ICC (INTERNATIONAL CHAMBER OF COMMERCE)

# SOLETANCHE BACHY FRANCE SAS V. AQABA CONTAINER TERMINAL (PVT) CO

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## APPROVED JUDGMENT OF THE HIGH COURT OF JUSTICE IN THE QUEEN'S BENCH DIVISION COMMERCIAL COURT

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17 January 2019

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# Approved Judgment of The High Court of Justice in the Queen's Bench Division Commercial Court

1. This has been an application by the Claimant, Soletanche Bachy France SAS ("SB"), to which Aqaba Container Terminal Private Company ("ACT") is the Defendant under ss. 67 and 68 of the Arbitration Act 1996 ("the Act"). It relates to an arbitration award of 30 August 2017, made by Mr Andrew Foyle, Mr John Marrin QC and Arbitrator X, and is an application to set aside that award on what are now four grounds, with which I shall deal in turn, a fifth ground relating to quantum not being pursued.

2. The application has been very ably and fully argued by Mr Foxton QC, with Mr Iain Quirk and Mr Stephen Donnelly, who did not appear below, and there have been written submissions of a very persuasive and clear kind by Mr Marcus Taverner QC, who did appear below, with Mr Tom Coulson, and I did not, in the light of those submissions, and notwithstanding Mr Foxton's oral submissions, call on him.

3. The arbitration related to a contract for the construction of extensions to the Defendant's terminal by the Claimant. There were to be five modules to such extension, work was to commence on 9 December 2009. The first module to be worked on was module 5 which had a completion date in the contract of 9 December 2010, so that it was a 12-month contract for module 5, and then it was to be followed by work on the other modules in accordance with the main contract.

4. When the other modules had not yet started and module 5 was still unfinished on 15 February 2011, a notice to terminate was given by the Defendant for the entire contract on 21 February 2011. The contractual completion date for the other modules would have been, had they been started, so as to create the totality of the work, in March 2012.

5. Other grounds were also relied upon, but the relevant ground upon which the Defendant succeeded before the Arbitrators was pursuant to clause 8 of the contract, to proceed with the works with due diligence and without delay and in accordance with that clause.

6. The arbitration led to the award to which I have referred, and the Claimant having commenced the arbitration, the Defendant defended and counterclaimed. The Claimant relied on wrongful termination and repudiatory breach by the Defendant, the Defendant relied upon the notice which it had served.

7. By 15 February, there had been critical delay of between 199 and 231 days: see paragraph 1201 of the award.

8. After the award was made, there were addenda, to which I shall refer, and there has been this application to set it aside. The first ground to set it aside was only raised in October of 2017, after the arbitration was completed and the award given and indeed the issues in respect of the first

addendum had been canvassed. It arose in circumstances in which, by an email of 23 October 2017, Arbitrator X was asked by the Claimant to account for his activities in respect of a company called BAM. He gave his answer in respect of those questions, initially on 24 October and then, when the matter was referred, in the event unsuccessfully, by the Claimant to the ICC, in two further detailed letters dated 24 November and 10 December 2017.

9. BAM came into the matter because they had been an unsuccessful tenderer in competition with the Claimant, and once the termination had occurred, they became the replacement contractor without a further tender, but on the basis of direct tender negotiations.

10. In the information supplied to the Arbitrators for the purposes of their signing the relevant forms of independence etc., there was a list of relevant entities put together by ICC, it would seem simply by ploughing through the papers and finding the names of companies or individuals who might be relevant, and BAM was included in that list.

11. BAM featured in the pleadings to this extent, namely that the counterclaim by the Defendant for damages as a result of the wrongful termination was based by reference to the prices which had been subsequently charged by BAM when they took over the work, and there was argument as to, first of all, in circumstances in which BAM was taken on as successor without a tender, whether their prices could be regarded as justifiable and also whether the work which they were contracted to do was or was not identical to that which was to be done by the Claimant, but obviously that would have been for quantification of the counterclaim in due course by the Arbitrators and no one from BAM was called as a witness. The quantification was done by exchange of expert reports.

