Neutral Citation Number: [2022] EWHC 2906 (Comm)

Case No: CL-2021-000620

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2022

Before :

THE HON MR JUSTICE BUTCHER

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Between :

NATIONAL IRANIAN OIL COMPANY **Claimant**

- and –

(1) CRESCENT PETROLEUM COMPANY INTERNATIONAL LIMITED

(2) CRESCENT GAS CORPORATION LIMITED **Defendants**

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David Bailey KC, Jessica Sutherland and Frederick Alliott (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimant**
Ricky Diwan KC and Tariq A Baloch (instructed by **McDermott Will & Emery UK LLP**) for the **Defendants**

Hearing dates: 27-28 September, 9 November 2022

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JUDGMENT ON ADDITIONAL REASONS

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Mr Justice Butcher :

1. On 21 October 2022 I handed down judgment ('the 21 October judgment') in relation to the preliminary issue and to Crescent's application for summary dismissal of NIOC's s. 67 application.

2. In the usual way I had previously circulated a draft of the judgment, for the identification of errors prior to its finalisation. At that stage, NIOC did not suggest that there was a lack of reasons relating to any aspect of the case. In its Points of Difference served on 20 October 2022, which was the day before the scheduled hand down of the judgment, NIOC identified as a ground of appeal, for which permission to appeal would be sought, a contention that the reasons given in the judgment for the dismissal of what was called 'NIOC's party consent/*ratione personae* objection' were inadequate and cursory.

3. In light of this and the other points at issue between the parties which had been identified in the Points of Difference, I decided that there should be a two hour hearing of the consequential matters arising from my judgment, at a date to be fixed. That hearing took place on 9 November 2022. In the event, it took longer than two hours.

4. At that hearing, Mr Bailey KC made an application for permission to appeal. One of the grounds was, again, that the court's reasons in relation to the 'party consent/*ratione personae* objection' had been inadequate and that, as a result, the way in which this objection had been dismissed was unfair. It was said that the giving of inadequate reasons constituted a free-standing ground of appeal.

5. In the course of argument, I raised the issue of whether, in the light of a contention that the court had given inadequate reasons on a particular aspect, the proper course was not for the court to consider whether further reasons should be given, as indicated in English v Emery Reimbold & Strick Ltd (Practice Note) [2002] EWCA Civ 605, at paragraph 25. Mr Bailey KC did not argue that this was not an available course. Mr Diwan KC contended that there was no inadequacy in the reasons given in the 21 October judgment, and that therefore no question of the court needing to provide additional reasons arose; but did not dispute that the appropriate course would be for the court to give additional reasons if it considered that there was force in NIOC's complaint that the reasons given had been inadequate.

6. In the 21 October 2022 Judgment, the reasons for my decision are apparent. I consider, however, that it is of great importance that the parties should not be in any doubt as to what they are, and I accept that certain limited aspects of my reasoning could have been spelled out more explicitly than they were. I have therefore decided that this is a case where it is appropriate to provide additional reasons in relation to the point in question.

7. Mr Bailey KC submitted that, if the court was considering giving additional reasons, the court should proceed on the basis indicated in In re A (Children) (Judgment: Adequacy of Reasoning) Practice Note [2012] EWCA Civ 1205, at paragraph 25 where Munby LJ said that when a judge was giving further reasons, he 'should not feel himself constrained to stand by his earlier findings … if on revisiting his evaluation of the evidence he comes to different conclusions'. The situation which

had arisen in that case is not exactly analogous to this, but I have sought, in carrying out the process of giving additional reasons, to keep an open mind as to whether that process indicates that my previous determinations were erroneous.

8. NIOC's complaint as to inadequate reasons relates to a contention that the Tribunal lacked relevant jurisdiction because what it was being asked to determine was (or was in effect) the existence and amount of CGC's liability to CNGC under a contract separate from the GSPC and in the absence of CNGC; and that there could be a determination of this issue only with the agreement of CNGC or by a tribunal with jurisdiction over CNGC. There was therefore an objection *ratione personae* to the Tribunal's jurisdiction 'as CNGC was not a party to the GSPC or the Arbitration Agreement therein'.

9. This point was put to the Tribunal, apparently without, at that stage, any case being made that Iranian law was relevant to the issue. The Tribunal rejected it, at paragraph 555 of the Partial Remedies Award, which I set out at paragraph 22 of the 21 October judgment.

10. It is that reasoning that I adopted in paragraph 62 of the 21 October judgment, because I considered it to be correct.

11. NIOC complains, however, (1) that it made a case at the hearing on 27-28 September 2022 on the *ratione personae* objection which was distinguishable from its more general case that the arbitration clause should be given a narrow construction in accordance with Iranian law, and which (NIOC contends) was itself supported by evidence as to Iranian law, and (2) that the 21 October judgment did not give any adequate reasons for rejecting that case. Specifically, NIOC says that this case is supported by certain paragraphs in Dr Mokarrami's report, and that the court did not give adequate reasons for rejecting it.

