THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

LUCINETHLUCINETH

Claimant

and

LUTINALUTINA TELECOM GROUP LTD

Defendant

ORDER WITH REASONS OF H.E. JUSTICE SIR JEREMY COOKE

UPON reviewing the Defendant's Application Notice No: ARB-005-2019/01 dated 17 June 2019 and the Defendant's Application Notice No: ARB-005-2019/02 dated 17 July 2019 (together the "**Defendant's Applications**")

UPON reviewing the Claimant's Application Notice No. ENF-096-029 dated 24 June 2019 and the Claimant's Application No. ARB-005-2019/03 dated 25 July 2019 (together the "**Claimant's Applications**")

UPON reviewing the First to Third Witness Statements of Larmi herein with Exhibits LT1, LT2 and LT3

UPON reviewing the First to Third Witness Statements of Luter herein with exhibits TR1, TR2 and TR3

UPON reading the relevant material in the case file

UPON considering the Order with Reasons of Justice Sir Jeremy Cooke dated 1O July 2019

AND UPON hearing Counsel for the Claimant and Counsel for the Defendant at the hearing on 5 August 2019

IT IS HEREBY ORDERED THAT:

1. Pursuant to Articles 42 to 44 of the DIFC Arbitration Law and RDC Part 43 the Defendant's Applications dated 17 June 2019 and 17 July 2019 are hereby dismissed.

2. The Stay Order of H.E Justice Omar Al Muhairi dated 18 June 2019 is hereby vacated.

3. Pursuant to Article 43 of the DIFC Law of Damages and Remedies No. 7 of 2005 and RDC 46.17 the charge imposed by the interim charging order dated 10 July 2019 on the Defendant's interest in the shares of Lumca corresponding to its 60% shareholding in Lumca (the "**Lumca Shares**") shall continue without modification.

4. The Defendant shall within 7 days of the date of this Order deposit with the Court by way of security the share certificate(s) held to its name in Lumca.

5. The Defendant shall pay the Claimant's costs of the Defendant's Applications and of the Claimant's Applications (together the" Applications") on an indemnity basis.

6. The indemnity costs to be paid by the Defendant to the Claimant in respect of the Applications are hereby immediately assessed at AED 375,000 .

Issued by:
Nour Hineidi
Deputy Registrar
Date of issue: 8 August 2019
At: 3pm

SCHEDULE OF REASONS

Introduction

1. Having given my ruling orally and expressed the essential reasons for my decision at the end of the hearing, I now set out my reasons in a little more detail in writing.

2. On 28 June 2018, the Tribunal issued a Final Award in an ICC arbitration between the parties ordering the Defendant to pay a sum exceeding USO 5 million to the Claimant in respect of the purchase price for shares in Lurina, a holding company which owned shares in Lurina which held

telecommunication licences in xxx. The seat of the arbitration was Paris.

3. On 1 April 2019 a Recognition and Enforcement Order was made ex parte by this Court in respect of that Award. It was served the following day on Lutina Telecom Limited("Lutina"), a company registered in the DIFC. Under the terms of the RDC, the 14 days allowed for an application to set aside that Order expired on 16 April 2019. An Order of Execution was issued by the Court on 29 May 2019. The latter order was served on 30 May 2019. On 17 June 2019, effectively 2 months out of time, Lutina applied for an extension of time to set aside the Order of Recognition and Enforcement and, alternatively, if that was declined, for an order actually setting it aside on the basis of the facts set out in the application. In due course, on 17 July 2019 a further Application Notice seeking an extension of time and setting aside the same Order was made.

4. In the meantime, execution had proceeded and, despite an order of 18 June 2019 granting a stay of enforcement, on 1O July 2019, the stay was lifted for the limited purpose of making an ex parte interim charging order over shares held by Lutina in a company called Lumca. On 12 July 2019 Lutina filed proceedings before the Paris Court of Appeal seeking nullification of the Award.

5. The court has 3 witness statements from each of the parties before it and a further witness statement from a French lawyer, adduced by Lucineth Universal Inc ("**Lucineth**").

Extension of time

6. The Parties agreed on the principles which applied to any application for an extension of time, save that Lutina maintained that the principles applicable to statutory time limits did not apply with the same force to time limits set by Rules of Court. In my judgement, on the facts of this case this distinction makes no difference to the outcome. The factors to be considered in extending time to challenge an arbitral award are agreed to be those identified by Popplewell J (as he then was) in Terna Bahrain Holding Company WI/ v Al Shamshi [2013] 1 All ER (Comm) 580 at paragraphs 27 - 31. The court may take account of the length of the delay, whether a party acted reasonably in permitting the time limit to expire and the subsequent delay thereafter, whether the respondent would suffer irremediable prejudice as a result of the delay, the strength of the application and whether, in the broadest sense, it would be unfair to deny the applicant the opportunity to have the application determined.

7. Cogent reasons are required for the extension of time and a distinction is drawn between inadvertent delay, incompetence or honest mistakes on the one hand and deliberate decisions on the other. The length of the delay is to be judged against the yardstick of the prescribed period.

