Robert Scrivener

Service under the Arbitration Act 1996 – a cautionary tale

If taken at face value s.76 of the Arbitration Act 1996, which provides that service can be by "any effective means", might suggest that service of notice of arbitration should keep pace with the modern world and permit service by email. This is in rather stark contrast to the technical rules relating to service contained in part 6 of the CPR, where service by email is not automatically valid: Barton v Wright Hassall LLP [2016] EWCA Civ 177.

However, Sino Channel Asia Ltd. v Dana Shipping and Trading PTE Singapore [2016] EWHC 1118 (Comm) should remind us that there are risks in trying to conduct an arbitration wholly by email, particularly where the exact roles which the individuals acting for each of the parties have is murky. In Sino Channel an unfortunate litigant (who was a receiving party under an arbitration award for about USD1.7 million) found some 11 months after the event that the arbitration was ineffective and that their award had to be set aside under s.72 of the Arbitration Act.

The facts

The parties had entered into a COA, with Dana as owner and Sino Channel as charterer. We are not told in the judgment what the applicable arbitral rules were, but Sir Bernard Eder commented that the COA provided for London arbitration *"in conventional terms"* and we can therefore safely assume that it was nothing unusual.

The COA – making provision for shipments of iron ore from Venezuela to China – had been negotiated between brokers. The main point of contact with Sino Channel both prior to and during those negotiations (for both Dana itself and also Sino Channel's brokers) was one Mr. Cai. Mr. Cai, it transpired, was not in fact employed by Sino Channel but rather another company. It seems it was this other company that was going to manage the day-to-day workings of the COA. However, for whatever reason, it did not and the result was that none of the planned shipments took place. Dana decided to commence an arbitration to sue for its losses.

It served a notice of arbitration by sending it to Mr. Cai's email address. It also decided to send the notice to Sino Channel's brokers, who in turn forwarded it on to Mr. Cai, again by email. Sino Channel did not respond to the notice and, after an arbitrator had been appointed, was made subject to a debarring order. The arbitrator eventually went on to award Dana some USD1.7 million, plus interest and costs.

It was at this point Dana decided to try and enforce its award. A hard copy of the award was therefore sent to Sino Channel's registered office in Hong Kong. According to Sino Channel's evidence, the award came as something of a surprise. It seems that Mr. Cai did not tell anyone at Sino Channel about the arbitration. After a gap of around 6 months, and only after enforcement proceedings in Hong Kong were well underway, Sino Channel applied to set aside the award on the basis that it had not received any notice of arbitration (or any other information about the proceedings for that matter).

The decision

Sino Channel's argument was a simple one: despite his extensive involvement in the negotiations for the COA and centrality to the relationship between Dana and Sino Channel, Mr. Cai had no authority to accept service on Sino Channel's behalf. This meant there was no valid service under s.76, so that under s.72 it was entitled to have the award set aside because it was made without jurisdiction.

After some deliberation, Sir Bernard Eder agreed with this argument and set aside the award. Since Mr. Cai had no express authority to accept service, it was common ground that the only way Sino Channel would have been validly served was if Mr. Cai had implied or ostensible authority to that effect or, alternatively, Sino Channel had ratified his actions.

Much as with any other agency situation, the question of whether Mr. Cai had implied authority to accept service had to be determined by the conduct of the parties and all other relevant circumstances. Dana relied on a number of points to show that, properly understood, the relationship between Sino Channel and Mr. Cai was one which gave rise to an implied authority to accept service. These points included the fact that Sino Channel had effectively delegated everything relating to the COA to Mr. Cai.

However, Sir Bernard Eder found that despite Mr. Cai's significant involvement in dealing with the COA and representing Sino Channel, he had no implied authority for that reason alone. Ultimately, the point which seems to have been most persuasive was that (as previously pointed out by Gross J. in The "Lake Michigan" [2009] EWHC 3325 (Comm)) neither a solicitor nor a P&I club will, at least without more, generally have authority to accept service on behalf of a client or member. The result, therefore, is that it will not normally be enough that a person (whether an employee or not) is the main point of contact in a relationship in order to demonstrate they have authority to accept service; something else will be needed as well.

