Litigation

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English Court Trumps Arbitration Clause in Favor of One-Stop Litigation

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The English High Court in Monde Petroleum SA v WesternZagros Ltd *[2015] EWHC 67 (Comm) recently decided whether a dispute resolution clause in a settlement agreement referring disputes to the English court superseded an arbitration provision in the underlying contract so as to govern resolution of subsequent disputes arising out of both agreements. The court held that the later clause controlled, and it applied a presumption of one-stop adjudication as evidenced by the language of the clause itself as well as the surrounding factual circumstances, including the timing of the agreement to the conflicting provisions.*

WesternZagros Ltd ("WZL") is a company incorporated in Cyprus with its head office in Canada. It carries on business exploring for, developing and producing crude oil and natural gas. In 2006 it was engaged in negotiations with the Kurdistan Regional Government in Iraq ("KRG") for the exploitation of oil in the South Sulaymaniyah region of Kurdistan. Monde Petroleum SA ("Monde") is a company incorporated in the British Virgin Islands. The dispute between the parties originated from an agreement for consultancy services dated 23 April 2006 ("the CSA"), by which WZL engaged the services of Monde, to assist WZL in concluding and maintaining the exploration and production sharing agreement ("EPSA") which WZL was negotiating with the KRG, and in relation to business opportunities in the region more generally. It provided for Monde to receive monthly fees, enhanced payments upon the achievement of certain milestones, and an option in certain circumstances to share in the benefit of a successful EPSA by acquiring a 3 percent interest. The CSA contained a London arbitration clause.

In January 2007 WZL stopped paying the monthly fee invoiced by Monde, and on 16 March 2007 WZL purported to terminate the CSA pursuant to a contractual termination provision. WZL disputed that the unpaid amounts invoiced by Monde, which included a milestone payment, were due.

On 18 April 2007 the parties entered into a settlement agreement ("the Termination Agreement"), under which WZL was to pay Monde's disputed invoices in full and there was a mutual release and waiver of all claims by each party against the other in respect of the CSA. The Termination Agreement contained a clause conferring exclusive jurisdiction over disputes on the courts of England and Wales.

Monde commenced proceedings in the English High Court alleging that the Termination Agreement was induced by misrepresentation and/or duress. It claimed damages in an amount which it claimed it would have earned under the CSA, including what it would have earned pursuant to the 3 percent option. The quantification of such damages claim necessarily involved an assumption that the CSA was not validly terminated, a matter disputed by WZL. The relief claimed by Monde in the Commercial Court proceedings also included "further or alternatively" a claim for rescission of the Termination Agreement by reason of the alleged misrepresentation and/or duress.

Monde also commenced arbitration proceedings before the International Chamber of Commerce (ICC) against WZL as a protective measure, even though its primary claim was that the English Court had exclusive jurisdiction. WZL counterclaimed for declaratory relief in the ICC arbitration, including seeking declarations that Monde had no further entitlement under the CSA and so had not lost any benefit by entering into the Termination Agreement. Monde disputed that these questions fell within the ICC tribunal's jurisdiction. By an award dated 16 July 2014 ("the Award"), the tribunal determined that it had no jurisdiction over the declaratory relief counterclaimed by WZL in the arbitration. It ordered WZL to pay Monde's costs of the arbitration proceedings.

Four applications by WZL came before the English court and resulted in the decision here. The principal one was an appeal under s.67 of the Arbitration Act 1996 ("the s.67 appeal") by which WZL sought to overturn the decision in the Award that the arbitral tribunal did not have jurisdiction over WZL's counterclaims for declaratory relief. The second application was to set aside an order of High Court Judge Sir Julian Flaux dated 6 October 2014, made *ex parte*, granting Monde permission to enforce the Award in respect of the order for costs. The third application was a challenge to the court's jurisdiction in respect of part of the claim made by Monde in the court proceedings. It was agreed that the outcome of the second and third applications would be determined by the outcome of the s.67 appeal. The fourth application by WZL was for security for the costs of defending the court proceedings in the event that it was unsuccessful on the other applications.

The dispute, therefore, can be summarized as whether the English court or the ICC arbitral tribunal had jurisdiction. Monde argued that the court had jurisdiction, pursuant to the Termination Agreement, while also disputing the validity of that Agreement, WZL, on the other hand, argued that the ICC arbitral tribunal had jurisdiction pursuant to the CSA even though it claimed that it had been validly terminated. So both parties were arguing for conflicting dispute resolution clauses contained in contacts that they argued were either invalid or terminated.

The matter came before Sir John Popplewell sitting in the Commercial Court. He upheld the arbitral tribunal's finding that the court and not the tribunal had jurisdiction under the exclusive jurisdiction clause in the Termination Agreement. He based his decision on the following rationale:

- It was reasonable to presume that rational business people would seek to have all disputes arising out of their legal relationships determined swiftly and in the same forum because fragmentation might result in inconsistent findings, and increased expense and delay.
- This presumption has particular relevance to settlement agreements resolving disputes arising from an underlying contract, where it can be anticipated that one party may seek to attack the settlement agreement and resurrect claims under the underlying contract.
- The judge felt that a determination of which of the conflicting dispute resolution provisions should govern required consideration of the language used in the clauses and the surrounding circumstances.
- Under this approach, he then found the Termination Agreement provision took precedence for the following reasons:

- the Termination Agreement was later in time and entered into for the specific purpose of resolving the specific dispute under the underlying contract (in other words it was not a boilerplate provision);
- the Termination Agreement clause was the only provision which could govern disputes arising from the Termination Agreement, and therefore was the only provision available to address all disputes arising under both agreements;
- the Termination Agreement's provision was worded to be "exclusive", and therefore overrode any other dispute resolution agreement between the parties; and
- the entire agreement clause in the Termination Agreement further supported the conclusion that all disputes with respect to the subject matter of the Termination Agreement were to be governed by its dispute resolution provision.

The Judge also rejected WZL's argument that the arbitration clause was severable from the CSA and, therefore remained in effect. He held that such a finding would be commercially unreasonable as it would fragment the parties' dispute. WZL also argued that more specific language was required to override an arbitration clause. Judge Popplewell distinguished WZL's proffered authority on the basis that it did not involve conflicting jurisdiction clauses, only survival of an arbitration clause after termination of an agreement, and could not be taken as authority that an arbitration clause could never be superseded other than by express wording. Further, it appears that Judge Popplewell was of the opinion that under the circumstances, there was a clear intent here to supersede the underlying contract's arbitration clause with a new and exclusive referral to the English court.

This decision may appear to be unremarkable as based on accepted principles of contractual interpretation, which is a commercially rational construction of the document against the relevant factual background. However, it does cut against any assumption that the courts will usually defer to arbitration whenever it is reasonable to do so. Likewise, it would not appear safe to assume that a later dispute resolution provision in a settlement agreement will always override a conflicting provision in a prior underlying agreement. As seen here, each case will depend on its facts and the use of clearer wording in the Termination Agreement might have avoided this dispute entirely.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the author below.

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