NEUTRAL CITATION NUMBER [2012] IEHC 361

THE HIGH COURT

[2012 No. 1887 S]

BETWEEN

P. ELLIOT & COMPANY LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION)

PLAINTIFF

AND

FCC ELLIOT CONSTRUCTION LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 28th day of August 2012

1. This is an application by the defendant to stay proceedings in which the plaintiff seeks judgment of approximately UK£1.2m in connection with an agreement referred as 'the consultancy contract'. The defendant's says that the plaintiffs claim is governed by an arbitration agreement pursuant to which the defendant has requested an arbitration under the auspices of the International Chamber of Commerce in Geneva, Switzerland.

2. A somewhat complicated history of commercial and legal relationships between entities connected to the parties is central to the arguments they make and so I shall first attempt to describe that before addressing the merits of the application.

3. Spanish and Irish enterprises were jointly involved in a bid to design, construct, finance, operate and maintain a new hospital in Enniskillen, County Fermanagh. An entity called 'Northern Ireland Health Group' (referred to by the parties as 'NIHG') pre-qualified in the bid process. The plaintiff (in its written submissions) says that the full name of the entity is 'NIHG South West Health Partnership' and that 5% of its shares are held by a company called Elliot Holdings Ltd. and 39% are held by FCC Construcción S.A. (apparently a Spanish corporate entity).

4. Following the successful pre-qualification of NIHG, the plaintiff and FCC Construcción S.A. ('the joint venturers') entered a joint venture agreement in February 2008. By this agreement (called the 'JVA'), *"the Joint Venture"* was formed and named *'FCC Elliot Healthcare Contractors'.* The purpose of the joint venture, according to clause 2.2 of the JVA, was to prepare a tender for the design and construction works of the new hospital and, if selected, to carry out the works under a building contract to be entered by "P. Elliot FCC Joint Venture" and NIHG.

5. The JVA provided for what was to happen if no contract was entered with NIHG. At clause 4, the agreement stated that:

> *"If the joint venturers shall fail to enter into a contract with NIHG or shall fail to agree as to the terms and conditions of the tender or if the tender shall not be accepted by NIHG within the period for acceptance specified in the tender or such further period as may be agreed ... or if the contract is awarded to a third party, then this agreement and all its provisions shall automatically cease . .."*

6. Clause 5 of the agreement provided for what was to happen in the event of a successful tender, as follows:

> *"If the Tender shall be accepted by NIHG on or before the expiry of the period for acceptance specified in the Tender . .. the Joint Venture will enter into the Contract with NIHG, and thereafter the Joint Venturers, jointly and severally, will faithfully perform and observe all the terms and conditions of the Contract and this Agreement both to each other and to NIHG."*

That last reference to *"Contract"* is a reference to the building contract intended to be entered with NIHG for the construction of the hospital. These clauses, 4 and 5, have acquired some significance because the plaintiff argues that the joint venturers never entered the contract with NIHG and that, therefore, the joint venture agreement has terminated.

7. Approximately a year after the joint venture agreement was entered, tax advice was received which recommended that the primary construction contract for the hospital be entered, not by the joint venturers as originally envisaged, but by a new, specially formed Irish company, one share of which was to be owned by the plaintiff (one of the original joint venturers) and the other share was to be owned by another Irish company.

8. This proposed company was formed and is now the defendant in these proceedings. The corporate structure deliberately put in place by the joint venturers, following professional advice, permitted profits on the building contract - carried out in Northern Ireland- to be taxed at the relatively advantageous Irish corporate tax rate of 12.5%.

9. The JVA contained an arbitration clause for disputes arising *"between the joint venturers in respect of the [building] Contract or the Joint Venture Agreement"*. The arbitration clause invoked the Rules of Arbitration of the International Chamber of Commerce and Geneva, Switzerland was identified as the seat of arbitration. Clause 20 provided that the JVA be construed and interpreted in accordance with the laws of Northern Ireland.

10. The parties agree that P. Elliot & Company Ltd. and FCC Construcción S.A. (the entities identified as the joint venturers in the JVA) did not enter the building contract for the hospital.

11. An unsigned and apparently draft and incomplete version of the JVA has been exhibited by the plaintiff who, for the purposes of this application only, accepts that it is the agreement entered between the joint venturers. The defendant has not exhibited the JVA in any form, much less in executed form, though it relies on its contents in seeking a stay.

The Building Contract

12. The building contract, originally envisaged by the JVA to be entered between the joint venturers and NIHG, was entered instead between the defendant and NIHG. This is the first significant departure from the JVA one observes. The building contract is a lengthy document running to some 159 pages, not including annexes. Significantly, there is no arbitration clause in the contract. Instead, clause 56 provides that disputes arising out of or in connection with the contract *"shall be resolved in accordance with the procedure set out in [the construction dispute resolution procedure in Schedule 26]"*. That procedure establishes processes for complaint making, dispute resolution and the appointment of an adjudicator. The decision of the adjudicator is said to be binding. The procedure provides that the adjudicator is not an arbitrator and the provisions of the [UK] Arbitration Act 1996 *"and the law relating to arbitration"* are stated not apply to the adjudication. Thus, a second significant departure from what was originally agreed in the JVA emerges. The joint venturers had envisaged an ICC arbitration in Geneva to deal with disputes arising from the building contract. However, when that contract was eventually entered, a non-arbitral procedure was established. The governing law of the building contract is the law of Northern Ireland. Exclusive jurisdiction for disputes arising from the contract is conferred on the courts of Northern Ireland.

