Beware Conflicting Governing law provisions in Contracts and Guarantees

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Disputes between an employer and a consortium of contractors in a contract for the expansion of the Panama Canal became the subject of several ICC arbitrations seated in Miami. The contract was subject to Panamanian law. Separately, the parties had entered into six advance payment guarantees of which the employer was beneficiary. The contractors argued that because of the employers' breach of the main contract, as a matter of Panamanian law they could not call on the guarantees. They used this argument in an application to one of the ICC tribunals for an order restraining the employer from enforcing the guarantees. The tribunal rejected the application on the basis that the guarantees were subject to exclusive jurisdiction of the English courts.

The employer then applied to the English courts for summary judgment to enforce the guarantees and the contractors responded by applying for a stay of those proceedings pending the outcome of the arbitrations, relying on section 9 of the Arbitration Act 1996 and case management grounds arguing that it made no sense to litigate matters that were to be decided in the arbitrations.

Section 9 provides that litigation will be stayed if it is "*in respect of a matter*" which the parties have agreed to refer to arbitration. The contractor argued that the guarantees were due and payable under the main contract governed by Panamanian law and the subject of the ICC arbitrations.

Autoridad del Canal de Panamá v Sacyr S.A. and others [2017] EWHC 2228 (Comm)

Decision

In applying section 9 to the litigation, the court considered that the "*matter*" in question in the litigation was a claim under guarantees, which were subject to English law and exclusive English jurisdiction. It was not the contractual claims for breaches of the contract, which matters the parties had agreed to refer to arbitration. Accordingly, the court decided that the contractors were not entitled to a stay under section 9.

As to the contractors' application for a stay of the proceedings on grounds that proper case management required the contractual claims in the arbitrations to be decided first, the court rejected this argument on grounds that the contractor had simply not made out a compelling case.

As to the employers' application for summary judgment to enforce the guarantees, the court refused that as it decided that there was no immediate right to judgment, as the guarantees were not payable on demand.

Comment

The approach taken in this case reflected the fact that the parties had agreed that the guarantees were stand-alone contractual commitments governed by a completely separate legal regime. That is not an unusual arrangement but parties agreeing to that type of arrangement should appreciate that, by agreeing to related transactions being governed by different laws and dispute resolution mechanisms, there is a real risk of inconsistent decisions and conflicting timetables. These complexities can be avoided by linking all disputes to the same resolution scheme but that may not be negotiable, not least because it is not always in both parties' interests to do so.

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