Clarity over English court's jurisdiction to grant anti-arbitration injunction against foreign-seated arbitrations

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Introduction

In *Sana Hassib Sabbagh v Wael Said Khoury*,(1) the Court of Appeal partly upheld, and partly dismissed, an injunction granted by the High Court to restrain an arbitration seated in Lebanon.

In so doing, it has confirmed the English court's power to grant anti-arbitration injunctions pursuant to Section 37(1) of the Senior Courts Act 1981 in respect of a foreign-seated arbitration where the dispute does not fall within the scope of the arbitration agreement and the proceedings are, or would therefore be, vexatious and oppressive.

The Court of Appeal confirmed that this power exists even if England is not the natural forum for the dispute (as would be required for an anti-suit injunction).

The absence of an express power in the Arbitration Act 1996, read in conjunction with the principles underpinning the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, did not deprive the court of its power to grant an injunction. However, this power should be exercised only in exceptional circumstances.

Facts

This was an appeal against the grant of an anti-arbitration injunction by Justice Knowles in the Commercial Court. The injunction concerned claims being pursued in an arbitration seated in Lebanon, in respect of which similar claims had also been brought before the English courts.

The claimant in the English proceedings and respondent in the appeal (S) was the daughter and the fifth and sixth defendants were the sons of a wealthy businessman (H) who had died in early 2010. S and her two brothers were H's heirs under Lebanese law and each child was entitled to one-third of his estate. H had built up a large construction business in the Middle East, of which the eighth defendant (CCG) was the ultimate holding company. The first defendant was domiciled in England and Wales and was the anchor defendant, the others having been brought within the courts' jurisdiction as necessary and proper parties to the litigation. S's brothers, CCG and another company were the claimants in the Lebanese arbitration (the Lebanese claimants).

S brought two claims in the English proceedings:

- An asset misappropriation claim – dividends from H's shares in CCG were alleged to have been used for unauthorised investments in S's brothers' own names.
- A share deprivation claim – S alleged that following H's death, the defendants in the English proceedings conspired to deprive her of her entitlement under Lebanese law to one-third of the shares in CCG by unlawfully procuring the transfer of those shares to their own company.

In the arbitration, the Lebanese claimants sought a declaration as to the respective entitlements to shares in CCG (the shares claim) and a determination of any monies owed by CCG on H's shareholder account (the asset claim). The arbitration was commenced under CCG's articles of association, which provided that disputes should be resolved through mediation or arbitration (the arbitration agreement). The Lebanese claimants applied for a stay of the English court proceedings pursuant to

Section 9 of the Arbitration Act.

In 2017 the court rejected the stay application pursuant to Section 9 of the Arbitration Act, holding that neither S's asset misappropriation claim nor the share deprivation claim fell within the scope of the arbitration agreement (the 2017 judgment).

Significantly, the defendants in the English proceedings admitted that S's asset misappropriation claim was indistinguishable from the arbitration asset claim, which did not come within the scope of the arbitration agreement and therefore was not the subject of the pending arbitration seated in Lebanon. However, no such admission was made in relation to the shares claim.

Issues

The grounds of appeal before the Court of Appeal were twofold:

- The grant of an injunction restraining the defendants' pursuit of the asset and shares claims in a foreign-seated arbitration was not an order which:
    - the court had power to make, *a fortiori* where one of those claims was a claim which indisputably fell to be arbitrated; or
    - could ever in principle be a proper exercise of the court's discretion to make.
- The court could not restrain a foreign arbitration, in cases not involving exclusive jurisdiction agreements, unless England was the natural forum for the underlying dispute.

The defendants separated their submissions in relation to the first ground of appeal into two: one broader and one narrower (which structure the court adopted):

- The English court had no jurisdiction to grant an injunction to restrain an arbitration with a foreign seat.
- Even if the English court did have that jurisdiction, there was no such jurisdiction in circumstances where, if the claim in the foreign-seated arbitration had been brought in proceedings before the English courts, those court proceedings would be subject to a mandatory stay under Section 9 of the Arbitration Act, as was arguably the case for the shares claim.

Decision

As a preliminary point, and in contrast to Knowles in the High Court, the Court of Appeal held that the shares claim fell within the scope of the arbitration agreement. The Court of Appeal agreed with the High Court that the asset claim did not fall within the scope of the agreement. However, the Court of Appeal noted that S's share deprivation claim in the English proceedings would not be subject to the arbitration agreement, as S was not claiming on H's behalf nor was she claiming to be a shareholder in CCG. It distinguished the shares claim from the share deprivation claim on the basis that the former was a claim for entitlements to be recognised as a shareholder of CCG, whereas the latter was a claim for damages for conspiracy to deprive S of an entitlement to the shares in CCG.