12. A circumstance arose just immediately before the start of the arbitration in October 2016. Fresh documentation was submitted by the Claimant, apparently showing that there had been corruption by an employee of ACT and BAM, leading to the obtaining of the successor contract by BAM. Although no specific matter was at that stage raised, it appeared and was referred to in the course of the opening on the first day.

13. There then followed an exchange, of which we have a transcript. Counsel then appearing for ACT relied upon these documents and Mr Taverner referred to this and, at page 435 of bundle C1, it was said the problem is that if the submissions which Counsel for ACT made were right, there was dishonesty at the heart of Soletanche Bachy, and Arbitrator X intervened to say this: "*There is another issue which... I have not read the documents which have come in. I am instructed by BAM in a joint venture in relation to a project in Australia, totally unrelated to this. I have not met anyone from BAM, I have only dealt with the solicitors, who are not involved in this, to answer certain legal questions, but I am actually currently retained by them and that may affect whether or not first of all you are happy for me to continue... sitting here and/or whether to be party to that application.*"

    That is an application relating to the admissibility of the new documents.

14. The discussion continued, and after the President and the other Arbitrators had had a discussion, Mr Darling QC, the counsel for SB, said this:

"*I mean, I have quite a lot to say in addition... but as far as my clients are concerned, they are content to waive any conflict that may exist in* [Arbitrator X]."

15. Then Arbitrator X said:

"*I can say quite clearly I'm absolutely crystal clear on what I have seen that there is no conflict. It is utterly unrelated. If something came out that suddenly got the alarm bells ring, you can rest assured I would say something.*"

16. So the reason why Arbitrator X thought it was necessary, indeed essential, to disclose the position was the new evidence apparently showing fraud between an employee of ACT and BAM.

17. Immediately, on the next day, SB withdrew the allegation of fraud or corruption and accepted that the documents were forgeries and could not be relied upon, and in due course indemnity costs were ordered against SB in relation to their attempt to rely on those documents without, it seems clear, sufficient investigation of them, if indeed it was immediately conceded, the moment that the matter was raised, that they were forgeries.

18. So that issue went out of the case. There was no witness called by BAM in the arbitration and the arbitration went ahead without it. Mr Foxton says that in his submission it remained significant there might be, and in due course was, a discussion by the Arbitrators as to whether an unfavourable inference ought to be drawn in respect of SB's attempted use of such obviously forged documents. But that, it seems to me, was a matter in respect of SB, and not relating to any issue on which BAM could have any relevant evidence to give, the issue being, it now being completely abandoned that there was any corruption, why did SB seek to rely on it at all? In the event the Arbitrators said that they had no need to rely on any unfavourable inference, and decided the award without it.

19. It seems clear, and although not formally conceded, Mr Foxton did not vigorously resist the suggestion, that as at that date there was waiver in the clear terms of Mr Darling's words, which I have cited, of any previous failure to disclose, assuming there was one. For my part, I do not regard there as having been any need to disclose simply because there was a naming of BAM in the list of names supplied by ICC, because I am quite satisfied no thought went behind that, it was simply a helpful list, and it would not have affected the duty of disclosure by Arbitrator X, which was at that stage covered by an ICC Rule which did not expressly require disclosure of any relevant entity unless it was an entity connected with one of the parties and had a financial interest in the litigation.

20. As to whether there was a duty to disclose at common law, simply by virtue of the fact that BAM were the successor contractor, and that argumentation about the counterclaim might have involved some criticism of the figures, which SB would have had to have justified by reference to them and did in the event do, and without any evidence from BAM, I am quite satisfied that as at that date there was no duty on Arbitrator X to disclose any prior involvement with BAM.

21. The nub of Mr Foxton's application relates to what happened afterwards, namely that although, it

seems, certainly there is no evidence that they had any reason to suspect anything at all, at the time when they had lost the award, it looks to me as though they were looking round for some basis to challenge the award, and one of the ways was to write a letter or an email to Arbitrator X, to find out whether he had had any continuing involvement with BAM, albeit that none appeared at all, nor any inference of it in the way the Arbitrators had dealt with the award, or indeed with any very limited involvement of BAM such as I have described.

