Neutral Citation Number: [2020] EWHC 3653 (Comm)

Case No: CL-2020-000477

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

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 11 December 2020

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

REPUBLIC OF UGANDA **Claimant**

- and –

RIFT VALLEY RAILWAYS (UGANDA) LIMITED (IN LIQUIDATION) **Defendant**

- and –

(1) RVR INVESTMENTS (PTY) LIMITED
(2) KU RAILWAYS HOLDINGS

Additional Parties

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- -

Mark Handley and Sena Tsikata (instructed by **Curtis, Mallet-Prevost, Colt & Mosle LLP**) for the **Claimant**
Nelson Nerima (Liquidator of RVRU) **did not appear**
Wendy Miles QC and Harris Bor (instructed by **Alston & Bird LLP**) for the **Defendant (as represented by its pre-liquidation management)** and the **Additional Parties**

Hearing dates: 11 December 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mrs Justice Cockerill :

Introduction

1. This hearing was in respect of the application by RVR Investments (Pty) Limited ("RVRI") and KU Railways Holdings Limited ("KURH") (the "Shareholders") to be joined as parties to the proceedings under CPR rule 19.4 – or more correctly CPR rule 19.2. The underlying proceedings are a challenge under section 67 of the Arbitration Act 1996 brought by the Claimant, the Republic of Uganda ("Uganda") seeking to set aside determinations of the arbitral tribunal which are said to be to the effect that they have jurisdiction and that the arbitration can proceed.

2. The Shareholders are respectively the Defendant's ("RVRU") direct and indirect parent entities, together holding 100% of the share capital in RVRU. The Shareholders are subject to a pending application for joinder as parties to the underlying arbitration to which these proceedings relate.

3. RVRU is currently in liquidation pursuant to an order of the Ugandan High Court of 23 May 2019 (the "Liquidation Order"). The Arbitration, however, is being pursued by the former management of RVRU (the "Former Management") in circumstances which are contentious.

4. As a result the Republic of Uganda has made applications in the Arbitration (13 August 2019, 11 April 2020) challenging the arbitral tribunal's (the "Tribunal") jurisdiction. Those challenges have been unsuccessful in that by a decision called "*Procedural Order No 5*" the tribunal have ruled that the arbitration can proceed without the liquidator's consent. On 28 July 2020 Uganda filed its application under section 67 of the Arbitration Act 1996 seeking to set aside the Tribunal's determination.

5. The Section 67 Application does not fall to be heard now, but is listed to be heard on 16 February 2021 at the same time as an application by Uganda relating to the standing of the Former Management of RVRU to appear on behalf of RVRU in the proceedings related to the Section 67 Application (the "Standing Application").

6. The Shareholders submit that given the Shareholders' separate status in both the underlying arbitration and associated Ugandan liquidation proceedings, it is desirable to add them to the arbitration claim: (i) so that, if necessary, they can assist the court in resolving all matters relating to the challenge to the Tribunal's substantive jurisdiction and continuation of the arbitration; and (ii) because the Tribunal's jurisdiction to determine the Shareholders' pending application is an issue connected to the matters in dispute in these proceedings.

Background

7. By way of background, the Arbitration arises out of a long-term concession contract awarded in 2006 by the Republic of Uganda to RVRU to manage, operate and invest in Uganda's freight railway system to operate the Ugandan portion of the Rift Valley Railway that connects Kampala, the capital of landlocked Uganda, to the Indian Ocean port of Mombasa in Kenya (the "Concession Agreement").

8. For the purposes of the Shareholder Application, the relevant facts can be briefly stated. On 12 September 2017 a commercial supplier to RVRU ("Hass Petroleum") issued to RVRU a statutory demand for unpaid invoices in the sum of just over US$1m. On 13 October 2017 after receiving no payment, Hass Petroleum commenced insolvency proceedings against RVRU in the Ugandan High Court (the "Hass Proceedings"). On 17 October 2017 RVRU accepted service of the Hass Proceedings.