The Consultancy Contract
13. Ten days after the execution of the building contract, the plaintiff and the defendant entered an agreement referred to by the parties as the consultancy contract and further to which the plaintiff seeks judgement of approximately UK£1.2 in these proceedings. In the recitals of the consultancy contract the plaintiff is referred to as *"an experienced contractor with management knowledge and systems appropriate for development of the Enniskillen hospital project".*

14. In the same recitals, the defendant expresses its wish to engage the plaintiff to provide services for the hospital project. Schedule 1 of the consultancy contract sets out in nine paragraphs the services to be provided by the plaintiff to the defendant and, to give a flavour of what was envisaged, the Schedule refers to attending liaison meetings with the Western Health and Social Care Trust (the public authority which awarded the hospital building project), providing management, technical and construction related advice to the defendant, providing advice on management of cash flow and construction budget related matters and providing appropriate business systems and processes for construction of the hospital. Significantly, there is no arbitration clause in the consultancy contract; instead, there is choice of law and jurisdiction clauses establishing Irish law and Ireland, respectively.

The Primary Sub-Contractor
15. The building contract was sub-contracted to a partnership between two Northern Irish registered companies, FCC Construction Northern Ireland Ltd. and P.E. Construction (N.I.) Ltd. Clause 27.1 of the sub-contracted building contract is an arbitration clause engaging the Rules of Arbitration of the International Chamber of Commerce with a seat in Geneva (Switzerland), the contract to be governed and construed in accordance with the law of Northern Ireland. In this sub-contract, one observes the third significant departure from what was envisaged in the JVA as it had proposed that the joint venturers themselves would execute the building works.

The Present Proceedings
16. The plaintiff has endured financial difficulties recently. It was unable to meet certain payments due to Ulster Bank on a debenture and this default permitted the bank to appoint receivers on 19th May 2011. An official liquidator was appointed on 4th July 2011. These circumstances, in the view of FCC Construcción S.A. (one of the original joint venturers) constituted a breach of the JVA and correspondence making this case was addressed to the plaintiff. The correspondence was replied to by solicitors for the receivers who, briefly stated, asserted that the JVA had no relevance as the joint venturers had not proceeded with their plans to enter a building contract. The building contract had, they said, been entered by a third party.

17. By letter of 9th December 2011, solicitors for the receivers referred to the consultancy contract and said that a sum of approximately UK£1.18m was due and that they expected the defendant to pay that amount within 15 days. Details of the services provided by the plaintiff in respect of which the monies were sought were provided by letter of 1st May 2012, and in response, the defendant, on 4th May 2012, denies, for various reasons, that the monies are due, saying:

> *"There is a clear dispute between the parties as to the effect of the JVA and how and when any monies allegedly due to P. Elliot should be dealt with including the monies claimed by P. Elliot under the invoices. We invite you to agree that the matters above should be referred to arbitration so that the most appropriate body can look at all aspects of the parties ' dealings and resolve them efficiently and effectively in one enforceable and binding decision. It may well be that as completion of the Contract approaches and the accounting envisaged under the JVA takes place, we are able to resolve such matters. However, it is clear that a formal referral to arbitration is necessary to assist the parties in resolving these present disputes. We look forward to hearing from you with the details as requested in your agreement to arbitrate."*

18. The plaintiff's position as expressed in the correspondence was that monies were due to it further to a contact with an Irish governing law and Irish jurisdiction clause and without an arbitration clause. The defendant insisted that any dispute between the parties was connected intimately with the original JVA which had an arbitration clause. Matters did not progress between the parties and the plaintiff issued a summary summons It was unaware that the defendant had submitted a request for arbitration to the ICC in Geneva dated 3rd May 2012.

The Request for Arbitration
19. FCC Construcción S.A. and the defendant jointly requested arbitration from the ICC. The defendant, in its request, asserted that the JVA governed the relationship between FCC Construcción S.A., the plaintiff and the defendant *"in everything they did in pursuit of the objectives"* of the joint venture and that the building contract was entered between FCC Construcción S.A. and NIHG *"through the defendant".*

20. Paragraph 13 of the request for arbitration states that:

> *"... on or about 20th May 2009, both [FCC Construcción SA.] and [the plaintiff] entered into consultancy agreements with [the defendant] for the provision of services in relation to the project."*

This appears to be a reference to the consultancy contract at issue in these proceedings. The defendant states that it too has entered a separate consultancy contract with FCC Construcción S.A.

The consultancy contract is sought to be brought within the ambit of the JVA and the defendant says, in the request for arbitration (at para. 24):

> *"The Consultancy Agreement is a contract which implements the objectives, intention and purpose of the JVA in relation*

to the execution of a single Project; the contracts are extremely closely connected and a breach of the Consultancy Agreement is effectively a breach of the JVA and vice versa. .."

21. The defendant and its fellow claimant, FCC Construcción S.A. seek various reliefs connected with the winding up of the plaintiff, saying that the JVA provides for what should happen if one of the joint venturers is wound up. In addition, specific negative declaratory relief is sought in relation to the consultancy contract, as follows *"the respondent has no entitlement to payment in respect of the [consultancy contract] invoices by reason of clauses 14.3 and 14.4 of the JVA, clauses 2.2 and 2.5 of the Consultancy Agreement, statutory, legal or equitable set off or otherwise".*

22. The Defendant's Application for a Stay

23. This application for a stay was sought by the defendant's notice of motion which also requested the court to strike out the proceedings for want of jurisdiction but this relief is not now pursued. Equally, relief related to *forum non conveniens* and *lis pendens* identified in the motion is not now pursued.

24. The defendant advances two main grounds in support of its application that the plaintiff's action be stayed. The first argument relates to Article 8 of the Uncitral Model Law in International Commercial Arbitration (the Model Law). The second is based upon the inherent jurisdiction of the High Court to stay proceedings and, in the Commercial List of the High Court, to manage such proceedings.

The Model Law
25. Article 8 of the Model Law was incorporated into the law of the State by section 6 of the Arbitration Act, 2010. Article 8 is as follows:

"8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests, not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

8(2) Where an action referred to in paragraph (1) of this Article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

26. Anticipating the plaintiffs response that the consultancy contract contains no arbitration clause, that the dispute in these proceedings does not fall within the scope of the arbitration agreement and that the arbitration agreement has expired, the defendant characterises these objections as matters of jurisdiction and notes that Article 16 of the Model Law grants the arbitral tribunal the competence to rule on its own jurisdiction.