8. Here the delay of 2 months, set against a period for challenge of 14 days was explained in the following manner. The delay prior to 16 April was attributed to the conflict check procedures which had to be carried out by Lutina's newly appointed lawyers by reason of the Sudanese shareholding in Lutina. The delay thereafter was variously explained by reference to the Eid holidays (which did not commence until 3 June) and to Ramadan which commenced on 5 May and ended on 3 June, but more recently and definitively in evidence and oral argument, by reference to a decision taken to seek to set aside the award in the onshore Dubai courts. In the 2nd Witness Statement of Limisha on behalf of Lutina, he stated that he "was concerned the DIFC Courts would not entertain a late application but given the grounds were based upon a possible contravention of UAE public policy as opposed DIFC public policy" the decision was taken to instruct an onshore law firm to consider whether it would be appropriate to make an application to set aside the Order before the onshore Dubai Courts. On 12 June 2019 those courts notified Lutina that as it was itself based in the DIFC, the DIFC Courts were the appropriate courts, as indeed should have been obvious to any lawyers. Thus, it appears that Lutina deliberately took the risk of not making application to the DIFC Court at a time when it already knew it was out of time, in the hope of avoiding the necessity to do so and adopting the course of applying to a different court, a course which has been taken by many recalcitrant Award debtors in the hope of obfuscating or delaying enforcement.

9. There is thus no good reason for an extension to be granted and, as appears below, the grounds of challenge to the Award are extremely weak. Those grounds were known to Lutina when deciding to apply to the onshore courts. The absence of any application to the courts of the seat of arbitration is also telling since that step was only taken on 12 July after Lucineth's evidence pointed to the significance of its absence.

10. The absence of irremediable prejudice to Lucineth does not outweigh these 3 factors which mean that fairness and justice require the application for an extension to be refused.

The Grounds of Challenge

11. Lutina contends that the enforcement of the award would be contrary to the public policy of the UAE. This contention is based upon the unfairness which it says would result from having to pay the purchase price for shares in Lurina when, as a result of its subsidiary going into liquidation 9 months after delivery of the Award, the shares in subsidiary are now said to be effectively valueless. In consequence it is argued that, both as a matter of UAE law and public policy and the law of France (the governing law of the Sale and Purchase Agreement for the shares):

a) Lucinethwould be unjustly enriched by receiving the purchase price.

b) Lucinethcould not perform its part of the bargain in transferring shares of value so that the mutual obligations of the parties could not be fulfilled and the purpose and subject matter of the Sale and Purchase Agreement has been vitiated.

c) An order for payment of the sum awarded would be in such circumstances disproportionate and the payment would be made without consideration moving from Lucineth.

12. The points are expressed slightly differently in the context of UAE public policy and French law, but the above captures the essence of Lutina's submissions.

13. There is no principle of DIFC, Dubai, or UAE substantive law on which Lutina can rely. The sole basis for challenge to the Enforcement and Recognition Order is Article 44(1)(b)(vii) of the DIFC Arbitration Law which provides that recognition or enforcement of an arbitral award may be refused if the DIFC Court finds that the enforcement of the Award would be contrary to the public policy of the UAE. As articulated in earlier cases, the public policy defence can be applied only if the Arbitral award fundamentally offends the most basic and explicit principles of justice and fairness in the enforcing state or evidence shows intolerable ignorance or corruption on the part of the arbitral tribunal. Not every infringement of

mandatory law amounts to a violation of public policy but without any such infringement it is hard to see how any question of public policy can arise unless the Award is contrary to the essential morality of the state in question or discloses errors that affect the basic principles of public and economic life.

14. In the context of UAE public policy, Lutina, in its skeleton argument, put forward very little to justify its stance. At paragraph 37 it stated that "the liquidation of Lurina renders the shares in Lurina of little financial value. This was not a situation envisaged at the time of the Award. In light of the liquidation, . the underlying purpose of the share transfer cannot be fulfilled; compelling Lutina to make payment of the amount set out in the Award without it receiving the equivalent value envisaged by the Sale and purchase agreement would result in Lucineth obtaining an unjustified windfall tantamount to unjust enrichment."

15. No authorities were produced to support these conclusions and the Dubai Court of Cassation cases relied on referred to reciprocal obligations in the sense of set-off or termination for breach of reciprocal contractual obligations (i.e repudiatory breach in English law terms). They had nothing to say about enforcement of an Award in the circumstances which obtain here.

16. In my judgement, Lutina's arguments on UAE public policy have no prospect of success.

17 . In the context of the law of France and the application for nullification of the Award, no grounds have yet been set out in the French proceedings, but reliance was placed on a Court of Cassation decision in 2010 relating to "disproportionate payments" and to Articles 1131 and Article 1303 of the French Civil code.

a) Article 1131 provides that "an obligation without consideration or with a false consideration or with an unlawful consideration cannot have any effect". It is said that because the subsidiary's shares are valueless, there would be no consideration for the performance of the debt owed under the Award.

b) Article 1303 provides that "the person who benefits from unjust enrichment to the expense of another person who is the latter compensation equal to the lower value between the enrichment and the impoverishment".

