Neutral Citation Number; [2006] EWHC 448 (Comm)

Case No: 2004 FOLIO NO. 579

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/04/2006

Before :

MR JUSTICE DAVID STEEL

- -

Between :

The Republic of Kazakhstan — **Claimant**

and -

Istil Group Inc — **Defendant**

- -
- -

Ali Malek QC and Matthew Parker (instructed by **Messrs Richards Butler**) for the **Claimant**
Hugo Page QC (instructed by **Messrs Penningtons**) for the **Defendant**

- -

Judgment

Mr Justice David Steel :

1. In these proceedings the Claimant ("ROK") applies to set aside a final award of the LCIA dated 1 June 2004. The application is made under section 67 of the Arbitration Act 1996 ("the Act") on the grounds that the arbitral tribunal lacked substantive jurisdiction.

2. In the award, the arbitrators held, pursuant to section 30 of the Act, that the tribunal did have substantive jurisdiction and, as regards the merits, ordered ROK to pay to the Defendant (the claimant in the arbitration) the total sum of approximately US $6million in respect of liabilities for non-delivery accruing under three contracts for the sale of rolled steel.

3. The Defendant ("Istil") is the successor to a company called Metalsrussia (BVI) Ltd. This latter company changed its name to Metalsrussia Corp. Ltd in 1991 and then, in early April 2002, merged into its parent company Metalsrussia Group Holdings Ltd. This company then in turn merged into Istil in mid-April 2002. The consequences of each merger was that Metalsrussia (BVI) Ltd and, later, Metalsrussia Group Holdings Ltd, ceased to exist by virtue of section 70 of the British Virgin Island International Business Companies Act.

4. The arbitration arose out of claims made under the following three contracts: -

    a) Contract No.505/293-04/320 13 dated 15 June 1994 between Metalsrussia Corp. Ltd ("Metalsrussia") and The State Foreign Trade Company Kazakhstan Sauda ("Sauda").

    b) Contract No.OLT- B-027/95, undated, between Metalsrussia and Oltex Trading Ltd ("Oltex").

    c) Contract No.OLT-B-026/95 dated 21 July 1995 between Metalsrussia and Oltex.

5. Each of the contracts contained an arbitration clause providing for arbitration in London under the auspices of the LCIA. The arbitration got underway in July 2000, the claimant being, subject to the issue discussed below, Metalsrussia. The arbitrators were Professor Alexander Komarov (Moscow), Mr. Per Runeland (London) and Dr. Volker Triebel (Dusseldorf) as chairman.

6. In a partial award dated 15 January 2003, the tribunal gave a ruling that it had jurisdiction to hear the dispute. However, in their final award dated 1 June 2004, the tribunal held that, because Metalsrussia (BVI) Ltd and Metals Group Ltd had ceased to exist in April 2002, the partial award was a nullity. However, the tribunal nonetheless confirmed that there was substantive jurisdiction to hear and determine the dispute as between Istil and ROK .

7. At this early stage, it is convenient to deal with one discrete issue raised by ROK. ROK contend that Metalsrussia (BVI) Ltd was not the original party to the contracts (or indeed the claimant in the arbitration). ROK contend that the original claimant was Metalsrussia Corporation Ltd, a Hong Kong company. This company had also been dissolved in June 2000. It was ROK's case that not only was the partial award a nullity but that the tribunal lacked jurisdiction in respect of any dispute between Metalsrussia and ROK on this ground alone.

8. This contention seems to have emerged from what was perceived as the unlikelihood of two companies with similar names having offices in the same building in Hong Kong (Metalsrussia Corp at 4809, Central Plaza and Metalsrussia Corporation at 3604, Central Plaza). Mr Mohammed Zahoor gave oral evidence. He is president of Istil. He had been chairman and chief executive officer of Metalsrussia Corp. Ltd. He signed the second and third contracts and gave authority for the signature of the first contract. He told the court that he did not know of the Hong Kong company and had no knowledge of its business at the time when the contracts were entered into. I accept that evidence. In my judgment Mr Zahoor was, as he stated, signing on behalf of Metalsrussia which in due course merged into Istil. Metalsrussia was accordingly a party to the contracts and to the arbitration and none of the documents relied on, or submissions made, by ROK undermines that conclusion.

The claims

9. It is Istil's case that the rolled steel sold under the three contracts identified above was to be supplied from a steel mill owned or operated by Karaganda Metallurgical Combine ("Karmet"). Although Karmet was not a named party to these contracts, it was identified as the consignee of gas coal to be supplied by Metalsukraine Corp Ltd pursuant to a counter-contract dated 21 July 1995 whereby "payment for delivered coal may be affected by way of metal delivery…".

