SCA – 16 MARCH 2016

"OFFERS ADMISSIONS AND SETTLEMENTS IN ADR"

ADRIAN HUGHES QC NOTES FOR DISCUSSION

Topic 1 – Cultural differences in approach to offers and their costs implications

1. Just returned from Shanghai – first IBA arbitration day. This backdrop suggests Topic 1 for discussion – cultural differences to offers/admissions and settlement.

2. Example of different approaches to sealed offers and costs protection in arbitration – this technique unfamiliar to Chinese parties and to many arbitrators. Extends more widely to many situations where mixed common law and civil law panel.

3. The recent **ICC Commission Report on Decisions on Costs in International Arbitration 2015** – notes at para 100 – "***There is no general provision in international arbitration for the use of settlement offers to reduce costs but, if appropriate, it could be considered at the first case management meeting***."

4. IBA agenda focused on the inevitable topic associated with ADR/Arbitration in China – Med/Arb and the case of ***Gao v Keeneye*** HK CACV No 79 of 2011, in the Hong Kong CA:

   (i) Issue involved whether a share transfer agreement relating to a company owning a mine in China between Gao as seller and Keeneye as buyer should be revoked and of so whether compensation should be

awarded. Arbitration commenced by Keeneye in the Xian Arbitration Commission. Tribunal proposed a settlement. Tribunal appointed the XAC Sec General Mr Pan and one arbitrator to conduct a mediation. Proposal communicated to G; Pan and arbitrator met with an agent of K at dinner and told him to "*work on*" K. Both parties rejected the proposal.

(ii) Tribunal reconvened and decided to revoke the agreement. K applied to Xian court to set aside on ground bias. Refused. Applied to HK court to set aside enforcement order in HK. Allowed at 1st instance but overturned by CA on grounds: (1) K had waived its right to complain by continuing with the arbitration without raising the issue of bias; (2) bound by the supervisory jurisdiction of the courts of the seat – its decision influential; (3) on the facts, no apparent bias.

Topic 2 – Jurisdiction of arbitrator following a settlement and scope of settlement

5. ***Dawes v Treasure*** [2010] EWHC 3218 – per Akenhead J:

(i) Parties reached settlement during a CIMAR arbitration on terms whereby the Claimant Contractor was entitled to £400k against Respondent Employer (in fact involved a repayment of £600k by the Claimant who had been awarded and recovered £1 million in adjudication. No order or award reflecting the settlement.

(ii) Claimant Contractor applied for its costs in the arbitration – awarded 80% of its costs by the Arbitrator. Respondent Employer sought to challenge in court but dismissed.

(iii) Then Employer started a new arbitration proposing a separate arbitrator claiming the costs of remedial works. Contractor contended that issue of defects included in the settlement and issued its own notice.

6. Raised 2 issues:

   (i) Whether IS became functus officio after settlement or after costs award? – Answer: Decision that arbitrator retained his jurisdiction after the settlement because the settlement agreement did not terminate his jurisdiction and he himself had not done so. The CIMAR rules allowed a further reference to him.

   (ii) Whether the defects claim compromised by settlement? – Answer: Arbitrator had been right to decide that the defects claims had been compromised.

Topic 3 – When has there been an agreement to settle?

7. ***Mi-Space v Bridgwater*** [2015] EWHC 3360 (TCC), in which Edwards-Stuart J in the TCC held [decision dated 20.11.15] that the parties had reached agreement by email exchange, which meant there was no dispute to refer to adjudication. As such, summary judgment on the adjudicator's decision was refused.

8. The court applied [at paragraphs 69 and 70] the principles derived from ***RTS*** [2010] UKSC 14 as to whether the parties had reached an agreement.

9. ***Seeney v Gleeson*** [2015] EWHC 3244 (TCC) – [decided 16.11.15] this case raised a similar issue as to whether an email contained a binding agreement by a building contractor that its bill for extras in constructing a house for the Claimant (Seeney) would be limited to 30k.

10. Coulson J construed the email and the circumstances as a binding agreement and granted the Claimant's application for summary judgment to this effect.

Topic 4 – Can the parties override the "without prejudice" nature of negotiations to establish an agreement?

11. ***RMC v UK*** [2016] EWHC 241 (TCC), in which Edwards-Stuart J in the TCC held that the parties' exchanges by email had been classic examples of the type of discussions that are protected by the "without prejudice rule" so that admissions against interest made in the course of such discussion were not admissible in evidence and should not have been put before the adjudicator. [see paragraphs 18-26].

Topic 5 – Can the parties rely upon an (unaccepted) open offer as the basis for an application for a judgment upon an admission under CPR part 14.1?

12. ***Dorchester v Kier*** [2015] EWHC 3051 (TCC), [21.10.15] in which Coulson J rejected the contention that an open offer by Kier, including a term which declared acceptance of the discount in the sum determined by the adjudicator, which had not been accepted by Dorchester could subsequently be used by Dorchester as the basis for an application for a judgment by admission under CPR 14.1 on the following grounds:

    (i) The open offer included a package of terms which Dorchester could accept or reject. They were not permitted to accept part whilst rejecting the other element of the package.

    (ii) Courts should encourage parties to make offers. It would be contrary to that policy if a recipient of an offer could pick over the terms and accept parts and reject others thus ensuring that the litigation would continue.

    (iii) The letter did not make any admissions and made no reference to CPR 14.1. it was not a notice under Part 14

(iv) The admission would have had to have been clear and unequivocal; it was not and clarification was immediately requested by Dorchester, who in any event were claiming more than the figure allegedly agreed.

Topic 6 – When will a refusal to participate in ADR be taken into account by the courts in relation to costs?

13. Update on cases considering the principles in Halsey in:

(i) ***PGF*** [2013] EWCA Civ 1288 [context – claim for repair costs under a lease]:

(a) Silence in the face of an invitation to settle will generally be unreasonable;

(b) This can be taken into account in the overall approach to costs

(c) (para 51) the bracket of appropriate responses will range between depriving the successful party of all or part of its costs

(d) It should not extend to ordering the successful party to pay the other side's costs

(e) The 1st instance decision to deprive the successful Defendant of its part 36 costs was upheld by the CA

(ii) ***Laporte*** [2015] EWHC 371 QB [context – a compensation claim against the Police]:

(a) Defendant Police authority refused to take part in ADR

(b) Court considered the 6 factors in Halsey:

(1) Nature of the dispute suitable for mediation?

(2) Merits of the case

(3) Any other ADR tried?

(4) Costs of mediation disproportionately high?

(5) Would it delay trial?

(6) Did mediation have a reasonable prospect of success?

(c) Court decided that none applied to excuse the Defendant from refusal to mediate and exercised its discretion to reduce the successful Defendant's costs by 1/3.

Topic 7 – Court unsympathetic to a stay application made to secure a tactical advantage

14. Not strictly in relation to offers/settlement but an interesting illustration of the court's refusal to support an unmeritorious application merely intended to seek a tactical advantage in pending arbitration proceedings: ***H&CS*** [2015] EWHC 1665 - in which a stay of execution in the UK of a Singaporean arbitral award was refused as the purpose of the stay was merely to seek a tactical advantage in pending arbitration proceedings.

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