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An Attempt at an Innovative Arbitral Solution

A Comment on a Dispute over a Consignment of Beans

LORD DAVID HACKING[1]

INTRODUCTION

We have been asked in these chapters to be presented to Professor Hans van Houtte to seek out innovative solutions to problems faced by arbitral tribunals. When tied to the arbitration rules of an arbitral institute, under which the parties have agreed to conduct their arbitration, innovation is hard if not impossible to achieve – notwithstanding that an innovative solution would provide a fairer result between the parties. Professor van Houtte, in his long and distinguished career in international arbitrations, knows more than most of us that an arbitral tribunal can become stuck when it is without an innovative solution.

This is exactly what happened a few years ago in an arbitration in which the author was involved. The dispute in this arbitration arose out of the sale of a consignment of beans from an island in the Indian Ocean, in effect, to a company registered and based in the USA. The beans turned out to be very expensive and the claim in damages, as calculated by the claimant, was in excess of US $23,000,000.

The claimant was represented by a European lawyer who lacked experience in international arbitration. Unfortunately, therefore, he named in the Application for Arbitration (and the subsequent submissions) the wrong party as respondent. It was somewhat understandable because the American Pennsylvanian parent company had a wholly owned subsidiary company in another island in the Indian Ocean which the American parent company used to 'front up' the contract with the claimant company – the contract itself being typed out on the notepaper of the American company's subsidiary company in this other island in the Indian Ocean.

The only difference between the names of the US parent company and its subsidiary on the island in the Indian Ocean was that the former merely carried the name of the American

[1] The Rt Hon Lord Hacking, Chartered Arbitrator, Accredited Mediator, Barrister-at-Law and an Associate Member of Littleton Chambers, Temple.

company while the latter had added the word 'International' after the name. Thus, one company was named '. . . Company Inc' and the other '. . . International Inc'.

Although counsel for the claimant was aware of the existence of both the Indian Ocean and the US parent company and was aware that the former was just the 'frontage' company of the latter, he did not wake up to the importance of the proper naming of the respondent companies until one of the later written submissions was made to the Tribunal. In that submission he sought to get the Tribunal to order 'Additional Entities' into the arbitration – those 'Additional Entities', now being correctly named, being the US parent company in Pennsylvania, the US parent company of the US company in Pennsylvania and, in his personal capacity, the President and Chief Executive of the US company in Pennsylvania.

There was, however, a lot of evidence indicating that, from the outset, counsel for the claimant did intend to bring this arbitration against the US parent company in Pennsylvania. The claimant's Statement of Case was served both at the postal address of the Respondent's Indian Ocean company and at the registered office in Pennsylvania of the US parent company. In doing the latter, counsel for the claimant arranged for his client's Statement of Claim to be served in the USA by courier and with a letter addressed to the President and Chief Executive of the US parent company with the name of the Indian Ocean company at the address of the US parent company. In addition, just the telephone number of the US company was recorded on the courier dispatch form. Moreover, in many paragraphs of the Statement of Case, as thus served in the USA as well, there were references to the respondent company which could only have been referring to the US parent company and not the Indian Ocean subsidiary company. For example, in the Statement of Case, there were references to the respondent company as 'a determining factor in the world market of [these beans], being regarded as the principal importer [of them] of the United States', 'one of the largest supplier of the American food industry', a 'market leader . . . in the [bean] industry' and so forth.

Also of importance, other than the contract between the parties being set out on the headed notepaper of the Indian Ocean company, was the fact that all correspondence between the parties, which was mainly conducted by email, was between the American parent company and the seller of the vanilla beans from the island in the Indian Ocean. Moreover, the address of the Indian Ocean company was a postal address at which none of the employees of the company were present. In addition, the Directors, including the Chairman and the Chief Executive, of the Indian Ocean company were exactly the same persons as the Directors and Officers of the US parent company. As such, there was no evidence of any separate existence of the Indian Ocean company beyond being a registered company in the place of its postal address.

Furthermore, the respondent in its own submissions made reference to itself which can have only been references to the parent company being the respondent in this arbitration. For example, in the respondent's submissions, there was a reference to the 'Respondent's customer [rejecting] the [beans]' and there were a number of references to the 'Respondent' being the receiver in the USA of the beans and the onward seller of them.

Under the Institute's Rules, under which the arbitration was conducted, it was impossible to accept the claimant's application for three new parties to become parties in the arbitration after the arbitration had been fully set up and extensive written submissions had been exchanged between the parties. In this arbitration, as in others, it is the right of the parties to participate in the choice of the arbitral tribunal, the place of arbitration, the governing law, the language of the arbitration and so forth. Concerning the first matter, there was no provi-

sion in the arbitration agreement for the parties to choose their own arbitrator and hence the Institute appointed all three arbitrators, including the original Chairman of the Tribunal and later me in his place. There remained, however, decisions in the setting up of this arbitration, in which the parties were entitled to participate. Thus, it was clear under the Institute's rules that the claimant was not entitled to add in further respondents into this arbitration. Therefore, it was the duty of the Tribunal to rule that this arbitration had to continue just with the original parties named in it.

Yet such a ruling by the Tribunal would fly in the face of fairness. It was of no benefit to the claimant to obtain damages, let alone damages in excess of US $23,000,000, against a company with no assets. It would have been possible to have left the claimant to start this arbitration all over again, but then all the costs would have been wasted and put down to the account of the claimant. There was, however, a solution and that was not to add in new parties but to treat the true respondent in this arbitration as being the American parent company. Since both parties in the written submissions were effectively treating the American parent company as the respondent, this would have responded to how the parties were identifying the respondent in the arbitration proceedings. Thus, the simple solution – the 'innovative' solution – would have been to allow the claimant to amend the name of the respondent so that it bore the name of the American parent company.

I regret, however, that it was not to be. It was the Tribunal's view that under the application of the Institute's Arbitration Rules, it was not possible to treat the American company as the true respondent, let alone allow the claimant to rename the respondent. In the background, of course, was the US counsel for the respondent, who undoubtedly would have taken the point that the Tribunal, in holding that the Pennsylvanian company was the true respondent, was indulging in 'Un-American Activity'. Perhaps there could be a next time, but not in this arbitration. It collapsed without trace as soon as the Tribunal ruled against the claimant on this procedural issue.

What are the conclusions and lessons to be learned? Firstly, nobody can say the Tribunal's conclusion was wrong. It strictly abided by Institute's Arbitration Rules. Yet a Tribunal, whether or not it is seeking innovative solutions, should always be seeking to make the arbitral process work. Never deserting its duty to be fair to all parties, it should avoid getting entangled with an institute's rules so that the whole arbitral process comes to naught. Thus an arbitral tribunal should never cease from seeking a better way to conduct the proceedings before it. That is what the adoption of innovative solutions is all about.