Neutral Citation Number: [2020] EWHC 1799 (Comm)

Case No: CL-2020-000271

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 10 July 2020

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

SHELL ENERGY EUROPE LIMITED	**Claimant**
- and -	
META ENERGIA SpA	**Defendant**

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- -

Gemma Morgan (instructed by **Clifford Chance LLP**) for the **Claimant**
Matthew Kennedy (instructed by **Grande Stevens International LLP**) for the **Defendant**

Hearing date: 3 July 2020

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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.

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 10.00 am on 10 July 2020.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

1. This matter came before me in the Friday list last week (3 July 2020). The decision required was not difficult or complex, so whilst time on the day did not allow me to give judgment immediately, my decision and the reasons for it can be set out shortly.

2. The defendant applies by Application Notice dated 25 May 2020 to set aside an order of Teare J dated 7 May 2020 made under s.66 of the Arbitration Act 1996 granting the claimant leave to enforce in the same way as a judgment, and leave to enter judgment in the terms of, an award of arbitration dated 4 December 2019.

3. The arbitration in question was seated in London and was conducted under LCIA Rules. It concerned amounts totalling c.€20 million due under a contract for the supply of electricity by the claimant to the defendant. The defence was *force majeure*; and the defendant also alleged that the claimant had made defamatory statements about it and had abused a dominant position contrary to Chapter II of the Competition Act 1958 and Article 102 of the Treaty on the Functioning of the European Union. By their award, the arbitrators (Ms Clare Ambrose, Mr Oba Nsugbe QC SAN and Prof Zachary Douglas QC) upheld the claimant's claim and awarded it the principal sum of €19,712,077.20, plus quantified sums by way of interest, legal costs and the costs of the arbitration.

4. The defendant participated fully in the arbitration until the last stage. On 19 September 2019, with the two-day final hearing of the arbitration set for 25-26 September 2019, the defendant dismissed its then legal team (solicitors and counsel) despite having confirmed as recently before that as 11 September 2019 that they would be attending the hearing and presenting the case for the defendant. The defendant retained its present solicitors, Grande Stevens International LLP ("GSI"), the next day, and on 24 September 2019 the arbitrators granted an adjournment of the final hearing, to 8-9 October 2019, to allow the defendant time to be ready.

5. It is said that the defendant, acting by its CEO Mr Molinari, dismissed the original legal team because it was not satisfied with the way it had pursued or presented the defence. However, no serious attempt was made to identify, and no attempt at all was made to evidence or justify, the respects, if any, in which the defence pleaded and pursued in the arbitration should, or even could, have been improved or different.

6. GSI say through the witness statement of Mr Vincenzo Lanni, the partner with conduct of this matter, that they contacted "*a number of barristers' chambers to enquire as to counsels' availability for the adjourned Hearing. Despite the adjournment, it remained difficult to find counsel with adequate availability to prepare for and attend the Hearing*". Some further details are given, including some advice given by one leading counsel, not identified by Mr Lanni, that he did not think he would have enough time to prepare fully. This evidence falls well short of its intended mark, which was to persuade the court that the defendant had no choice but to cease participating on the merits, as it did (see below).

7. Firstly, it is clear from the limited further detail given by Mr Lanni, as Mr Kennedy for the defendant conceded, that in substance the defendant took a view that it would not participate on the merits unless it could be represented by leading counsel. There were substantial sums at stake, and I would not criticise the defendant for preferring,

if possible, to have leading counsel; but it is not arguable that that was essential for a proper presentation of the defendant's case or for the defendant to have a fair opportunity to defend the claimant's claim and put its own case forward. There was no evidence to support a finding that the defendant could not have been well represented by junior counsel with relevant expertise and experience.

8. Secondly, there was no reason why the defendant had to use the Bar at all. The claimant was not doing so, its case was run for and at the hearing by a team from Clifford Chance. If, as Mr Kennedy emphasised, GSI did not have the experience or size to take the case on without external, specialist, help for the hearing, and leaving to one side the fact that the defendant only had itself to blame for that, GSI had a City of London full of highly skilled and experienced international arbitration practitioners, not just the Bar, within which to seek out co-counsel.

9. In those circumstances, GSI were instructed to and did attend the final hearing only so as to make a brief submission asserting that the defendant was unable to present its case before withdrawing. The arbitrators, as is clear from their award, gave careful and anxious consideration to whether it was just and appropriate to continue. They concluded on proper, reasonable and sufficient grounds that it was. The Clifford Chance team properly did all they could, based upon the defendant's written submissions on the merits, to ensure that the arbitrators were reminded of points of substance raised against the claimant.

10. The arbitrators afforded the defendant a further opportunity to engage with the merits, if it wished to do so upon reading the hearing transcript. The defendant was given until 24 October. It chose neither to do so nor to seek additional time, although it did make some comments on costs. There was no sensible evidence before me explaining that decision. There was therefore not even an attempt to justify by any facts the argument Mr Kennedy was forced to make that the defendant's position had been irreparably compromised by the hearing going ahead in its absence.

