim, the effect of a judgment either way on the parties, who is to pay for the commissioning of the evidence on each side and the delay, if any, which the production of such evidence would entail (particularly delay which might result in the vacating of a trial date).
34. In this case the factors which the court weighs are as follows:
- i) the discretion under section 103(3) is separate from the first stage; this court cannot conclude that the need for such discretion to be exercised will not arise;
 - ii) if the court has to exercise its discretion, that discretion is not circumscribed by the Act and it seems to me that the position under French criminal law in the circumstances will or may assist;

- iii) the cost of the expert evidence is very modest at some €8000, although I note that the claimant submits that the expert evidence in response is likely to be fuller and therefore more expensive;
 - iv) even if the expert report in response is more extensive, the extent of the expert evidence on this issue is not in my view likely to be so extensive such as to create a “confusing distraction”; it is confined to a narrow point of French criminal law;
 - v) the significance of the proceedings to the parties and the implications for the defendants if enforcement is permitted, namely that the defendants may be faced with a choice as to whether to comply with the English court order or face committing an offence under French law; as the offence relates to bribery, this may well have reputational significance which is broader than the penalties imposed by French law;
 - vi) it was accepted for the claimant that were this expert evidence to be allowed, thus requiring a need to obtain responsive evidence, it would not affect the timing of the May Hearing.
35. Taking all these matters together, in my view this is evidence which is reasonably required in order to resolve the proceedings.
36. In light of my conclusion on this first issue it is not necessary for me to decide whether this evidence is also reasonably required in order to resolve the issue of whether enforcement of the Award would be contrary to public policy, the first stage to be considered by the court under section 103 (3).
37. I propose therefore to deal with this alternative basis shortly.
38. I was referred to *Dicey, Morris and Collins (15th ed)* and I note that at [16-149] the authors cite Sir John Donaldson M.R. in *Deutsche Schachtbau v Shell International Petroleum Co Ltd* where he:
- “emphasised that public policy could never be exhaustively defined, and that it should be approached with extreme caution: for an argument based on public policy to succeed it has to be shown that there is some element of illegality or that recognition or enforcement of the award would be clearly injurious to the public good, or, possibly, that recognition or enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.” [emphasis added]
39. I also note the commentary at [16-150]:
- “English law recognises an important public policy in the enforcement of arbitral awards, and the courts will only refuse to do so under Rule 69(2) in a clear case. A controversial question, which has been the subject of several

recent decisions, is the extent to which it may be contrary to English public policy to enforce a foreign arbitral award rendered on the basis of an underlying contract the enforcement of which (as distinct from enforcement of the arbitral award) might be contrary to English public policy. The following principles can be derived from the authorities. First, it is legitimate for the court, in considering whether a foreign arbitral award should not be enforced on the ground of public policy, to take account of the underlying contract on which the award is based. Second, if that contract is in itself contrary to public policy (e.g. the classic case of a contract to share the proceeds of crime) the award may be refused enforcement on the ground of public policy. Third, it is important to distinguish between domestic public policy in English law and considerations of international public policy applied by the English courts so as to disapply foreign law or refuse to enforce an arbitral award, as the case may be. Thus the mere fact that English law would have arrived at a different result does not of itself justify the application of English public policy. Fourth, the mere fact that the performance of the contract may be illegal in the place of performance, without more, will not render an award on the basis of such a contract unenforceable in England, where the contract is legal by its applicable law and by the *lex arbitri*. Fifth, if it is apparent on the face of the award that the contract was made with the intention of violating the law of a foreign friendly State, then the enforcement of an award rendered on the basis of such a contract may be contrary to English public policy. Sixth, the court has to perform a balancing exercise between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the enforcement power of the English court is not abused: the nature of, and strength of the case for, the illegality, and the extent to which it can be seen that the asserted illegality was addressed by the arbitral tribunal are factors in the balancing exercise between the competing public policies of finality and illegality.” [emphasis added]

40. Whilst I accept this is a case where it is not suggested that the underlying contract was illegal in the place of the performance, this is only one of the six principles identified above and I have highlighted in the extract above the principle that the court has to perform a balancing exercise between the competing public policies of finality and illegality. It seems to me that the issue as to whether the exception in section 103(3) is established is both legally complex and fact sensitive. The matter is for determination at the May Hearing and whilst it was common ground that the defendants faced a high hurdle, this court cannot prejudge the outcome of that balancing exercise. The question for this court is whether the expert evidence is or may be helpful and if it may be helpful, whether it is “reasonably required”.

41. In my view in carrying out the balancing exercise between the competing public policies, the expert evidence as to the consequences under French law may be helpful and having regard to the factors identified above including the significance of the issue, cost and the effect on the hearing date, conclude in the alternative, that in the circumstances the evidence should be admitted on this basis as being reasonably required and thus meeting the test in CPR 35.1.

Conclusion

42. For all these reasons the Permission Application is granted.