



Neutral Citation Number: [2019] EWHC 471 (Comm)

Claim No: CL-2018-000551

**IN THE HIGH COURT OF JUSTICE**  
**THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES**  
**COMMERCIAL COURT (QBD)**

Rolls Building  
Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 01/03/2019

**Before :**

**MR JUSTICE ROBIN KNOWLES CBE**

-----

**Between:**

**AQABA CONTAINER TERMINAL (PVT) CO.**

**Claimant**

**V**

**SOLETANCHE BACHY FRANCE SAS**

**Defendant**

-----  
-----

**Stephen Houseman QC and Owen Lloyd (instructed by Allen & Overy LLP) for the Claimant**  
**Iain Quirk (instructed by Bryan Cave Leighton Paisner LLP) for the Defendant**

Hearing date: 17-19 December 2018

-----  
**APPROVED JUDGMENT**

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

## Mr Justice Robin Knowles:

### Introduction

1. The Claimant (“ACT”) seeks a permanent anti-suit injunction against the Defendant (“Soletanche”). This is the judgment of the Court on the trial of ACT’s claim.
2. ACT is a Jordanian company. Soletanche is a French construction company. In 2009 ACT and Soletanche entered into a written contract (“the Construction Contract”) for works (“the Works”) at the Aqaba Container Terminal in Jordan.
3. The full title of the Construction Contract is “Contract Agreement – Main Civil Infrastructure Works for the Development of Aqaba Container Terminal”, and it incorporated “Conditions for Construction for Building and Engineering Works Designed by Employer”.
4. Soletanche has described the Aqaba Container Terminal in this way:

“... [T]he Aqaba Container Terminal ... is a public utility. [It] is the only Jordanian Container Terminal and the backbone of logistic transport and shipping sector and national economy and engine for [Aqaba Special Economic Zone Authority (“ASEZA”)] being the main gate of the Jordanian market and the vital port of goods’ transport from/to other countries in the region.”
5. The injunction that is sought is directed to proceedings commenced by Soletanche against ACT and another in Jordan (“the Jordanian Proceedings”). Those proceedings are currently before the Economic Chamber at the Amman Court of First Instance though Soletanche seeks a reference to the Court of Cassation or a Constitutional Court of Jordan.
6. The Jordanian Proceedings have been issued in circumstances where there is an arbitration agreement between Soletanche and ACT, to be found in the Construction Contract, and after a substantive arbitration under that agreement.

### The Arbitration Agreement

7. The arbitration agreement is in these terms (“the Arbitration Agreement”):

“20.4 If a dispute (of any kind whatsoever) arises between the Parties [ie Soletanche and ACT] in connection with or arising out of the [Construction Contract] or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the [Dispute Adjudication Board] for its decision, with copies to the other Party and the Engineer ...

...

20.6 Unless settled amicably, any disputes in respect of which the [Dispute Adjudication Board’s] decision (if any) has not become final and binding

shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

- a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
  - b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
  - c) the arbitration shall be settled by three arbitrators in the language for communications defined in Sub-clause 1.4 (Law and Language)
  - d) the arbitration shall take place in London, England.”
8. There is no dispute that Soletanche and ACT made the Arbitration Agreement. As appears below, Soletanche was first to invoke it.

### **The arbitration**

9. In February 2011 ACT gave notice to terminate the Construction Contract. Soletanche responded by claiming to treat the notice of termination by ACT as a repudiatory breach of the Construction Contract by ACT.
10. After an unsuccessful process before the Dispute Adjudication Board, in October 2013 Soletanche commenced arbitration, seated in London, against ACT.
11. In the arbitration Soletanche sought a declaration that the termination by ACT was unlawful. It also sought payment for work certified but unpaid, and damages. ACT in turn counterclaimed for a declaration in the arbitration that the termination by it was lawful and for damages.
12. In 2017 the arbitral tribunal issued an award holding that ACT had validly terminated the Construction Contract and ordering Soletanche to pay damages and costs.

### **The Jordanian Proceedings**

13. On or about 2 July 2018 Soletanche commenced the Jordanian Proceedings.
14. The Jordanian Proceedings are against Aqaba Development Corporation (“ADC”, as first defendant) and ACT (as second defendant). Soletanche is the sole plaintiff.
15. As summarised by Mr Iain Quirk for Soletanche, the Jordanian Proceedings seek a declaration of unconstitutionality of an article of Jordanian Law, namely Article 17 of the Aqaba Special Economic Zone Law No 32 of 2000. Soletanche’s position is that “if Article 17 is unconstitutional then contracts entered into pursuant to it were without legal basis and are null and void”.
16. Law No 32 of 2000 concerns the establishment of a Special Economic Zone in Jordan. It is Soletanche’s case in the Jordanian Proceedings that the first defendant ADC was incorporated according to that Law and established to be the investment arm of ASEZA (the relevant Special Economic Zone Authority).

