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RECENT ENGLISH COURT DECISIONS CONCERNING ANTI-SUIT INJUNCTIONS

Mobile Telecommunications Co Ltd v HRH Prince Hussam Al-Saud [2018] EWHC 1469 (Comm) and *Sabbagh v Khoury* [2018] EWHC 1330 (Comm) and *Nori Holdings Ltd v PJSC Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm) and *Perkins Engines Co Ltd v Ghaddar* [2018] EWHC 1500 (Comm)

Introduction

This round-up is intended to summarise recent English court decisions concerning anti-suit injunctions handed down in May-June 2018 on aspects including: (a) whether summary judgment should be granted on an anti-suit injunction claim made in the course of efforts to enforce an arbitration agreement and award; (b) the English court's power to restrain participation in a foreign-seated arbitration; (c) whether the judgment in *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07)* [2009] 1 AC 1138 remained good law following the enactment of EU Regulation No.1215/2012 ("the Recast Brussels Regulation"); (d) whether, on a proper construction of an agreement to arbitrate to the extent that there were no "*reciprocal enforcement procedures*" between the United Kingdom and Lebanon, the prevention of the application of the arbitration agreement would require a binding treaty providing the rules/procedures governing the reciprocal enforcement of judgments.

(1) *Mobile Telecommunications Co Ltd v HRH Prince Hussam bin Saudi bin Abdulaziz Al-Saud (t/a Saudi Plastic Factory)* [2018] EWHC 1469 (Comm) (18 May 2018) (Andrew Baker J)

The parties entered into a loan agreement in 2010. A dispute arising out of that loan agreement was referred to a LCIA arbitral tribunal seated in London. In 2012, the defendant commenced proceedings before the domestic courts of Saudi Arabia seeking to enforce an alleged 'investment agreement', the effect of which would have been that the disputes as to the existence and effect of that agreement would be outside the scope of the LCIA arbitration proceedings. The defendant sought from the tribunal a stay of the LCIA arbitration proceedings pending the determination of the claim before the Saudi courts. By an award dated 1 October 2013, the tribunal refused the defendant's stay application. Following that

decision, the defendant procured a stay of the Saudi proceedings and participated in the LCIA arbitration.

By a final award dated 23 December 2015 the LCIA tribunal held: (a) that it had jurisdiction over the substantive claim; (b) that the 2010 loan agreement had been concluded between the parties; (c) that two alleged oral agreements (in the same terms as the 'investment agreement' forming the subject of the Saudi proceedings) had never been entered into or concluded and thus did not affect liability under the 2010 loan agreement; and (d) declared that the claimant's claim was successful and that the claimant was entitled to a payment of approximately US$527 million.

The defendant unsuccessfully challenged the final award under Section 68 (serious irregularity) of the Arbitration Act 1996, but made no challenge under Section 67 (lack of substantive jurisdiction). In 2018, the defendant caused the resumption of the Saudi proceedings, which led to the granting of an urgent interim anti-suit injunction from the English court on 1 May 2018 (continued on 14 May 2018). The claimant now applied to make that anti-suit injunction final and applied for summary judgment under CPR Part 24 on its claim. The defendant did not participate in the English court proceedings.

The Court granted the claimant's summary judgment application.

Andrew Baker J held that, having failed to timely challenge the substantive jurisdiction of the tribunal under Section 67 of the Arbitration Act 1996, it was no longer open to the defendant to assert that the arbitrators had gone beyond the scope of their jurisdiction. That the matters forming the subject of the Saudi proceedings were within the scope of the arbitration agreement was therefore beyond dispute. On that basis, the defendant's pursuit of the Saudi proceedings amounted to a breach of the arbitration agreement and an anti-suit injunction to restrain the Saudi proceedings was appropriate.

Alternatively, the defendant's full participation in the arbitration proceedings would (if necessary) have amounted to an *ad hoc* extension of the scope of the LCIA arbitration giving rise to a contractual obligation to pursue his claims within the arbitration.

The defendant had been seeking to avoid complying with the final award by procuring the resumption of the Saudi proceedings. The claimant's application for the interim anti-suit injunction had been made without any material delay. The defendant bore the burden of demonstrating why a final anti-suit injunction should not be made and that burden was not discharged.

Further, Andrew Baker J held that the claim was suitable for summary judgment. The defendant had been duly served and was choosing not to take part in the English proceedings. There was no real prospect of a successful defence to the claim for final injunctive relief to restrain the Saudi proceedings. Summary judgment was granted and the defendant ordered to cause the Saudi proceedings to be discontinued or withdrawn as soon as reasonably practicable.

