Neutral Citation Number: **[2020] EWHC 2145 (Comm)**

Case No: CL-2020-000318
CL-2020-000320

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: Friday, 31st July 2020

Before:

MR. JUSTICE FOXTON

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Between:

BANCO SAN JUAN INTERNACIONAL, INC.

Claimant

- and -

PETRÓLEOS DE VENEZUELA, S.A.

Defendant

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- -

MR. ADAM AL-ATTAR (instructed by **Allen & Overy LLP**) appeared for the **Claimant.**

DR. HARRIS BOR (instructed by **Dentons LLP**) appeared for the **Defendant.**

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JUDGMENT
(Remotely via Skype)

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MR. JUSTICE FOXTON :

1. This application comes before me today on the bank's ("BSJI's") application for summary judgment against PDVSA, which is the Venezuela state-owned oil company.

2. The application is made in an action in which PDVSA had not participated until yesterday evening, when Dentons came on the record and applied for an adjournment. The adjournment application is pursued before me today by Mr. Bor of counsel. There is a preliminary issue which has arisen both on Mr. Al-Attar's application for BSJI and on Mr. Bor's application for an adjournment, which is whether the present proceedings have been properly served.

3. The service argument is one which arises within a narrow compass and no one has suggested it is not something I cannot properly determine now. BSJI relies upon CPR 6.11, and contends that this is a case in which the contracts between the parties contain a term providing for the method of service, namely on a process agent, and it contends that both credit agreements in issue - clause 9.12(c) of the 2016 agreement and clause 10(c) of the 2017 agreement - permit service on such a process agent and that such service has taken place.

4. The general efficacy of such clauses has been recognised by a long line of first instance authorities, almost exclusively decisions of this court. However each clause depends upon its own particular language. The structure of the clauses in this case is as follows:

    i) PDVSA is obliged forthwith to appoint a process agent to be an authorised agent for service of proceedings in England.

    ii) If for any reason the process agent ceases to be such an agent, then PDVSA must forthwith appoint a new agent and notify that appointment within 30 days of the previous agent ceasing to be agent.

    iii) If PDVSA fails to comply with its obligation to appoint a new agent for the service of process, the lender may appoint an agent for service of process on PDVSA.

5. So far as the 2016 credit agreement is concerned, it is not disputed that Sisec Limited was appointed as process agent on 6th April 2016. That appointment expired on 6th April 2019. PDVSA failed to appoint a replacement process agent in time and, accordingly, BSJI appointed Maples as process agent where service was in due course effected on 19th May 2020.

6. Mr. Bor submits that an appointment by BSJI cannot be an appointment of PDVSA's "authorised" agent for service, which is what the clause requires. However, the word "authorised" must mean authorised under the terms of the contracts in question. If those contracts permit BSJI to appoint a process agent for PDVSA, then by definition an agent so appointed is an authorised agent of PDVSA. Any contrary argument would render the right on the part of the lender to appoint a replacement agent entirely nugatory and purposeless. Nor can I see any basis for implying what appeared to be the increasingly elaborate term for which Mr. Bor contended, that before a

replacement agent could be appointed by BSJI, PDVSA had to be notified in advance of the identity of the agent and of the terms of appointment, and given an opportunity to make recommendations or comments, with some further obligation of uncertain scope on the part of BSJI to have regard to those comments or to implement those recommendations if reasonable. That would obviously introduce considerable scope for obstruction and delay into clauses whose purpose is well recognised as being to allow simplicity and speed in service of proceedings. The argument that, in the event of a dispute as to whether a new process agent had been validly appointed having regard to such a term, BSJI could always go along to court and commence proceedings to determine that dispute, was particularly unattractive given that it would be necessary then to serve those proceedings without the benefit of the process agent provision.

7. The short answer to Mr Bor's submissions about the unfairness of PDVSA being foisted with an agent and terms of agency without its own approval is that if PDVSA does not want to be at risk of an agent being appointed who it does not like on terms of appointment it does not like, all it need do is comply with its contractual obligation to appoint in the first place. Nor can I accept that the obligation under clauses 9.12(c) and 10.12(c) does not survive what Mr Bor described as "termination" of the credit agreements, which on further analysis was a submission it could not survive after the lender had refused to lend any more funds. These agreements clearly have not been terminated, in that the predominant and characteristic obligation of the borrower, namely repayment, has yet to be performed. It is precisely when the relationship of the parties has either broken down or at least entered a new phase such that proceedings need to be commenced, that clauses of this kind are most valuable. A construction in which they cease to apply in that eventuality would be wholly uncommercial.

8. There is a more complicated issue which arises under the 2017 agreement, because no process agent was originally appointed by PDVSA. The issue that then arises is whether the clause will wholly fail to achieve its intended effect in that scenario or whether the clause entitling BSJI to appoint a "new" process agent is capable of applying in those circumstances.

