Arbitration Agreement Agency & Share Purchase Awards

An arbitration agreement binds only the parties who have agreed to it. That comes from the consensual nature of arbitration. It follows that an arbitrator has no jurisdiction or power over a person who has not agreed that he or she should arbitrate the dispute.

In *Filatona Trading Ltd v. Navigator Equities Ltd* [2019] EWHC 173 (Comm), an interesting situation arose.

FACTS

In 2005 a Cypriot company, its beneficial owner Mr D and a British Virgin Islands company and its apparent beneficial owner Mrs L entered into a shareholder agreement relating to a Cypriot company NH Ltd which in turn was to own a Russian textile company TGM which owned heritable property in Moscow, Russia. In effect NH Ltd was the vehicle for a joint venture between the beneficial owners.

A dispute arose between the funder of the BVI company, a Mr C and Mr D over the control of NH Ltd. Mr C alleged that Mr D had in effect seized the property in Moscow. Mr C was not named as a party to the shareholder agreement. That agreement contained an arbitration agreement stating :

“The Parties undertake to do their utmost to settle all disputes and disagreements arising from this Agreement or in connection therewith, including those concerning its execution, breach, termination or invalidity ("Dispute"), by negotiations.

[….]

In the event that [a dispute is not settled following negotiation and/or mediation], the Dispute is to be settled at the London Court of International Arbitration in accordance with its rules, the provisions of which are deemed to be included in this Clause 12.1.”

After negotiations for the buy out of the BVI’s investment had failed, Mr C referred the dispute with Mr D over NH Ltd to arbitration under the arbitration agreement. In an English arbitration the arbitral tribunal found that Mrs L had in fact signed the shareholder and arbitration agreements as an agent for her principal Mr C and that therefore Mr C was a party to the arbitration agreement. It therefore had jurisdiction to decide the dispute. It decided the dispute with an award requiring Mr D to purchase BVI’s and Mr C’s shares in NH Ltd for a certain sum.

Mrs L however did not accept that she was a mere agent. She raised an action in the English courts seeking a declarator that she was the party to the shareholder agreement as beneficial owner of the BVI company. In addition Mr D appealed the arbitrators’ decision claiming:

- they lacked jurisdiction in relation to Mr C as Mrs L and not Mr C was the party to the arbitration agreement and she was not a mere agent;
- their decision to make a share purchase order was outwith their powers and thus a serious irregularity;

- they had prejudged the merits in making their decision on jurisdiction and this was a serious irregularity
- they had failed to properly assess the valuation evidence when reaching their decision

The Court found that Mrs L had agreed with Mr C that she would sign on his behalf and that Mr D had been aware of this. It also found that despite an entire agreement clause which stated that the agreement was the complete and exhaustive agreement between the parties, there was nothing to suggest that Mr D was not prepared to have the agreement with Mr C. In short Mr C was party to the shareholder and arbitration agreements and the arbitrators had had jurisdiction to decide Mr C's claim.

With regard to the share purchase order, the court found that had NH Ltd been an English company it would have had the power under the equivalent of rule 49 of the Scottish Arbitration Rules, to make the share purchase order. As NH Ltd was Cypriot, it could not do this under that provision, but the arbitration agreement was wide enough to give the court to do everything that a Cypriot court might do. Given that a Cypriot court had power to make a share purchase order in relation to a Cypriot company the arbitral tribunal had that power.

The other grounds of challenge for serious irregularity were dismissed. It was noted as it has been in many other cases that the assessment of the evidence is something for the arbitral tribunal and is final and not open to review.

DISCUSSION

Arbitration Agreements – Jurisdiction

The case is an illustration that just as a person signing a main contract can be a mere agent for an undisclosed principal who is the true party, so that person can be a mere agent for the undisclosed principal who is the true party to the arbitration agreement – and thus entitled to arbitrate on it.

The law of agency can therefore have a significant effect on the jurisdiction of an arbitral tribunal.

It's unusual for a person not party to the arbitral proceedings to seek a court order that she and not one of the parties in the arbitration was party to the arbitration agreement. Usually they would be participating in the arbitration itself

Given that a full-scale court action was raised by Mrs L, a proof with hearing of evidence was necessary for both the action and the resolution of Mr D's jurisdiction appeal. Had Mrs L not raised the court action, a hearing with evidence for the jurisdiction appeal would not have been necessary.

Power to Make Share Purchase Order

The Scottish Arbitration Rules in rule 49 entitle an arbitrator to order a party to "do . . . something". This can include the purchase of shares by a Scottish company shareholder.

Rule 49 is a default rule which means that it can be modified by the parties' agreement. Applying the arbitration agreement in this case, it would appear to be seen as a modification of rule 49 to expand it to include purchase of shares in a foreign company, which otherwise – by implication – the English section [ ] – and rule 49 would not have allowed.