ICC (INTERNATIONAL CHAMBER OF COMMERCE)

ICC Case No. 21404/ASM/JPA (C-21757/ASM)

PT VENTURES SGPS S.A. V. VIDATEL LTD., MERCURY - SERVIÇOS DE TELECOMUNICACÕES S.A. AND GENI SA

JUDGMENT OF THE HIGH COURT OF JUSTICE OF THE BRITISH VIRGIN ISLANDS

---

12 May 2020

Table of Contents

Judgment of the High Court of Justice of the British Virgin Islands 1
THE EXPERT'S QUALIFICATIONS ON ANGOLAN LAW 2
THE EVIDENCE OF ANGOLAN LAW 4
DELAY 6
CONCLUSION 6
POSTSCRIPT: PERMISSION TO APPEAL 7

Judgment of the High Court of Justice of the British Virgin Islands

1. JACK, J [Ag.] : By an application issued on 24h April 2020 the defendant seeks the following order:

"1. An Order permitting Vidatel (and, if so advised, [PT Ventures]) to adduce Angolan law expert evidence on the matters identified at paragraph 14 of the Sixth Affidavit of Michelle Duncan dated 24 April 2020... at the trial of the Recognition Claim commencing on 27 July 2020.

2. An Order (insofar as is necessary) that the matters identified at paragraph 14 [aforesaid] stand as an additional element of Vidatel's defence of the Recognition Claim.

3. Orders that:

3.1. Vidatel is to serve its Angolan law expert evidence by Friday 29 May 2020.

3.2. PT Ventures is to serve any Angolan law expert evidence in reply (if so advised) by Friday 26 June 2020.

3.3. By no later than 16:00 GMT on Friday 10 July 2020 the parties shall serve a joint memorandum signed by the Angolan law experts which records what matters are agreed and what matters in dispute. For the matters that are in dispute, each Angolan law expert can explain briefly in the body of the joint memorandum the position which he or she adopts, and the reasons advanced to justify that position.

3.4. Each Angolan law expert may produce a short supplemental report arising from the above process and any such supplemental report shall be served by 16:00 GMT on Friday 17 July 2020."

2. This case concerns the enforcement of an arbitration award for US$646,445,968 given by a Paris arbitration panel in favour of PT Ventures against Vidatel. I last dealt with the matter on 16th March 2020, when I handed down a judgment dealing with an application by PT Ventures for summary judgment against Vidatel. At that time, Vidatel raised a number of defences. The first two ("the Paris defences") were (a) that the arbitral panel had not been composed in accordance with the provisions of the shareholders' agreement which contained the arbitration provision and (b) that two of the arbitrators were conflicted. The remaining three ("the BVI defences") raised matters of BVI public policy. I granted the summary judgment in respect of the three BVI defences. I refused to grant summary judgment on the first Paris defence (the composition issue) and adjourned the second Paris defence to be determined at trial. The factual background I set out in my earlier judgment and I shall not reproduce it in the current judgment.

3. The current proceedings were commenced on 16th May 2019. The matter first came before me on 20th June 2019, when I gave directions (a) that the pleadings in the Cour d'Appel in Paris stand as pleadings in respect of the Paris defences and (b) for the pleading of other matters, the BVI defences.

Those directions were followed with various affidavits standing as the parties' respective pleadings. No issues of Angolan law were raised.

4. On 2nd August 2019, PT Ventures issued the application for summary judgment, which was argued before me on 24th and 25th February 2020 and resulted in my judgment of 16th March 2020. At no stage was any application made for adducing evidence of Angolan law, nor was any point of Angolan law pleaded. The default position is that, in the absence of evidence of Angolan law, the law governing the make-up of the arbitral tribunal is that of the seat of the arbitration, in this case French law. Angolan law was thus irrelevant.

5. PT Ventures raise three points in opposition to Vidatel's application to adduce evidence of Angolan law. First, the proposed expert is an expert on Portuguese law rather than Angolan law. Second, the evidence he gives of Angolan law is far too vague. Third, the application has come too late.

6. After hearing Mr. Adkin QC's argument on Vidatel's behalf on these points, I indicated that I was against him on all three points. Since Vidatel might well wish to consider an urgent application to the Court of Appeal, I said that I would put my reasons in writing and consider any application for permission to appeal on paper. These are the reasons I promised.

