

**ENGLISH HIGH COURT REJECTS ABUSE OF PROCESS CHALLENGE IN OIL
CONTRACT CASE**

OMV Petrom SA v Glencore International AG [2014] EWHC 242

Introduction

In a decision released on 7 February 2014 in *OMV Petrom SA v Glencore International AG* [2014] EWHC 242, the English High Court rejected an application, based on allegations of abuse of process, to strike out parts of a defence in an oil dispute amid allegations of dishonesty.

Background

The claimant, OMV Petrom SA, was an oil company incorporated in Romania. The defendant, Glencore International AG, was incorporated in Switzerland, and was involved in the oil trading business. The proceedings arose out of contracts for the supply of crude oil to Romania between 1993 and 1997. Glencore had entered into contracts with a company called SC Petrolexportimport SA (“Petex”).

Unknown to Petrom, Petex commenced arbitration against Glencore in 2003 on the grounds that Glencore had not supplied crude oil of the contractual specification, but delivered blended cargoes made of up various types of cheaper and heavier crude oils.. The arbitral tribunal found that Glencore had breached the contract, but that Petex had not suffered any actionable loss on the basis that its principals (two Romanian companies) had ceased to exist and Petrom appeared to be the successor in title.

Following an assignment between Petex and Petrom of its rights under the contracts, Petrom commenced arbitration proceedings and a Commercial Court action against Glencore. The arbitration proceedings were struck out, but the Commercial Court proceedings continued.

Petrom brought an application seeking to strike out parts of Glencore’s defence on the grounds of abuse of process. Petrom contended that it would be manifestly unfair to Petrom for Glencore to be permitted to challenge the conclusions reached by the tribunal in the first arbitration between Glencore and Petex, particularly as given the passing of time, the recollections of witnesses would have dimmed and a key witness had died.

Glencore contended that it was not an abuse of process to raise these matters again, arguing a number of grounds including the confidentiality of the arbitration, that as Glencore had won the arbitration it could not challenge any findings of fact, there was no unfairness in requiring Petrom (which was not a party to the arbitration) to prove the allegations.

Decision

Mr Justice Blair rejected Petrom's application to strike out the relevant parts of Glencore's defence on the grounds that Petrom had not satisfied the "exacting test" which needed to be satisfied.

Mr Justice Blair noted the comments of Sir Andrew Morritt V-C in *Secretary of State for Trade and Industry v Birstow* [2004] Ch 1, in which he said "*If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute.*"

In Mr Justice Blair's view, the same principle was equally applicable where the previous proceedings were arbitration proceedings rather than litigation, provided the same tests were satisfied.

On the facts of the present case, it would not be an abuse of process. The charges against Glencore involved allegations of dishonesty, and the court should be slow to prevent a party from continuing to deny serious charges of which another court has previously found him guilty. This, in Mr Justice Blair's view, was enough to dispose of Petrom's application.

Other factors which were important included:

- the act that the arbitration was confidential and Glencore had filed an application to enforce;
- while seeking to deny Glencore the opportunity to re-argue its defence, Petrom did intend to relitigate the arbitral tribunal's finding on quantum;
- there had been a delay in the making of Petrom's application;
- there were significant doubts as to the effect of the order sought by Petrom as regards the issues that would, and would not, remain live at trial, and on the basis of Petrom's draft order, issues that would remain for decision at trial would be intertwined with issues to be struck out, making a sensible resolution of the issues difficult.

25th March 2014