10. Against this background, Istil contended that the contract had been concluded by Sauda and Oltex as agents for Karmet. In this connection, particular reliance was placed on the following documents:

    i) As regards Sauda, Istil pointed to an order of the Prime Minister of ROK dated 17 October 1995 appointing Sauda as "general agent" for the sale of Karmet's products.

    ii) As regards Oltex, Istil pointed to a Contract for Control dated 15 June 1995 whereby ROK retained a consortium known as Group United Steel Management ("GUSM") to manage Karmet's business and a letter dated 28 August 1995 from GUSM describing Oltex as "the sole and exclusive trading organisation of GUSM…"

    iii) The various "verifications of debt" relating to monies due from Karmet to Metalsrussia referred to below.

11. In contrast, again as regards documents, ROK placed reliance on an agreement between Karmet and Oltex dated 27 June 1995 (number KOLT-001) which provided that Oltex "has got exclusive rights for… purchasing goods of [Karmet]."

12. In any event, by late 1995, Karmet was experiencing serious financial difficulties. Accordingly, on 17 October 1995, the government of ROK passed Decree No.1338 entitled "Concerning Reforming the State-Owned Joint Stock Society of [Karmet]". Clause 1 of the decree provided that Karmet should be "recognised as insolvent debtor" and promulgated the suspension of creditors' claims. By clause 2 of the decree, the government formed a commission for the evaluation of Karmet's debts. Clause 6 went on to provide: -

> "6… from the 18th October 1995, the effect shall be suspended of entered export and selling agreements,

> agreements for supply of raw materials… and it shall be delegated to the trusted administrator of [Karmet] to re-enter the Contracts."

13. That same day, Metalsrussia, Oltex and Karmet signed a "Verification of Debt" (or "Deed of Reconciliation") acknowledging a debt of US $2,152,781.67 under the third contract and a total debt of US $7,206,073.35 payable by Karmet to Metalsrussia.

14. The following day, 18 October 1995, Metalsrussia, Oltex and Karmet signed a further verification of debt whereby Karmet acknowledged a debt under the counter contract of US $814,992.30.

15. The relevance of those verifications on Istil's case, as already indicated, was that they confirmed that Sauda and Oltex had acted as agents for Karmet. Further, it was contended that Karmet was not a distinct legal entity from ROK and, accordingly, ROK was liable in respect of those same sums.

16. In the further alternative, Istil argued that ROK had become a party to the contracts (and the associated arbitration agreements) by virtue of the effect of the Privatisation Agreement and the Sale and Purchase Agreement, both dated, contemporaneously with the verifications, 17 November 1995. These agreements constituted, in effect, a contract for the sale of Karmet's assets to Grupo Ispat (UK) ("Ispat"). The price was about US $225million which was duly paid to ROK.

17. Particular emphasis was placed by Istil on Clause 9.1 of both agreements which were almost in precisely the same terms:

> "9.1 [The Republic and Karmet] shall continue to be responsible for and shall pay, satisfy or discharge all of their debts, obligations and liabilities whether actual or contingent as at the First Completion Date… Such debts…include, without limitation, the following:
>
> …
>
> 9.1.1 all debts, obligations and liabilities, losses (including consequential losses) ….damages …and expenses arising from the carrying on of the business…".

18. In validation of this agreement, the same day also saw the issuance by ROK of Decree No. 1564 which authorised the privatisation of Karmet and sale of its assets. The decree specified that Ispat would acquire Karmet's assets only and also recorded that Ispat would provide about US $50million "for payment of pending debts of the plant".

19. On 20 November, ROK passed a further Decree No.1579 authorising such payments "under prior approval of the Republic". Nonetheless, by letter of the same date, ROK informed Metalsrussia that its contract with Karmet was "invalidated".

20. In due course, the process of consideration of payment of such debts was transferred to the State Rehabilitation Bank by Resolution No.770 dated 21 June 1996, which also intimated that non-Kazakh companies (outside the former Soviet Union) would received half their debt in steel and half in promissory notes.

21. Despite this latter undertaking and despite acknowledgement by the State Rehabilitation Bank dated 26 July that the debt due to Metalsrussia from Karmet was US $4,238,259.38, the Bank took the point in January 1997 that the contracts had been concluded by Sauda and Oltex as principals and not on behalf of Karmet and, thus, no payment would be made.

The French proceedings

22. Prior to the LCIA arbitration, Metalsrussia brought proceedings against ROK before the Paris Commercial Court by a writ dated 7 November 1997. The claim encompassed the sums sought under the three contracts in the arbitration. However, in what was described in the course of the hearing before me as an attempt to avoid a dispute as to the application of the arbitration clause, Metalsrussia sought to pursue its claim on the basis that ROK was responsible for Karmet's debts either by virtue of its prevention of Karmet fulfilling its obligations and/or by virtue of Clause 9.1 of the Privatisation Agreement and/or ROK's agreement to use part of the purchase money to settle Karmet's debts. In reality, however, all these propositions were exactly the same as the principal arguments advanced in the arbitration proceedings. (Indeed, it was further contended in the French proceedings that Karmet was "an emanation" of ROK and therefore that ROK was liable for Karmet's debts."

