UK DEFENCE CLUB

Soundings

A recent High Court decision serves as a timely reminder to ensure that arbitration proceedings are served on the correct party.

This may seem to be rather stating the obvious, but due to the broad nature of arbitration service provisions, the position may not always be clear cut. The consequences of invalid service can be serious, particularly in cases where a time bar is missed as a result. So litigating parties would be wise to consider the guiding principles that are usefully set out in a recent case: Glencore Agriculture B.V. and Conqueror Holdings Limited [2017] EWHC 2893 (Comm)

Glencore v Conqueror

Conqueror claimed a relatively small sum of damages for detention from Glencore. In the absence of any service provisions in the charterparty, Conqueror's claim adjuster served notice of arbitration on the individual email address of a Mr Oosterman. Mr Oosterman had been involved in the operation of the charterparty and had used that same email address during discussions with Conqueror regarding the detention. Having received no reply, Conqueror's claim adjuster proceeded to appoint Conqueror's arbitrator as sole arbitrator by default and pushed ahead with the arbitration, sending all further documents to Mr Oosterman. No reply was ever received from Mr Oosterman, or anyone else at Glencore, up until the point where an award was issued against Glencore. Mr Oosterman had left Glencore's employment a month before the service of the arbitration award.

Glencore applied to set aside the award, pursuant to section 72 of the Arbitration Act 1996 ("Arbitration Act"), on the basis that it had not been validly served with the proceedings. Conqueror argued that Mr Oosterman had implied authority, under agency principles, to act on behalf of the company and accept service.

The court, however, agreed with Glencore that Mr Oosterman, who held a junior operational role within Glencore, did not have authority to accept service, whether express, implied or ostensible. There was clearly no express authority. Equally, no authority could be implied from the mere fact that Mr Oosterman handled the operational aspects of the voyage. Mr Justice Popplewell commented that the functions of operations and dispute handling are distinct and to conflate the two ignores the serious nature of acceptance of legal process as

continued overleaf

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distinct from the company's ordinary commercial activities. Glencore's application therefore succeeded and the arbitration award was set aside.

Analysis

The Arbitration Act permits the parties to agree their own provisions for service in the contract. In the absence of an express agreement, the Arbitration Act offers relatively limited guidance as to how service should be carried out. Section 76 provides, simply, that notice may be served "by any effective means". It has been said that this rather broad approach to service, compared to the Civil Procedure Rules, is intentional and recognises the face that, by contrast to court proceedings which cater for litigants from all backgrounds, arbitrations are usually conducted by people represented by or with ready access to lawyers. Although this permissive approach may have its advantages in that the service of arbitration proceedings is simple and cost effective, it does leave scope for uncertainty as to what constitutes valid service.

The following guiding principles can be drawn from the judgment:

- Service by email can be good service, so long as the appropriate email address is used.
- Where possible, claimants should make enquiries with the company as to who has authority to accept service. Unsurprisingly, however, companies may not always be forthcoming with this information.
- Where a company publishes a generic company email address, e.g. via their company website, it may be inferred that the person who receives and opens an email sent to that address is authorised internally to deal with its contents if the subject matter falls within the scope of the business activity for which the email address is promulgated.
- So, service to a generic legal department email address should be effective, whilst service to a generic chartering department email address may not be effective.
- Where a generic email address is held out to be the only email address for that company, the sending of notice to such address may be effective.
- Where an individual's email address is used, agency principles must be applied to determine whether that person's role is such that they have authority (whether express or implied) to accept service. Even where an employee has a wide general authority to act on behalf of the employer, such authority does not generally include an authority to accept service of a notice of arbitration. If their responsibility encompasses dispute handling and they are of sufficient seniority, authority to accept service will ordinarily be implied.

Conclusion

The consequences of ineffective service can be serious. In this case, the award was set aside and the claimants had to start proceedings again, having wasted the time and costs incurred in the first instance. In an even worse scenario, the time bar may expire before the situation is rectified and valid service is made. Parties should pay careful attention to the method of service and should make active enquiries as to which address service should be sent.

Although the guiding principles set out above may be helpful, if there is any doubt at all, the safest approach would be to send documents by post to the company's registered office. Parties can also try to avoid the problem arising in the first place by including contact details for service of notices in their contracts.

If Members have any questions arising from this judgment please contact your ususal contact at the Managers' offices.

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