11. No challenge to the award under s.68 of the Arbitration Act 1996 was made, which would be the normal means by which in this court to pursue a complaint of lack of due process or other procedural unfairness in an arbitration governed by the 1996 Act. It will be apparent from what I have said that in my judgment there was no arguable basis for any such challenge. The arbitrators were scrupulously even-handed; they conducted an unimpeachably fair dispute resolution process. The defendant had more than ample opportunity to identify, develop, pursue and present any case on the merits it might wish to run. In substance, it chose not to avail itself of that opportunity; this is not remotely a case of an inability or lack of entitlement to present a case for the defence.

12. The defendant is an Italian company with substantial assets in Italy, and the claimant is seeking to enforce the award in Italy pursuant to the New York Convention. The defendant resists enforcement there on the sole substantive ground that, as it asserts, it was unable to present its case in the arbitration (New York Convention, Article V.1(b)). As will be apparent, there is no sensible basis that I can identify for that assertion.

13. There is also a point taken in Italy by the defendant that an order for immediate enforcement was granted that should not have been made pending the determination

of the substantive 'due process' complaint. That is a technical point of Italian law on the merits of which I make no comment. There is in my judgment nothing in a contention by the defendant before me that it was a failure to make materially full and frank disclosure to Teare J *ex parte* that in the claimant's s.66 application on the papers the court's specific attention was not drawn to that technical point. The claimant properly drew to the court's attention the fact that an enforcement effort was under way in Italy and was being resisted by the defendant there. The substantive complaint of want of due process, that (if it had any merit) would or might have its echo here under s.68 so as perhaps to be a reason against enforcing the award, was mentioned. The additional technicality under Italian law was immaterial to the s.66 decision, and in any event would not cause me to set aside Teare J's order since (all things being equal) I would be content immediately to re-grant the same relief under s.66 by reference to the full facts.

14. The defendant does not have any business or presence of its own in this jurisdiction, so far as the claimant has been able to identify, but it may have intra-group debt payable here. The defendant's information in the Italian enforcement proceedings, *viz.* that a payment was due by 30 June 2020, was a principal trigger for the claimant to make its s.66 application here.

15. The defendant now says its information to the Italian court was mistaken, and that by virtue of a complex re-ordering of group debts, what it told that court was a debt here with a payment soon falling due is now subordinated so as to be payable only after certain bonds issued by a group company not to the defendant have been repaid, such that the defendant will not be entitled to any payment until 2029. The claimant has not had the detailed supporting evidence said to demonstrate the correctness of that new case for very long, and in any event Ms Morgan submits for the claimant, and I agree, that the appropriate process within which to explore the detail will be an application by the claimant, if made, for a third party debt order.

16. Furthermore, in the context of the international enforcement of an arbitration award, there is an inherent value in there being confirmation from the court of the seat, as in this case there now will be by this short judgment, that the award in question is fully valid, effective and enforceable according to the law governing the arbitral process, and that there was and is no basis for a challenge to the award on 'due process' grounds under that law. At all events, there is inherently such value where, as here, the award debtor has chosen to raise before the court of the seat a suggestion to the contrary in an attempt to persuade that court to refuse to recognise the award as enforceable. I do not accept a submission by Mr Kennedy that the claimant must adduce affirmative evidence of the potential value of such a judgment from the courts of the seat, at all events in relation to enforcement before the courts of another New York Convention state (here, Italy), given the particular role of the courts of the seat at the enforcement stage that is built into the Convention by Articles V.1(e) and VI. If Burton J meant to suggestion otherwise in *Nomihold Securities Ltd v Mobile Telesystems Finance SA* [2011] EWHC 2143 (Comm) at [47], I respectfully disagree and would not follow that view. (*Nomihold* was a very different case on its facts, as regards the allegations made against the award.)

17. On the other hand, I agree with Burton J (*Nomihold* at [23]) that there is no need to show assets within the jurisdiction before granting leave to enforce an incoming New York Convention award (*Rosseel NV v Oriental Commercial and Shipping Co UK Ltd*

[1991] 2 Lloyd's Rep 625 at 629), therefore *a fortiori* no such need before leave is granted under s.66 to enforce as a judgment of the court an English award, i.e. an arbitration award made in an arbitration reference seated within the jurisdiction.

18. In the circumstances, assuming in the defendant's favour without expressing any view that Mr Kennedy is correct that (i) it does not matter that there was no s.68 challenge, the defendant being, so he submitted, entirely free to raise a 'due process' complaint against an English award as a discretionary reason why it should not be enforced under s.66, and (ii) there must be, so he contended, some evident utility behind granting leave to enforce under s.66 before the court should do so, in my judgment this was and is an appropriate case for leave, and plainly so. The defendant's evidence notwithstanding, there remains a possibility of useful enforcement action within the jurisdiction; and in any event it is valuable without more for the court of the seat to confirm the lack of merit under the law governing the arbitration of any 'due process' complaint by the defendant.

19. For those reasons, the defendant's application is dismissed and Teare J's order under s.66 of the 1996 Act is confirmed.