Cordells Rompotis

Case Note - December 2016

A v B: The Consequences of Companies Merging During Arbitration Proceedings

Background

Arbitration is a consensual process. Only the parties to the arbitration agreement are bound by it. Problems may arise, as in this case (A v B [2016] EWHC 3003), when one of the parties to the arbitration agreement had merged or amalgamated into another entity, especially when the merger or scheme of amalgamation takes effect during an on-going arbitration. In some civil law jurisdictions, a corporation can universally succeed to the rights and obligations of another corporation, whereas under English law, the "succession" has to be carried out by way of novation or assignment of contractual rights.

In this case, the contract for the long-term supply of iron ore entered into originally between P and E contained an arbitration agreement which provided for ICC arbitration. P commenced arbitration proceedings in the ICC as the original claimant. In August 2014 P, F and a third company petitioned the Indian High Court pursuant to section 391 of the **Indian Companies Act 1956** for the merger of the three companies under a scheme of amalgamation. By Orders dated 28 January 2015, the proposed merger was approved and on 7 February 2015 (the **"Effective Date"**) the companies merged to constitute a single company F.

On the basis of the merger, F applied to the ICC arbitral tribunal for its substitution as claimant in the arbitral proceedings in place of P, which had already been dissolved at that time. The ICC arbitral tribunal acceded to the request and on 29 February 2016 rendered a partial award in favour of F. E applied to have the award set aside under section 67 and 69 of the **Arbitration Act 1996** (UK) on the basis respectively that the arbitral tribunal lacked substantive jurisdiction and on a point of law.

Issues

The central issue was the manner in which "the business, rights and liabilities of P devolved upon and became vested in F". While it was accepted that the corporate status of P and F was governed by Indian law, it was argued that English law remained the applicable law of the contract between P and E. On that basis, since English law (and in any event Indian law) did not recognize the doctrine of universal succession, any transfer or succession of rights under the arbitration agreement must be conducted by way of assignment from P to F. And since the formal requirements for a legal assignment under section 136 of the Law of Property Act 1925 had not been complied with, such assignment must have taken place in equity where notice of assignment must be given to E prior to P's dissolution on the Effective Date. Since no notice had ever been given by P prior to the Effective Date, the Arbitration "lapsed and the claim against E died on that date". Accordingly, the arbitrators had no jurisdiction to continue the proceedings and acted *ultra vires* by substituting F for P.

Result

The Court rejected this argument on the basis that as a matter of English law, the effect of the change in corporate status under Indian law should be recognised. Even though the concept of "universal succession" was unknown to English or Indian law, the focus is "the substance of what takes place", ie. whether F has validly succeeded *per universitatem* to the rights and liabilities of P under Indian law, which was undoubtedly the case, as evidenced by foreign law. This was so notwithstanding that F had not continued in P's personality following the amalgamation, as required under the civil law notion of "universal succession" as stated by Parker LJ in *Metliss v National Bank of Greece and Athens SA* [1957] 2 QB 33, 51.

Accordingly, it would be absurd and inconsistent with international comity to classify the scheme of amalgamation by reference to the English law concept of equitable assignment whereby notice

was required. To do so would perpetrate an injustice and result in the disappearance of the arbitration into a legal "black hole" since evidence of Indian law, which was accepted, suggested that the scheme of assignment only took effect on 7 February 2015, the same date when E ceased to exist. On that basis, it could not logically be possible for P to give notice after the scheme took effect and prior to its dissolution.

In the circumstances, the award could not be set aside under section 67 of the Arbitration Act since the issue did not concern the substantive jurisdiction of the tribunal.

Nor could section 68 be of any assistance, since the application to the arbitral tribunal was for the substitution rather than the joinder of F as party to the arbitration. Since the ICC rules were silent in respect of the former issue, the arbitral tribunal enjoyed exclusive competence on this matter of procedure.

In any event, the Court held that even if there had been an irregularity, it was likely that E had, under section 73 of the Arbitration Act, lost its right to object to the arbitral tribunal's jurisdiction or on the basis of a procedural irregularity, since it had fully participated in the arbitration without raising the matter to the arbitral tribunal.