9. It must be immediately acknowledged that the language of the final sentence of clause 10.12(c) might be said to pre-suppose that PDVSA had at one stage appointed a process agent and failed to replace it. It can certainly be argued that the words "such obligation" more readily relate to the replacement obligation in the previous sentence, rather than the original obligation to appoint an agent in the opening sentence. It can also be argued that the words "new agent" suggest there has already been an agent.

10. Having heard argument from the parties, I am satisfied that adopting what I conclude to be an appropriately purposive construction of the clause, that is not how that clause falls to be construed.

11. First, such a construction would allow PDVSA to frustrate the operation of the clause in the first place by failing to appoint an original process agent. It is clear from the authorities that the courts construe these clauses, so far as possible, in the light of their acknowledged purpose of allowing a speedy and certain means of service, and they seek to avoid a construction which allows the party to be served to deprive the clause of its intended benefit. I will not recite all of the authorities, but there is a convenient

summary by Popplewell J in Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd [2018] EWHC 974 (Comm) at [25]-[30].

12. Second, such an argument would put PDVSA in a better position by reason of having breached its initial obligation to appoint an agent, than if it had complied with that obligation but then breached a subsequent obligation to appoint a replacement agent. A construction of a clause in which a party is better off by reason of its own breach of contract is one that the courts seek to avoid where possible. It is no answer, to my mind, that BSJI would have known very shortly after the conclusion of the 2017 credit agreement that PDVSA had not yet appointed a process agent. The promise at the time it was given was one which both parties were entitled to assume would be performed, and there is no rational basis for distinguishing between steps that the lenders might take at or near the start of the 2017 credit agreement in the absence of an original appointment by PDVSA, and those that might be taken in response to that original failure at a later stage once it became necessary to issue proceedings.

13. In my view, the better construction of the last sentence of the clause is that the words "such obligation" embrace the general obligation of PDVSA to appoint a process agent, whether under the first sentence or the second sentence, and that an agent is a "new" agent if it is an agent being appointed for the first time. Someone who has never owned a coat may still be said to buy a new coat, notwithstanding the fact that it is not a replacement for a much loved but now no longer serviceable coat.

14. In these circumstances, it seems to me that both proceedings under the 2016 and 2017 credit agreements have been properly served and therefore PDVSA's application to adjourn will fall to be considered on that basis.

(For continuation of proceedings please see main transcript)

15. I find myself in the unusual position at 3.30pm on the last day of term of determining whether to adjourn an application for a summary judgment in an amount of the order of $80 million, listed with a half-day time estimate. I have not found the question of how to proceed an easy one to resolve.

16. It appears to be, based upon what I have heard, that any argument by PDVSA that there is a US sanctions defence is extremely difficult as a matter of law, and extremely difficult as a matter of fact. There might be rather more to be said, I do not know, on the 2007 credit agreement penalty argument which might depend on how far some of the pre-Makdessi authorities survive the restatement of the law in Makdessi. There might also be mrore to say on the issue (on which a much smaller amount turns) of how the BSJI has set about proving the amount of costs and expenses which it claims.

17. If I were approaching the question before me purely by reference to the likelihood of an arguable defence turning up if the case adjourns, it might lead me to refuse the application sought. However, the point that has ultimately weighed with me is as follows. This is a case in which it would have been open to BSJI to seek judgment in default of acknowledgment of service. Understandably they did not want to do so, because of the greater ability to enforce a judgment on the merits, a judgment in which any suggested defences have been considered and found not to be arguable. In the circumstances of the present hearing -- and I will say a little more about that in a

moment – I should be concerned if it appeared that there had not been the chance today for PDVSA to say what it wanted to say, such that any judgment was really not a summary judgment on the merits that should bring those enforcement benefits as compared with a default judgment.

18. In my view PDVSA has acted very slowly in responding to this action, and the matter seems to have reached outside lawyers late. But once it had done so, I do not think one can criticise the speed with which the outside lawyers have acted. This is their first procedural indulgence PDVSA have sought in the case. The amount of money for which judgment is sought is very substantial. Further the hearing today has involved at least the determination after full argument of one issue on service.

19. In these circumstances, with great reluctance, I am going to allow an adjournment, but I am going to allow it only on the following basis. The case is to be re-fixed with a half day estimate, because if there is anything in that executive order argument, as to which I have indicated I have the gravest doubts, it will either get off the ground and onto its legs in half a day or not at all. It is to be listed on or as soon as possible after 16th October, the first Friday in term. That does involve a short delay, but nothing like the six-month delay that was as one stage in contemplation. Whilst I accept there must be a risk of prejudice to BSJI in that period, I think there was always a risk that if PDVSA did show up for this hearing, the half day for which it was listed was not going to be enough to hear and determine all the issues. In the circumstances ,it was never going to be possible to roll the hearing into another day because it was being heard on the last day of term.

20. I will obviously allow some submissions on costs in a moment. However, it appears to me that the adjournment involves a major indulgence to PDVSA and the normal principle which applies to a party who comes along at the last minute and seeks an adjournment should apply here.

(For continuation of proceedings please see main transcript)

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