The expert's qualifications on Angolan law

7. Ms. Duncan's sixth affidavit says this:
"14.3 Vidatel wishes to contend that, as a matter of Angolan law, even if PT Ventures is correct in its assertion that the contractually agreed mechanism for appointing the arbitrators was invalid or inoperable as a matter of French law (which Vidatel denies), the consequence is not that the parties are to be taken to have agreed that the ICC Court could appoint five arbitrators itself. Rather, Vidatel wishes to contend that the effect of any such invalidity or inoperability was, as a matter of Angolan law (which governs the issue), either:

14.3.1 that the parties are to be taken to have agreed on some different mechanism for the appointment of the arbitrators to the one actually adopted, with the consequence that the Tribunal as actually appointed was not appointed in accordance with the agreement of the parties to the arbitration clause (which would provide a ground for refusal of recognition and enforcement of the Final Award under [the BVI Act]), or alternatively

14.3.2 that the arbitration clause was thereby rendered invalid as a matter of Angolan law (which would provide a ground for refusal of recognition and enforcement of the Award under [the BVI Act])."

8. The evidence which it is sought to adduce is an expert report of Prof. Paulo Mota Pinto. He is a professor of law at the University of Coimbra. He was a judge of the Portuguese Constitutional Court between 1998 and 2007. As such he seems to be a distinguished jurist in *Portuguese* law. Ms. Duncan's seventh affidavit she says in paras 5 and 6:

"Prof. Mota Pinto was asked to consider how the arbitration clause would be construed, and

what effect such a state of affairs would have, according to Angolan law, on the assumption that Angolan law is the system of law governing the arbitration clause. In response, Prof. Mota Pinto has explained as follows. Angolan law is a civil law system which is substantially similar to Portuguese law, and the Angolan civil code... is derived from and similar to the Portuguese civil code."

9. That is all the evidence relied on to show that Prof. Mota Pinto is qualified to act as an expert in *Angolan* law. It gives no indication of his having had actual dealings with Angola or its law. The impression given (or at least the evidence is consistent with) Prof. Mota Pinto having read the relevant parts of the Angolan civil code and having applied his Portuguese legal learning to its interpretation.

10. The difficulty is that giving an opinion on a point of foreign law does not depend solely on the wording of the relevant law (although of course the wording is important). What matters is how the courts of the foreign jurisdiction would interpret the law. This applies to jurisdictions with a civil law tradition just as it does to jurisdictions with a common law heritage.

11. This can be seen most clearly by reference to the German civil code, the **Bürgerliches Gesetzbuch** ("BGB"). This was drafted in the late nineteenth century on liberal principles in the legal positivist tradition. It came into force on 1st January 1900. The whole approach of the BGB was undermined by the hyperinflation of 1923, which had the effect of ruining creditors by rendering the debts owed them worthless. In order to try and achieve some measure of justice between the parties, so that creditors were not completely wiped out, the German courts effectively ignored the liberal principles of the original draftsmen. The method adopted was to use certain "general clauses", especially §§ 138 and 826 (which concerned "gute Sitten" or good moral values) and §§ 157 and 242 (which concerned "Treu und Glauben" or good faith), so as to give the courts a flexibility to do justice.

12. The same type of application of general clauses was used in a much more sinister manner after 1933 in order to introduce principles of Nazi ideology into German civil law, but again without any amendment to the BGB having been made.[1] Likewise after 1948, the BGB continued in force in East Germany until it was replaced by the **Zivilgesetzbuch** in 1976, but the interpretation of the BGB in the East reflected the "real existierender Sozialismus" of the German Democratic Republic, not the nineteen century positivism of the draftsmen.

13. It can be seen that advising on German law cannot involve solely reading the BGB. The advice which would be given on the same point of construction of a provision of the BGB in 1910, in 1925, in 1937, in East Germany in 1970 and in reunified Germany in 2020 might well be completely different. The contemporary legal precedents and culture are key considerations.

14. Vidatel have adduced no evidence about the development of the Angolan civil code post-independence. Until 1975, Angola was a Portuguese colony. Portugal was ruled from 1932 until his death in 1970 by António de Oliveira Salazar, a right-wing dictator. Only after the revolution of 1974 did Portugal become a democracy. After obtaining independence the following year, Angola described itself as the "Marxist-Leninist Republic of Angola", which suggests a certain ideological

[1] Hans-Detlef Heller, Die Zivilrechtsgesetzgebung im Dritten Reich (Civil law-making in the third Reich) (2015) pp 140ff.

bent. In the meantime, a civil war raged in Angola which was only finally resolved in 2002.