(2) *Sabbagh v Khoury* [2018] EWHC 1330 (Comm) (31 May 2018) (Robin Knowles J)

The claimant, the fifth defendant and the sixth defendant were all the children of one of the founders of the Consolidated Contractors Company group ("the CCC Group").

The claimant commenced proceedings before the English courts against all of the defendants alleging a conspiracy to misappropriate her late father's monies and a conspiracy to deprive the claimant of her entitlement to shares in the CCC Group. Following the commencement of the English proceedings, the fifth defendant, sixth defendant, eighth defendant (the ultimate Lebanese parent company of the CCC Group) and tenth defendant (a Lebanese company owned and controlled by the fifth and sixth defendants) commenced arbitration proceedings in Lebanon, contending that Article 45 of the eighth defendant's articles of association conferred jurisdiction upon the tribunal which provided for shareholder-shareholder disputes and company-shareholder disputes to be referred to arbitration.

Following the tribunal's decision that it had jurisdiction over the dispute, a stay of the English proceedings was sought. That application was ultimately dismissed by the Court of Appeal (reversing a first instance judgment) on 28 July 2017 on the grounds that, because the claimant was not suing on behalf of her father as a shareholder nor were her claims founded upon the eight defendant's articles of association, the claimant was not bound by Article 45 thereof and her claims were not within the scope of the arbitration agreement.

By the instant application, the claimant applied to the English courts for an interim injunction restraining the pursuit of the Lebanese arbitration and prohibiting the defendants from seeking recognition or enforcement of any award arising out of the Lebanese arbitration.

The Court granted the claimant's application.

Robin Knowles J noted that the English courts' previous case law provided that there would need to be exceptional circumstances before it would restrain participation in a foreign-seated arbitration where the courts of the foreign jurisdiction provided appropriate supervision. The English courts had to be cautious in exercising the anti-arbitration injunction in such circumstances. However, the authorities recognised that it might be appropriate for the English court to exercise its powers in this respect where the continued prosecution of the arbitration would be vexatious or oppressive.

Robin Knowles J considered that this was in certain ways an exceptional case. In light of the decision of the Court of Appeal, that the claimant was not bound by the provision upon which the arbitral tribunal's jurisdiction was based, the defendants' continued pursuit of the Lebanese arbitration, and an award to enforce against the claimant, was vexatious and oppressive. Furthermore, there was a risk of wasted resources and delay if the arbitration were to continue in those circumstances. Robin Knowles J considered that it was a "*plain and compelling case*" for the exercise of the court's discretion.

Robin Knowles J recognised the significance of the English court restraining the prosecution of a foreign-seated arbitration. However, it was because it was the parties who had commenced the arbitration that had caused the question of the whether the claimant was bound by the arbitration agreement to come before the English court – the point had been fully argued and an answer given by the Court of Appeal – that meant that those parties were bound by the Court of Appeal's answer and its consequences.

(3) *Nori Holdings Ltd v PJSC Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm) (6 June 2018) (Males J)

The claimant companies had been involved in transactions by which loan agreements (governed by Russian law and providing for the jurisdiction of the Moscow Arbitrazh Court) secured by the claimants' pledges of shares (governed by Cypriot law and providing for

London LCIA arbitration) had been replaced by unsecured bonds. The defendant bank (which had entered temporary administration in Russia) had commenced proceedings in Russia and in Cyprus contending that those transactions amounted to a fraud. The Russian proceedings included an insolvency law claim that the transactions were not valid because of "*unequal consideration*".

The claimants instituted arbitration proceedings seeking declaratory relief that the termination of the pledge agreements had been valid by virtue of pledge termination agreements that had incorporated the LCIA arbitration clause. The claimants sought an anti-suit injunction from the English court restraining the Russian and Cypriot proceedings. The defendant resisted the application on multiple grounds, including: (1) that the claimants' application should have been made to the arbitral tribunal rather than the court; (2) that the Russian law insolvency claim was outside the scope of the arbitration clause and/or was non-arbitrable; and (3) the Cypriot proceedings could not be restrained by virtue of the Recast Brussels Regulation.

The Court granted an anti-suit injunction restraining the Russian proceedings but declined to grant an anti-suit injunction restraining the Cypriot proceedings.