23. The response of ROK was predictable. By a written submission dated 3 February 1999, it was argued that:

    a) because Metalsrussia was claiming that ROK was liable for Karmet's debts under the original sale contracts, it was bound to submit its claims to arbitration in accord with the arbitration clauses contained in those contracts;

    b) alternatively, ROK enjoyed sovereign immunity in respect of Metalsrussia's claims and, accordingly, the French courts were bound to decline jurisdiction.

24. Metalsrussia's pleaded response was dated 31 March 1999. It placed particular emphasis on the point that the claim was not being advanced on the basis that there were contracts between Metalsrussia and ROK, but on the separate undertakings given by ROK for the benefit of Metalsrussia as a creditor of Karmet.

25. The Paris Commercial Court gave judgment on 23 June 1999. In its recitals (or "motifs"), the court found as follows:

> "Nevertheless, in view of the fact that the claims which are being presented today relate to the compliance by the Republic with the undertakings which it made during the bankruptcy procedure and the subsequent liquidation of Karmet and not to the performance of the contracts entered into with that company; that by means of various regulatory decisions, the Republic has settled the outcome of the undertakings, the assets and the liabilities; that the State Rehabilitation Bank, the officiating body, is responsible for verifying the receivables and that its intervention led to the admission or rejection of the actual form of the claims made by the creditors.

> In view of the fact that, in these circumstances, the defendants are wrongly relying on an arbitration clause which does not apply to what concerns them.
>
> In view of the fact, however, that the regulatory decisions made by the Republic of Kazakhstan in order to handle the bankruptcy of the State company, Karmet, and to organise, following the sale of its assets, the terms and conditions for settling its liabilities, were not intended and did not replace the debtor by the State subject to this special liquidation-privatisation procedure implemented in a context coming under the scope of sovereign prerogatives rightly invoked; that in fact, whilst the Republic did make certain undertakings for guaranteeing liabilities in the contract for the sale of Karmet's assets, this was destined for the assignee and not for the third parties whose position had been settled by means of decrees intended for them.
>
> In view of the fact that, consequently, the Republic of Kazakhstan's exception of non-jurisdiction shall be accepted in favour of the courts having jurisdiction in Kazakhstan."

26. The formal conclusion or "dispositif" was as follows:

> "The Court ruling by judgment in the presence of all the parties in the first instance… accepts the exception of non-jurisdiction for the Republic of Kazakhstan and sends the parties to go before the courts having jurisdiction in Kazakhstan."

27. Metalsrussia sought to challenge this decision by means of a "contredit". The two parties repeated the earlier arguments in their submissions to the Court of Appeal. The Court of Appeal gave judgment on 1 March 2000. The conclusion was that a contredit was not admissible since the judgment was in part a judgment on the merits and, thus, any challenge to the judgment should have been dealt with by way of an appeal.

28. However, in identifying the scope of the decision on the merits, the Court of Appeal found: -

> "In this case the first judges ruled on the merits by … upholding the plea in bar arising from the immunity from jurisdiction invoked by the Republic of Kazakhstan which they more specifically defined as an exception of non-jurisdiction. They also ruled on the jurisdiction, explicitly as regards the grounds and implicitly, by sending the parties to go before "the Kazakhstan court having jurisdiction" in the dispositif, by excluding the application of the arbitration clauses claimed by the Republic of Kazakhstan and the National Bank of the Republic of Kazakhstan."

29. Metalsrussia did, in fact, lodge an appeal on 20 March 2000 but this appears to have been "cancelled" in October 2000 by reason of delay in summoning ROK. Whilst

some steps in the appeal seem to have taken place after the commencement of the arbitration, it would appear that it was, to all intents and purposes, ineffective.

The LCIA proceedings

30. The arbitration was commenced by notice given by Metalsrussia dated 5 July 2001. It is to be noted that the notice made the following point as regards the scope of the claim and thus the question of jurisdiction:-

> "The Republic is not directly a party to the contracts. The contracts were in fact entered into by companies wholly owned or controlled by the Republic. Despite the fact that the Republic was not a signatory of the contracts, the Republic has pleaded in the French proceedings on various occasions that the arbitration clause in the contracts bind it……There is therefore a voluntary acceptance by the Republic to submit to the jurisdiction of the arbitral tribunal, alternatively the submissions constitute an offer that MCL hereby accepts by commencing proceedings before the LCIA."

31. It was suggested by Metalsrussia that the issue of jurisdiction should be decided as a preliminary point. Following service of the claim on ROK, ROK's lawyer stated in the letter dated 8 November 2001 that ROK "reserves all its rights to raise before the tribunal for arbitration… all issues which may be relevant to its defence in this matter, notably in relation to the court's competence in the admissibility of the request which had been filed with it."

