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The Limits of Court-Ordered Interim Relief in Support of Arbitration?

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It is important for parties to arbitration agreements to understand to what extent they might be able to obtain effective interim relief from the courts. While parties may provide in their arbitration agreement, whether through express drafting or (more often) by incorporation of institutional rules, that the parties shall be permitted to seek interim relief from any competent court, it will not necessarily be clear to the parties at the outset what steps this will entitle them to take in the courts without breaching their arbitration agreement. The measures that are available from national courts will of course depend on the local legislative framework in question. While parties may want to apply to the courts of the seat or the courts in another appropriate jurisdiction for legitimate interim relief, for example to preserve evidence or prevent the dissipation of assets, those proceedings must not stray into a determination of the merits.

Parties choosing London as the seat of their arbitration can take comfort from the considerable body of anti-suit injunction case-law, in which the English courts have clearly defined how they will uphold and enforce the parties' contractual bargain as set out in the arbitration agreement, absent strong reason to the contrary. As it was put in the seminal *Angelic Grace* case (*Angeliki Charis Compania Maritima SA v Pagnan Spa* [1995] 1 Lloyd's Rep 87), "*if an injunction is granted, it is not granted for fear that the foreign Court may wrongly assume jurisdiction despite the plaintiffs, but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to that Court at all*".

The English courts are known to take a robust approach in respect of clear attempts to circumvent an arbitration clause through the initiation of litigation in a foreign court and will be prepared to grant an injunction in appropriate circumstances. However, it is well-established that the English courts will generally not grant an anti-suit injunction against a party which has commenced court proceedings with the sole purpose of seeking interim protective measures in support of its substantive claim, brought or to be brought in arbitration. Any application to a foreign national court seeking interim measures should therefore be carefully framed so that there is no application for determination of the merits.

But what if provisional measures are obtained and it subsequently becomes apparent that the provisional measures in question would lapse upon staying or dismissing the foreign court proceedings? In the recent case of *SRS Middle East FZE v Chemie Tech DMCC* [2020] EWHC 2904 (Comm), the English Commercial Court held that seeking provisional measures should be taken as a breach of the arbitration agreement, if such provisional measures can only be maintained

by pursuing the claim on the merits before the relevant court. While the parties' arbitration agreement in this case included, pursuant to Article 28(2) of the ICC Rules, wide and general wording as to the type of interim relief it was permissible to seek from a court, this could not sensibly be read as permitting a party to seek relief that would require the final determination of the substantive merits to occur otherwise than in arbitration.

In the *SRS* case, the claimant ("**SRS**") had filed for anti-suit injunctions to restrain the defendant ("**CT**") from pursuing proceedings in the Emirate of Sharjah, UAE (the "**Sharjah Claim**") based on the orthodox test from the *Angelic Grace* case, asserting that (a) the commencement and/or pursuit of the Sharjah Claim was and would be a breach of the arbitration agreement and (b) no good reason had been shown why that should be tolerated to continue.

What made this case very unusual was that the anti-suit injunction defendant, CT, openly accepted its obligation to arbitrate the claims in question and indeed had already brought and was pursuing its substantive claims in ICC arbitration in London. CT contended that it had filed the Sharjah Claim for the establishment of its substantive rights in the Sharjah Court (after commencing the ICC arbitration) solely on the basis of advice that this filing was necessary to prevent the provisional measures it had already obtained from becoming deemed void under UAE law, and claimed that it ought not to be restrained by injunction from pursuing the Sharjah Claim if this would mean losing the protection of the conservatory measures and security which it had been granted.

The English Commercial Court disagreed. Echoing the Court's wording in *The Sam Purpose* [2017] EWHC 719 (Comm) (a ship arrest case), it held that "*if the effect of requiring the defendant to honour the arbitration agreement is that the provisional measures have to be discharged, so be it*".

The Court found that, on the evidence before it here, there was a *prima facie* case that a breach of the arbitration agreement was threatened, and no 'good reason' for not enforcing the arbitration agreement by injunction. In line with the view taken in *The Sam Purpose*, CT was not entitled to demand, as a condition to consenting to a stay of the Sharjah Claim proceedings, terms that would in substance preserve the provisional measures it had been granted. Such terms were either unnecessary, because the provisional measures would not be lost by the stopping of the Sharjah Claim, or they were inappropriate, because if the provisional measures could not be maintained under UAE law without prosecuting the Sharjah Claim through to judgment on the substantive merits, then they should not have been sought in the first place. The Court accordingly issued anti-suit injunctions restraining CT from pursuing the Sharjah Claim further and requiring it to consent to SRS's application for a stay of the Sharjah Claim in favour of the ICC arbitration.

While anti-suit injunctions can also be obtained in other common law jurisdictions, this kind of injunctive relief can be controversial, particularly in civil law jurisdictions where there is no equivalent measure. As underlined in the UK Supreme Court decision in *Enka v Chubb* [2020] UKSC 38 (discussed in this recent blog post), the grant of anti-suit injunctions is a well-established and well-recognised feature of the supervisory and supporting jurisdiction of the English courts. More recently, this has also become a well-established feature of the jurisdiction of the courts of Hong Kong and Singapore (see further here and here in respect of Hong Kong, and *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] SGCA 10 for Singapore).

An application for court-ordered interim relief in support of arbitration should of course be avoided

where such relief can only be preserved by maintaining a substantive claim in the local courts. For English-seated arbitration it is now clear that the English courts will not throw a party a lifebelt to enable it to preserve interim measures obtained from a foreign court in such circumstances.

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