

The Cost of London as An Arbitration Venue – The Court of Appeal Decision in *Midgulf v Groupe Chimique Tunisien*

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I fully understand that the Court of Appeal found *Midgulf's* written submissions unusually lengthy in this case. They were, indeed, and we were not surprised by Lord Justice Toulson's comments. There were, however, good reasons for this, not all of which are mentioned in the decision.

The matter had already required three hearings before two judges at first instance. It involved, on appeal, submissions on the underlying contractual correspondence, the parties' conduct in performing obligations under the contract, issues of *compétence-compétence* and separability, Tunisian law and an anti-suit injunction, as well as a point Mr Justice Teare relied on at first instance although neither party had relied on or adduced evidence in relation to it (the factual question of the actual depth of the Tunisian ports of Sfax and Gabès - the 31ft point). Both parties submitted additional evidence, including expert witness statements, on Tunisian law and the 31ft issue. The oral hearing before the Court of Appeal was limited to 1.5 days, a time constraint the Court repeatedly, and rightly, sought to maintain in the weeks leading up to the hearing.

What the Court of Appeal plainly took issue with was *Midgulf's* reliance on strong principles of *compétence-compétence* and separability, neither of which is yet fully accepted in England despite entrenchment of these principles, not otherwise indigenous to English law, in the 1996 Arbitration Act. *Midgulf* relied on emerging English case law as well as doctrine and comparative jurisprudence in other New York Convention member States. Lord Justice Toulson rejected these principles and authorities as "irrelevant" and unnecessary since, from his perspective, the issue could be resolved by the Court itself coming to its own conclusions as to whether the parties had concluded the main contract in their written exchanges including, at first instance, by hearing witnesses (paras 36 and 73). Indeed, his Lordship goes so far in his decision as to commend GCT for not joining issue with *Midgulf* on the applicability of these principles (para 71) which concern, instead, only the question of the parties' separate arbitration agreement.

I am happy, naturally, that the Court of Appeal decided in *Midgulf's* favour and, of course, *Midgulf* also made the arguments Lord Justice Toulson accepted concerning the parties' contractual correspondence. Essentially, the Court, per Lord Justice Toulson, decided that "a reasonable person" would have regarded the parties as having completed offer and acceptance of the main contract despite the lack of clarity in their exchanges. Further, the Court of Appeal found the 31ft point not to be determinative choosing to characterize it as a "clarification," rather than a new term forming a "counter offer." Lord Justice Toulson is somewhat unfair, however, to suppose that *Midgulf* should have been able to count on that particular interpretation alone and the Court's willingness to ignore the 31ft point in preparing their appeal. After all, that approach had not been accepted by a Commercial Court Judge at first instance who considered that he could not decide the matter on the basis of the correspondence alone and without hearing all of the witnesses and came to a different conclusion as to how a "reasonable person" might have understood the same correspondence.

Had the Court of Appeal been in favour of Teare J's offer and counteroffer analysis of the main contract, however, the only basis for enforcing the arbitration agreement would have been strong principles of separability and *compétence-compétence*. In the event, the Court of Appeal wrongly stated the law on separability (para 36) ignoring the combined effect of ss 7 and 5(3) as well as DAC commentary on the purpose and meaning of s 5(3) and practice in other New York Convention States.

What the Court of Appeal also missed is that the application of strong principles of *compétence-compétence* and separability not only accord with the UK's international obligations to enforce

arbitration agreements under the New York Convention, but also resolve the issue of costs that arise as a result of the involvement of local courts in the merits of disputes governed by arbitration agreements. They provide a short, and inexpensive, answer to objections by parties who contest the existence of a separable arbitration agreement on the basis of issues arising out of the main or "host" contract. As Mr Justice Coté of the Alberta Court of Appeal put it in *International Resource Management (Canada) Ltd and Anr v Kappa Energy (Yemen) Inc* (2001): "Arbitration only after a lawsuit about arbitration is likely to be slower and more expensive than the lawsuit which the parties contracted not to have."

In contrast to the approach in England, Tunisian courts deciding the same issue under the same contract were able to reach the same result directly and without the need for a trial and witness testimony or any considerations relative to the merits of the underlying contract which trespass upon arbitral jurisdiction. Unlike the English courts, the only question arising for Ms Reem Al Nifati, Deputy Judge of the Tunis court of first instance, was the existence of an arbitration agreement in writing under the New York Convention (whether or not it was binding and regardless of disputes as to the underlying or main contract – all matters for the arbitral tribunal). She was thus able to decline jurisdiction only on the grounds of separability and compétence-compétence which is the correct approach and one applied uncontroversially in numerous other jurisdictions as the authorities before the Court of Appeal demonstrated.

Most interestingly, this was also the approach of Burton J who first granted the anti-suit injunction before the matter went to Teare J. Burton J's conclusion that there was nothing in the parties' correspondence about the main terms of the contract "that ousted the arbitration agreement" was spot on. The legislative history of ss 7 and 5(3) of the Arbitration Act makes it clear that written confirmation of an arbitration agreement is not required where parties act on the basis of the contract which contains it (as the DAC commentary sets out).

The Court of Appeal's attention to the main contract only and its preference for a traditional approach focusing only on the parties' contractual correspondence is redolent of pre-1996 reasoning and now discredited doctrine pursuant to which the fate of an arbitration agreement necessarily follows that of the main contract. The problem was not, as the Court of Appeal saw it, a conflict between appellate practice in other jurisdictions and that in England, but one of conflicting approaches in this jurisdiction where "new" principles under the Arbitration Act still compete with *Chitty on Contract*. English courts continue to be in a period of transition under the 1996 reforms and it is to be regretted that the Court of Appeal, in this instance, did not take the opportunity to follow the direction set by the House of Lords in *Fiona Trust*.

It is now reported in *Global Arbitration Review* that GCT are applying to the Supreme Court for permission to appeal on the basis that the Court of Appeal cannot overturn a High Court decision on issues of fact and law, where the trial judge heard all of the witnesses, particularly where "the trial judge said he could not decide on documents alone and needed to hear the witnesses as well." If this is correct, *Midgulf* will once more have to avail itself of strong principles of separability and competence-compétence which the Arbitration Act makes available to parties who choose to arbitrate here. Lets hope they are not precluded from doing so by the Court of Appeal's complaint regarding the costs of hearing submissions on these fundamental principles however unfamiliar they may still be to the courts in this jurisdiction.