22. The explanations were given in his three accounts, to which I referred earlier in this judgment. I do not propose to set out the full history which he very fully disclosed in those documents, but suffice it to say that the instruction of him by BAM, and his retainer by BAM, led on in the event to an arbitration later in the year, and it seems continuing even after the award, relating to matters completely unconnected with SB, or the facts of this case, and involved his having meetings with the clients and one particular director of the clients, again not featuring in this case, although it seems having some business role in relation to the Middle East, and this extended to some social contact in addition.

23. I have been taken to the authorities by both sides, and many of them were familiar, and insofar as they were not, I have had the opportunity of reading them, and both sides really accept that the most recent decision is the most important for me to consider, namely the recent Court of Appeal decision in **Halliburton Co v Chubb Insurance Limited & Ors** [2018] 1 WLR 2361, which I am told is to go to the Supreme Court but in the meantime the Court of Appeal authority remains the leading case. And I have re-read, with Mr Foxton's help, the relevant passages in **Halliburton.**

24. There is no doubt, and even without **Halliburton** there would be no doubt, that there is a continuing duty to disclose on an arbitrator. The fact that Arbitrator X had no connection at all with BAM when in 2014 he was first appointed an arbitrator is of course of no relevance, and he did disclose, in the circumstances which I have referred to. Whether he needed to do so I have doubted before the arising of the new application at the beginning of a hearing, which necessarily led him to disclose the position, as he did.

25. But the question then is, there being a continuing duty, was there, as Mr Foxton puts it, a change in the essentials, as he put it. Really that was common ground between the parties, that I had to look carefully at what Arbitrator X said he had done in his three accounts, to see whether any of them amounted to a change in the essentials such as to render it necessary for there to be further disclosure, over and above the disclosure he had previously made.

26. There are two aspects upon which Mr Foxton relies. The first is that what had then been a retainer and instructions, and the giving of advice, morphed into advising and having an involvement in the pleadings in an arbitration which started in the course of 2017. The second is the fact that, having had, prior to October 2016 and the disclosure at the hearing no personal connection with the client, all his involvement having been with the solicitors, he now thereafter did have contact with the client as I have described, and in particular a four-day meeting in Perth in January 2017.

27. So far as the first of those two alleged changes of essentials is concerned, I have no difficulty whatever in concluding that once it was known that he was retained and instructed by BAM in relation to a dispute, the fact that the dispute subsequently became active, in the sense of an arbitration, made no material change whatever. It had been disclosed, and although I entirely

accept what Mr Foxton says about the embarrassment and difficulty of chasing up an arbitrator to see whether there has been any change, they could certainly have made enquiries if they had wanted to with him about whether there had been any change, if it mattered, with regard to his involvement with BAM. I do not consider that it did matter, and I consider that Arbitrator X was right to conclude that he had disclosed enough, and that it did not matter that the dispute which he had disclosed had become litigious.

28. The second matter was that, as is certainly the case, at the time in October 2016 he had not met the client. Subsequently he did. I do not have any doubt that it was an appropriate decision for him to make not to disclose.

29. Of course, whether there is a duty to disclose is only a factor, and, if I did find that there had been a duty to disclose, there would still need to be consideration as to whether objectively there was apparent bias, which would include any unconscious bias. I have no doubt at all that no reasonable observer, no objective observer, would conclude that there had been any risk at any time of a lack of impartiality by Arbitrator X, whether as a result of his non-disclosure or otherwise. I am satisfied that this ground must fail.

30. The second ground, still under s.68 but now referring to the content of the award, relates to the case made by Mr Foxton that there was a failure by the Tribunal to determine issues argued by the parties as to (a) whether at the date of termination SB would still have been able to deliver the works on time (or substantially so), (b) whether SB was entitled to an extension of time for modules 6, 7 and 8 of the construction project and (c) whether SB would have been delayed by a need to install piles to a greater depth than that provided for in the original design. All these of course are matters which would occur after the termination, as it turned out, in February 2011.

31. The case was made originally in respect of liability and quantum, but the quantum case has been abandoned: the quantum case being that, although they were in breach of contract, the damages ought to be tested by reference to what would have happened afterwards, so that, by dint of doing things differently as per one or more of those issues, there might have been some savings. As I indicate, that was dealt with in the award as well, and I shall briefly mention it, but it is not now pursued.