15. Now it may be that none of these events impacted on the way the Portuguese and Angolan Courts interpreted the Portuguese, and subsequently the Angolan, civil code. Courts in fascist Salazar Portugal, communist Angola and modern-day Portugal and Angola may all have adopted the same interpretation. Some evidence to that effect would, however, be necessary. In particular, it is in my judgment dangerous to assume that Angolan courts would generally follow the principles established by the Portuguese courts; evidence to that effect should be adduced. The mere fact that the respective civil codes are similar, or even identical, is not sufficient.

16. It follows that Vidatel have not shown that Prof. Mota Pinto is a properly qualified expert in Angolan law. CPR 32.6(3)(a) requires the party seeking to adduce the evidence to name the expert, and Vidatel have done this. In the absence of adequate evidence of Prof. Mota Pinto's expertise in Angolan law, I refuse the application on this ground.

The evidence of Angolan law

17. The evidence which Vidatel proposes to adduce is set out in Ms. Duncan's seventh affidavit as follows:
"6....Angolan law would consider the process of identifying the contractual effect of the assumed state of affairs as one of 'gap-filling', since that state of affairs [French law requiring the ICC to appoint the five arbitrators] was not one which is catered for or in the arbitration clause itself. The [Angolan civil code] contains provisions which set out how a Court is to undertake such a process as follows.

7. First, the Court is required to identify whether there are any standard terms or special rules which apply to clauses of the sort of involved, so as to fill the gap in the clause. There is none applicable to the clause in question in this case.

8. Second, in the absence of any such terms or rules, the Court is required to consider what would have been agreed by the parties, acting in good faith, if they had thought about the situation which in fact arose. In order to do so, the matters the Court may take into account include the text of the clause, the purpose of the parties in agreeing it, pre-contractual negotiations and the way in which the contract is performed. It is possible that in considering such matters the Court may conclude that the clause should be regarded as void or ineffective, in particular if the Court concludes that the parties would not have agreed to such a clause at all if they had foreseen or understood the state of affairs which in fact pertained.

9. Prof. Mota Pinto has not expressed a concluded view on what the outcome of such an approach would be in relation to the arbitration clause, not least because that requires the application of the relevant Angolan law to the relevant facts, which is, of course, a matter for the BVI Court."

18. Whilst I am happy to accept that Prof. Mota Pinto is trying to do his best to assist the Court, I am afraid this evidence is so vague that the Court would in my judgment have no adequate evidence on which to form a view on how Angolan law should be applied. Now Prof. Mota Pinto is of course right

that the facts are for this Court, not for him. However, on the key facts there is, so far as I have seen to date, no real dispute.

19. The arbitration clause in the shareholders' agreement appears to be a boiler-plate provision. No evidence has been adduced that it was the subject of negotiation or as to the parties' subjective beliefs in what it meant (assuming such evidence would be admissible as a matter of Angolan law). Accordingly (on the assumption Vidatel loses on its Paris defences) we have a straightforward factual scenario: the parties agree to arbitration in Paris, the provisions for the appointment of the arbitrators are as a matter of French law inoperable, but French law permits another form of appointment, which is the method in fact adopted for the appointment of the arbitrators. The question is: on these facts, is the appointment of the arbitrators valid?

20. That, it seems to me, is a question of law which an expert on Angolan law should be able to answer one way or the other. But even if there were factual issues which required determination, it would in my judgment be for the expert to identify what those factual issues might be. What more is required than the bald facts set out in the previous paragraph? Telling the Court to apply "the relevant Angolan law to the relevant facts" is not useful if the relevant facts are not adequately identified.

21. Further, Prof. Mota Pinto says nothing about Lusophone arbitration law. Portuguese law is based on Roman law, which in classical times had a vigorous culture of arbitration. That was revived in mediaeval times, particularly after Durandi, the bishop of Mende, compiled the **Speculum Judiciale** in 1271 (with revisions in 1286 and 1291).[2] Mr. Adkin QC says on instructions (it is not in evidence) that neither the Portuguese nor the Angolan civil codes have special provisions governing arbitrations, however, I would still have expected an expert to have given some account of how arbitration law operates in Portugal and Angola.