9. On 25 January 2018 the Republic of Uganda, relying upon what it characterises as "*years of dismal performance and express statements by RVRU that it could not perform its basic obligations under the existing concession terms and required fundamental changes to the Concession*", stated that it accepted RVRU's repudiatory breach of the Concession and that it was terminating the Concession Agreement. The validity of that termination is in issue. On 31 January 2018, RVRU commenced an arbitration against Uganda (PCA Case No. 2019-07). RVRU seeks damages for breach of contract and/or expropriation arising from Uganda's alleged wrongful termination of the Concession Agreement.

10. On 7 March 2018 RVRU entered an appearance at the first hearing in the Hass Proceedings. During the hearing RVRU accepted the debt to Hass Petroleum as due and sought and obtained a 30-day extension from the court to complete payment. On 22 November 2018 no payment to Hass Petroleum having been made, RVRU was ordered by the Ugandan High Court to pay the debt to Hass Petroleum within 30 days or be wound up. On 22 March 2019 Uganda raised the issue of the potential winding up of RVRU in correspondence in the Arbitration.

11. On 23 May 2019, RVRU was ostensibly placed into involuntary liquidation and the Liquidation Order by the Ugandan High Court and Mr Nelson Nerima was appointed as RVRU's putative liquidator (the "Liquidator"). Mr Nerima, is a regulated insolvency practitioner and partner of the law firm of Nambale Nerima & Co Advocates. On 20 June 2019, RVRI (one of the Shareholders) filed an application with the Ugandan High Court to stay the Liquidation Order. On 25 June 2019 – RVRI applied to set aside the Liquidation Order (the "RVRI Application").

12. On 22 July 2019, RVRU submitted its Statement of Claim in the arbitration, in which it, inter alia requested to join the Shareholders as additional claimants, pursuant to Article 17(5) of the 2013 UNCITRAL Arbitration Rules. The Shareholders would seek damages for breach of contract, as third-party beneficiaries and/or beneficiaries under the contract, and/or for expropriation arising from the Concession Agreement termination. On 13 August 2019 Uganda applied for a stay of the Arbitration pending a decision by the Liquidator as to whether to approve the Arbitration, noting that the question of authority "*may impact [the Tribunal's] jurisdiction over the present Arbitration*".

13. On 3 September 2019 the Tribunal issued Procedural Order No. 2 in which it declined to decide the Joinder Application (at [35]) noting, *inter alia*, that Article 17(5) of the 2013 UNCITRAL Arbitration Rules does not impose a time limit within which the tribunal must make a decision on joinder and Article 23(3) permits the tribunal to rule on a plea that it does not have jurisdiction either as a preliminary question or in an award on the merits. It also declined to decide on the stay application.

14. On 11 September 2019 the RVRI Application in the Ugandan High Court was heard. The judgment remains pending but the Liquidation Order continues in place and has not been stayed.

15. On 28 February 2020, Uganda submitted its Statement of Defence, including the Shareholders as additional claimants in the names of the parties pending the Tribunal's ruling on the joinder issue (albeit making submissions on why the Shareholders should not be joined) and putting forward its jurisdictional and substantive defences to the Shareholders' claims in the arbitration. It has also included the shareholders in its description of the arbitration in correspondence with the Tribunal.

16. On 2 April 2020 RVRI and KURH issued a Request for Arbitration against both the Republics of Uganda and Kenya raising very similar facts and claims to those brought in the Arbitration (the "Second Arbitration").

17. On 2 May 2020, Uganda submitted to the Tribunal an injunctive relief application against the Shareholders arising out of and in relation to a separate arbitration commenced by the Shareholders, which RVRU and the Shareholders opposed. Ultimately, the Tribunal indicated that it was prepared to deal with three issues at that time: (i) whether RVRU may continue to maintain the claims in the arbitration without the consent of the Liquidator; (ii) whether the Shareholders' joinder request was timely pursuant to Article 17(5) of the UNCITRAL Arbitration Rules; and (iii) whether RVRU may request the joinder of the Shareholders without the consent of the Liquidator. On 27 May 2020 the parties to the Arbitration agreed that the Joinder Application in relation to RVRI and KURH, and the issue of the Former Management's authority to represent RVRU post liquidation were "ripe" for decision by the Tribunal.