27. Reference is made by the defendant to *Ahmad Alnaimi v. Islamic Press Agency* [2000] 1 Lloyd's Rep. 150 (CA) in support of the proposition that where there is a valid arbitration agreement but a dispute concerning the scope of that agreement, then the matter should be referred to arbitration so that the issue of the scope of the arbitration agreement can first be determined.

28. In support of its contention that the dispute in these proceedings falls within the scope of the arbitration agreement the defendant refers to a body of case law which suggests a generous interpretation of arbitration clauses so as to embrace commercial arrangements somewhat outside the precise commercial relationship where the arbitration clause is to be found. In other words, these cases, it is said, favour a commonsense approach to relations between enterprises (see *Continental Bank v. AGELAKOS* [1984] 1 WLR 588, (*per* Balcombe LJ *"it may be presumed that the parties intended to refer all disputes arising out of this particular transaction to arbitration"); Harbour Assurance Co. (UK) Ltd. v. Kansa General International Assurance Co. Ltd.* [1993] 1 Lloyd's Rep. 455 at p. 470 (*per* Hoffman L.J. "the presumption in favour of one stop adjudication").

29. Reliance is placed by the defendant on the decision of the House of Lords in *Fiona Trust & Holding Corp. v. Privalov* [2007] UK HL 40. In this case, owners of vessels entered into charters with eight charterers. The contract provided that *"any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree"* and the next clause in the agreement allowed for *"any such dispute"* to be referred to arbitration. The owners of the vessels sought to rescind the contracts, saying they had been procured by fraud and they commenced court proceedings for a declaration that the charters had been validly rescinded and that the arbitration agreement was rescinded also. The charterers sought a stay on the proceedings on the basis that the matter should have been arbitrated. A stay was refused at first instance but allowed by the Court of Appeal. The decision of the Court of Appeal was upheld in the House of Lords and the judgment was given by Lord Hoffman, who said [1]:

"[5]. .. arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intend to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen, in particular, are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.

30. Hoffman L.J. ruled that the charterers were entitled to a stay. He found that notwithstanding the allegations that the charter agreement had been procured by fraud and bribery, there was no evidence that the arbitration agreement (contained within the charter agreement) had itself been procured by bribery etc. and therefore the agreement was required to be respected.

31. The defendant refers to authorities addressing sequential agreements where earlier agreements contained arbitration clauses but later agreements did not. It is said that the courts have imputed the earlier arbitration agreements into the later agreements (see *Emmott v. Michael Wilson (No. 2)* [2009] EWHC 1 (Comm.) and *El Nasharty v. J Sainsbury* [2004] 1 Lloyd's Rep. 309).

32. The defendant says that there is support for the proposition that in multiple contracts containing contradictory dispute resolution and/or jurisdiction clauses, the courts seek to find *"the commercial centre of the overall relationship between the parties and apply the relevant jurisdiction and/or arbitration clause".* Reference is made in this connection to the decision of the Court of Appeal in England and Wales in *UPS AG v. HSH Nordbank AG* [2009] EWCA Civ. 589. This case concerned parties to centralised debt obligations across a series of agreements containing contradictory jurisdictional clauses. Collins L.J. [2] concluded as follows:

"[95] ...whether a jurisdiction clause applies to a dispute is a question of construction. Where there are numerous jurisdiction agreements which may overlap, the parties must be presumed to be acting commercially, and not to intend that similar claims should be the subject of inconsistent jurisdictional clauses. The jurisdiction clause in the dealer's confirmation is a 'boilerplate' bond issue jurisdictional clause, and is primarily intended to deal with technical banking

disputes. Where the parties have entered into a complex transaction, it is the jurisdictional clauses in the agreements which are at the commercial centre of the transaction which the parties must have intended to apply to such claims as are made in the New York complaint and reflected in the draft particulars of claim in England."

33. In anticipation of the plaintiff's case that the parties to the consultancy contract are not the parties to the joint venture which contains the arbitration clause, the defendant identified some principles of law and case law in support of its position. The defendant asserts (in its written submission) that *"[the defendant company] is the entity which was incorporated for the purposes of effecting the joint venture. Therefore, the plaintiff understood and agreed that the Joint Venture Agreement would also apply to the defendant in such a way that the defendant would be bound by its terms*". [3] Further, at para. 36 of its written submissions, the defendant says that:

"The defendant was effectively assigned the benefit (and the burden) of the Joint Venture Agreement by FCC SA and this was done with the agreement of the plaintiff in order to give business efficacy to the Joint Venture Agreement. Furthermore, it is significant that no new agreement was entered into between the plaintiff, FCC SA and the Defendant herein concerning the Joint Venture and how their relations might be governed. In those

circumstances, it was clearly the parties' intention (and therefore the plaintiff's intention) the Joint Venture Agreement remained binding and on all those entities which were incorporated for the purpose of implementing and carrying out the Joint Venture Agreement."

34. The defendant's submissions in this connection seem to rest upon the contention that the JVA was somehow incapable of being modified. It may well be that the purpose of the incorporation of the defendant was to achieve one of the purposes of the JVA. In this regard, I note that the purpose of the JVA was to bid for a 'design and build contract' for the hospital. The JVA provides that the plaintiff and FCC SA shall be the bidders, and if successful, shall be the executors of the building works. It is common case that this did not happen and that the joint venturers decided that they themselves would not pursue the building contract and would not execute the works. Instead, a new Irish corporate entity (directly or indirectly controlled by the original joint venturers) would enter the building contract. In addition, a partnership of two Northern Irish companies instead of the joint venturers would execute the works by way of a building sub-contract. These are very significant modifications to what was agreed in the JVA. It should also be recalled that clause 21 of the JVA expressly permits modifications thereof.

