# Too little too late

Valid arbitral awards can withstand untimely collateral attacks, as **Andreas Dracoulis** & **Matthew Turner** demonstrate

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**IN BRIEF**

▶ English law conflict rules will not readily permit a party to rely upon its local law to circumvent the consequences of an otherwise enforceable contract.

The Commercial Court decision in *Exportadora de Sal S.A. de C.V. v Corretaje Maritimo Sud-Americano Inc* [2018] EWHC 224 (Comm), [2018] All ER (D) 93 (Feb) is a salutary reminder of the need to act promptly in jurisdictional challenges and a welcome example of the English courts' support of arbitration.

The proceedings arose out of an English law shipbuilding contract for the construction of a self-unloading salt barge (the SBC) concluded between Exportadora De Sal S.A. De C.V. (ESSA) and Corretaje Maritimo Sud-Americano Inc (CMSA). ESSA is a partially state owned Mexican salt mining corporation which, for the purposes of Mexican law, is treated as a state entity.

When ESSA failed to pay the second instalment CMSA terminated the contract and commenced LMAA arbitration proceedings claiming the outstanding instalments. ESSA took no part in the arbitration until late July 2016, shortly before a scheduled final hearing of the merits, when it put forward a claim that the contract resulted from the bribery of one of its employees.

However, at the same time as it took part in the arbitration, the Office of Internal Control for ESSA (the OIC) commenced a regulatory audit inspection and in late August 2016 issued a preliminary report indicating that the tender process for the SBC was null. Thereafter on 16 November 2016 the OIC issued a resolution (the Resolution) that decreed the tender null and ordered ESSA to 'early terminate' the SBC, which ESSA purported to do on 28 November 2016.

Despite these events, ESSA played a full role in a rescheduled arbitration hearing in December 2016 and even confirmed to the tribunal that the events in Mexico were a separate matter. However, shortly after the conclusion of the hearing ESSA raised a jurisdiction challenge before the tribunal founded upon the Resolution.

ESSA was unsuccessful in the arbitration. The tribunal rejected ESSA's bribery claims and concluded that CMSA had validly terminated the contract and was entitled to payment of the second instalment. The tribunal also dismissed the jurisdiction challenge on the basis that it had been raised too late. Thereafter ESSA commenced court proceedings under s 67 of the Arbitration Act 1996 (AA 1996) alleging that the arbitrator lacked substantive jurisdiction.

## The substantive challenge

ESSA's argument was unusual in that it was based on the proposition that the arbitrator had jurisdiction at the outset but was deprived of the same upon the issue of the Resolution. This was based on the contention that, under principles of Mexican law, the effect of the Resolution was to retrospectively nullify the SBC (and the arbitration agreement contained within it) such that both were treated as if they had never existed. Consequently, it was said that ESSA had no legal capacity to enter into the SBC or the separable arbitration agreement.

In his analysis, Baker J concluded that the principles of Mexican law relied upon, although expressed by ESSA in terms of capacity, in reality went to the discharge of the contract (albeit with a retrospective effect akin to the English law concept of rescission). This was so despite the fact that the relevant Mexican law principles speak of 'nullity', ie use of such language does not in itself mean that the issue was therefore one of capacity to contract for the purposes of English conflict rules. As the judge noted, 'a doctrine that accepts and acknowledges that a valid and binding contract was concluded, including a valid and binding arbitration agreement, but requires by reason of the act of an administrative body over two years later that it thereafter be treated as if it had never been validly concluded is, by nature, not a doctrine concerning capacity to contract'. ESSA's argument was, therefore, mischaracterised and failed without even considering the evidence on Mexican law.

## Challenge made too late

Under ss 31(2) and 73(1) of AA 1996, it was incumbent on ESSA to object to the arbitrator's jurisdiction as soon as possible unless it did not know, and could not with 'reasonable diligence' have discovered, the grounds for the objection. The difficulty for ESSA, however, was that it knew of the OIC regulatory investigation and, in the judge's view, ESSA was, by late August 2016, aware that the OIC would likely decree the nullity of the tender process.

In assessing reasonable diligence, Baker J emphasised that the first question a party should ask itself when presented with an arbitration claim is whether it accepts the validity of the process. This was particularly so in the present context given the proximity of the final hearing. ESSA should, therefore, have treated the Resolution as a development of the 'highest priority' and sought urgent advice. Had it done so the objection could have been raised in a matter of days if not, given the particular background facts, within a working day or two of receiving the Resolution. Thus even if ESSA had a viable claim of lack of substantive jurisdiction, it was brought too late and was barred by operation of AA 1996.

## Sanctity of arbitral awards

The decision of Baker J underscores the sanctity of arbitral awards against untimely collateral attacks. It is a reminder of the general proposition that English law conflict rules will not readily permit a party to rely upon its local law in order to circumvent the consequences of an otherwise enforceable contract. As Lord Denning made clear in *Adams v National Bank of Greece* [1961] AC 255, 'liabilities under [English law contracts] cannot be discharged by foreign legislation'.

The judgment also stands as a clear warning against holding a jurisdictional objection in reserve. Where a party becomes aware of facts giving rise to a jurisdictional objection it must act promptly and, potentially, within a matter of days of the relevant circumstances coming to light. **NLJ**

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