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UPDATE

Anti-arbitration injunctions alive and well in the BVI

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Much has been written about the BVI's new arbitration regime, which provides a modern legislative framework for the conduct of arbitral proceedings within the BVI, and the recognition of foreign arbitral awards. This new regime does not, however, in any way derogate from BVI's reputation as being a leading offshore financial centre for the conduct of complex commercial litigation, with the Commercial Division of the High Court being the venue for many of the largest and most complex offshore disputes over recent years.

One such matter is the on-going dispute between Sonera Holdings B.V (**Sonera**) and Cukurova Holding A.S. (**CH**) over their interests in Turkcell, Turkey's largest telecommunications operator. In the latest decision in the on-going saga, the BVI Court of Appeal has confirmed that, notwithstanding the implementation of the new arbitration regime, and the BVI being an 'arbitration friendly' jurisdiction, the court retains the jurisdiction to grant anti-arbitration injunctions, and will do so in appropriate circumstances.[1]

Background

In brief, the history of the dispute (which is relevant for present purposes) is as follows:

- 1 September 2011: An ICC award was made in favour of Sonera in Geneva (the **Final Award**) in relation to an arbitration constituted under an arbitration clause contained in a letter agreement (the **Letter Agreement**).
- 24 October 2011: The BVI High Court made an *ex parte* order permitting Sonera to enforce the Final Award in the same manner as a judgment of the BVI High Court (the **Enforcement Judgment**).
- 25 November 2011: CH applied to set aside the Enforcement Judgment arguing, *inter alia*, that the remedies granted in Geneva were granted for breach of a different agreement, a Share Purchase Agreement (**SPA**), which itself included an arbitration clause. This application was unsuccessful (as were the appeals which followed).
- 10 April 2012: CH commenced arbitration proceedings constituted under the arbitration clause in the SPA (the **Second Arbitration**) before a new tribunal (the **Second Tribunal**) seeking, *inter alia*, compensation from Sonera in an amount equal to the Final Award (eg to 'cancel out the Final Award'). Sonera objected to the Second Arbitration being constituted and argued amongst other things that it was an abuse of process and that the principle of estoppel applied. Whilst the Second Tribunal did not declare that the Final Award was a nullity and it agreed that estoppel was relevant to certain parts of the Final Award, it took the opposite view in relation to other parts of that award and declared that the Second Arbitration ought to proceed to a determination on the merits of CH's claim.

[1] BVIHCMAP 2015/0005.

- 19 September 2014: CH produced its statement of claim in respect of the Second Arbitration disclosing that, in addition to the damages discussed above, CH was seeking orders:
  - restraining Sonera from relying on or enforcing the Enforcement Judgment; and
  - unwinding the provisional Charging Order granted by the BVI Commercial Court in respect of the Enforcement Judgment on 31 July 2014 (which was made final on 4 November 2014 – no appeal was filed by CH).
- 27 October 2014: Having become alarmed by CH's claims which, it said, 'amounted to a serious collateral attack against the Enforcement Judgment', Sonera applied to the BVI Commercial Court for an anti-arbitration injunction against CH under Section 24 of the West Indies Associated States Supreme Court (Virgin Islands) Act (Cap. 80) (the Supreme Court Act).

Sonera's Application for an Anti-Arbitration Injunction

Section 24 of the Supreme Court Act states:

> 'A mandamus or an injunction may be granted … by an interlocutory order of the High Court or of a Judge thereof in all cases in which it appears to the Court or Judge to be just or convenient that the order should be made and any such order may be made either unconditionally or upon such terms and conditions as the Court or Judge thinks just.'

However, on 1 October 2014 the new Arbitration Act 2013 (the Arbitration Act) came into force, section 3(2)(d) of which states that it is a founding principle of the Act that 'the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act'. Upon coming on for hearing before the BVI Commercial Court, Mr Justice Bannister dismissed Sonera's Application on the basis that, in light of section 3(2)(d) he had no jurisdiction to interfere in ongoing arbitration proceedings.

The Appeal

Sonera appealed to the Court of Appeal arguing that Bannister J. had erred in his interpretation of section 3(2)(d) of the Arbitration Act. Sonera argued that section 3(2)(d) had not affected the general power granted by section 24 of the Supreme Court Act and the BVI Court retained the power to grant an anti-arbitration injunction restraining a party, such as CH, from pursuing a foreign arbitration.

Following on from the above argument, Sonera also argued that Bannister J. ought to have exercised his discretion and granted the relief to Sonera by restraining CH from pursuing arbitration proceedings before the Second Tribunal.

CH opposed the application on both counts.

The Decision of the Court of Appeal

The Court of Appeal delivered its decision in June 2016. It held that the jurisdiction granted by section 24 of the Supreme Court Act had not been swept away by the 'prohibition' set out in section 3(2)(d) of the Arbitration Act.

The Court of Appeal was not persuaded by Bannister J's view that section 3(2)(d) applied to both domestic and foreign arbitrations. It held that it was clear from the way in which the Arbitration Act had been drafted that the intention was for section 3(2)(d) to operate in the same way as Article 5 of the UNCITRAL Model Law and 'to conform to the established and internationally recognised scope of Article 5 … in not extending its applicability to foreign arbitrations'.

The Court of Appeal was persuaded by Sonera's submissions regarding the position in England and Wales and the interpretation of analogous legislation dealing with arbitrations in that jurisdiction citing *AES Ust-Kamenogorsk Hydropower Plant LLP -v- Ust-Kamenogorsk Hydropower Plant JSC*[2] in which Lord Mance

[2] [2013] 1 WLR 1889.

adopted the following passage from Lord Mustill's decision in *Channel Tunnel Group Ltd and Another -v- Balfour Beatty Construction Ltd and Others*:[3]

> 'it would be astonishing if Parliament should, silently and without warning, have abrogated or precluded the use by the English Court of its previous well-established jurisdiction [to grant injunctions under Section 37 of the Senior Courts Act 1981] in respect of foreign proceedings.'

The Court of Appeal noted that section 3(2)(d) makes no reference whatsoever to section 24 of the Supreme Court Act and that such a change would have aroused much debate when the legislation was drafted given the 'far-reaching and unprecedented consequences' of removing the Court's long-standing jurisdiction to grant the equitable remedy of injunctive relief.

The Court of Appeal's view was that the BVI Court's equitable jurisdiction to grant injunctions was well established and was developed 'for the purpose of relieving against a wrong where no remedy at law would be effective for righting it' noting that it was an inherent jurisdiction as well as one granted by statute and, as such, had not been removed or affected by the principle of non-intervention as set out in section 3(2)(d).

It was noted that the power granted by section 24 of the Supreme Court Act is a widely expressed and flexible one – an injunction may be granted where 'it appears to the Court or Judge to be just or convenient that the order should be made' – highlighting that this allows the BVI Court to remain relevant and to adapt to modern times and to modern disputes.

The Court of Appeal also noted that, rather than characterising the exercise of the power granted by section 24 as the BVI Court 'interfering' in an arbitral process, it should be viewed as the BVI Court ensuring that its own process is protected from abuse.

Conclusion

Plainly, it is right and proper that the BVI Court has, and continues to have, the power to protect against vexatious claims, abuse of process and parties who would seek to subvert, nullify or render ineffective its previous orders or judgments. The Court of Appeal's decision is thus to be welcomed, confirming that the jurisdiction's efforts to implement a modern and user friendly arbitration regime do not come at the expense of limiting or encroaching on the court's jurisdiction to grant injunctive relief in appropriate circumstances.

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[3] [1993] AC 334