Hayri International LLC v (1) Hazim Telecom Private Limited (2) Hazim Telecom Limited [2016] DIFC ARB 010

Claim No: ARB 010/2016

THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

In the name of His Highness Sheikh Mohammad Bin Rashid Al Maktoum, Ruler of Dubai

IN THE COURT OF FIRST INSTANCE
BEFORE JUSTICE SIR JEREMY COOKE

BETWEEN

HAYRI INTERNATIONAL LLC

Claimant

and

(1) HAZIM TELECOM PRIVATE LIMITED
(2) HAZIM TELECOM LIMITED

Defendants

Hearing:**9 March 2017**
Counsel: Tom Montagu-Smith QC instructed by Dentons & Co. for the Claimant
Al Tamimi & Co did not make submissions on behalf of the Defendants, but a representative of the firm was present in the courtroom
Judgment: **9 March 2017**

RULING OF JUSTICE SIR JEREMY COOKE

Transcribed from the oral ruling handed down on 9 March 2017, revised and approved by the Judge.

Justice Sir Jeremy Cooke:

1.This is the adjourned return date in respect of an ex parte injunction that I gave on 25 February 2017. I gave reasons at that time which have been transcribed in which I stated that in my judgment the Claimant could show to a high degree of probability that DIFC was the seat of arbitration. I went on to deal with the issue as to whether the DIFC-LCIA rules were in fact incorporated in the arbitration clause or whether the "Rules of the Arbitration of the DIFC" was a reference to DIFC Law. For the purpose of establishing the seat, both results led to the same conclusion.

2. I concluded when making the ruling that there was a good arguable case, a strongly arguable case, a high probability of succeeding in showing not only that DIFC was the seat of the arbitration but also that the rules to be applied were those of the DIFC-LCIA. I have seen nothing since then to persuade me that that was a wrong conclusion to make and that is the view that I hold on the basis of the submissions made to me and the form of words adopted. It appears to me that reference to "Rules of Arbitration of the DIFC" is a much more appropriate way of describing the DIFC-LCIA rules than it is of referring to the law of the DIFC as a general body of law.

3. The matter is reinforced by the specific reference to the selection of a third arbitrator by the DIFC if the parties' appointed arbitrators cannot reach agreement on the appointment of the third. To my mind the only sensible conclusion when looking at the clause as a whole is to say that the DIFC-LCIA rules are incorporated and that DIFC-LCIA is the body responsible for administration of the arbitration. In those circumstances, it

would fall to that organisation to do the administration and to make the necessary selection should that arise.
4. Otherwise, I think I need add nothing to the ruling that I made on an ex parte basis since nothing has changed in the interim which would suggest that the views that I then expressed need to be revised.
5. It is worth saying at this juncture that the return date that was originally specified for the injunction was in fact Tuesday of this week. On that occasion, the Defendants appeared by counsel who sought an adjournment in order to have time to raise whatever arguments they wished to raise. In fact, there had been service and notice given from fairly shortly after the injunction was granted, on Saturday or perhaps just the Sunday of the week preceding this week. By the time the matter therefore came before me on Tuesday, the Defendants had had a week to consider the position and it appeared from what I was told by local counsel that the Defendants taken advice “early on” from them in DIFC in relation to it. Nonetheless, instructions to appear as I understood it were only given very late on and no criticism is made of the local lawyers in that respect. They appeared and asked for 21 days in which to deal with the matter, a period that I considered grossly excessive. It seemed to me that in circumstances where it was suggested that London counsel would be instructed, it was sufficient to adjourn the matter until today which gave an opportunity to instruct counsel on what is a well known field of law for specialist commercial counsel. The whole area of anti-suit injunctions is one which is well known to many counsel in the UK.
6. In my judgment, therefore, adequate time was given to deal with what was a fairly limited amount of material where issues of fact would not appear to arise and where the only arguments which matter would be those relating to construction of the arbitration clause itself and the powers of the Court in the light of any decision as to the seat of arbitration.
7. As matters have turned out, the Defendants have not appeared today to make representations, sending a letter to the Court to say that they had not been given sufficient time and also suggesting that the Court had a closed mind. I unhesitatingly reject the suggestion that insufficient time was given and the Court would of course be prepared to listen to any submissions that might be made in relation to the matters in issue where I had, as is plain from my earlier ruling, formed a view as to the high degree of probability required.
8. In those circumstances, the right thing to do is to treat this as the final hearing of the application for an injunction and to grant an injunction in the terms that have been sought. Consequently, the order will take the form of that set out in what was paragraph 3 of the draft provided to the Court, and also in the form of paragraph 4 so that this Court is granting both a negative and a mandatory injunction in relation to the proceedings in Pakistan.
9. There was an error in the earlier order made for shortening the period for acknowledgment of service, because this being a Part 43 case a longer period of 28 days should have been allowed rather than 14. The order will reflect that too.
10. I am also asked to deal with issues of costs. In my judgment, it is right that indemnity costs should be awarded, both because the conduct in question amounts to a breach of the agreement to arbitrate in bringing proceedings in Pakistan and reasonable costs incurred would be recoverable as a matter of damages for breach of that obligation and by analogy are therefore recoverable as a matter of costs.
11. I am asked to make an order for interim payment where the essential criterion is that I should make an order on the basis of that which I can be confident would be recovered if the matter were to go to assessment. I have already made an order for an interim payment of USD 12,000 and that falls to be taken into account. It is the general rule that an order for indemnity costs results in recovery of about 80% of the figure sought, which in this case would be a figure of approximately USD 72,000. As there must be a little give in that, the figure I award by way of interim payment is USD 65,000. This is excluding the figure of USD 12,000 already granted by way of interim payment.

Issued by:

Maha Al Mehairi

Judicial Officer

Date of Issue: 9 March 2017

At: 4pm