The jurisdictional limits of enforcing an arbitral award: Commercial Court finds no jurisdiction to impose worldwide freezing order against third parties outside England and Wales in support of an arbitration claim

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The success of international commercial arbitration as a form of alternative dispute resolution much depends on the extent to which parties may vindicate their rights through the enforcement of any arbitral award. For this reason, to date – consistent with the pro-arbitration approach adopted by courts in many jurisdictions – English commercial court judges have shown a marked enthusiasm to use the panoply of remedies available to traditional civil litigants, both within the jurisdiction and without. The most powerful of these remedies is, of course, the worldwide freezing order which operates to restrain the respondent from disposing of assets available to satisfy any arbitral award, even where those assets are situated outside the jurisdiction.

For reasons of both theory, and practice, it is useful to consider the possible limits of that jurisprudential enthusiasm. A recent decision of the Commercial Court, *Cruz City 1 Mauritius Holdings v Unitech Limited and others* [2014] EWHC 3704 (Comm.) ("***Cruz***") (Males J), gives, perhaps, one indication of how far English judges will (or, more accurately, will not) go in their support of the beneficiaries of arbitral awards.

In *Cruz* the Court was called upon to consider whether the English courts have jurisdiction to make a freezing order in aid of enforcement of a London arbitration award against subsidiaries of the award debtor against whom no substantive claim is asserted, and who have no presence, or assets, within the jurisdiction. In a decision arguably out of kilter with the "pro arbitration" approach so often adopted by the English courts, Males J concluded that no such jurisdiction existed.

Background

The decision in *Cruz* was the latest interlocutory battle in a campaign fought by the claimant, Cruz City 1 Mauritius Holdings ("**Cruz City**"), to enforce a substantial arbitral award against the first defendant, Unitech Limited ("**Unitech**").

Although Unitech is an Indian company, its assets were held by a number of subsidiary companies incorporated outside India (the "**Subsidiary Companies**"). Cruz City had obtained receivership orders over Unitech's shareholdings in the Subsidiary Companies, and sought to reinforce those orders by obtaining a worldwide freezing order against assets of the Subsidiary Companies themselves.

In August 2014, Cruz City obtained permission to serve proceedings out of the jurisdiction on the Subsidiary Companies, seeking freezing order relief. The Subsidiary Companies applied to set aside the order for service. It was this application that Males J was called upon to decide.

Freezing order relief against third parties

Cruz City sought relief under the principle established in *TSB Private Bank International v Chabra* [1992] 1 WLR 231 ("***Chabra***"). In *Chabra*, a freezing injunction was granted against the assets of a third party company associated with the defendant, even though no substantive claim was asserted against that company. The court found that there was a good arguable case that assets that appeared to belong to the company may in fact have been the defendant's assets and therefore available to satisfy a judgment obtained against him. The court therefore determined that the company should be restrained from dealing with those assets pending the trial.

An Australian decision, *Cardile v LED Builders Pty Ltd* [1999] HCA 18, extended the *Chabra* jurisdiction beyond assets beneficially owned by the defendant, such as shares in a third party company, to include the rights of the defendant to compel the third party to disgorge property or otherwise contribute to the funds or property of the defendant. This principle has been accepted in the English courts.

However, as Males J noted in *Cruz*, even where there is compelling evidence that subsidiary companies are for all practical purposes controlled by the parent company (Unitech, in the case before him), and used to move assets, investments and debt around the group at will, either for tax or other purposes, they nonetheless remain separate legal persons. There is nothing inherently wrong about such a group structure, and the mere fact that a company should choose to arbitrate in England will not, of itself, be sufficient to bring its subsidiaries within the supervisory jurisdiction of the English courts.

The issue before the court in *Cruz*

Males J was not called upon to decide whether *Chabra* relief should be granted against the Subsidiary Companies, but whether Cruz City should be permitted to serve proceedings upon them at all.

English procedural law requires that, in order to serve proceedings out of the jurisdiction, the claimant must be able to rely on one or more of an exhaustive list of "gateways" set out by the Civil Procedure Rules (the "**CPR**"). Cruz City primarily relied on CPR 62.5(1)(c), which provides that in the context of an arbitration claim specifically, proceedings may be served outside the jurisdiction where the claimant,

(i) seeks some other remedy or requires a question to be decided by the court affecting an arbitration (whether started or not), an arbitration agreement or an arbitration award; and

(ii) the seat of the arbitration is or will be within the jurisdiction or the conditions in section 2(4) of the [Arbitration Act 1996] are satisfied.

Cruz City argued that the freezing order which it seeks by way of *Chabra* relief was a "*remedy … affecting … an arbitration award*".

Alternatively, Cruz City argued that the Subsidiary Companies were a "*proper or necessary party*" for the purposes of the gateway set out in CPR PD 6, para 3.1(3), which provides that service may be effected out the jurisdiction where:

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

The decision

In summary, Males J held as follows:

Firstly, that CPR 62.5(1)(c) was limited to a remedy sought against a party to the arbitration or arbitration agreement in question. The Subsidiary Companies were not parties to the arbitration between Cruz City and Unitech, meaning that Cruz City's attempts to serve out of the jurisdiction in reliance on CPR 62.5(1)(c) failed.

Secondly, in relation to CPR PD 6, para 3.1(3), there was no substantive claim against the proposed "anchor defendant" (i.e. Unitech), that claim having been determined in the arbitration itself.

Consequently, the court had no jurisdiction over the Subsidiary Companies, and the order permitting them to be served with the proceedings was set aside.

Comment

As noted above, the decision in *Cruz* is in apparent conflict with the pro-arbitration approach adopted by the English courts, which have consistently shown willing to construe legislative and other legal provisions in favour of supporting arbitral claims and, in particular, to permit the beneficiaries of arbitral awards to better enforce those awards through recourse to the broad range of injunctive remedies available to traditional civil litigants.

The problem which Cruz City encountered was that, in *Cruz*, the court was faced with an equally important policy: a "*cardinal rule*" established for over a century (see *The Hagen* [1908] P 189) to the effect that any doubt as to the correct construction of the jurisdictional gateways ought to be resolved in favour of the foreign defendant. As Males J noted, "*[the] policy of supporting arbitration cannot justify construing the jurisdictional gateways in a way which extends their scope beyond their proper bounds*".

Whilst that may be so, the decision in *Cruz* does create immediate difficulties for claimants seeking injunctions to support efforts to recover award monies from defaulting parties by seriously limiting the extent to which *Chabra* relief is available in international arbitration claims (which, by their very nature, are likely to include actions against group companies holding substantial assets through subsidiaries in much the same manner as Unitech). Given the fiercely fought background to this matter, it is almost inevitable that the decision of Males J will be subject to appeal. Practitioners will be watching keenly.