35. Finally, and in further anticipation of the plaintiffs case in respect of the Article 8 application for a stay, the defendant refers to the assertions by the plaintiff (in the affidavit of Mr. Wallace sworn in these proceedings on 18th May 2012) that the JVA has been terminated because clause 4 of that agreement states *"if the joint venturers shall fail to enter into a contract with NIHG, then the Joint Venture Agreement 'shall automatically cease "'*. The defendant replies to this complaint that this itself is a matter to be determined at arbitration. In advancing this contention, the plaintiff, like the defendant, is inferentially suggesting that the JVA was incapable of modification. My view is that the JVA was capable of modification and that the joint venturers did indeed change the original agreement.

36. The defendant has exhibited a series of minutes of Board meetings of the joint venture. The purpose of showing these minutes to the Court is to establish that prior to and after the incorporation of the defendant, the Board meetings continued and seemed to address general project management issues. The personnel remained fairly constant and one can see that the attendance notes indicate the Spanish companies and Irish companies' participation at these meetings. At best, this suggests that Board meetings of the joint venture continued after the incorporation of the defendant and the execution of the building contract and of the consultancy contract. It is understandable that the defendant would be keen to prove that the joint venture seemed to continue following the establishment of the defendant and the execution of the building contract because the plaintiff has argued, with some force, that the JVA terminated when the joint venturers themselves did not enter the building contact in the manner that had been envisaged by the JVA. My view is that whether or not the joint venture agreement and/or the joint venture itself continued after the execution of the building contract is not determinative of any of the issues on this application. Even if the plaintiff could establish that the JVA has terminated, that of course does not mean that the arbitration agreement has terminated. Arbitration agreements survive the demise of the contracts in which they are to be found so that disputes arising from the expired contract can be resolved in the manner which the parties had agreed. Article 16 of Model Law so provides.

37. The question of whether or not the JVA has terminated is not a matter that I decide on this application. Whether it has terminated or not, the arbitration agreement within it survives. That, however, does not mean that the arbitration agreement governs the building contract and/or the consultancy contract and/or the building subcontract.

The Plaintiffs Response to the Article 8 Application

38. The plaintiff argues that the defendant is not a party to the arbitration agreement contained in the NA and lacking privity, cannot invoke it. Reference is made by the plaintiff to the decision of *City of London v. Sancheti* [2008] EWCA Civ. 1283, [2008] All ER (D) 204, [2009] 1 Lloyd's Rep. 117, and to the statement by Laurence Collins L.J. at para. 29 as follows:

"I have no doubt that section 9 {of the UK Arbitration Act, 1996} cannot apply if the parties to the court proceedings are not the parties (or persons claiming through or under a party: section 82(2)) to the arbitration agreement. It would be wholly inconsistent with the purpose and structure of the 1966 Act in general, and of s. 9 in particular, if a stay could be obtained against a claimant who is not a party to the arbitration agreement."

39. Case law from England and Wales, dealing with applications for stays to accommodate arbitration, are based, in the main, on s. 9 of the (United Kingdom) Arbitration Act, 1996. This provision is similar, though not identical to, the Article 8 of the Model Law which has been incorporated into Irish law. Given the reliance placed upon the case law from England and Wales, I think it important to note the subtle differences between s. 9 of the UK Act and Article 8 of the Model Law. Section 9(1) of the UK Act provides:

"A party to an arbitration agreement against whom legal proceedings are brought . . . in respect of a matter which under the agreement is to be referred to arbitration may ... apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter...

(4) On an application under this section, the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed."

40. The differences between Article 8 and section 9 of the UK Act are not fully relevant to these proceedings, but in passing, I note that Article 8(1) and s. 9(4) are addressed to courts and describe the duty of the courts to refer matters to arbitration unless certain countervailing circumstances apply. Section 9(1) of the UK Act is addressed, not to the court, but to a party invoking an arbitration

clause, creating a procedure by which such a party may seek a stay. No similar provision is to be found within Article 8, although Article 8 certainly envisages applications by defendants for stays in favour of arbitrations. This is confirmed by section 11 of the Arbitration Act 2010 which provides that there shall be no appeal from any court determination of a stay application pursuant to Article 8 (1) of the Model Law.

41. The plaintiff refers to *Joint Stock Company Aeroflot Russian Airlines v. Berezovsky* [2012] EWHC 1610, which suggests (at para. 5 in the judgment) that if a stay is to be granted under s. 9 of the (UK) Arbitration Act. 1996, the court must be satisfied that there is an arbitration agreement in existence.

42. The plaintiff says that *"the fact that the applicant for a stay is not a party to the arbitration agreement with the respondent is a complete answer to the application and an insurmountable barrier insofar as Article 8 of the Model Law is concerned"*. [4] I disagree. There are circumstances in which a defendant seeking a stay in favour of an arbitration is not itself a party to the arbitration clause it seeks to rely upon. Thus, the question is not whether the party relying upon the arbitration clause itself agreed the clause, but rather, whether it has a sufficient connection, whether factually or by operation of law, with the party who agreed to the arbitration clause to invoke the clause and stay the proceedings in which it is a defendant. And that is one of the questions which is before this court, because it is common case that the consultancy contract, on foot of which the plaintiff sues, contains no arbitration clause and the defendant argues that the nature of the commercial dealings between the plaintiff, the defendant and the original joint venture, FCC SA, justifies either bringing the consultancy agreement under the umbrella of the JVA and thus infusing the consultancy contract with the arbitration clause or borrowing the arbitration clause from the JVA and placing it into the consultancy contract.