18. On 13 July 2020 the Tribunal issued what it called "Procedural Order No. 5" in which it held that it had jurisdiction to hear the Former Management's claims: *"In the absence of any contrary direction from the Liquidator, the Tribunal considers that RVRU may continue to pursue these proceedings. The Tribunal does not consider it necessary to speculate as to what might be the position if the Liquidator does, in due course, express a view one way or the other."* . The Tribunal also again declined to decide the Joinder Application.

19. On 29 July 2020, Uganda commenced these court proceedings to challenge PO5 under section 67 of the 1996 Act and on 30 July 2020 it requested that the Tribunal stay the arbitration pending the outcome. On 3 August 2020, Mr Nerima wrote to the Tribunal to confirm that he had not "*sanctioned the commencement or continuation of the above arbitration proceedings.*" On 6 August 2020, Uganda requested the Tribunal to dismiss the arbitration in light of the communication from Mr Nerima.

20. On 28 August 2020, RVRU and the Shareholders submitted their Statement of Reply, in accordance with the procedural timetable in the arbitration. On 30 September 2020 the Tribunal issued Procedural Order No. 6 in which it reaffirmed its decision to allow the Arbitration to proceed notwithstanding the lack of authorisation from the Liquidator and the Former Management's lack of authority to take any action on behalf of RVRU, and it yet again declined to decide the Joinder Application. It also

denied Uganda's application for a stay pending the outcome of the section 67 Application.

Parenthesis: the issue in the section 67 application

21. Uganda says that it follows from this chronology that:

    i) The Arbitration was commenced after the commencement of the liquidation (see *Bank of Ethiopia v National Bank of Egypt and Ligouri* [1937] Ch 513, at 523-524);

    ii) RVRU is in liquidation as a matter of Ugandan law;

    iii) The application by the Former Management to join RVRI and KURH to the Arbitration was made after Hass Petroleum had commenced the Hass Proceedings and after the Liquidation Order; and

    iv) Neither RVRI, nor KURH, have been admitted as parties to the Arbitration, and neither RVRI nor KURH has sought to challenge any of the Procedural Orders no. 2, 5 or 6.

22. Under Ugandan insolvency law, there are consequences which flow from the application to join RVRI and KURH to the Arbitration having been made after the commencement of the liquidation. The relevant provision of the Ugandan Insolvency Act is section 97(1) , which reads:

> "97. Effect of liquidation.
>
> At the commencement of liquidation—
>
> (a) the liquidator shall take custody and control of the company's property;
>
> (b) the officers of the company shall remain in office but cease to have any powers, functions or duties other than those required or permitted to be exercised by this Act;
>
> (c) …;
>
> (d) shares of the company shall not be transferred or other alteration made in the rights or liabilities of any shareholder and a shareholder shall not exercise any power under the company's memorandum and articles of association or the Companies Act; and
>
> (e) the memorandum and articles of association of the company shall not be altered, except that the liquidator may change the company's registered office or registered postal address"

23. Consequently, officers and shareholders of the insolvent company lose their powers "*at the commencement of liquidation*". Section 93 of the Ugandan Insolvency Act then defines what is meant by "commencement":

> "93. Commencement of liquidation by court.
>
> (a) Where, before the presentation of a petition for the liquidation of a company by the court, a resolution is passed by the company for voluntary liquidation, the liquidation of the company shall be deemed to commence when the resolution is passed and unless the court, on proof of fraud or mistake, thinks fit and directs, all proceedings of the voluntary liquidation shall be taken to be valid.
>
> (b) In all other cases, liquidation of a company by the court shall be taken to commence at the time of presentation of the petition for liquidation".

24. It is therefore Uganda's case that as the liquidation of RVRU is not a voluntary liquidation, the officers of RVRU lost all their powers with the presentation of the petition for winding up and that the Former Management had lost any and all powers to direct the actions of RVRU –including commencement of the arbitration.

