

English HC Dismisses S.72 Application Challenging Jurisdiction of ICC

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The Queen's Bench has recently considered the interplay between Section 72 of the English Arbitration Act, 1996 and the doctrine of Competence-Competence while interpreting an arbitration clause.

Facts of the Case:

The question of existence of a valid arbitration agreement came up before Justice Burton in the case of **Hashwani v OMV Maurice Energy Ltd.**^[1] which was decided early last week. The Claimants in this case were Zaver Petroleum Corporation Limited and Ocean Pakistan Limited and the Defendant was OMV Maurice Energy Limited. The case at hand arose out of a series of agreements in relation to oil and gas exploration in Pakistan, namely:

- The Petroleum Concession Agreement ("**the PCA**") dated 29.12.1999 between the President, a Pakistan entity called Government Holdings and Ocean Pakistan.
- A Joint Operating Agreement ("**the JOA**") also dated 29.12.1999 between Government Holdings and Ocean Pakistan.
- The Farm-out Agreement ("**FOA**") dated 30.03.2000 between Ocean Pakistan, OMV Maurice and Zaver Petroleum.
- The OMV Maurice Assignment Deed amending the licence, dated 30.03.2000.

Disputes arose between the Parties with OMV Maurice claiming that Ocean Pakistan and Zaver Petroleum failed to pay calls under the Joint Operation Agreement. Thus, OMV Maurice commenced arbitration at ICC in accordance with Article 28 of the PCA which provided for arbitration at the ICC *"in case of a dispute between foreign Working Interest Owners ("FWIO") inter se or between foreign Working Interest Owners and THE PRESIDENT, provided that in the event of a dispute between the Pakistani Working Interest Owners ("PWIO") inter se, or between the Pakistani Working Interest Owners and THE PRESIDENT, the arbitration shall be conducted in accordance with the Pakistan Arbitration Act ."*

¹ Hashwani v OMV Maurice Energy Ltd 2015 WL 3795750

Subsequently all three Parties approached the Court: Ocean Pakistan and Zaver Petroleum challenging the jurisdiction of the ICC on the grounds that there was no valid arbitration agreement under **Section 72 of the Arbitration Act** ^[2] and OMV Maurice requesting for a stay of the above mentioned proceedings on the principle of competence-competence, or alternately under Section 9 of the Arbitration Act.

Contentions of the Parties:

The Claimant contended that there was no valid arbitration agreement as the arbitration clause was applicable only to disputes between FWIOs only and the Defendant's claims were against Zaver Petroleum, an PWIO, and Ocean Pakistan, an FWIO together. Thus, the whole claim of the Defendant against Ocean Pakistan and Zaver Petroleum is outside Article 28.

Au contraire, the Defendant argued that the claims made by OMV Maurice against Ocean Pakistan and by OMV Maurice against Zaver Petroleum are several and severable.

Decision of the Court:

The Court accepted the argument raised by the Defendant and ruled that the dispute between OMV Maurice and Ocean Pakistan falls within the ICC arbitration.

However, it left the question of jurisdiction of the ICC to the dispute between OMV Maurice and Zaver Petroleum to be decided by the Tribunal on the off-chance "*that the*

² Section 72 : Saving for rights of person who takes no part in proceedings.

- (1) A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question—
 - a) whether there is a valid arbitration agreement,
 - b) whether the tribunal is properly constituted, or
 - c) what matters have been submitted to arbitration in accordance with the arbitration agreement, by proceedings in the court for a declaration or injunction or other appropriate relief.
- (2) He also has the same right as a party to the arbitral proceedings to challenge an award—
 - a) by an application under section 67 on the ground of lack of substantive jurisdiction in relation to him, or
 - b) by an application under section 68 on the ground of serious irregularity (within the meaning of that section) affecting him;and section 70(2) (duty to exhaust arbitral procedures) does not apply in his case.

parties may be prepared to agree, now that in any event the issue as between OMV Maurice and OPL will be decided by the ICC, that there need be no further challenge to their jurisdiction."

The Court also went on to observe that *"When a court cannot be sure of jurisdiction but there will in any event be an arbitration, as I have concluded there will be here, and between closely related parties as to the very matters in issue, then it is a sensible course to take to leave the question of the arbitrators' jurisdiction in relation to this claim, that is the claim by OMV Maurice against Zaver Petroleum, which must manifestly run in tandem with the claim by OMV against Ocean Pakistan, to be finally decided by the ICC arbitrators."*

Comments:

The Court should ideally have left the matter of jurisdiction entirely upto the Tribunal to decide in accordance with the doctrine of competence-competence, because it is possible that the Tribunal would have, and may still decide the issue of jurisdiction with respect to claims of OMV Maurice against Ocean Pakistan and Zaver Petroleum differently. In that case, this dispute which is already being litigated in Pakistan also, will become all the more complicated.

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