43. Both parties refer to case law which has evolved in England and Wales arising from s. 82(2) of the (UK) Arbitration Act, 1996 extending the definition of a party to 4 See paragraph 54 of the plaintiffs written submissions an arbitration to include *"any person claiming under or through a party to an agreement"*. Examples of a claim 'arising under or through a party to an agreement' cited by the defendant deal with matters of assignment or corporate restructuring. The defendant's reliance on *Russel-Uclafv. G.D. Searle & Co. Ltd.* [1978] 1 Lloyd's Rep. 225, as authority for the proposition that in a group company situation, a subsidiary can obtain the benefit of an arbitration agreement entered by its parent company, is answered by the plaintiff, firstly by stating that the proposition is dependent upon the new entity being a wholly owned subsidiary. The defendant, according to the plaintiff, is not even a subsidiary of the FCC SA, and I agree that it is not possible on the evidence before me to determine whether or not the defendant is a subsidiary of any other entity.

44. The evidence is that the plaintiff and another Irish company (Fomento de Construcciones y Contratas, Construction Ireland Limited) ('FCC Ireland') own one share each, being an A share and a B share, respectively, in the defendant. The plaintiff (at paragraph 20 of the affidavit of Kieran Wallace, sworn on May 18th 2012) avers that FCC Ireland is related to a group of companies controlled by FCC SA- the Spanish joint venturer. This is not denied by the defendant. Indeed the defendant is at pains to establish commonality between the defendant and the Spanish arm of the joint venture.

45. In any event, the plaintiff points out that the *Russel-Uclaf* case, insofar as it addresses the 'claiming through another' proposition, has been overruled. In the *City of London v. Sancheti* [2008] EWCA Civ. 1283, [2008] All ER (D) (204), Laurence Collins L.J., having held that it was necessary for an applicant for a stay to be a party to the arbitration agreement said:

> *"30. Nor is it sufficient for there to be a mere connection between the claimant and another person who is bound by the arbitration agreement. For Mr. Sancheti, reliance was placed upon a case in which a subsidiary of a party to an arbitration agreement was entitled to a stay because of an arbitration agreement with its parent company. In Russel-Uclaf v. G.D. Searle & Co. Ltd. [1978] I Lloyd's Rep. 225, 23I-232, Graham J held (in relation to the stay provisions of s. I of the Arbitration Act 1975) that a wholly owned subsidiary company could claim to be a party to an arbitration where the arbitration agreement was between the parent company and a third party on the basis that the parent and subsidiary were 'so closely related' that it could be said that the subsidiary was 'claiming through or under' the parent . ..*
>
> *34. Russel-Uclaf v. G.D. Searle & Co. Ltd. was a case in which the subsidiary was seeking a stay of court proceedings brought against it and claiming the benefit of an arbitration agreement to which it was not a party. Here, Mr. Sancheti seeks a stay of proceedings brought against him by the Corporation of London and thereby seeks to impose upon the corporation the burden of an arbitration agreement to which it is not a party. But even without such a distinction, I do not consider that Russel Uclaf v. G.D. Searle & Co. Ltd. assists Mr. Sancheti. In my judgment, it was wrongly decided on this point and should not be followed. A stay under s. 9 can only be obtained against a party to an arbitration agreement or a person claiming through or under such a party and a mere legal or commercial connection is not sufficient."*

46. The logic of the *Sancheti* decision and the criticism of the *Russel-Uclaf* decision are persuasive. Thus in so far as the defendant claims that Irish law permits a party to claim the benefit of an arbitration clause 'through or under' another, I would adopt the approach of Collins LJ and look for more than a bare commercial or legal connection between two entities. However, I do not regard the defendant to be seriously contending that it has the benefit of an arbitration clause 'under or through' another in the manner in which that phrase is understood in England and Wales.

47. The essence of the defendant's case is that a combination of the real commercial relations between the parties to these proceedings and all of the other entities, be they corporations in three jurisdictions, partnerships, or joint ventures, permit it to invoke the terms of the original agreement on which the plaintiff and its original Spanish joint venture set out to obtain the contract to design and build the hospital in Enniskillen.

Analysis of Article 8 of the Model Law

48. I have not been directed to any Irish decision dealing with the interpretation of Article 8 of the Model Law but the provision has been adopted in many countries and some guidance maybe found from foreign court decisions.

49. The Supreme Court of British Colombia gave a decision called *Pacific Erosion Control Systems Ltd. v. Western Quality Seeds* [2003] BASK 1743, in which the defendant applied for a stay of proceedings in favour of arbitration pursuant to s. 8 of the (Canadian) International Commercial Arbitration Act, and pursuant to the inherent jurisdiction of the court (s. 8 of the Canadian International Commercial Arbitration Act provides for stays on proceedings where a court has referred disputes to arbitration pursuant to Article 8 of the Model Law). The learned trial judge referred to the decision of Hinkson J. in the Court of Appeal in *Gulf Canada Resources Ltd. v. Arochen International Ltd.* [1992] BCJ 500, which, in admirably clear terms, formulated a test for whether a stay of proceedings should be ordered, as follows:

> *"The test formulated is that a stay of proceedings should be ordered where: (i) it is arguable that the subject dispute*

falls within the terms of the arbitration agreement; and (ii) where it is arguable that a party to the legal proceedings is a party to the arbitration agreement. "

My view is that this is the correct test.

50. The position in England and Wales concerning disputes as to substantive arbitral jurisdiction - such as the dispute in this case - has been set out in a number of decisions of the Court of Appeal. In *Birse Construction Ltd. v. St. David Ltd.* [1999] BLR 194, the trial judge set out a clear and logical approach to resolving the question faced by the court. In *Birse*, a builder brought court proceedings for money due on a *quantum meruit* claim. The defendant applied for a stay under s. 9 of the (UK) Arbitration Act, 1996. The claimant disputed the existence of an arbitration agreement, arguing that a standard arbitration clause in building contracts had not been incorporated into the party's bargain. The trial judge said as follows:

"It is common ground that the following courses are open to me:

1. To determine on the affidavit evidence that has been filed, that an arbitration agreement was made between the parties, in which case the proceedings would be stayed in accordance with s. 9 of the 1996 Act

2. To stay the proceedings, but on the basis that the arbitrator will decide the question of whether or not there is an arbitration agreement ...