25. While it is accepted that I cannot decide this point now, it is right that I note that marker was put down as to this point in this application too because it is Uganda's case that the issue extends to the application to join RVRI and KURH to the Arbitration and under the UNCITRAL rules which apply in the Arbitration a third party may not be joined to the arbitration except upon request of a party to the arbitration.

The Law on Joinder

26. The tests for joining a party under CPR 19.2(2)(a) and 19.2(2)(b) are:

> "(2) the court may order a person to be added as a new party if -
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
>
> (b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue."

27. In connection with that rule, I have had my attention drawn to a number of authorities, in particular *Molavi v Hibbert* [2020] EWHC 121 (Ch), *Benkel v East-West German Real Estate Holding & Anor* [2020] EWHC 1489 (Ch), *XYZ v Transform Medical Group (CS) Limited & Ors* [2014] EWHC 4056 and *PDVSA Services SA v Clyde & Co* [2020] EWHC 2322.

28. It is common ground between the parties that each of 19.2(2)(a) and 19.2(2)(b) are separate and independent tests (e.g. *Molavi v Hibbert,* at [49]). Further, the use of "may" in 19.2(2) illustrates that joinder is a question for the exercise of the Court's discretion.

29. It is also common ground that in relation to 19.2(2)(a) there are two conditions:

    i) the new party can assist the court to resolve the matters in dispute in the proceedings; and

    ii) it is desirable to add the new party to achieve that end.

Discussion

30. In broad terms, it is accepted that in relation to 19.2(2)(a) the rule effectively imports two conditions: first, the new party can assist the court to resolve the matters in dispute in the proceedings and, secondly, it is desirable to add the new party to achieve that end. That is effectively a reflection of a two-stage test, a jurisdictional test as to whether it is within the relevant part of the rule and then a discretionary test as to whether it is desirable, and the court has a broad discretion once it is satisfied that the relevant condition has been met as to whether or not to order that joinder.

31. In relation to CPR 19.2(2)(b), Uganda submitted (rather more contentiously) that 19.2(2)(b) requires a wholly-new issue which is specific to the joining party. Mr. Handley referred me to a long passage from *Molavi v Hibbert*, paragraphs 64-70, and submitted that CPR 19.2(2)(b) requires a wholly new issue which is specific to the joining party and which is sufficiently connected to the existing matters in dispute but which need not be a cause of action. That being the jurisdictional part and to which is then added the extra layer of it having to be established that it is desirable.

32. Mr. Handley then submitted that bearing in mind that background, the test is not met. In particular by reference to the points he made at paragraph 23 of his skeleton, he focused on the question of whether the shareholders effectively can assist in the issues. I will come to deal with that in due course.

33. The first point I would like to make is in relation to sub-paragraph (b), however and Mr. Handley's submission that a new issue is needed. Having read the authority, I am not persuaded that what the authority says - or what the rule says, which is more important - is that there needs to be a new issue between the party proposed to be joined.

34. However, as I indicated in argument to Mr. Bor, the consideration of the court as to whether there is an issue which it is desirable to join a party for may be affected by whether there is a new issue or not under paragraph (b), particularly in circumstances where the requirements of (a) are not met. But this is all slightly academic, because it seems to me that in this case the best focus is on sub-paragraph (a).

35. When I turn to that sub-paragraph, the authorities actually suggest that sub-paragraph (a) is capable of applying in a wide range of situations. That is certainly the way that it is drafted. The wording "*it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings*" is wording which is capable of

going quite wide. The potential width of that provision has been remarked upon in the authorities.

36. While Mr. Handley submitted to me that it is effectively a "but for" test that there needs to be something that cannot be determined without the new party, I do not accept that submission. That would be incompatible with the overriding objective. It also seems to me to be incompatible with the dictum of Snowden J in the *PDVSA* case at paragraph 34, where he said:

> "However, the broad terms of CPR 19.2(2) are plainly wide enough to cover an alternative (and less common) situation in which a non-party is sought to be joined which does not have rights which might be affected as such, but where, for some other reason, its presence before the court is desirable in the broader interests of justice and the overriding objective so that the court can resolve all the matters in dispute in the proceedings between the existing parties."