32. What is pursued is the question of liability, and both parties refer me to the very helpful and well-known decision of Akenhead J. in **The Secretary of State for the Home Department v Raytheon Systems Limited** [2014] EWHC 4375 (TCC). Mr Foxton refers to paragraph 33(g) at (iv), whereby he said:

"*There will be a failure to deal with an issue where the determination of that issue is essential to the decision reached in the award. An essential issue arises in this context where the decision cannot be justified as a particular key issue has not been decided, which is critical to the result, and there has not been a decision on all the issues necessary to resolve the dispute or disputes.*" And (v):

"*The issue must have been put to the tribunal as an issue and in the same terms as is complained about in the s. 68 (2) application.*"

33. Mr Taverner refers to two additional subparagraphs of that same Judgment in his skeleton argument:

"(*vi):If the tribunal has dealt with the issue in any way, section 68.2(d) is inapplicable and that is the end of the inquiry. It does not matter for the purposes of section 68.2(d) that the tribunal has dealt with it well, badly or indifferently*."

And

"(*vii): It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issue at greater length*."

34. Mr Taverner points out that these issues, which I have recited above, and whose absence is complained of, were not included by the Claimant in their own list of issues for the hearing. But Mr Foxton has referred me to the judgment of Andrew Smith J.in **Petrochemical Industries Co (KSC) v Dow Chemical Co** [2012] 6 Lloyds Reports 691 and it is clear from that authority that the absence of such issues from a list is certainly not conclusive. For example, there can be sub-issues and there may be no need to list the sub-issues in a case management list – a deliberately short list - of issues.

35. However, it is clear in this case that, in my judgment, the Arbitrators, notwithstanding the absence of the specific sub-issues, if that is what they were, from the list of issues, did address the points made by Mr Foxton and made by his clients in the arbitration.

36. I turn to the award. Where they began, and importantly began, at the beginning of Section 13 of their award, by saying as follows:

"*282. The liability issue at the heart of this arbitration can be simply stated: was ACT entitled to terminate SB's contract pursuant to clause 15 of the contract?"*

37. Then paragraph 283:

"*SB has run a myriad of arguments as to why ACT was not entitled to terminate, however having considered all the evidence and standing back from the detail, the tribunal believes that SB's arguments complicate what is really a straightforward case*."

38. Notwithstanding the fact that the award was, even as to liability, a long one, that approach seems to me to have been what underlay this very experienced Tribunal's decision-making.

39. In paragraph 986 of the award they record that in respect of the period after termination SB maintains that its notional final account should be assessed on the basis that it would have been entitled to further extensions of time amounting in total to 261 days, and they set out those days relating to each of the surviving non-commenced modules.

40. Then at paragraph 1042, they say:

"*As already observed, SB claims extensions of time in respect of the period up to 7 March 2011 amounting in total to 193 days. The Tribunal addresses that claim in relation to Module 5 only, since that is the only module for which the contractual milestone had passed by the date of termination",* and then they refer to the constituent elements of the claim, with regard to different windows forming part of module 5, and they say that they are going to go on to address the claims for extensions of time, which they then do, relating to module 5.

41. At paragraph 1107 they recite under the heading "*Termination under clause 15.2(c)(i)",* paragraph 1107:

"*Whether ACT was entitled to terminate the contract under clause 15.2(c)(i) raises two issues:*

*"(a) was SB proceeding with the Works with due expedition and without delay during the relevant period?*

*"(b) did SB have a reasonable excuse for such failure?*

That of course was the nub of the case, because that was the contractual term under which the Defendant terminated.

42. At paragraph 1110 and following there were points of principle, raised by the parties, set out and discussed by the Tribunal and at paragraph 1111 the Tribunal said:

"*First SB maintains that clause 15 permits termination only for significant or substantial breaches, as opposed to trivial, insignificant or insubstantial ones."*

And they accepted that proposition at paragraph 1114.