22. The position in English law is that "the choice of curial law is a submission to the curial jurisdiction."[3] It may be wrong to say that this is the position in all systems of law, but it is certainly very common. It behooves an expert on Angolan law to explain why the rule does not apply in Angola. Again, there is simply a blank in Vidatel's evidence on this.

23. CPR 32.2 restricts expert evidence "to that which is reasonably required to resolve the proceedings justly." If Prof. Mota Pinto gave evidence in accordance with the summary given by Ms. Duncan, it would not in my judgment assist the Court. He does not give his own view on the validity of the arbitration clause in Angolan law. Nor does he explain what findings of fact the Court needs to make in order to determine that point. In effect his evidence goes nowhere. At present, the Court will effectively merely have a blank in the evidence of Angolan law.

24. Accordingly, I do not consider that Prof. Mota Pinto's evidence is "reasonably required" and I refuse the application on this basis too.

---

[2] D. G. Durandi episc. Mimatensis, Speculum Juris, cum Joan, Andreae, Baldi etc visionibus (Frankfurt, 1612), cited in Karl-Heinz Ziegler, *Arbite, arbitrator und amicabilis compositor* (1967) 84 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung 376.

[3] Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" [2020] EWCA Civ 574 at para [47].

Delay

25. Lastly, I turn to the issue of delay. The relevant dates are: 20th June 2019, when I held the case management conference; 2nd August 2019, when PT Ventures issued its summary judgment application; 24th and 25th February 2020, when the summary judgment application was heard; 16th March 2020, when I handed down my judgment on the summary judgment application (it had previously be circulated in draft); and 24th April 2020, when Vidatel issued its application to adduce evidence of Angolan law. Vidatel's first intimation that a fresh issue of Angolan law might arise was around the time of 16th March judgment hand-down, but the details of what was proposed to be adduced were only given in the evidence in support of the 24th April application.

26. No reason has been advanced for the delay. It is common ground between the parties that all sides had access to specialists in Angolan law in the course of the arbitration in Paris. Vidatel therefore had the ability without difficulty to consult its own lawyers on any issues of Angolan law which arose or might have been capable of affording Vidatel a defence.

27. There is no reason in my judgment why issues of Angolan law could not have been raised at the case management hearing in June last year. The August and February dates would have been important triggers for Vidatel and its advisors to reach a final view on whether Vidatel needed to widen its defence. The gap between 16th March and 24th April 2020 is also significant in the context of a trial fixed for 27th July 2020. The absence of any adequate reason for the delay is not of itself fatal to the application, but it is a significant consideration in deciding whether to allow the further evidence to be adduced.

28. Prejudice to the other side is a very important consideration. At present, Vidatel are not in a position to serve their expert report. They seek until 29th May 2020 to serve Prof. Mota Pinto's report. They then give PT Ventures merely four weeks to obtain its own evidence of Angolan law. That in my judgment is a significant prejudice. The papers in this matter are extensive. I very much doubt an expert on Angolan law could be fully briefed and research and prepare a detailed report in only four weeks, even without the handicap of the coronavirus. Mr. Adkin QC suggested that the timetable could be adapted to give PT Venture's expert more time by omitting the provision for the experts to meet, but the meeting of experts and the making of a statement of agreements and disagreements are in my judgment very important parts of the way in which experts' evidence is to be adduced.

29. The reality is that, if I acceded to this application, the trial would need to be adjourned off. That would be very serious prejudice to PT Ventures. Even if an adjournment were not necessary (and I am sure PT Ventures would do its best to avoid that outcome), the quality of the expert evidence which PT Ventures can adduce in the very limited time-frame available is likely to be impaired. That would also be prejudicial.

30. Balancing the reasons for delay and the possible prejudice to PT Ventures as well as the other elements of the overriding objective (especially CPR 1.1(2)(d) and (e)), I refuse the application on this ground as well.

Conclusion

31. Accordingly, I dismiss the application with costs. The question as to whether to grant permission to appeal will be adjourned to be considered on paper.

Postscript: permission to appeal

32. After the distribution of the judgment in draft, Mr. Adkin QC has served his skeleton argument seeking leave to appeal. This was in accordance with the discussions I have set out in para [6] above. In order to succeed on appeal, he would need to succeed in overturning my judgment on all three of the points on which he lost.