37. So what one sees there is Snowden J indicating that joinder might be desirable and would be possible jurisdictionally in a case where the non-party does not have rights which are even effective, but there is some reason why it is desirable in the broader interests of justice and the overriding objective so that the court can resolve all the matters.

38. But in any event in this case I can resolve this matter simply by confining myself to the wording of the rule and asking myself, is there an issue on which the shareholders can assist -- quoting again from the wording -- to resolve all the matters in dispute in the proceedings, or is there an issue on which the shareholders are likely to be able to assist in order to resolve all the matters in dispute in the proceedings?

39. Starting with the position as matters stand: is there such an issue? I conclude that there is. That issue relates to the substantive element of the challenge, the section 67 challenge. As Ms. Miles pointed out in her submissions, there are effectively two layers to the section 67 challenge. The first is the argument about whether it is a procedural order or an award, as to which a certain amount of background is likely to be relevant but which is mainly a question of law. Then there are substantive issues as to what has happened in relation to liquidation in the light of those conclusions, and what is the status of the people who were in control of the company RVRU up until the liquidation.

40. One of those issues, which is dealt with at considerable length in the evidence on behalf of Uganda, is the challenge to the liquidation, so the existence of the liquidation and then the challenge to the validity of the liquidation is part of what will be in issue at the section 67 challenge. The specific challenge to the liquidation is not a challenge brought by the management itself, who are currently the people who are in the arbitration which is the subject of this dispute. It is a challenge brought by one of the shareholders who now seek to be joined to this arbitration claim. It seems to me that the submission that the shareholders are therefore in the best position to deal with that challenge and issues arising out of that challenge is a good one.

41. Secondly, coming back to the issue which Snowden J indicated about somebody who has rights which are affected, this is a case where because of the position of the shareholders as at least potentially parties to the arbitration they have an interest in the formulation of the relief. They also have an interest in any submissions which are made as to the status of the arbitration agreement in so far as there is an arbitration agreement which affects them. So there are at least potentially, two issues, one substantive and one as to relief, as to which they are directly affected and in which they have a specific interest which may be slightly different from that of RVRU.

42. So those are issues in relation to the section 67 challenge itself. There is also to some extent a distinct interest in the sense that there is within the arbitration an element of the claim which is only relevant to the shareholders. I do not place much emphasis on that because it seems to me highly unlikely that that is going to be an issue in the section 67 challenge, but there is that contingent possibility.

43. More importantly perhaps is a point which Mr. Handley made in relation to what is sought vis-à-vis the existing running of the case. He made forcefully the point that what is not wanted on the part of Uganda is for some further arbitration to come leaping out of nowhere, and that what is sought effectively is finality. To the extent that what is sought is finality, there is an issue *vis-à-vis* the shareholders, who are at least contingently a party to the proceedings in the existing arbitration and who have evinced an intention to start another arbitration if that arbitration does not go ahead, the only way in which Uganda is likely to get finality *vis-à-vis* the shareholders is if the shareholders are party to the determination of these issues in this section 67 challenge.

44. So I am satisfied that as matters stand there are issues in relation to which the shareholders could provide assistance with the determinations which have to be made and also provide assistance with the long-term resolution of the matters in dispute in these proceedings. That is as matters stand.

45. I now turn to the separate point which is that there is a contingent issue with these proceedings, that is that even though as matters stand all the rest of the issues in these proceedings look to me like ones which will and can be dealt with by what one might term the current representation of RVRU. It is by no means certain that those issues will be capable of being dealt with at the hearing of the section 67 challenge by that representation; and that is because the Republic of Uganda has issued an application saying that the current representation of RVRU has no right to represent RVRU.

46. Were it the case that Mr. Handley was in a position to say that there would be no argument as to the ability of that representation of RVRU to make submissions at the section 67 hearing this point would not arise. Mr Handley came close to saying this in submissions; but when I asked him he confirmed he was not able to say this. It follows that the position, as matters stand, is that the Republic of Uganda is not accepting that the section 67 challenge can properly be argued by the current representation of RVRU. There will be an attempt to bring on that application at the start of the section 67 hearing and were that done and were it to succeed, the logical result would be that the current representation of RVRU would be excluded from making representations. At that point, points in which the shareholders have an interest, which is equivalent to that of RVRU's, would no longer be being covered by that representation.