32. The issue of jurisdiction was the subject of an exchange of submissions between the parties in the period between March to June 2002. It was during this period that Metalsrussia Corp Ltd merged into its holding company and, thereafter, the holding company into Istil. (It is also of note that, in its submission of 13 April 2002, ROK raised the question of res judicata arising out of the decision of a Paris Commercial Court.)

33. As already stated, the tribunal issued its partial award in regard to jurisdiction on 15 January 2003 determining that it did have jurisdiction. It was not until 14 April 2003 that Istil notified the tribunal of what it describes as a "change of claimant" in that Metalsrussia Corp Ltd had merged into Metalsrussia Group Holdings on the 2 April 2002 and Metalsrussia Group Holdings into Istil on 15 April 2002.

34. In November 2003 ROK raised the issue, which I have already dealt with, that the original claimant in the arbitration was Metalsrussia Corporation of Hong Kong and asked for disclosure "of all necessary documents in support of the claimant's presumed contention that the jurisdiction award contains no error."

35. Following a final hearing in February 2004, the tribunal made its final award on 1 June 2004. It concluded that the partial award was a nullity because Metalsrussia had ceased to exist by the time it was made. For the purposes of the final award Istil was substituted as claimant. Jurisdiction was nonetheless confirmed on the following grounds: -

    a) ROK was "closely involved in the privatisation of Karmet";

b) ROK played a "decisive role in its manifold capacities" in regard to privatisation;

c) Clause 9.1 of the privatisation agreement confirmed the "continued responsibility of the respondent for such debts";

d) It was a "justified interpretation that the respondent as co-seller accepts its contractual obligation to be responsible to trade creditors of Karmet…";

e) The Respondent succeeded to Karmet not merely by reason of Clause 9.1 but also by reason of the debt confirmations, Decree 1564, Decree 1579 and Resolution No.770.

Finding of nullity

36. It was Istil's case that the arbitrators had no power to make a finding that the partial award was invalid or a nullity.

37. This proposition involves two issues:

a) was the tribunal right to find that its partial award was a nullity and

b) are the parties bound by the tribunal's decision that its partial award was a nullity?

38. It is convenient to consider the second question first. The stages of the argument, on Istil's case, appear to be these:

a) ROK did not challenge the partial award as regards jurisdiction to hear Metalsrussia's claim.

b) ROK could have challenged it pursuant to section 67.

c) By reason of section 73 of the Act it could not thereafter challenge the tribunal's substantive jurisdiction.

d) Accordingly ROK cannot challenge the final award which found in favour of jurisdiction to determine Istil's claim again ROK.

39. The essential issue is whether the tribunal was to be treated as functus as regards the determination of its own jurisdiction. It is clear the tribunal did not think so. Given Istil's case that it should be substituted for the original claimant and ROK's case that the partial award had been rendered on a false basis in that the initial claimant (whoever that may have been) had not then been in existence, it is perhaps not surprising that the tribunal regarded the validity of the partial award as being in issue.

40. ROK's position is to the effect that it would only have lost its right to challenge the final award by reason of the partial award if the circumstances set out in Section 73(2) of the Act applied:

> "73.2 Where the arbitral tribunal rules that it has substantive jurisdiction and a party to arbitral proceedings could have questioned that ruling – a) by any available abitral process of

appeal or review or b) by challenging the award - does not do so or does not do so within the time allowed by the arbitration agreement or any provision of the Part, he may not object later to the tribunal's substantive jurisdiction on any ground which was the subject of that ruling."

41. The short answer is that, whether invited to or not, the tribunal clearly treated the partial award as open to question by an available arbitral process of review. Neither side thereafter challenged that approach. It seems to me that, if Istil/Metalsrussia took the view that in responding to an application to substitute Istil as claimant the tribunal was exceeding its powers in setting aside the partial award, this irregularity should have been the subject of an application under section 68 of the Act, time for which of course has expired.

42. Accordingly, I accept ROK's submission that Istil has lost its right to object to the making of the final award on the jurisdiction issue and thereby short circuit ROK's challenge to the jurisdiction thereby determined in the final award.

Was the Partial award a nullity?

43. In the light of that conclusion, it is strictly unnecessary to go on to consider the question whether the arbitral tribunal were correct in their conclusion that the partial award was a nullity. However, since the point was debated at some length, I will express a provisional view on the topic.

44. The tribunal's award had this to say:

"6.3 **The Effect on the Award on Jurisdiction**

BVI Metalsrussia as Initial Claimant in the present arbitration proceedings has ceased to exist on 2 April 2002 as a consequence of the first merger and thus before the Award on Jurisdiction was made. Hence, the interim award was made in respect of a party which was no longer existent. As a matter of English procedure (see above 5.2) an award, be it a final or interim award, in respect of a party which did no longer exist can have no legal effect.