18. There is a fundamental flaw in the whole basis of challenge put forward by Lutina and there is no injustice in enforcement of an award in respect of a contract debt which has been owing since 2010. At that time, Lutina should have paid the full contract price, but instead, over a period of several years paid approximately 45% of that which was due whilst the balance remained outstanding as at the date of the Award, 28 June 2018, the date of the writ issued by the Ministry for Telecommunications in Guinea on 15 October 2018 (which led to the liquidation) and the date of liquidation of the subsidiary company on 28 February 2019. Whenever a contract is concluded for the sale and purchase of assets, the value of those assets can obviously fluctuate between the date of the contract and the date of contractual completion, let alone the date of the late completion as the result of a failure by the buyer to pay the sums due. There is no injustice in a party being kept to its bargain and being required to pay the sum which it agreed to pay for the assets in question, even if the value of those assets has diminished to zero. No question of unjust enrichment can arise . No question of disproportionate payment can arise. No question of lack of consideration can arise.

19. The only evidence of French law comes from the witness statement of M. Legan in which he stated; "I wish to also confirm that alleged unjust enrichment of the type being argued by the Defendant in this case does not correspond to a cause of action under French substantive law. Under French substantive law, it is solely recovery of undue payments and enrichment without cause that constitute causes of action. These are governed respectively by Article 1302 and 1303 of the French Civil Code. Under Article 1302 of the Civil Code, any payment implies a debt and what has been received without being due is subject to restitution , but refunds shall not be allowed in respect of natural obligations which have been voluntarily discharged Under Article 1303 of the Civil Code, except in cases of business management and undue payment, a person who benefits from enrichment without cause to the detriment of others owes to the person who is impoverished, compensation equal to the lesser of the two values of enrichment and impoverishment. In the present case the whole arbitration was about a contractual breach unrelated to Lurina's insolvency. Furthermore, it is apparent both that the debt has a cause and that the amount is due. In consequence, neither Article 1302 nor 1303 of the Civil Code applies, still less could the result of which the defendant complains achieve the status of a wrong that would be contrary to international public policy".

20. Contrary to earlier evidence put before this Court about the Holding company being in liquidation, the shares in the holding company can be transferred (whatever their value) with the shares owned by it in its subsidiary, Lurina. Lucineth will not be unjustly enriched in receiving the contractual purchase price to which it is entitled, both as a matter of contract and as a debt due under an award. There is no impossibility of performance nor vitiation of the purpose and subject matter of the Sale and Purchase Agreement. There is nothing disproportionate about such a payment being made nor any difficulty about consideration which was constituted by the contractual promises which can still be fulfilled.

21. Not only is there no basis in either UAE law or French law for a challenge to the Award, but there are no considerations which militate against enforcement of the Award under the law of the DIFC. As put by Lucineth in its skeleton argument:

a) As a matter of DIFC law, enforcement would have to "fundamentally offend the most basic explicit principles of justice and fairness in the UAE" if enforcement was to be refused on the grounds of public policy.

b) As a matter of French law "a flagrant real and concrete violation of international public policy" would be required if enforcement was to be refused on those grounds.

c) Neither is applicable here.

Bad Faith and Non-disclosure

22. It is Lutina's position that Lucinethdeliberately waited until the shares had become worthless before commencing proceedings to enforce the Award but even if that were the case, it could make no difference. Either Lucineth had a contractual entitlement, which the Tribunal found that it had, or it had not. If it had, it was entitled to enforce that contract as the arbitrators found it was. There can be no question of bad faith in enforcing contractual rights nor any abuse of such rights in circumstances where the arbitrators have considered in full the merits of the parties' respective

positions and come to a reasoned conclusion which is not the subject of challenge. Lutina specifically abjured any contention that the arbitrators had erred in any way, and relied solely on the ex post facto event of the liquidation of Lurina.

23. Equally there can be no question of a failure to disclose to the court on the ex parte application for Enforcement or Recognition of the Award, the potential defences which have now been raised. It is hard to imagine that any claimant seeking enforcement could have envisaged these defences being put up, devoid as they are of any merit at all. In any event there is real doubt as to the extent of any duty of disclosure in the context of an application for enforcement where an Award has already dealt with the known defences raised and dismissed them. It will be a rare case where any other potential defences are known to a claimant and fall to be disclosed to the court, particularly as the defendant has the opportunity to object to enforcement, as occurred here.

Conclusion

24. In these circumstances, where it is accepted that the Award is manifestly valid on its face and only an ex post facto change in circumstances is relied to resist enforcement, there is every reason to allow such enforcement and I can see no basis for staying or adjourning enforcement proceedings pending the challenge to the Award in Paris which, on the evidence, could take anything between 1 and 2 ½ years to resolve, if pursued.

25. Because there is no substance in that challenge, I consider that there is no basis under Article 44 (2) of the DIFC Arbitration Law to adjourn enforcement proceedings. The Enforcement and Recognition Order was rightly made and any stay which has been ordered should be lifted. The claimant should be free to proceed with enforcement measures.

26. Furthermore, the basis of challenge is out of the norm and by reason of Practice Direction 1 of 2017, Lutina should pay Lucineth's costs on the indemnity basis.