More Interesting Anti-Suit Injunction Cases

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Anti-suit injunctions have certainly received their fair share of air time (and some would say more) as a result of the *West Tankers* debate – about which this blog entry is not. Now that all eyes are on anti-suit injunctions, it is interesting to keep an eye on how the cases post *West Tankers* pan out, in particular as regards non EU states. One recent case and one pending case, both before the English Court of Appeal, are of interest as regards the interaction between anti-suit injunctions and the New York Convention. The cases are *Midgulf International Ltd v Groupe Chimique Tunisien [2010] EWCA Civ 66 and Shashoua & another v Sharma* [2010] EWCA Civ 15.

In the *Midgulf* case, the Court of Appeal issued an anti-suit injunction restraining Tunisian court proceedings brought in breach of an arbitration agreement.

The English courts' ability to issue anti-suit injunctions in respect of proceedings overseas is found in s.37 Supreme Court Act 1981 and s.44 Arbitration Act 1996. Article II of the New York Convention obliges contracting states' courts to uphold arbitration agreements by, once seized of jurisdiction, referring disputes to arbitration unless the underlying arbitration agreement is found to be *"null and void, inoperative or incapable of being performed"*. The jurisdictional aspects of this within Europe are of course now well understood following the ECJ's decision in *West Tankers*, but *West Tankers* does not affect the position as regards court proceedings commenced in apparent breach of an arbitration agreement outside of Brussels Regulation states.

In *Midgulf*, three sets of proceedings were brought in the Tunisian courts. Two were substantive claims seeking damages. The third was for a declaration that there was no arbitration agreement. The High Court granted an anti-suit injunction on an interim basis, which was then upheld (pending the appeal to the Court of Appeal) when the court subsequently found that there was no valid arbitration agreement in the underlying contract. The Court of Appeal found that there was a valid arbitration agreement, and therefore reinstated the anti-suit injunction. The Court of Appeal rejected the argument that it would not be a breach of the arbitration agreement for the declaratory action to be pursued because it would not involve the foreign courts determining the parties' contractual rights and liabilities. When there is a valid English arbitration agreement it is repudiatory for a party to ask a foreign court to declare no such agreement exists. Furthermore under English law the court may restrain a party over whom it has jurisdiction from instituting or continuing proceedings in a foreign court when it is *"necessary in the interests of justice"*. The Court of Appeal equally rejected roundly the suggestion that it could not grant an anti-suit injunction where the foreign court concerned is in a New York Convention state. The English courts have long taken the view that anti-suit injunctions and Article II of the New York Convention are compatible with one another. This case does not make any new law in that regard, but is nonetheless a useful reminder/confirmation of the English law stance in relation to the New York Convention notwithstanding the position vis-a-vis the Brussels Regulation post *West Tankers*.

In the *Shashoua* case, in 2009 the High Court issued an anti-suit injunction restraining proceedings in the Indian courts challenging certain pre-existing interim arbitral awards. The distinguishing and unusual feature of this case was that the injunction was issued in terms so as to extend to any attempts to challenge the recognition or enforcement of the awards in the Indian courts under Article V of the New York Convention, rather than dealing with the hearing of the underlying case itself. The Court of Appeal has now granted permission to appeal on two questions, namely:

• whether it is permissible for an anti-suit injunction to restrain a party from resisting the recognition or enforcement of an award under Article V of the New York Convention; and

• whether it is permissible to impose a successful application to the English court as a condition of resisting enforcement under Article V of the New York Convention.

This short blog certainly does not permit a full airing of the issues. We understand the appeal is due to be heard in April 2010. The result will plainly be of interest to successful parties in arbitration who are concerned that the unsuccessful party will seek to deploy Article V of the New York Convention to avoid the consequences of the award.

The fact that the case involves the Indian courts is of particular interest following their controversial decision in *Venture Global Engineering v Satyam Computer Services Ltd & Anr*. There, the Indian courts decided that Part 1 of the Indian Arbitration and Conciliation Act 1996 (including the ability thereunder to remove arbitrators and to set aside awards for being contrary to public policy) applied to foreign arbitrations as much as it did to Indian-seated arbitration. This case has been widely criticised on the basis that it represents an undue level of interference and has led to an increasing tendency among contracting parties to exclude Part 1 of the Indian Act from arbitration agreements.

Anti-suit injunctions have ended up very much in the spot light of late. We should expect that to continue, not just as a result of the continuing fallout from *West Tankers* but also as a result of “more interesting” (double meaning intended) cases such as those mentioned above.