As the award on jurisdiction is a nullity, it is necessary for the Arbitral Tribunal to decide on its jurisdiction anew. However, significant conclusions made in the Award on jurisdiction still hold true and are persuasive.

6.4 **Substitution of BVI Metalsrussia by the Claimant**

BVI Metalsrussia as Initial Claimant was succeeded by Metalsrussia Group Holdings Ltd and then by the Claimant. In the present arbitration proceedings, this double succession on the Claimant's side became effective only when the Claimant in its submission of 14 April 2003 gave notice of the two mergers to the Tribunal and the Respondent.

As a consequence of the two mergers, the claims of BVI Metalsrussia under the Three Contracts were transferred to the Claimant. Such transfer under the two mergers was made by universal succession and not by separate assignments. The claims under the Three Contracts were not affected by the two mergers, only the identity of the creditors changed twice, from BVI Metalsrussia to Metalsrussia Group Holdings Ltd and then to the Claimant.

In pending arbitration proceedings, it is permitted to make a legal assignment of the title to sue. What is required is the debtor and the Arbitral Tribunal are given notice. This is established in Montedipe S.p.A. v JTP-RO Jugotanker (the "Jordan Nicolov"), Queen's Bench Division Commercial Court, 21 December 1989 per Mr Justice Hobhouse. What is right for a legal assignment, applies the more in the case of a transfer by way of universal succession. The surviving companies, first Metalsrussia Group Holdings Ltd and thereafter the Claimant, acquired the claims under the Three Contracts and the benefit of the arbitration agreements as well. As a legal assignee may continue the arbitration proceedings already commenced, so may the surviving companies as a consequence of mergers.

Under English court proceedings it is possible to substitute one party by another (see CPR 19 (2) (4)). The same applies in English arbitration proceedings which will take an even more liberal view. Hence, the Arbitral Tribunal has no hesitation in permitting the substitution of the Claimant in place of BVI Metalsrussia. The Tribunal also take notice that Metalsrussia Group Holdings Ltd had been interposed between BVI Metalsrussia and the Claimant."

45. As can been seen the tribunal referred to one decision of this court, namely ***The Jordan Nicolov*** [1990] 2 Lloyds Rep 11. That case concerned a claim that had been assigned by charterers to their insurers. However, notice of the assignment was not given to the arbitrators until the hearing. The arbitrators took the view that a fresh arbitration needed to be commenced in the insurers' name and, accordingly, their claim was time barred.

46. Hobhouse J rejected that submission and held as follows: -

a) The assignment of a cause of action included all the remedies in respect of that cause of action.

b) The assigned right could not be asserted without acceptance of the obligation to arbitrate.

c) The position was no different where the arbitration clause had been partly executed.

d) However, for the assignment to take full legal effect, notice must be given both to the other party and to the arbitrators.

47. In the course of the submissions before me I was invited to consider four other authorities. Firstly, in ***Baytur S.A. v Finagro Holding S.A.*** [1992] QB 610, an arbitration award was made in favour of buyers at a time when the buyers had been dissolved, their rights and obligations under the contract having been transferred by reason of French "demerger" law to the defendants. The award was held to be void by reason of the absence of notice to the sellers and the arbitrators: -

> "I would decide the present case on this simple ground. An assignee does not automatically become a party to a pending arbitration on the assignment taking effect in equity. Something more is required. It must give at least notice to the other side and submit to the jurisdiction of the arbitrator. Since

> this was never done I would answer the first question in favour of the plaintiffs.
>
> What is the consequence? The immediate consequence was undoubtedly that the arbitration lapsed. An arbitration requires two or more parties. There cannot be a valid arbitration where one of the two parties had ceased to exist." per Lloyd LJ at p.619.

48. It is to be noted that, in earlier part of his judgment, Lloyd LJ, having accepted the finding at first instance that an assignee cannot become party to a pending arbitration "unless and until he effectively submits to the jurisdiction of the arbitrators", went on to question whether mere notice was enough. He went on : -

> "Because of the nature of arbitration as a consensual matter of settling disputes, it may be that the consent of the arbitrator and of the other party to the arbitration is required. If this is the correct analysis then only exception might be where foreign law creates a universal successor…"

49. ***In Global Containers v Bonyard*** [1999] 1 Lloyd's Rep 287, a company called Global Bahamas merged with the claimants, an associated company, on terms that only the latter was to be "the surviving corporation". To that extent, it was said by Istil to be a case on all fours with the present dispute.

50. The defendants had applied to strike out the writ on the grounds that the proceedings were a nullity. Rix J held that under the Bahamian law (which in all relevant respects is the same as BVI law) that, disregarding a delay in striking off Global Bahamas from the register, there was no clear view that a constituent company that had merged into a surviving company lost its complete existence as regards current litigation. The court against that background should exercise its power to substitute the new company under RSC Ord.15 r.7.