17. In 2003 ASEZA and ADC entered into a contract (“the Development Contract”). ADC co-owns ACT with AP Moller Finance SA. In 2006 an agreement entitled “Joint Development Agreement” (“the JDA”) was signed by ADC and ACT and two others (but not Soletanche). On Soletanche’s case the Development Contract and/or the JDA are concession agreements.
18. In the Jordanian Proceedings Soletanche alleges, in its claim form (in translation, and where the translation is not entirely clear about which agreement is being referred to I adhere to the text of the translation) and subject to amendment:

“The [JDA]... entitled [APM Moller Jordan] the ownership, management, operation of the Aqaba Container Terminal is a Concession Agreement to manage and invest a public utility according to the Definition set out in Article (117) of the Constitution. The word “concession” provided in Article (117) of the Constitution means conferring an exclusive right to a specific body which body could be a company or individual or a government or a non-governmental entity for the purpose of investing in mines, minerals or public utilities within its public boundaries ....

...

The [JDA] has not gone through the constitutional framework and no law endorsing the [JDA] was passed according to the requirements of Article (117) of the Constitution. Rather, the [JDA] was signed by [ADC] and [ACT] without passing through any procedures and/or the constitutional channels described in Article (117) of the Constitution which provides “Each concession that confers any right related to the investment of mines, minerals or public utilities shall be endorsed by a law.”

[T]he [JDA] was signed based on Article (17) of ASEZ Law No. (32) of 2000 in breach of Article (117) of the Constitution ...

...

...[ADC] ignored the constitutional channels described in Article (117) of the Jordanian Constitution by relying on Article (17) of ASEZ Law referred to above. Hence, Article (17) of ASEZ Law is a provision in breach of the Constitution’s provisions.”

19. At this point Soletanche inserted into its claim form in the Jordanian Proceedings the allegation:

“This Statement revolves around the annulment of the Agreement signed by [Soletanche] and [ACT] [i.e. the Construction Contract] based on the unconstitutionality of the provision that established [ACT] and conferred [ACT] the right of concession over a public facility.”

20. Soletanche continues in its claim form in the Jordanian Proceedings:

“Pursuant to the [JDA] ..., [ACT] on 16/8/2009 issued a tender to invite construction companies to submit their bids for the execution of Aqaba Container Terminal infrastructure works. In the tender, [ACT] stated it is the

party entitled to own, manage and develop the Aqaba Container Terminal, and is entitled to enter into necessary contracts for that purpose. The Parent Company of [Soletanche] submitted their bids in the tender of [ACT] under the belief that [ACT] is the owner and the rights holder to offer such tenders and to enter into contracts with third parties for that purpose.

[ACT] issued the decision of award to [Soletanche] ... A construction contract [ie the Construction Contract] was signed to execute [the Works] for the Aqaba Container Terminal expansion ...

...

The work of the ... [Construction Contract] ... was halted. The [Construction Contract] was terminated by [ACT] ....

[Soletanche] is claimed of millions of Dinars by [ACT]. [Soletanche] has interest to prevent being claimed such amounts based on the invalidity of the [Construction Contract] and the invalidity of the agreement from which the incorporation of, and the entitlement of [ACT] to own and manage the Aqaba Container Terminal, was derived, being unconstitutional.

There is serious intention to advance the plea of unconstitutionally of conferring the concession to [ACT]. If the concession agreement granted to [ACT] is declared unconstitutional, this will result in the invalidity of the development agreement based on the violation of the foundation by which [ACT] came about and for the breach of the formality required by the law for the conclusion of this agreement. This means that if the principle [sic., according to the translation] fails, the accessory also fails.

[Soletanche] filed this Claim to declare the annulment of the [Construction Contract] signed between [Soletanche] and [ACT] based on the invalidity and unconstitutionality of concession agreement signed pursuant to Article (17) of ASEZ Law which is expressly in breach of Article (117) of the Jordanian Constitution.

In addition to contract being null for the failure to satisfy the legal requirements, there is a constitutional reservation encompassing the agreement and the authority and ownership of [ACT] over the Aqaba Container Terminal.”

21. Soletanche then requests the Jordanian Court to refer “the plea of unconstitutionality of Article (17) of ASEZ Law” to the Court of Cassation or a Constitutional Court, “suspend hearing this Claim until the constitutionality of Article (17) of ASEZ Law is decided”, and “eventually, judge the unconstitutionality of Article (17) of ASEZ Law, and consequently declare the annulment of the concession agreement and the [Construction Contract] based on the unconstitutionality of Article (17) of ASEZ Law pursuant to which the [JDA] was signed, in breach of Article (117) of the Jordanian Constitution.”
22. Soletanche makes no reference to the arbitration or the award in the Jordanian Proceedings.

