

International Arbitration Alert

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Anti-Arbitration Injunctions: The Implications of Sabbagh vs Khoury

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Background

In *Sabbagh v. Khoury* [2019] EWCA Civ. 1219, the English Court of Appeal has held that English courts have the power, in “exceptional cases”, to grant anti-arbitration injunctions to restrain an arbitration seated abroad—even where England is not the natural forum for the underlying dispute.

Sana commenced litigation proceedings in England in July 2013 against her two brothers, three of her cousins and a number of companies within the CCG, alleging that the Defendants had conspired to misappropriate assets belonging to her father (referred to in the proceedings as the “asset misappropriation” claim), and deprive her of entitlement to shares in the ultimate parent company of the CCG (referred to in the proceedings as the “share deprivation claim”).

A number of the Defendants to the English proceedings subsequently commenced an arbitration pursuant to the arbitration clause in the Articles of Association of CCG, seated in Lebanon, seeking declaratory relief mirroring in substance the claims brought in the English proceedings. The tribunal appointed in the arbitration determined that it had jurisdiction to hear the case.

In July 2017, the Court of Appeal refused an application issued by the arbitration claimants to stay the English proceedings in favor of the arbitration, on the basis that Sana was not bound by the arbitration clause in the CCG Articles in respect of the asset misappropriation claim and the share deprivation claim.

Sana then applied for an anti-arbitration injunction to the English Commercial Court, requiring the arbitration claimants to take steps to stay the arbitration in Lebanon.

First Instance Judgment

Mr. Justice Knowles granted the anti-arbitration injunction on the footing that the claims made in the arbitration fell outside the arbitration clause of the CCG Articles, and duplicated claims properly brought by Sana in proceedings in England. He determined that, given that the Defendants in England had asked the English court to rule on whether Sana was bound by the arbitration clause, they were bound by the

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Court of Appeal's judgment that she was not, and therefore that it would be vexatious and oppressive for them to continue with the arbitration.

The Court of Appeal Judgment

The issues raised on appeal included whether the court has jurisdiction on these grounds to grant an injunction to restrain an arbitration with a foreign seat and, if so, whether the jurisdiction is limited to cases where England is the natural forum for the underlying dispute.

Jurisdiction to grant an injunction restraining a foreign arbitration

Lord Justice David Richards, delivering the leading judgment, determined that neither the English Arbitration Act 1996 nor the New York Convention created any sort of prohibition on the power of the court to grant an anti-arbitration injunction in respect of a foreign arbitration otherwise existing under section 37 of the Senior Courts Act 1981. The word "should" as opposed to "shall" had been used in Arbitration Act ("in matters governed by this Part the court should not intervene except as provided by this Part") to ensure that intervention was not precluded, but exercised with caution.

Granting an anti-arbitration injunction where the dispute falls within the arbitration agreement

Lord Justice Richards found that the share deprivation claim made in the Lebanese arbitration was subject to the arbitration provisions of the CCG Articles, and that the Court of Appeal had not in fact expressly or implicitly decided otherwise in 2017.

In these circumstances, the court would be required to grant a stay of any English court proceedings in which the same claims had been brought (under Section 9 of the Arbitration Act). Therefore, an anti-arbitration injunction would be wholly contrary to the fundamental principle underpinning the New York Convention and the 1996 Act of respecting and giving effect to arbitration agreements.

Is it a precondition for the grant of an anti-arbitration injunction that England is the natural forum?

The Court of Appeal's answer to this question was no.

An anti-arbitration injunction did not involve an interference with the jurisdiction of a foreign court (except in the very indirect way of relieving it of its role as the supervisory court for the arbitration). An anti-arbitration injunction involves an interference with a different principle, namely the fundamental principle of international arbitration that courts should uphold, and therefore not interfere with, arbitration agreements. Where the dispute falls outside the terms of an arbitration agreement, the court may grant an anti-arbitration injunction but only if the circumstances of the case require it.

Comment

Sabbagh v. Khoury provides welcome clarification that the English courts can, in principle, assist a party that is seeking to restrain foreign arbitration proceedings, even where England is not the natural forum for the underlying dispute.

However, parties hoping to avail the court of this power should take note that the grant of an anti-arbitration injunction remains, as per Sabbagh, "an exceptional step" and that it is an "exceptional course" for the English court to decide issues concerning the

existence, validity and scope of an arbitration agreement for a foreign-seated arbitration.

The development of authority on what constitutes “exceptional” circumstances in this respect is at a nascent stage. However, it is implicit from the Court of Appeal’s judgment that the exceptional circumstances emboldening it to intervene in Sabbagh were the fact that the Defendants to the English proceedings had already themselves submitted to the English court the question of whether the claims fell within the arbitration agreement, and had had that question answered in the negative. Subsequent pursuit of the arbitration in Lebanon would therefore, in the Court of Appeal’s determination, have amounted to “vexatious or oppressive conduct.”

Readers need not be concerned that Sabbagh v Khoury represents the start of a trend of anti-arbitration rulings in England. The judgment itself is an explicit reminder that the English courts will give effect to parties’ selection of arbitration as a means of dispute resolution, and its default position is that the supervisory jurisdiction of a foreign court will be respected.

However, it is equally clear that the English court will intervene if the circumstances are deemed sufficiently exceptional for it to do so. Specifically, parties should be wary of commencing an arbitration abroad without first obtaining a stay of proceedings where the English court has already been seized of the matters in dispute.

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