Having set this baseline, the Court of Appeal then turned to the grounds for appeal:

- Ground 1a – following *South Carolina Insurance Co v Assurantie Maatshappij De Zeven Provincien NV*(2) and having considered further case law,(3) the Court of Appeal held that the Arbitration Act, read in conjunction with the New York Convention, did not deprive the court of its inherent power to grant an anti-arbitration injunction for a foreign-seated arbitration pursuant to Section 37 of the Senior Courts Act. Indeed, the Court of Appeal noted that seven Commercial Court judges had previously found "nothing surprising or questionable about the existence of this power, while acknowledging that it was to be exercised sparingly".(4)
- Ground 1b – given the Court of Appeal's finding that the shares claim fell within the scope of the arbitration agreement, the Court of Appeal held that the High Court in its 2017 judgment would have been bound by Section 9 of the Arbitration Act to stay any English court proceedings brought in respect of that same claim. It follows that the court had no power, or should not have exercised its power, to grant an anti-arbitration injunction in relation to the shares claim; otherwise, the:

    > *anti-arbitration injunction would [have been] wholly contrary to the fundamental principle underpinning the New York Convention and the 1996 Act of respecting and giving effect to arbitration agreements.*(5)

    The Court of Appeal found the logic of this submission to be "irresistible".

- Ground 2 – the Court of Appeal stressed that the general rule (with few exceptions) is that the English courts will not grant anti-suit injunctions (ie, to restrain foreign court proceedings) unless the case involves an exclusive jurisdiction clause or England is the natural forum for

the dispute in question. The rationale behind this rule is that anti-suit injunctions *prima facie* run counter to principles of comity; they indirectly interfere with the sovereign jurisdiction of foreign courts and should therefore be kept within narrow boundaries (the requirement that England be the natural forum for the dispute in question being one of the key means by which this is achieved).

However, the Court of Appeal held that that rationale does not apply to foreign arbitrations. Anti-arbitration injunctions do not interfere with the jurisdiction of foreign courts (except in the indirect way of relieving it of its supervisory role in respect of the arbitration – a role that is entirely dependent on the continuation of the arbitration itself).

Rather, anti-arbitration injunctions interfere with the fundamental principle of international arbitration that courts should uphold arbitration agreements. Accordingly, if it was clear that the dispute fell within a valid arbitration agreement, the court should not interfere; but if the converse was true, the court could grant an anti-arbitration injunction, albeit that it should exercise this power only in exceptional circumstances (save perhaps in the case of exclusive jurisdiction agreements). Where there is a question as to the validity or scope of an arbitration agreement with a foreign seat, the court will, other than in exceptional circumstances, leave this determination to the arbitral tribunal itself.

However, the court will normally have to decide whether the issues in English proceedings would fall within the relevant arbitration agreement – as the High Court did in the 2017 judgment, when it held that neither the asset misappropriation claim nor the share deprivation claim fell within the scope of the arbitration agreement.

As the asset claim did not fall within the scope of the arbitration agreement, the Court of Appeal upheld the anti-arbitration injunction in relation to that claim, even though England was not the natural forum for the dispute. In contrast, as the shares claim fell within the scope of the arbitration agreement, the Court of Appeal partially lifted the injunction in respect of that claim.

Comment

The Court of Appeal has provided welcome clarity as to the jurisdiction of the English courts to grant anti-arbitration injunctions for foreign-seated arbitrations. The court's jurisdiction to grant an anti-arbitration injunction is not limited solely to cases where English is the natural forum for the dispute. However, the court will only exercise this power with caution and will grant such injunctions only in exceptional circumstances, such as where the dispute does not come within the scope of the arbitration agreement and the pursuit of a foreign-seated arbitration amounts to vexatious and oppressive conduct. Therefore, the availability of such relief will turn in large part on the nature of the claims being pursued both before the English courts and in the foreign-seated arbitration, and on the precise scope of the arbitration agreement pursuant to which that arbitration was commenced.

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Tom Dopstadt, trainee solicitor, assisted in the preparation of this article.

Endnotes

(1) [2019] EWCA Civ 1219.

(2) [1987] AC 24.

(3) *Weissfisch v Julius* [2006] EWCA Civ 218; *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124; and *Claxton Engineering Services Ltd v TXM Olaj-Es Gazkutato Kft* [2011] EWHC 345 (Comm).

(4) *Sabbagh v Khoury* at 89.

(5) *Ibid*, at 93, 96, citing: *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd (The Barito)* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep 242.