### **The anti-suit relief sought by ACT**

23. ACT responded to the issue of the Jordanian Proceedings by issuing the present proceedings in the Commercial Court in London. ACT sought and obtained an urgent interim anti-suit injunction in August 2018 from Jacobs J ex parte, and in September 2018 from Moulder J inter partes.
24. Apart from damages and costs the anti-suit relief sought by ACT at trial is as follows:
- (1) A declaration that Soletanche “breached the Arbitration Agreement by seeking to obtain a declaration (or equivalent remedy) as to the invalidity and/or invalidation of the [Construction Contract] in the Jordanian Proceedings”.
  - (2) An injunction restraining Soletanche “from taking any step(s) directly or indirectly to obtain a declaration (or equivalent remedy) as to the invalidity and/or invalidation of the [Construction Contract] in the Jordanian Proceedings” (or otherwise than in accordance with the Arbitration Agreement).
  - (3) An injunction requiring Soletanche to “take all steps to withdraw, discontinue or bring to an end” what it had done to obtain a declaration (or equivalent remedy) “as to the invalidity and/or invalidation of the Construction Contract in the Jordanian Proceedings”.
25. ACT expressly proposes a proviso to the two injunctions framed at (2) and (3) above, in these terms:
- “For the avoidance of doubt, paragraph 2 and 3 above does not restrain [Soletanche] from pursuing allegations in the Jordanian Proceedings as to the unconstitutionality as a matter of Jordanian law of specified legislative enactments(s) and/or decisions(s) taken by specified entities pursuant to such statutory power(s).”
26. In the course of argument at trial, the parties cited a number of authorities. There was much emphasis in argument that (as was frequently the case) the facts or circumstances of many of the authorities cited were different to those in the present case.

### **Matters not in issue between the parties**

27. As a proposition of English Law, Mr Stephen Houseman QC and Mr Owen Lloyd accept for ACT (and Mr Quirk does not challenge) that a constitutional claim to invalidate Article 17 of Law No 32 of 2000 and the JDA is not within the scope of the Arbitration Agreement or arbitrable as a matter of English Law.
28. Mr Quirk however says that this proposition and the propositions next set out proceed on the basis that a claim to invalidate the Construction Contract can be separated out, which he does not accept.

29. As propositions of Jordanian Law, Mr Houseman QC accepts and Mr Quirk does not challenge that:
- a. A constitutional claim is the sole pleaded basis for Soletanche's claim to invalidate the Construction Contract in the Jordanian Proceedings. Mr Houseman QC adds that this does not mean it is the only available claim.
  - b. Soletanche needs to claim to invalidate the Construction Contract in order to have any arguable locus or standing to pursue a constitutional claim in the Jordanian Proceedings.
  - c. It follows from b. that if the final anti-suit injunction is granted in respect of Soletanche's pursuit of a claim to invalidate the Construction Contract then Soletanche will lose whatever right or standing it may otherwise have (which is disputed) to pursue the Jordanian Proceedings.

### **Evidence of Jordanian Law**

30. Ultimately, as seen below, there are limits to the materiality of the evidence of Jordanian Law to the outcome of the trial. Nonetheless, evidence of Jordanian Law was adduced at the trial and some (but not all) of that evidence was the subject of cross examination at the trial.
31. Dr Salaheddin Al-Bashir is lead counsel for ADC and ACT in the Jordanian Proceedings. Although a lawyer of standing and experience, in the present case I cannot treat his evidence on Jordanian Law without reservations. He was close to his clients and decisions made with his clients and this compromised his objectivity as a source of evidence on Jordanian Law in this case.
32. ACT also provided evidence on Jordanian Law from Dr Ahmad K Masa'deh. This was independent expert evidence from a distinguished and careful expert who, in my assessment, was trying throughout to assist the Court impartially.
33. Dr Masa'deh was clear in his analysis (which I accept) that under Jordanian Law the Jordanian Proceedings are at present, before the Economic Chamber at the Amman Court of First Instance, simply a civil claim (and, for that matter, a civil claim that was to invalidate the Construction Contract). The Jordanian Proceedings would only be a constitutional claim once (if) they reached the benches of a constitutional court. There, the constitutional court would have nothing to do with contracts. It would decide whether to declare a law unconstitutional and stop there. It would not declare a contract void.
34. Mr Iyad Hamarneh provided expert evidence at the request of Soletanche. Mr Hamarneh is a lawyer with 22 years' experience in litigation and arbitration. I am grateful for his contribution so far as it went. I found particular force in Mr Houseman QC's criticism of the fact that Mr Harmaneh does not sufficiently explain or develop his assertion that the Construction Contract would or could be unconstitutional "by extension" if Article (17) of ASEZ Law No. (32) of 2000 was.

