Arbitrating Insolvency Disputes? The English High Court Showcases Its Pro-Arbitration Stance Once Again

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On 23 September 2020, the England and Wales High Court ("High Court") rendered its judgment in *Riverrock Securities Limited v International Bank of St Petersburg (Joint Stock Company)* granting Riverrock Securities Limited ("RSL") an interim anti-suit injunction in respect of bankruptcy proceedings in Russia brought against RSL by the receiver of the International Bank of St Petersburg ("IBSP").

The court held that the avoidance claims brought in the foreign bankruptcy proceedings fell within the scope of the LCIA arbitration agreements concluded between RSL and IBSP and were arbitrable as a matter of English law, even though such claims were non-arbitrable under Russian law.

Facts Are Facts: What Happened?

IBSP was a major retail bank incorporated in Russia until it was declared insolvent. In contrast, RSL is a company whose place of incorporation is England and Wales.

The two parties concluded nine almost identical contracts ("the Contracts") whereby IBSP purchased securities from RSL in the form of credit link notes. Looking at the bigger picture, other parties had a role to play in the transactions as well, including UBS AG ("UBS") (through its London branch), a major Swiss multinational investment bank and financial services company. Essentially, by purchasing the aforementioned credit link notes, IBSP undertook the credit risk stemming from certain loans given by UBS in exchange for a coupon.

The Contracts provided for English law as the governing law of the main contract. Furthermore, they all contained an arbitration clause which stated that "[a]ny dispute under the Agreement or in connections with it shall be referred to and finally resolved by arbitration under the LCIA Rules […]". As for the seat, the arbitration clause pointed to London, England.

The Russian authorities conducted an investigation into the activities of IBSP, finding numerous irregularities and non-compliance with Russian banking law. IBSP's banking license was revoked, and eventually, on 24 September 2019, the bank was declared insolvent. The Russian State Corporation Deposit Insurance Agency ('the DIA') was appointed as IBSP's official receiver in bankruptcy.

It was against the background of the bankruptcy proceedings that IBSP sought that the Russian court invalidates the Contracts with RSL on the basis that these had been nothing but the tools to siphon off the Russian bank's assets. The laws on which IBSP relied in this context were the Russian Bankruptcy Law and the Civil Code of Russia.

In turn, RSL turned to English courts for the purposes of securing an interim anti-suit injunction. RSL opined that, as a result of the arbitration clauses that were included in the Contracts, the matters arising out of or in relation to them must be resolved through the LCIA London-seated arbitration, and not be entertained by the Russian court. Unsurprisingly, IBSP challenged RSL's application for an interim anti-suit injunction on several grounds, as discussed below.

Issues in the Case and Positions Taken by the High Court

The High Court was asked to shed light on the following issues:

1. Is the Russian Federation, as opposed to England and Wales, a natural and appropriate forum for RSL's application for an interim anti-suit injunction?
2. Is the action before the Russian court pursued by DIA, and not by IBSP?
3. Are the claims brought before the Russian court, as a matter of construction, to be deemed as falling outside of the coverage of the LCIA arbitration agreements?
4. Are the claims brought before the Russian court actually arbitrable?

In discussing the first issue listed above, the High Court referred to *Enka Insaat Ve Sanayi A.S. v. Chubb* case (discussed in a previous post on the blog) and characterised the position of IBSP as hopeless. Given the fact that the parties had chosen London, England as the legal seat of their arbitration, this in and of itself meant that the parties had also submitted themselves to the jurisdiction of English courts in certain respects, including the power of English courts to grant anti-suit injunctions when such a need arises. Thus, England and Wales indeed is an appropriate forum for seeking anti-suit injunctions in the case at hand.

In terms of the second issue, the underlying argument brought against the application was that, since DIA was behind the steering wheel when it came to the proceedings before the Russian court, the substantive matters of those proceedings were thus outside of the purview of the LCIA arbitration agreements. The High Court disagreed, concluding that the claims before the Russian court were indeed brought by DIA, but on behalf of IBSP. To support its stance, the English High Court, among other things, relied on the document with which the proceedings before the Russian court had been commenced (the said document contained the following wording: ""Applicant: [IBSP] represented by the Official Receiver State Corporation Deposit Insurance Agency"") as well as the judgment of the Singapore Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*. In this case, the Singaporean judges opined that the claims of the liquidator seeking to set aside a transaction in accordance with the (Singapore) Bankruptcy Act would be deemed as claims by the actual party to the arbitration agreement.

As for the third issue, the High Court recapitulated the "generous approach" to the construction of arbitration agreements as espoused in the case law since *Fiona Trust & Holding Corporation & Others v Yuri Privalov & Others* and basically noted that there is no place in English law for the "presumption that an arbitration agreement should not extend to claims which only arise on a company's insolvency". Moreover, the expansive wording of the parties' arbitration

agreements "("under or .... in connection with")", as per the High Court, leads to the conclusion that the claims brought before the Russian court are within the reach of the LCIA arbitration agreements.

As for the last issue listed above, the High Court noted that both under Russian and English laws the claims under the Russian Bankruptcy Law indeed belonged in the realm of insolvency. This finding, however, did not render these claims non-arbitrable as a matter of English Law. Only in rather specific circumstances would insolvency claims under English law not be arbitrable, including when the order sought would be of the type that only a court could make, something that here certainly was not the case. Furthermore, there was nothing in the facts of this case that would bring the High Court to trample "the clear policy of English law of upholding arbitration agreements".

In reaching the relevant conclusions, the High Court relied heavily on Nori Holding Ltd v PJSC Bank Otkritie Financial Corp, a case with comparable facts to the case at hand.

Key Takeaways

The judgment of the High Court is important as it confirms that avoidance claims brought under foreign insolvency law are arbitrable in England and Wales, maintaining England's position as an attractive jurisdiction for international arbitration.

The High Court did not accept IBSP's argument of non-arbitrability of insolvency claims under Russian law as a strong reason not to grant an anti-suit injunction. Instead, it reaffirmed the robust pro-arbitration approach of the English courts in holding parties to their agreement to arbitrate when the latter is broad enough to cover the claims under dispute.

The judgment demonstrates the importance of the wording of the arbitration agreement, the choice of the governing law and the seat of arbitration, reminding once again that parties should be mindful when drafting their agreement to arbitrate.

If the parties use the wording "any dispute under the agreement or in connections

with it", they should be prepared to face a broad range of claims that touch upon their contractual obligations.

Concerning the governing law, the High Court did not discuss at length which law should apply to the LCIA arbitration agreements. It merely relied on *Enka Insaat Ve Sanayi A.S. v. Chubb* to conclude that English law governs the arbitration agreements, whichever of the two approaches for identifying that law discussed in *Enka* is adopted.

Further, if the parties choose England as the seat of their arbitration, they should consider English courts' expansive interpretation of the scope of the arbitration agreement, even where the dispute that arises under the agreement invokes the application of foreign law. A party can be sure that their will to arbitrate will not be overridden by the existence of foreign bankruptcy proceedings against their counter-party.

The present judgment also delves into the question of the interaction between insolvency and arbitration.

In light of the inevitable economic consequences of the COVID-19 pandemic and the expected increase of insolvencies, arbitration may facilitate the resolution of insolvency disputes.

The case at hand is indeed a good illustration of an ongoing trend that is here to stay, namely that arbitration seems to be a growing nest in which an ever-expanding number of various claims find their place under the sun, including those on and related to insolvency.

While the judgment obstructs IBSP's receiver from pursuing bankruptcy claims against RSL in Russia for the time being, it remains to be seen whether the Russian court will give effect to it.