Males J held that it had been open to the bank (as the defendant to an English court claim for an anti-suit injunction against proceedings on the basis that they were in violation of an arbitration agreement) to apply for a stay of those proceedings under Section 9 of the Arbitration Act 1996 – but the bank had not done so, and it was too late to do so now. The fact that anti-suit injunctive relief was available from the arbitral tribunal was not a good reason for the court to refuse to exercise its own discretion.
Males J held that the pledge agreements' arbitration clauses were broad and contained no express exclusions of any kinds of disputes. There was no good reason to imply an exclusion as regards insolvency law claims. Furthermore, the insolvency law claim was not non-arbitrable as a straightforward factual dispute as to whether the transactions amounted to a fraud against the defendant. Whilst the Singaporean courts had held that arbitration agreements should not be interpreted to cover insolvency claims and that claims arising out of an insolvency regime should be treated as non-arbitrable, such an approach was not a part of English law. The Russian proceedings were in breach of the arbitration agreements and the defendant was ordered to discontinue or cause the termination of the Russian proceedings.

However, Males J held that no anti-suit injunction should be made that would restrain the Cypriot court from determining its own jurisdiction pursuant to the Recast Brussels Regulation. In *Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07)* [2009] 1 AC 1138 ("*West Tankers*"), the Court of Justice of the European Union had held that no anti-suit injunction could be granted by the courts of one EU Member State to restrain the pursuit of proceedings in another EU Member State. The issue was whether, following the promulgation of the Recast Brussels Regulation, the decision in *West Tankers* remained good law. In *Gazprom OAO (C-536/13)* [2015] 1 WLR 4937, the Advocate-General had given an Opinion that *West Tankers* was no longer good law after the Recast Brussels Regulation. However, Males J held that that Opinion was "*fundamentally flawed*" and, in any event, had not actually been adopted by the Court of Justice of the European Union. Accordingly, Males J held that *West Tankers* remained good law and there could not be an anti-suit injunction from the English courts to restrain the Cypriot proceedings.

(4) *Perkins Engines Co Ltd v Ghaddar* [2018] EWHC 1500 (Comm) (8 June 2018) (Bryan J)

After the claimant UK company discovered that its Lebanese distributors had been selling into Syria engines supplied by the claimant under a distribution agreement, the claimant terminated the distributor agreement.

The distributor agreement, as well as a non-exclusive jurisdiction clause in favour of the English jurisdiction, contained an arbitration clause which referred any dispute arising between the parties to London arbitration "*to the extent there is no reciprocal enforcement procedures between the United Kingdom and the country in which the Distributor is located*".

When the defendant distributors commenced Lebanese court proceedings, the claimant applied to the English courts for urgent interim anti-suit injunctive relief to restrain the continued pursuit of the Lebanese proceedings.

The defendants contended that the commencement of the Lebanese court proceedings did not constitute a breach of the arbitration agreement on the basis that there were "*reciprocal enforcement procedures*" between the United Kingdom and Lebanon – an English court judgment would be enforceable against the defendants in Lebanon "*to substantially (if not identically) the same "extent" that a Lebanese judgment obtained…against the Claimant would be enforceable against the Claimant in England*".

The claimant contended that "*reciprocal enforcement procedures*" required a treaty binding upon the United Kingdom and Lebanon that provided for the procedures or rules by which judgments would be reciprocally enforced by and in those two States. No such treaty existed as between the United Kingdom and Lebanon. Furthermore, there was not substantial reciprocity between English and Lebanese enforcement procedures.

The Court granted the claimant's application for an anti-suit injunction.

Bryan J held that the claimant's contention that "*reciprocal enforcement procedures*" required a binding international treaty was the proper construction, as well as being in concordance with business common sense and reasonableness. It would enable the parties themselves to quickly and easily determine whether the arbitration agreement was engaged, rather than require the parties to engage in a difficult assessment of whether "*substantially similar*" enforcement procedures were in place as between the United Kingdom and any other given jurisdiction.

On the above basis, it was not necessary for the court to determine whether there were reciprocal enforcement procedures as between the United Kingdom and Lebanon. However, Bryan J stated that, had it been necessary to do so, he would have held that there were not.

Furthermore, Bryan J held that, even if the arbitration agreement had not been held to have been engaged, the non-exclusive jurisdiction provision contained in the distribution agreement would ultimately have applied to prevent the defendants from pursuing their Lebanese court proceedings after the claimant had commenced the English proceedings by virtue of a submission to the English jurisdiction.