3. Not to decide the question immediately, but to order an issue to be tried.

4. To decide that there is no arbitration agreement and to dismiss the application to stay."

51. Before proceeding further, I should note that Article 16 of the Model Law gives the arbitral tribunal the power to rule on its own jurisdiction, thus, this court could resolve the matter before it by permitting the parties to test the arbitral jurisdiction at the arbitral tribunal, and indeed, this process is underway, initiated by the plaintiff in response to the defendant's request for arbitration. But the question for this court is not what it may do but rather what it is directed to do by Article 8 of the Model Law and I say this because I regard Article 8 as a provision which requires courts to refer matters to arbitration and to stay proceedings if certain circumstances exist.

52. The decision in *Birse* was appealed and the parties agreed that they had not asked the trial judge to determine any conflict of fact on affidavits alone. The Court of Appeal found that a triable issue had been raised as to whether or not the arbitration agreement had been incorporated into the contract, but that this issue was not suitable for summary determination and so should have been resolved, either by way of a preliminary issue or at the trial of the action. The matter was remitted to trial court.[5]

53. Unlike the trial judge in *Birse*, I am not faced with any conflict of facts as to whether or not an arbitration clause has been incorporated from one agreement into another. As previously stated, the parties agree that the consultancy contract contains no arbitration clause. The parties have placed on affidavit a fairly comprehensive description of their commercial history, their relationship to the original joint venturers, and the entirety of their dealings concerning the endeavour to win the contract to build the hospital in Enniskillen. The case made by the defendant for the applicability of the arbitration clause rests on an interpretation of agreed facts. Therefore, I conclude that this dispute is one which is capable of summary determination and it does not require a trial to determine the existence or otherwise of an arbitration agreement.

54. *In Ahmad Al Naimi v. Islamic Press Agency Incorporated (supra)*, the parties agreed that the existence or non-existence of the arbitration agreement could be determined summarily on affidavit alone, and on the facts of the case, the Court of Appeal granted a stay on proceedings. Describing the effect of the judgment, David Joseph Q.C. in 'Jurisdiction and Arbitration and their Enforcement' (2nd Ed.) (para. 1130), p. 341, said:

"The importance of the case, however, rests in the general guidance given by the Court of Appeal to s.9 Arbitration Act 1996 applications. Both Lord Justices Waller and Chadwick cited with approval the four possible options referred to by HHJ Humphrey Lloyd Q.C. in Birse Construction Ltd. v. St. David. Lord Justice Waller then commented that normally the court would have to be satisfied of the existence of the arbitration agreement before proceeding to stay proceedings under s. 9 of the Arbitration Act 1996. Lord Justice Waller, however, envisaged that a stay might be appropriate if the court was virtually certain of the existence of the arbitration agreement where the only dispute was as to the scope of the agreement. This would then leave the arbitral Tribunal to rule on its substantive jurisdiction pursuant to s. 30 of the Arbitration Act 1996, subject to challenge under s. 67 of the Arbitration Act 1996. It is not entirely clear from Lord Justice Waller's judgment whether, in this context, such a stay would be granted under s. 9 of the Arbitration Act, or pursuant to the inherent jurisdiction of the court. Lord Justice Chadwick appears to have concluded that such a stay would be pursuant to the court's inherent jurisdiction. It is clear from both judgments, however, that - in the absence of the court summarily determining the existence of an agreement to arbitrate, or exercising its inherent jurisdiction to stay - the court would determine the threshold jurisdiction in issue. In the event of a conflict of fact in which the parties were not content be resolved on affidavit or witness statements alone, the matter would have to be resolved after the trial of the issue and the court ought to give directions for the trial of the issue."

55. In *Alban v. Naza Motors (No. 3)* [2007] 2 Lloyd's Rep. 1, a stay was refused in circumstances where it was alleged that the claimant's signature to a contract containing an arbitration clause was a forgery. David Joseph Q.C. in his aforementioned work, notes in the Alban v. Naza Motors case:

"... what is important ... is to understand that the s. 9 stay was not refused as a question of discretion, but rather as a matter of jurisdiction. It was concluded that there was no power under s. 9 to stay proceedings unless the existence of an arbitration agreement had been established. "

56. I agree with the proposition that Article 8 of the Model Law does not create a discretion to refer or not to refer matters to arbitration but directs a court to grant or not to grant a stay, depending on the threshold issue of whether the parties to the proceedings are parties to an arbitration agreement. If they are, and the dispute is within the scope of the arbitration agreement and there is no finding that the agreement is null and void, inoperative or incapable of being performed, then the stay must be granted. Contrarily, if the parties are not bound by an arbitration agreement, then the stay, of course, must be refused.

Conclusion on Article 8 Application

57. The Irish and Spanish enterprises (the plaintiff and FCC SA) sought to combine their resources and skills to design and build a new

hospital in Enniskillen. The evidence suggests that they, along with other parties not identified to the court, were in fact the pre-qualified bidder for a much larger contract which involved financing the hospital and operating it after its construction. A joint venture agreement was entered whereby the plaintiff and a Spanish company committed themselves to bidding for the construction (and design) contract, and if successful, to execute it. They included an international arbitration clause in their joint venture agreement and indicated that the arbitration clause would cover not only the joint venture agreement, but also the building contract.

58. The joint venturers were advised to abandon the originally envisaged plan to enter the building contract. Considerable financial advantages would accrue to the enterprises if this tax advice was followed. Therefore, the joint venturers decided that they would not, as had been planned, enter a building contract, nor would they execute the building contract. Instead, a new company was incorporated and this company - the defendant in these proceedings - was chosen by the joint venturers, and inferentially with the agreement of the contract-awarding party, to enter the building contract. In addition, the original plan that the hospital be built by the joint venturers was changed and this task was instead subcontracted to a partnership comprising two Northern Irish companies. Having originally envisaged that the building contract would be governed by an ICC arbitration clause, the defendant and NIHG agreed a non arbitral dispute resolution procedure and in addition conferred exclusive jurisdiction on the courts of Northern Ireland.