51. The learned judge went on to consider the judgment in ***Baytur***, expressing some doubt whether it was consistent with another decision of the Court of Appeal in ***Mercer Alloys v Rolls Royce*** [1971] 1 W.L.R 1520 where the court thought it right that the interests of justice should override the logical implications of the nullity argument.

52. Rix J said this at p. 299 rhc: -

> "In Baytur, however, as in Morris v Harris, there was no application under Order 15 and the court was dealing with the matter only at second hand, as it were, in circumstances where in the arbitration the dead company had never been substituted. At first instance in Baytur at p.145 Mr Rokison QC having correctly stated the effect of Mercer Alloys and Rolls Royce simply distinguished it on the ground that it had no application to arbitration. In the Court of Appeal Lord Justice Lloyd pointed out (p.152) that the Morris and Harris rule applies equally to arbitration and to court proceedings. That must be so but there remains the point that Order 15 r.7 has no direct application to arbitration."

53. In ***Eurosteel Ltd v Stinnes AG*** [2001] 1 All.E.R (Comm) 964, the German claimant in the arbitration merged with another German company after the commencement of the arbitration. Longmore J held that the proceedings did not lapse. This conclusion was on the basis that notice to the arbitrators was not required as a matter of German law. However, as regards the question of notice under English law, he repeated the concerns of Mance J in ***The Choko Star*** [1996] 1 W. L.R. 774 that it was in principle undesirable that defendants could escape liability by merging with another company, such being "a happy means of terminating difficult litigation for ever to the profit of their successors".

54. As regards ***Baytur,*** Longmore J noted in particular that the court had not been considering a case of universal succession. He went on: -

> "It may be that Lloyds LJ's reservation in relation to universal succession was intended to relate only to the question of consent rather than the question of notice. But if the consent of the other party to the transferred contract is not necessary in a case of universal succession (as in manifest it cannot be), it becomes clear that the notice is no more than at most a procedural requirement. The question whether any such notice is a matter to be resolved by the law of the forum. English law does require such notice and it has now been given. In the **Baytur S.A.** case the rejected argument was that the assignee had automatically become a party once the assignments was effective in equity. All I decide in this case is that the merger did not automatically kill the arbitration."

55. In ***The Elikon*** [2003] 2 Lloyds Rep.430, the claimants as "owners" were Internaut. The arbitration had however been conducted in the name of Sphinx Navigation Ltd and interim awards had been made in favour of Sphinx. The issue was whether the arbitrators had power to substitute Internaut on the basis that references to Sphinx were "a mere misnomer". The court held that matters went beyond misnomer, that the arbitration was conducted in Sphinx's name and that because Sphinx was not the true owner and because Sphinx never instructed solicitors acting for the claimant, it followed that, in that respect, the arbitration and the awards made were a nullity. Rix J had this to say at p.448:

> "Once the decision has been taken that the identification (and acceptance) of Sphinx as the arbitrating party goes beyond a case of mere misnomer then it seems to be that the consequence must be that the further conduct of the arbitration in the name of the claimant who was never in truth a party to the charter party or to the arbitration agreement was a nullity, and it is for this court to say so. Sphinx therefore never had any possible role to play in the arbitration; I cannot ratify what has been done in its name. … However, it has been established that the arbitration was in fact invoked and commenced by and on behalf of Internaut. Such an arbitration is valid and has not been concluded. It is therefore still in being."

56. With those authorities in mind I turn to the question whether the partial award was in fact a nullity. The issue traverses, as has been seen, well trodden but tricky territory. It is accepted, as I understand it, that the merger did not render the arbitration a nullity

– it merely nullified, on ROK's case, the partial award made prior to notice being given to the other parties and to the arbitrators.

57. I can summarise my conclusions as follows: -

a) I accept that section 78 of the BVI International Business Company Act is to the same effect as the Bahamian Statute considered in ***Baytur.***

b) It makes provision for universal succession in respect of all proceedings including, in my judgment, arbitration proceedings.

c) Accordingly, as a matter of BVI law, no notice of merger is required to establish the right to claim in the proceedings.

d) As regards English law, notice is required, but once given it allows the arbitration to continue and reinstitutes any orders or awards already made by the tribunal.

58. I would conclude that the partial award was not a nullity. But, as already explained, that is not to the point.

Ad hoc agreement

59. The next issue that must be grappled with is the contention by Istil that an ad hoc agreement was entered into by the parties conferring jurisdiction on the tribunal to make a final determination of the issue of jurisdiction by virtue of the correspondence between Maitre Bidet (for ROK) and Penningtons in the lead up to the arbitration.