At paragraph 1115 they recite:

"*The second point of principle is over what period should SB's performance be judged for the purposes of termination under clause 15.2(c)(i).*"

43. That, it seems to me, led, on this issue, to the most important paragraph in the award. At paragraph 1122 the Tribunal said this:

"*The tribunal accepts that it has to determine SB's entitlement to an extension of time and that its performance during this period should be considered in that context."*

That of course is the period prior to termination, which would have involved at that stage only module 5. They continue:

"*Apart from that, the tribunal does not accept that it should 'look forward to consider the prospects of the project'...*" - a quotation from SB's submissions - "*... if this means that the tribunal should assess SB's prospects of recovering past culpable delays. There is nothing in the language of clause 15 to suggest that such a prospective analysis is required."*

44. Now, that is a very short conclusion, but it seems to me it plainly addresses the points made by Mr Foxton and the Claimant, and disposes of them. There was no call to look forward to see what might happen in the future, whether there could be a pull-back on some of the delays by virtue of subsequent developments. That was not the test, when analysing whether there had been a breach of clause 8, terminable on reasonable notice.

45. I can see, as I said earlier, that there could be some argument in relation to quantum and mitigation, but the Arbitrators dealt with the very same point when it came to quantum at paragraph 1319 of the award. They said this:

"*The tribunal also agrees with ACT that the calculation of the notional final account of SB for the purposes of clause 15.4 does not require the parties or the tribunal to engage in speculation as to what future claims SB or ACT may or may not have had against each other. This includes in particular any assessment of any entitlement to extensions of time in the future, future claims for liquidated damages, or future claims for prolongation costs.*" 1320: "*Such claims are by definition unknowable and speculative.*"

46. Then they say:

"*... Even assuming that SB could prove that such matters would have been critical at some point in the future and that there were no concurrent delays which would preclude the granting of an extension of time under clause 8.3, how would one determine, for example, whether, at the time of the assumed future delay, SB would nevertheless have been on site in any event as a result of delays for which it was responsible, thereby reducing or extinguishing any claim for prolongation costs.*"

47. Now, whether the conclusions in paragraphs 1122 and 1319-1320 are right or not, is not for me to judge, because there is no appeal on law. But on the basis that I am asked to conclude that the Arbitrators did not address the point, I find that unarguable. They plainly did address the Claimant's issues, and rejected them.

48. The third ground can be dealt with shortly in the light of the way the arguments went before me. The complaint made was that the Arbitrators, including Mr Marrin himself of course, dealt with concurrent delay, particularly in paragraphs 1066 to 1069, in discussing what was meant by concurrent delay, and reaching a conclusion about it by reference to an article by Mr Marrin, which no one seems to have cited, because it seems it was too well known, both to Mr Marrin himself and those counsel appearing in front of him, namely precisely what concurrent delay meant.

49. But at any rate, Mr Foxton puts forward a persuasive case that no sufficient opportunity had been given to deal with concurrent delay, and that the Defendant had not raised concurrent delay and that the Arbitrators had reached a decision on concurrent delay, without giving the parties, and in particular the Claimant, an opportunity to deal with it.

50. In the circumstances I have not needed to deal with the persuasive paragraphs 133 to 140 of Mr Taverner's skeleton argument, in which he set out all the various respects in which he says that both parties did, both in their pleadings and submissions, address, and that it was in fact in any

event necessary to address, clause 8.3 of the contract, relating to concurrent delay.

51. The reason it has not been necessary is because if there were a failure, such as is here alleged by the Arbitrators, it would, as Mr Foxton accepts, be necessary to show that there was substantial injustice as a result. And he argued that there was, both by reference to liability and quantum, in relation to the fact that only 54 days' extension of time in respect of module 5 was agreed and ordered by the Arbitrators, because they ignored or ruled out an additional 14 days on the basis of applying the concurrent delay concept. Hence there should have been 68 days on his case and there were only 54 days.

52. What the financial consequence would have been, he was unable to persuade me of. He showed me one paragraph of the award in which there was mention made of £60,000. This was an award for I think US$ 38 million and it seems to me, and indeed essentially must have seemed to Mr Foxton, because he did his best, but without a great deal of persuasiveness on this point, unlike his other arguments, that he could not justify an argument that, had there been an extra 14 days allowed for, there would have been such a material difference to the outcome that substantial injustice has been caused by not allowing it to be run. I dismiss this ground also.

53. The fourth ground relates to what I referred to earlier by way of the addendum. There must have been some embarrassment to the Arbitrators, or to the ICC, I am not quite sure where the error occurred, but the award was issued without its appendices, in error. That was picked up and it was then necessary subsequently to supply those appendices. There was, naturally enough, correspondence about it and how to deal with it.