33. As to the first point, my finding that Vidatel have not demonstrated that Mr. Mota Pinto was an expert in *Angolan* law, he says that this is not a point raised by PT Ventures. Mr. Masefield QC's skeleton at para 2(1) asserts that the proposed evidence "lacks proper clarity, particularity and cogency". When he expands on this matter in para 18ff, he says that "the proposed amendment is manifestly vague and embarrassing, and lacks proper particularity and clarity." Nothing is said at this point about cogency, which can only relate to the quality of the expert evidence.

34. In any event, Mr. Adkin QC took no point at the hearing before me that it was wrong to look at the qualifications of Prof. Mota Pinto to be an expert on Angolan law, on the ground that this had not been raised in Mr. Masefield QC's skeleton. He dealt with the point (albeit unsuccessfully). If I had called on Mr. Masefield QC to answer Mr. Adkin QC's submissions, no doubt he would have pressed the point as to the qualification of the proposed expert. A skeleton argument should not be treated as a pleading. Indeed a respondent to an application is not obliged to serve a skeleton at all: CPR Practice Direction 69A para 3(f); although a failure to do so, which results in an unnecessary adjournment so that the applicant can meet an unexpected and unheralded point, may have costs consequences.

35. Mr. Adkin QC says that if the point had been raised beforehand "Vidatel could have easily submitted further brief evidence explaining why Prof. Mota Pinto was a properly qualified Angolan law expert." I am with him on this point, but only to this extent. If he had said (even if only on instructions) that there was a lot more to Prof. Mota Pinto's experience of Angolan law than appeared in Ms. Duncan's affidavits, then (subject to anything Mr. Masefield QC might have said) I might have stood that part of the application over for the further evidence to be adduced. However, even now no attempt has been made to adduce the "brief evidence" which would answer this point. Given that I decided the matter on Thursday morning, Vidatel have had Thursday afternoon, Friday, the weekend and Monday to adduce that evidence, if it was as straightforward as is being suggested.

36. Accordingly, I do not consider that Vidatel have a reasonable prospect of succeeding on the first point, nor is there any other compelling reason to grant leave to appeal.

37. As to the second point, the skeleton in support of granting permission to appeal largely repeats the arguments which I have dismissed above. Mr. Adkin QC submits that I considered that Prof. Mota

Pinto "erroneously overlooked principles of Roman law." I have made no such determination. I have no knowledge of what Portuguese or Angolan arbitration law is. However, I have difficulty believing that arbitration law is a complete *terra incognita* in those two jurisdictions. It is for Vidatel to make out its case. Since distributing the draft judgment, I have become aware that there is an "Associação Portuguesa de Arbitragem", which reinforces my earlier doubts.

38. Again, an appeal on this second point has no reasonable prospect of success in my judgment, nor is there any other compelling reason to grant leave.

39. As to the third point, Mr. Adkin QC submits that PT Ventures would *already* have been able to instruct its own expert on Angolan law, so that in the time from 24th April 2020 or at any rate 7th May 2020 PT Ventures' expert could have been preparing. I do not consider that this is realistic. Ms. Duncan's evidence of what points of Angolan law would be presented is, I have found, too vague to be helpful to the Court. Likewise, the points would be too vague for PT Ventures' expert to be able to give a meaningful opinion on. The suggestion that the date for service of Prof. Mota Pinto's report should be brought forward was not made at the hearing.

40. Further, Mr. Adkin QC submits:
"Until 16 March 2020 when the Court dismissed PT Ventures' summary judgment application (in part) it was PT Ventures' position that there should and would be no trial of this matter at all, and that it ought to be disposed of summarily. Had that happened the question of whether or not there should be Angolan law expert evidence at trial would never have arisen." (Mr. Adkin's emphasis.)

41. With all due respect to Mr. Adkin QC, this is a nonsense. It has always been the case that, if as a matter of French law the ICC arbitration panel was properly composed with no arbitrator subject to recusal, Vidatel would need to rely on any defences available as a matter of non-French law. The bringing or not bringing of the summary judgment application is irrelevant to this. An Angolan defence could have been pleaded, just as the BVI defences were pleaded, to counter PT Ventures' claim.

42. The third point has no reasonable prospect of success, nor are there any other compelling grounds to grant leave to appeal. Accordingly, I dismiss the application for permission to appeal in its entirety.