## **Breach of the Arbitration Agreement**

35. I regard it as plain that a claim to invalidate the Construction Contract falls within the language of the Arbitration Agreement as a “dispute (of any kind whatsoever) aris[ing] between the Parties [ie Soletanche and ACT] in connection with ... the [Construction Contract]”.
36. Mr Quirk argues that it does not because the claim to invalidate the Construction Contract is not arbitrable. I respectfully disagree. What is not arbitrable is a constitutional claim to invalidate Article 17 of Law No 32 of 2000. If Article 17 of Law No 32 of 2000 is invalid the question whether the Construction Contract is as a result invalid would be (or have been) for the arbitration tribunal.
37. As for the Development Agreement (between ASEZ and ADC) and the JDA (between ADC and ACT), their validity is not within the scope of the Arbitration Agreement. However if one or other is invalid the question whether the Construction Contract (between Soletanche and ACT) is as a result invalid would again be (or have been) for the arbitration tribunal.
38. Mr Quirk argues that there is only one claim in the Jordanian Proceedings; a constitutional claim. I have criticised above the way in which Mr Hamarneh sought to support this theme. In any event the request by Soletanche of the Jordanian Court clearly goes beyond the question of invalidity of Article 17 to ask that Court the question whether the Construction Contract is (under Jordanian Law) a nullity as a result. The consequences (if any) of the invalidity of Article 17 for two contracting parties (ADC and ACT) who have entered into and since terminated a construction contract governed by English Law is a question that is in my view both arbitrable and within the Arbitration Agreement.

## **Absence of strong reasons for not granting an injunction to prevent further breach**

39. Referring to The Angelic Grace [1995] 1 Lloyd’s Rep 87, Teare J put the position succinctly in Dell Emerging Markets (EMEA) Ltd & Anor v IB Maroc.com SA [2017] EWHC 2397; [2017] 2 CLC 417: “Anti-suit injunctions based upon an exclusive jurisdiction clause are granted unless there are strong reasons not to do so” (see also Donohue v Armco Inc and Others [2001] 1 UKHL 64; [2002] 1 Lloyd’s Rep 425 at 435 per Lord Bingham; Ust-Kamenogorsk Hydropower Plant JSC v AES Hydropower Plant LLP [2013] UKSC 35; Nori Holdings Ltd v Bank Otkritie Financial Corporation [2018] 2 Lloyd’s Rep 80 per Males J (as he then was).
40. I can find no strong reasons for not granting an injunction to prevent further breach by Soletanche of the agreement it made to arbitrate a claim to invalidate the Construction Agreement (as a “dispute ... aris[ing] between the Parties in connection with ... the [Construction Contract]”).
41. The suggestion is that in order to have standing in the Jordanian Proceedings to pursue a constitutional claim Soletanche needs to bring a civil claim before the



Economic Chamber at the Amman Court of First Instance to invalidate the Construction Contract. But that is something Soletanche agreed not to do when it entered into the Arbitration Agreement.

42. Mr Quirk presses the argument to say that the result of an injunction is that Soletanche is prevented forever from advancing what he terms “its constitutional right”, and that makes for a strong reason. I respectfully disagree. If the result of agreeing not to bring a civil claim to invalidate the contract is that it is not possible to reach the benches of a constitutional court then that is the result of the agreement that Soletanche made, not of the injunction. It has been the position since 2009, and not simply since 2018.

### **Discretion and justice**

43. The Court always retains a discretion in these matters, and it must be just for an injunction to be granted (see Glencore International AG v Exter Shipping Limited and Others [2002] EWCA Civ 528 (per Rix LJ) and section 37 of the Senior Courts Act 1981).
44. However in the circumstances of the present case I am clear that the just course is to grant a permanent anti-suit injunction. I am not unhappy to do so where, as here, Soletanche itself relied on the validity of the Arbitration Agreement and the Construction Contract in order to claim (albeit unsuccessfully) damages from ACT.

### **Damages**

45. ACT has been put to expense by the Jordanian Proceedings and claims this as damages. There was some argument whether this was a matter for the Court or for an arbitral tribunal. The suggestion was also made that in any event the question of amount be left over until the parties had my decision on the anti-suit injunction.

### **Conclusion**

46. I shall make a permanent anti-suit injunction against Soletanche in appropriate terms.
47. I shall consider any additional argument on damages (jurisdiction, liability and quantum) when I hand down this judgment and hear argument about the costs of the present proceedings before this Court.