59. With respect to the alleged breach of the consultancy contract which has given rise to these present proceedings, it is important to emphasise that the defendant, a party to that contract, is controlled by the plaintiff and another corporate entity ('FCC Ireland") which in turn, is closely associated with and as a matter of probability, is actually controlled by the Spanish joint venturer. Had the joint venturers wished to include an international arbitration clause in the consultancy contract this was entirely within their power, but not only did they decide not to do so, but they took an opposite position by including a proper law and exclusive jurisdiction clause instead.

60. It is appropriate, at this juncture, to refer back to the decision of the Court of Appeal in *UPS AG v. HSH Nordbank AG (supra)*. In that case, it will be recalled that a series of agreements involved contradictory jurisdiction clauses as between New York and England and Wales which seemed to have the effect of granting jurisdiction for the same dispute to both territories. The court was of the view that reasonable business women and men could not have intended such a clash. The complexity of the series of agreements at issue seems to me to have been at the heart of the decision of the Court of Appeal and I note that the identity of the parties to the agreements which gave rise to the litigation and the parties to the proceedings which followed, remained constant. Thus, the approach in that case which sought out *'the commercial centre'*, taking all of the agreements together, and to attach to that centre a jurisdictional clause, is simply not warranted by the relative simplicity of the agreements in this case. In addition, seeking out the commercial centre of the business relationship between the players and the parties involved with this dispute does not seem to me to assist in resolving the relatively simple question as to whether the defendant was ever party to an arbitration agreement.

61. Finally, one can readily understand why a court would say that reasonable business men and women would not have intended to create conflicting jurisdictional clauses. Such a presumption, however, is capable of rebuttal. Applying a similar presumption to the facts of this case would not result in a finding that the original joint ventures, acting reasonably, could not have intended to replace an arbitration agreement in the JVA with a proper law and exclusive jurisdiction provision in the consultancy contract. To my mind there is nothing unreasonable in such an approach where what is intended is the replacement of one provision for another and not that both are to apply simultaneously.

62. In my opinion, the feature which distinguishes this case from the authorities cited by the defendant in favour of presumptions for one stop shopping, presumptions for a reasonable business intention and presumptions for the avoidance of contradictory jurisdictional clauses, is that in all of those cases the parties remained constant. In this case, by election of the original joint venturers, the parties to the arbitration agreement are not the parties to the consultancy contract and are not now the parties in these proceedings and the defendant cannot borrow, either by operation of law or by reference to some alleged commercial connection, the arbitration clause from an agreement entered before it was incorporated and expressly excluded from a contract which it entered at the direction of the joint venturers.

63. It appears to me that Hoffman L.J. in *Fiona Trust v Privalov* has made most useful comments about the need to respect what emerges as the intention of the parties in an examination of the agreements that they have entered. At para. 13 of the judgment (see *supra*) and at p. 1060, he said:

> *"In my opinion, the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same Tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore L.J remarked (at [17]):*
>
> > *'[I]f any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so '. "*

64. Applying that language and logic to the facts of this case, it may be said that if the original joint venturers had desired to stitch in the original arbitration clause from the joint venture agreement to any subsequent agreements, they could have done so. It is clear that subsequent agreements, all connected with the purpose of the original joint venture, either deliberately excluded the original arbitration clause or expressly included it. It is the apparent deliberation with which this is done that I find compelling. The Building Contract has a specialist dispute resolution mechanism running to many pages and declaring itself not to be an arbitration process, notwithstanding the fact that the NA expressly stated that the building contract would be governed by the ICC arbitration clause. Additionally, the building contract has an exclusive jurisdiction clause conferring jurisdiction on the courts of Northern Ireland., thus ousting any question of arbitration. The consultancy agreement excludes arbitration by the manner in which it expressly includes Ireland and Irish law as the jurisdiction and proper law for that contract. By way of contrast, the subcontract for the building of the hospital contains an arbitration clause which mirrors the arbitration clause in the JVA.

65. In *London v. Sancheti, supra*. Collins L.J. comments on the effects of an express inclusion of a proper law and territorial jurisdiction clause in an agreement. He says:

> *"... by clause 4(4)(e) of the lease, the lessors and the lessee 'submit to the non-exclusive jurisdiction of the competent courts of England and Wales'. That amounts to a contractual agreement that (f sued in England, the party being sued will not object to the jurisdiction of the English court. Consequently, there is no possible basis for the view that the subject matter of the County Court proceedings is in respect of a matter which under the agreement is to be referred to arbitration. On the contrary, it has been agreed that it may be submitted to the courts of England."*

66. Applying that same logic to the facts of this application, the express inclusion of a clause which provides for Irish jurisdiction and Irish governing law for the consultancy contract means that the parties have agreed to submit their disputes to the courts of Ireland. None of the presumptions which derive from the closeness of the relationship between the defendant and parties to the original JVA where the arbitration clause is to be found could be said to be more important or more effective than the actual agreement entered by the defendant and the plaintiff. This Court will respect that agreement.

67. There is no reason why parties capable of expressly including an ICC arbitration clause in one agreement could not have done so in related agreements, and the fact that they did not, but instead, put in contradictory clauses, establishes beyond doubt that this was the true intention of the parties in these proceedings and that this was also the true intention of the original joint venturers. Therefore I find that though the dispute comprised in these proceedings could possibly be within the scope of the arbitration agreement in the JVA, the defendant is not a party to the arbitration agreement and cannot invoke it.

68. Article 8 of the Model Law directs courts to respect the arbitral process and stay court proceedings not out of deference to arbitration *per se* but rather as an expression of the most basic concept in the law of contract-i.e., that parties who have mutually exchanged promises for value may, at the suit of each other, be kept to their promises. Where parties promise to arbitrate their disputes, courts should stay their proceedings in favour of arbitration if that promise is proved. In this case, the defendant has not proved even to the standard of arguability that it exchanged a promise to arbitrate with the plaintiff.