54. Mr Foyle wrote on 6 September to the parties to say that:

"*The tribunal proposes to correct this regrettable and unfortunate oversight by using its powers under Article 35.1 of the Rules to issue an addendum to the award to which the appendices will be attached. The addendum will then form part of the award. The tribunal can exercise this power provided the correction is submitted to the ICC Court within 30 days of the date of the award, ie by 30 September 2017.*

*However, before drafting the addendum the parties would like to give the parties the option of waiving these formalities, this would require the parties to agree to treat the final award as including the attached appendices for all purposes."*

55. This was not acceptable at any rate to SB, who wrote on 13 September, submitting that the parties:

*"... have not yet been formally notified of the award... In the circumstances... SB considers that none of the time limits in Article 35 or under the law of the seat have started to run... For the avoidance of doubt SB is not prepared to waive this irregularity in the preparation, scrutiny and notification of the award and reserves all of its rights in respect of the award's compliance with the ICC rules.*"

56. In those circumstances, the step was taken on 15 September 2017 by the Arbitrators as follows: "*It is the tribunal's view and that of the secretariat that the omission of the appendices did not invalidate the notification of the award. The award was properly notified to the parties by the ICC*

*in accordance with Article 34. The correct way of remedying the omission of the appendices is for the tribunal to issue an addendum pursuant to Article 35.1... The tribunal does not consider it appropriate to make any of the corrections proposed by SB* [which they had done in their letter], *without following the procedures set out in Article 35.2. This includes giving ACT an opportunity to respond."*

57. And so on 2 October the addendum was served by way of a corrective award. As the Arbitrators had indicated, there would then be 30 days for the parties to make corrections, including the corrections previously signalled by SB, and ACT's corrections were made on 16 October. Mr Foxton accepts that if there is no ground for challenging the date of 2 October as giving rise to another 30 days, then he does not make any case than the corrections are out of time.

58. His case is that the nature of the appendices was made known when courtesy copies of the appendices, as they would be proposed to be issued, were supplied to the parties, which of course had given rise to his clients' letter making their suggestions to what had not yet been incorporated into the award, but was then proposed to be. He submits that there was a nullity by virtue of the corrections being allowed out of time.

59. The corrections ought to have been notified, knowing what the appendices were going to say, by virtue of the courtesy copy supplied, within 30 days from the original award of 2 September, and they were not. This, he says, founds a substantive absence of jurisdiction falling within s. 67. There is no alternative application under s. 68, nor has any suggestion been made that one could have been made by reference to the existence of any injustice to the Claimant, which would of course have been a necessary concomitant to the making of any such application, whereas section 67 does not need it.

60. Mr Taverner relies, and in my view rightly relies, on two authorities : **Union Marine Classification Services LLC v Comoros [2015] 2 Lloyds Reports 49 (QB),** which approves an earlier judgment of my own in **CNH Global NV v PGN Logistics Ltd** [2009] EWHC 977 (Comm). What those authorities confirm is that s.67 is only apt for an attack, or a challenge to a failure of substantive jurisdiction can only be made, where there is a lack of *substantive jurisdiction* within the meanings of sections 82(1) and 30(1) of the Act, namely by reference to (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

61. Even if it was a nullity for the Arbitrators to accept corrections out of time in the circumstances to which I have referred, that does not amount to a substantive absence of jurisdiction. It would amount to a plain irregularity by the Arbitrators which, if there had been a substantial injustice, this court could correct. In the event, I am entirely satisfied that the right course was taken which was fair to all parties, and that it was absolutely right to conclude that what happened on 2 October was the correction of the original award by the making of a fresh award, giving a fresh 30 days for the parties to make corrections to the now corrected award.

62. Without that, even with courtesy copies, the parties could never have known whether they were making corrections, or suggesting corrections, to an award or to a letter from the Arbitrators. The only way to deal with this is the way the Arbitrators dealt with it, by making a fresh award and giving both parties a 30-day period.

63. I do not conclude there was anything irregular, but if there was anything irregular, it caused no injustice at all.

64. In those circumstances I dismiss all four grounds of this application.