Much the same points were made by Sir Bernard Eder on the question of whether Mr. Cai had ostensible authority. Despite his extensive involvement in the COA, there was nothing which could establish that Sino Channel had held Mr. Cai out to accept service. Sir Bernard Eder had even less trouble dismissing the argument Sino Channel had ratified Mr. Cai's actions, whether by corresponding with Dana after it first received the award or by failing to take any steps to dispute the award for some 6 months after becoming aware of it; a party was entitled to await for enforcement before denying that an award was binding on them under s.72 (cf. the strict time limits for challenging an award under ss.67 – 69 of the 1996 Act).

The upshot of Sir Bernard Eder's reasoning was that service on Mr. Cai was not valid, the arbitration had not been properly commenced, and the award was to be set aside under s.72.

As a postscript to the Commercial Court's decision, the Hong Kong Court of First Instance, in a decision handed down on 28 July 2016, decided to give effect to the English judgment by setting aside an enforcement order made in Hong Kong on the basis of the award.

Discussion

The situation which Dana found itself in could easily have been avoided. Section 76(4) of the Arbitration Act provides that postage of a notice to, amongst other things, a party's last known principal business address or registered office will be "treated as effectively served". Taking that relatively simple, albeit less efficient, step at the start of the proceedings would have been enough to ensure that Sino Channel was properly made a party to the arbitration. Although such a precautionary step might be said to be obvious only with the benefit of 20:20 hindsight, when Dana received no substantive response to its email notifying Sino Channel of the commencement of the arbitration it might have been wise for Dana to reappraise the method of service.

Nonetheless, the result that an award could be set aside some 11 months after it was issued, in circumstances where Sino Channel had obviously been willing to allow Mr. Cai to deal with the COA on its behalf, is one which should be the exception rather than the rule. The approach adopted in Dana Shipping can be contrasted with that of Christopher Clarke J. in The "Eastern Navigator" [2005] EWHC 3020 (Comm). There the Court held that service of a notice was valid where it had been sent to the respondent's generic email address (info@bernuth.com), even though the notice was ignored by the clerical staff who had access to the account. After comparing s.76 with CPR part 6, Christopher Clarke J. pointed out that s.76 was meant to be broad, finding that "arbitrations are usually conducted by businessmen represented by, or with ready access to, lawyers. Section 76(4), when providing that a notice could be served on a person by any effective means was, in my judgment, purposely wide… There is no reason why, in this context, delivery of a document by e-mail – a method habitually used by businessmen, lawyers and civil servants – should be regarded as essentially different from communication by post, fax or telex…". Despite the fact that the notice of arbitration did not make its way to the appropriate people, Christopher Clarke J. was nonetheless willing to find that there had been valid service. Evidently, he seemed to think that parties to arbitrations should not be allowed to take (sometimes technical) points about whether service was valid.

Given that many parties to London maritime arbitrations will be in different countries, the usefulness in recognising the validity of email communications is obviously important, not least because it allows for the efficient conduct of proceedings in a manner consistent with ss.1(a) and 33(1)(b) of the 1996 Act.

However, most charterparties, COAs and other shipping contracts will be arranged and managed through brokers or other agents (almost invariably via email), and working out who has authority to do what can be difficult, as Dana found out to its cost. Sir Bernard Eder's judgment is a useful lesson about the importance of taking the time to double check whether service on a particular person or entity (whether by email or otherwise) is likely to be valid. If in doubt, posting to the addresses specified in s.76(4) is a safer option than finding out at a later date that the arbitration was not properly commenced.

Pump Court

Chief Executive Carolyn McCombe Senior Clerks Carl Wall and Stewart Gibbs
4 Pump Court, Temple, London EC4Y 7AN
Tel +44 (0)20 7842 5555 Fax +44 (0)20 7583 2036 DX 303 LDE
www.4pumpcourt.com

Also tenants at
Arbitration Chambers Hong Kong
www.arbitrationchambershk.com