60. I accept that Monsieur Bidet was not an experienced English commercial solicitor and thus might more readily proceed to conduct an arbitration outside the terms of an arbitration clause. But in my judgment it is quite clear that Monsieur Bidet did not do so. His reservation of rights in his letter of 8 November 2001 in response to ROK's notification of its intention to ask the tribunal to decide the issue of jurisdiction as a preliminary issue contains nothing to suggest that ROK was abandoning its right to challenge the award on jurisdiction if appropriate. Nor indeed did Istil treat the letter as such. It was only later that the parties exchanged submissions identifying "squarely" what the issue on jurisdiction was (including the relevance or otherwise of the French proceedings). It is also notable that there is no suggestion that the tribunal regarded themselves as having an enlarged jurisdiction to make a final decision on the issue.

Agreement for arbitration in the course of the French proceedings

61. A supplementary contention is made by Istil that the reliance on the arbitration clause by ROK in the French proceedings constituted an offer to submit the claims to arbitration. It was contended that this offer was last repeated in the submissions filed by ROK on 17 January 2000 as referred to in the Court of Appeal judgment.

62. No copy of those submissions is in fact available. In any event, I am quite unable to agree with the proposition that, in issuing its request for arbitration in July 2001, Istil was accepting any such offer, not forgetting that it was all against the background that the finding of state immunity remained in place.

Parties to the contracts

63. I have already made the finding that Metalsrussia sought to pursue their claim before the French court on the basis that ROK was not a party to the arbitration agreements but was responding to a claim which was based on the proposition that ROK had become responsible for Karmet's debts on one basis or another. I have also found that, in reality, the claims advanced in the arbitration were formulated in the same way. I return to this topic below.

64. However, I have not forgotten that, before me, Istil also seeks to press the argument that ROK was an original party to the contracts. I have some doubt whether this is open to Istil. But putting those doubts aside, it is to be noted that this contention is based on two alternative grounds:

    a) that the contracts were concluded by Sauda and Oltex as agents for the Republic, or

    b) that the contracts were concluded by Sauda and Oltex as agents for Karmet which was not a separate legal entity from ROK.

    It is convenient to take the second proposition (which was also advanced rather tentatively before the French court) first.

65. Again each side adduced evidence of Kazakh law. Professor Butler produced a report for ROK and Professor Suleimenov for Istil. It did not prove necessary to call them to give oral evidence as there was little dispute between them. In particular it was common ground, as expressed in their joint memorandum, that Karmet and ROK were independent juridical bodies or entities.

66. I agree with the submission made on behalf of ROK that there is no basis for disregarding that separate legal personality on the basis that Karmet was "an organ" of ROK . The right of ROK to appoint directors of Karmet and any requirement that Karmet should obtain ROK's prior approval before entering into any contract does not justify piercing the corporate veil.

67. In this connection I also reject the submission that ROK has been shown to have defrauded the creditors of Karmet or indeed, if even such had been the case, that the outcome would be that ROK became a party to the contracts.

68. Thus I turn to the question whether Karmet was a party to the contracts and if so whether in turn it acted as an agent for ROK. The material on the topic is thin and the situation accordingly rather confused. I have already referred to some of the principal documents relied on by the parties relating to the dispute. As regards the second and third contracts under which the vast bulk of the claim arises, I prefer the view, if it matters, that Oltex was not acting as an agent of Karmet in concluding the original contracts.

    a) Although Sauda was appointed agent for Karmet, on the face of it Oltex acting on GUSM's behalf in entering into the agreement for counter deliveries with Karmet dated June 1995 and there were, in due course, counter deliveries between those parties as principals.

    b) The evidence is consistent with an assignment by Oltex to Karmet of its rights and obligations on the two contracts in October 1995.

c) These assignments appear to have been coincident with the deeds of reconciliation.

69. Whether this be right or not, I am satisfied that none of the contracts was concluded by Oltex or Sauda as agent for ROK. Purchases whether direct or indirect were all from Karmet. That such was the position is indeed confirmed by the assignments.

70. Moreover, throughout the French proceedings it is to be noted that Metalrussia's contention was that the second and third contracts were concluded by Oltex on behalf of Karmet. Whilst obviously Metalsrussia is not precluded from asserting an entirely contrary case in relation to the issue of the jurisdiction of the arbitrators, the stance clearly throws some doubt on the credibility of such a submission - the more so when the notice of arbitration itself relied only on the alleged agreement during the French proceedings. It was never contended that ROK was itself a party to the contracts.

71. There was nothing in Mr Zahoor's evidence, written or oral, that supported this new case. To the contrary it was all to the effect that the contracts were entered into by Oltex on Karmet's behalf, albeit subject to government approval.