69. I therefore refuse to grant a stay under Article 8 of the Model Law, not as a matter of discretion but for want for want of jurisdiction. But the matter does not end there. The defendant has urged the court that it should nonetheless invoke its inherent jurisdiction to stay the proceedings and I now turn to decide this issue.

Inherent Jurisdiction to Stay Proceedings

70. The defendant urges the Court to exercise its inherent jurisdiction to stay proceedings. I accept that this Court has such a jurisdiction and I note the useful guidance provided by Clarke J. in *Kalix Fund Ltd. v. HSBC Institutional Trust Services (Ireland) Ltd.* [2010] 2 I.R. 581, where he indicates the circumstances in which jurisdiction might be exercised. Clarke J. said:

> *"[38] It is not disputed by the parties but that this court has a broad power to give directions for the conduct of proceedings entered in the commercial list. As 0. 63A, r. 5 of the Rules of the Superior Courts 1986 states, such directions can be given 'as appears convenient for the determination of proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings '. It is also not disputed but that this court has an inherent jurisdiction to stay proceedings in certain circumstances: see for example McGrory v. ESB [2003] 3 I.R. 407. However, there is a dispute between the parties as to the precise extent to [2010] Kalix Fund Ltd. v. HSBC Institutional Trust Services (Ire) Ltd. 593 which a court has a jurisdiction to stay proceedings in circumstances such as those asserted in this case."*

71. In addition, the learned judge said:

> *"[43] Perhaps a closer analogy to the circumstances with which I am faced in these proceedings can be found in those cases where proceedings in one jurisdiction are stayed because there are already in being proceedings in relation to the same subject matter in another jurisdiction. Proceedings may be stayed where those latter proceedings are at a more advanced stage, and where other factors that may be relevant in determining which proceedings ought progress to trial favour the alternative jurisdiction: see for example, Reichhold Norway A.S.A. v. Goldman Sachs [2000] 1 W.L.R. 173, and Racy v. Hawila [2004] EWCA Civ. 209, (Unreported, Court of Appeal, 18th February, 2004). The underlying rationale behind those cases is the understandable desire on the part of courts in all jurisdictions to avoid a situation where there may be conflicting decisions on the same issue. In those circumstances it is highly undesirable that two courts in two separate jurisdictions should have to consider the same specific question with the consequent risk of differing decisions. Likewise, there may be circumstances where two different courts, within the same jurisdiction, may have to consider how best to deal with competing litigation which has been properly commenced in the respective courts. Similar points arise where a quasi-judicial body has jurisdiction over the same or closely connected issues: see for example L & W Developments Pty. v. Della [2003] NSWCA 140, (Unreported, New South Wales Court of Appeal, 5th June, 2003)."*

72. The defendant points out that the balancing of cases described by Clarke J. In Kalix has also been addressed in the context of the balancing required between court proceedings and arbitration. In *Ahmad Al Naimi v. Islamic Press Agency* [2000], 1 Lloyd's Rep. 150 (Ca.), the Court of Appeal addressed the impact of the principle known to the world of arbitration as *"kompetenz-kompetenz"*. As I understand it, this principle describes the power of an arbitrator to adjudicate upon its own jurisdiction. Waller L.J. said:

> *"The only other point I would make so far as the above approach is concerned is that it must not be overlooked that the Court has an inherent power to stay proceedings. I would, in fact, accept that on a proper construction of s. 9, it can be said with force that a court should be satisfied (a) that there is an arbitration clause and (b) that the subject of the action is within that clause, before the Court can grant a stay under that section. But a stay under the inherent jurisdiction may in fact be sensible in a situation where the Court cannot be sure of those matters but can see that good sense and litigation management makes it desirable for an arbitrator to consider the whole matter .first. If, for example, the Court thinks that it would take a trial with oral evidence to decide whether matters the subject of the action were actually within the scope of an arbitration clause, but that it was likely that on detailed enquiry the subject matter of the action will be found to be covered by the arbitration clause; and particularly if an arbitration was bound to take place in relation to some issues between the parties and where, having explored the details necessary to found jurisdiction, it would only be a short step to deciding the real issues, it will often be sensible for the Court not to try and resolve that question itself, but leave it to the arbitrator. "*

73. I find the guidance given by Waller L.J. to be very useful. He says that a stay might be sensible where a Court cannot be sure whether or not there is an arbitration clause and whether or not the subject of the action is within the clause. It seems to me that if the Court cannot be sure of those matters, then it might well be sensible to exercise the inherent jurisdiction of the Court to stay the proceedings and to permit those very questions to be determined by the arbitrator. However, I have concluded on the basis of the evidence that the contract on foot of which the plaintiff sues the defendant is not governed by an arbitration clause. By conferring exclusive jurisdiction on the Irish courts the parties to the contract have agreed a clause which has the very opposite effect of an arbitration clause. In the clearest of terms, the plaintiff and the defendant agreed what law would govern any dispute they might have and the courts of the country where the dispute will be litigated. The mere fact that a defendant in an action has attempted to submit the dispute in that action to arbitration does not establish its right so to do and does not establish either *prima facie* or to the standard of arguability that an arbitration clause exists.

74. The plaintiff has complained that the defendant's institution of arbitration without leave of the Court violates section 222 of the Companies Act 1963 (as amended), which requires leave to institute proceedings against a company in liquidation. Whether foreign arbitral proceedings are embraced by section 222 of the Companies Acts is a matter best left to another day. I am not required to decide this issue in view of the result of this application.

75. I refuse the defendant's application for a stay of these proceedings.

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[1] At page 1058

[2] See page 747

[3] See paragraph 35 of the defendant’s written submission

[4] See paragraph 54 of the plaintiff’s written submissions

[5] Birse Construction Ltd v St David Ltd [2000] PLR 57