12. In my view, no such distinguishable point was made in Dr Mokarrami's evidence, nor was raised by NIOC in its Grounds for its s. 67 application. Insofar as Dr Mokarrami's report addressed points as to the absence of CNGC from the arbitration and the Tribunal's absence of jurisdiction over CNGC it was as an aspect of his case on the scope of the arbitration clause as a matter of construction. Specifically:

(1) As set out in paragraph 23 of the 21 October judgment, NIOC's Grounds of Challenge and Relief Sought, at paragraph 53 *Ground 1*, identified the point that any liability of CGC to CNGC arose out of a separate contract and that CNGC was not party to the GSPC or the arbitration clause, and continued, at (vi):

> '**In light of the foregoing, on the proper construction of the Arbitration Agreement** (contained in Article 22 of the GSPC), as a matter of applicable Iranian law, the determination of the existence and/or extent of CGC's liability to CNGC under the terms of the CGC-CNGC GSA **were not matters within the scope of the Arbitration Agreement**. Whether and to what extent CGC was liable to CNGC were controversies that arose out of and related to a separate contract between separate parties and, **on the true construction of the Arbitration Agreement in accordance with Iranian law, they were not matters that arose out of or related to the GSPC**. They were not therefore

> matters which could be submitted to the Arbitration in accordance with the Arbitration Agreement within the meaning of Section 30(1)(c) of the Act. As a matter of Iranian law, the Tribunal exceeded its substantive jurisdiction, and its determination as to the existence and/or amount of CGC's alleged liability to CNGC under the CGC-CNGC GSA are void and/or of no effect. **In this regard NIOC relies upon the Expert Report on Iranian law of Dr Ali Mohammad Mokarrami dated 25 October 2021**.' (emphasis added)

NIOC's pleaded case was one as to the scope of the arbitration clause on its proper construction, and as to the contention that the relevant matters did not 'arise out of or relate to' the GSPC.

(2) In paragraph 8 of Dr Mokarrami's report he stated that
'The question that I have been asked to address in this Report is: "whether, on the proper construction of Article 22.2 of the GSPC as a matter of Iranian law, the Tribunal had jurisdiction to determine the existence and/or amount of CGC's alleged liability to CNGC under the terms of the separate CGC-CNGC GSA?"'
This is a statement that 'the question' which Dr Mokarrami was addressing was one of construction of the arbitration clause. A similar statement is found in paragraph 18. His conclusion at paragraph 44 answers the question referred to in paragraph 8.

(3) Paragraphs 42 and 43 of Dr Mokarrami's report do deal with 'The subject-matter scope of any arbitration agreement and the Iranian law approach to issues arising between a signatory and a non-signatory to an arbitration agreement'. As was submitted by Dr Baloch on behalf of Crescent on the second day of the September hearing (Transcript Day 2, pp. 288-289), correctly in my view, it is not possible to extract this part of Dr Mokarrami's report and distinguish it from his construction of the words 'arising out of or relating to'. This is demonstrated by the terms of paragraph 41, which after referring in its first two sentences to the principle of privity of contract - which does not of itself support the conclusion that the relevant matters were not within the jurisdiction of the Tribunal - refers in the third sentence to the principle of narrow construction, raised previously in the report. Paragraph 42 then proceeds on the basis of the matters in paragraph 41, hence the use of the word 'accordingly', and those matters included the principle of narrow construction.

13. I have given my reasons in the 21 October judgment for concluding that the principles of construction which Dr Mokarrami identifies in the admissible parts of his evidence do not lead to the conclusion that the arbitration clause must be given the effect for which NIOC contends.

14. NIOC has sought to rely on a case referred to in a footnote to Dr Mokarrami's report, namely a judgment of the Tehran Court of Appeal (Judgment No. 9309970221500726 (20 September 2014)). Dr Mokarrami did not make reference to that decision in support of the *ratione personae* objection which NIOC has now sought to identify as distinguishable from its case as to construction. Instead, it was referred to in relation to a point about privity, namely that a third party could only intervene in arbitration proceedings with the consent of the parties, and in relation to the view he puts forward on construction (see paragraph 39 of Dr Mokarrami's report, to which this case is footnoted). In any event, this case provides no significant support for NIOC's jurisdictional objection. This is not simply because Iranian law recognises no binding

judicial precedent (as was common ground in the arbitration and as was recorded by the Tribunal at paragraph 379 of the Partial Remedies Award), or because the report of the case is not very clear, and does not record the full terms of the arbitration clause. It is also because what is apparently said by the Court of Appeal is that it would not have been in accordance with the arbitration agreement for the tribunal to decide on certain matters relating to dealings with a third party; and that a third party's rights could not be impaired, and the third party could not be implicated and joined to the arbitral process, without its consent. This seems to be reasoning (a) as to construction of the arbitration clause in that case, and (b) that a tribunal cannot make a binding decision on the rights of a third party. The first would be relevant, if at all, to issues of construction, but does not appear to deal with the meaning to be given to words such as 'arising out of or relating to'. Nor does the court say that there is a generally restrictive approach to the meaning of arbitration clauses. The second matter is a principle which is not infringed by the Tribunal having jurisdiction to decide on the CGC Liability to CNGC Losses claim for the reason given in paragraph 555 of the Partial Remedies Award.

15. These additional reasons do not lead to any other conclusions than those which I reached in the 21 October judgment.