72. In the further alternative, Istil contends that ROK despite not being a party to the contract became liable by virtue of "succession". This was accepted by the arbitrators. The focus of this submission is Clause 9.1 of the SPA

73. But it is not realistic to construe this agreement as constituting an agreement whereby each vendor should be responsible for the liability of every other vendor. Indeed, even the arbitrators did not regard the clause as sufficient. But there is nothing in the decrees to support the conclusion that they constitute "a legally binding undertaking by the Republic" to be responsible for Karmet's liabilities: -

a) The Decree 1564 provided: -

"Under such, the Ispat Karmet Company shall acquire the plant's assets only and then under the agreement the government shall provide the capital for payment of pending debts of the plant in the amount of U.S $50 million. The remaining issues related to the plant's debt obligations shall be considered by the Commission on Debts appointed by the Government of the Republic of Kazakhstan."

b) Decree 1579 appointed the Deputy Chairman of the State Committee on the Management of State Property and gave him "under a prior approval of the Government of Kazakhstan, to make payments of the debiting and crediting debts of all kinds of property including securities and property rights, conclude agreements on waivers of credit claim, sales of debts."

c) In the Resolution 770 the Commission indicated that for creditors in countries other than the republics of the former Soviet Union, debt would be repaid: 50% of the total debt owed by Karmet by way of shipment of metal and "the other half of the debt owed by Karmet shall be repaid by issuing convertible state promissory notes on the same terms as applied to creditors of the Republic of Kazakhstan."

74. It was also argued by Istil, albeit faintly, that as a matter of Kazakh law, ROK were liable in respect of the debts by virtue of a "guarantiya" or a "unilateral undertaking".

Be that as it may (and I make no finding as to the relevance of Kazakh law let alone of these principles), there was no basis for the contention that as a consequence ROK became parties to the arbitration clauses.

Res judicata

75. As has already been noted, ROK raised two jurisdictional defences in the French proceedings: that the claims were subject to an agreement to arbitrate and that ROK enjoyed sovereign immunity in regard to the claims.

76. In considering the impact of the French judgments at first instance and in the Court of Appeal, I have had the benefit of oral evidence from two distinguished French jurists: Professor Loic Cadiet for ROK and Professor Jean-Jaques Daigre for Istil. As might be expected there was little in issue between them.

77. I approach their evidence on the basis of the conclusion that I have already reached earlier in this judgment that the claim in the French proceedings was in all material respects the same as the claim made in the arbitration. Indeed this is clear from the letter giving notice of the arbitration and the content of the awards.

78. As I have already outlined, leaving aside the proposition advanced in both sets of proceedings that Karmet was simply an emanation of ROK, it was Istil/Metalsrussia's primary contention throughout that ROK's liability for Karmet's debts arose by virtue of the decrees and the sale and purchase agreement. This coterminosity of the scope of the claims in the two sets of proceeding is further confirmed by the acceptance on the part of Metalsrussia that the commencement of the French proceedings interrupted the relevant period of limitation.

79. Furthermore it was Metalsrussia's case before the French court, not that the claim fell outside the scope of the arbitration agreements (which were very wide and covered "all possible disputes and differences that might arise" out of the contract) but that ROK was not a party to any arbitration agreements. This stance is confirmed by the judgments of the Court of Appeal which recorded Metalsrussia's challenge to the judgment as involving the submission that ROK "could not invoke an arbitration clause in a contract it did not sign and which it never accepted".

80. Thus it was rightly common ground between the experts that the jurisdictional defence based on the arbitration clause had to be decided first. The two defences were alternatives. Only if it was not bound by an arbitration agreement could the defence raised by ROK of sovereign immunity arise. In this respect it was, as I understood it, accepted that the tribunal was wrong to find that it was "not necessary for the Paris Commercial Court to decide on the issue of the application or non-application of the arbitration clause in order to reach its decision on sovereign immunity."

81. Moreover, both experts accepted that the French Court had impliedly determined ROK's arbitration defence in its dispositif, a view confirmed by the judgment in the Court of Appeal. (In this respect Professor Daigre took the view that the Court of Appeal was wrong but given that the purpose of expert evidence is to identify what conclusions would be reached by the relevant state court on the issue, I feel unable to look behind that decision).

82. It follows in my judgment (again this is not a contentious matter as between the experts), the judgment of the French Court is a judgment on the merits for the purposes of res judicata, despite the fact that the ruling was implicit rather than explicit. It thus constitutes an issue estoppel for the purposes of the present proceedings. On that basis, it has been accepted that ROK cannot be said to be a party to the arbitration clause and must be entitled to the relief claimed in the present application.

83. Indeed, I also accept the argument that Istil's case that ROK was a party to the contracts and/or the arbitration agreements cuts across the unequivocal and explicit finding of the French Commercial Court that ROK could invoke the defence of sovereign immunity. Since that defence on any view has not been waived, I accept the proposition that Istil is estopped from contending that the legal consequence of the decree and the SPA were that ROK had become a party to the contracts.

Conclusion

84. The outcome is that ROK is entitled to the relief sought, namely that the final award should be set aside on the grounds of want of substantive jurisdiction.