47. Mr. Handley says that that could perfectly well be dealt with by the current representation of RVRU themselves making a CPR 19.2 application. However, there is, in my judgment, a lack of logic for them (and it may indeed be prejudicial to them) to make such an application; because one could only make the application predicated on the position that they are not entitled or are not already representing RVRU, which is contrary to the arguments which have been made and the determination made in the arbitration. So that effectively undercuts the arguments which have already been made and on which they have won.

48. In that case the points which Mr. Handley made about the identity of interest between RVRI, KURH and RVRU and there being no legal argument which those companies could make which could not be made by the former management would no longer be right. While that is not an issue at the moment, there is a contingent issue and this contingent point at least would go to desirability.

49. For the reasons I have given, I therefore do not accept Mr. Handley's submissions that there is no already existing issue on which the input of the shareholders would not be of assistance. I will come back to the question of new issues. While the evidence might not be specific as matters stand to the shareholders, they do have a capacity to bring a unique and different perspective on a limited range of points at the moment and contingently to deal with the full range of points if RVRU's current representation is not brought.

50. I do not accept the submission, to the extent it was made, that the fact that somebody is a parent company is a bar and I do not think Mr. Handley was seriously suggesting that. His submission was that the fact that it is a parent company is not enough. I would entirely accept that, but that is a separate question from the question of whether there is an issue on which the party can assist.

51. The fact of whether RVRI and KURH are parties to the arbitration is again not relevant at that stage. To the extent that there is an issue about the other arbitration, as I have said, my conclusion is that the fact that there is a potential at least for a further arbitration or a threatened further arbitration itself feeds into an issue which is relevant for the purposes of the first stage of the inquiry.

52. Turning then to desirability. It will come as no surprise to anybody to discover that I consider that the desirability hurdle is met. As I have indicated, there is this contingent point in relation to what happens on the standing application. That itself essentially goes to desirability.

53. Further, even though I would not necessarily accept the submission that the shareholders are parties to the arbitration, there is ample material in the wider circumstances, which I have outlined above, to indicate that it is desirable for the shareholders to be parties to the challenge. I have in mind here the facts that:

    i) It is clear that the question of joinder is very live and is a key issue in the arbitration, which the tribunal in the arbitration has said is closely enmeshed in the question of merits,

    ii) There is the possibility of a multiplicity of arbitration proceedings which will be lessened by the shareholders involvement;

iii) Plainly it is the case that, putting aside all the minor points such as headings of letters and so forth, there has been a security for costs application brought by the Republic against the shareholders in the arbitration and there has been an application for an injunction specifically against the shareholders within the arbitration;

54. Overall therefore the embeddedness of the shareholders in the conduct of the arbitration so far seems to me to give a very real reason why it would be desirable for them to be present at the section 67 challenge.

55. In so far as anything in the countervailing sense goes, I see nothing in the way of prejudice which would arise from the joinder of the shareholders, particularly in circumstances where I am going to put down a firm marker now that the shareholders, of course, are perfectly entitled to make this application and their reasons for doing so are understandable. However, they should understand that their costs will be closely scrutinised and that they are likely to be at risk on costs if extra costs are incurred as a result of their joinder as a result of a duplication of effort. That is just a matter that they will have to take on the chin.

56. So far as the other bases for joinder are concerned, I am not entirely convinced that the Part 62 joinder would be appropriate, although I accept the submission that, in the circumstances of the security for costs application and the injunction application, it gets very close. So far as sub-paragraph (b) of 19.2(2) I do not need to decide that because of the decision which I have reached on sub-paragraph (a). If I had had to decide it I would probably have come to the view that the test was just met by reason of the liquidation challenge point and potentially also by reason of the finality point, but that is a point which I do not need to decide.

57. The application for joinder succeeds.