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Vive la différence: English High Court refused to grant an interim anti-suit injunction in support of ICC arbitration proceedings seated in Paris given the unavailability of such remedy in France

In a recent judgment of the English Commercial Court in *SQD v QYP (Rev1)* [2023] EWHC 2145 (Comm), the Court refused to grant an interim anti-suit injunction ("**ASI**") and an anti-enforcement injunction ("**AEI**") in support of arbitration proceedings seated in Paris. Whilst English Courts are ready and willing to support arbitration proceedings within the jurisdiction, and where appropriate also outside the jurisdiction, however, as was the case here, there may be exceptional circumstances militating against the granting of such relief, for example where there exists a fundamental objection to ASIs at the seat of arbitration.

Facts

The matter concerned an application by SQD, the claimant, for an interim ASI and AEI against QYP, the defendant.

The application had its basis in an agreement entered into between SQD and QYP[1] in respect of a project overseas (the "**Agreement**"). The Agreement contained express law and jurisdiction provisions, providing for English law and ICC arbitration seated in Paris.

When the work on the overseas project was suspended, QYP purported to terminate the Agreement and called for payment under it. SQD in response replied that it was legally prohibited from making the payment. QYP disagreed with that position and in its response also said that it was triggering the dispute resolution clause in the Agreement.

Instead of commencing arbitration proceedings, QYP commenced proceedings in the courts of its home country, seeking payment under the Agreement, as well as an order for the seizure of shares owned by SQD in that country. QYP in its statement of claim does not deny the existence of the arbitration clause, but contends that it would not have access to justice in the context of an ICC arbitration in Paris because it would not be able to appear or be represented, it is doubtful whether any hearing in Paris would be fair and further states that the only state in which QYP would be able to defend its rights effectively is its own country.

Shortly after having been served with QYP's statement of claim, SQD issued a request for arbitration seeking, *inter alia*, declaratory relief as to the validity and enforceability of the arbitration agreement and the jurisdiction of the tribunal, a declaration that the courts of QYP's home country did not have jurisdiction and an order that QYP must discontinue the proceedings before its home court and must not enforce any decisions of those courts.

SQD then made the *ex parte* application seeking an interim ASI and AEI from the English High Court pursuant to s. 44 of the Arbitration Act 1996 ("**AA**"), which sets out the Court's powers exercisable in support of arbitral proceedings, or alternatively, under s. 27(1) of the Senior Courts Act 1981 ("**SCA**"), which gives the Court general power to grant injunctions where it appears just and convenient to do so.

At the time of the hearing of the application by the Commercial Court, SQD had not entered an appearance in the court proceedings brought by QYP and the first hearing had not taken place. The ICC arbitration proceedings had not progressed beyond the filing of the request for arbitration.

[1] The Judgment has been anonymised.

The application itself was heard over two days and at the outset of the first hearing, the Judge gave several indications and concluded that, in principle, he would be very likely to grant an ASI and even probably the AEI, if the case involved an arbitration with its seat within the jurisdiction of the English Courts. However, the Judge was concerned whether it was appropriate to do so in this case, given that the seat of arbitration was Paris, and adjourned the hearing to the following day for SQD to provide evidence on the approach to ASIs in France. Before having been provided with evidence on this point, noting that the scenarios he had envisaged were not exclusive, he considered that in principle:

(a) it would be unlikely to be appropriate for the English Courts to grant an ASI if ASIs were readily available in France and there was no reason why SQD should not obtain it there;

(b) it might be appropriate for the English Courts to grant an ASI if ASIs were not available from the French Courts, depending on the reason why ASIs were not available; and

(c) it would be likely appropriate for the English Courts to grant an ASI where ASIs were available in France in principle, but it was practically difficult to obtain them on an interim basis, speedily and with the urgency required, especially during August.

The evidence put forward by SQD confirmed that it would not be possible to obtain an ASI in France as it would be legally impossible for a French judge to issue such an injunction and therefore this case fell into the second scenario envisaged by the Judge. The evidence put forward showed that not only is such a "tool" enabling the granting of such injunctions missing from the judge's procedural "toolkit" in France, but an ASI would contradict the fundamental principle of legal action and the constitutionally recognised limitation on the general powers of the judges who are not entitled to diminish the legal capacity of other judges.

The two main arguments ran by SQD in favour of its application were that:

1) the agreement to arbitrate was subject to English law and therefore the English Courts have an interest in securing the performance of contracts that are subject to English law; and

2) the fact that an ASI cannot be obtained in France makes the English Courts the proper forum, with the availability of ASIs being a legitimate judicial advantage.

Decision

The Judge went through the authorities dealing with ASIs sought in favour of arbitration proceedings and accepted that it was well-established that ASIs can be granted in support of arbitration proceedings under s. 37(1) of the SCA (not under AA as also alleged by SQD), and absent exceptional circumstances and delay, an ASI would be granted as a matter of course.

The Judge considered that the fact that the seat of the arbitration is outside the jurisdiction of the court could, in some cases, give rise to an "exceptional circumstance", which militates against the granting of an ASI. This was the case here.

The Judge held that England was not the proper forum and that the English Courts should not grant the ASI and AEI sought by SQD, where the law of the seat of arbitration had such a fundamental objection to ASIs. Whilst the Judge accepted in principle that it would be in the English Courts' interests that agreements subject to English law are being performed according to their terms, English Courts do not have jurisdiction to act in every case where the contract is subject to English law. The Judge considered that it was not appropriate for the English Courts to grant an ASI in this particular matter because to do so would be wholly inconsistent with the approach of the courts of the seat of arbitration and the procedural law governing the arbitration proceedings. The Judge also gave weight to the fact that the parties themselves had chosen Paris as the seat of arbitration, which must be taken as the parties having chosen a seat where ASIs were not available.

Comment

The judgment provides a comprehensive overview of the approach taken by the English Courts to ASIs in support of agreements to arbitrate and, whilst the remedy sought in this case was not granted, demonstrates the English Courts' willingness to grant ASIs in support of arbitration proceedings and to restrain breach of an agreement to arbitrate, unless there is delay or "exceptional circumstances" that militate against the granting of an ASI. It was the French Courts' fundamental, philosophical objection to ASIs, and not just the mere fact that the seat of arbitration was outside the jurisdiction, which was ultimately fatal to the application.

Please click here for a copy of the full judgment.

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