WATSON FARLEY
&
WILLIAMS

BRIEFING

ANTI-SUIT INJUNCTIONS - CHINESE SHIPOWNER RESTRAINS CARGO INTERESTS' CHINESE COURT ACTION

JUNE 2019

- THE ENGLISH COURT CAN GRANT AN ANTI-SUIT INJUNCTION WHERE FOREIGN PROCEEDINGS ARE BASED ON AN AGREEMENT CONTAINING AN ENGLISH LAW AND ARBITRATION CLAUSE, EVEN IF THE CLAIMANT IS NOT A PARTY TO THE AGREEMENT
- ANY APPLICATION FOR AN ANTI-SUIT INJUNCTION MUST BE MADE PROMPTLY

The English courts have recently granted an interim anti-suit injunction order restraining cargo interests from continuing foreign court proceedings in breach of an English law and arbitration agreement, even though they were not party to the arbitration agreement and the foreign court proceedings had been on foot for over a year[1].

"THE ENGLISH COURTS HAVE GRANTED AN INTERIM ANTI-SUIT INJUNCTION ORDER RESTRAINING CARGO INTERESTS FROM CONTINUING FOREIGN COURT PROCEEDINGS IN BREACH OF AN ENGLISH LAW AND ARBITRATION AGREEMENT."

Background

Qingdao Huiquan Shipping Co ("Owners") agreed to carry a cargo of nickel ore in bulk on board their vessel, the "CONFIDENCE", from Indonesia to China pursuant to a time charter. Charterers failed to pay hire and Owners exercised a lien over the cargo at the Chinese discharge port in an effort to recover the sum owed under the charter directly from the cargo receivers, Emori.

Owners and Emori agreed by way of a settlement agreement that Emori's "authorised agent" Shanghai Dong He Xin Industry Group Co. Ltd ("SDHX") (although not a party to the agreement) would pay a lump sum reflecting the sums owed under the charter to Owners in return for the lifting of the lien and the release of the cargo. It was also a term of the agreement that Owners would pursue legal proceedings against charterers to recover the sums due under the charter and then account to Emori for any sums recovered as a result, up to the amount received by Owners from SDHX. The agreement was explicitly governed by English law and any

[1] *Qingdao Huiquan Shipping Company v Shanghai Dong He Xin Industry Group Co Ltd* [2018] EWHC 3009 (Comm)

disputes arising under, out of, or in connection with it were to be submitted to London arbitration.

In the event, SDHX paid the settlement sum to Owners and Owners pursued legal proceedings against charterers to recover the sums owed under the charter, but no sums were recovered. SDHX alleged that shortly after the settlement agreement was executed, they had concluded a separate oral agreement with Owners in which it was agreed that the sum to be paid by SDHX was an advance for which they were entitled to a refund in any event. They accordingly commenced legal proceedings against Owners in China, claiming a refund of the sum paid under the settlement agreement and contending that, because their claim was based on the alleged oral agreement, they were not bound by the English law and arbitration clause in the written settlement agreement.

In due course the Chinese courts gave a judgment transferring the claim to a different court, which Owners contended made clear that SDHX's claim was premised upon the settlement agreement. However, the validity of the arbitration clause was left to be determined at a later date after the transfer of proceedings. Owners then applied to the English court for an interim anti-suit injunction restraining SDHX from pursuing the Chinese proceedings.

"AS A MATTER OF PRINCIPLE, THE ENGLISH COURTS WILL ORDINARILY RESTRAIN A PARTY FROM PURSUING PROCEEDINGS COMMENCED IN ANOTHER JURISDICTION OUTSIDE THE EU IN BREACH OF AN ENGLISH LAW AND ARBITRATION AGREEMENT UNLESS THERE IS A "STRONG REASON" NOT TO DO SO."

Owners' anti-suit injunction application

As a matter of principle, the English courts will ordinarily restrain a party from pursuing proceedings commenced in another jurisdiction outside the EU in breach of an English law and arbitration agreement unless there is a "strong reason" not to do so. Pursuant to the decision in *West Tankers Inc. v Allianz SpA*[2], an anti-suit injunction will not be available where the court proceedings are being pursued in the courts of an EU member state, but it may be possible to obtain a declaration that rights have been breached.

Each application is determined on its own facts and there is no fixed rule on what constitutes a "strong reason". While the applicant must show that there is a high degree of probability that there is an arbitration clause which has been breached by the commencement of the foreign court proceedings, it is then for the respondent to demonstrate that there is a strong reason for not granting the anti-suit injunction. One strong reason may be that the applicant has already effectively accepted the foreign court's jurisdiction over the claim and/or they have unduly delayed making the application. In this regard, the applicant is required to apply for the injunction promptly and before the foreign court proceedings are "too far advanced".

In this case the English court determined that although SDHX were not party to the settlement agreement, the basis of their claim in the Chinese proceedings was to seek a refund of sums paid under the agreement. The English court was not obliged to take into account the Chinese court's decision in any way but did so as evidence of the nature of SDHX's claim in China. Owners denied the existence of any oral agreement with SDHX, but this was now largely immaterial. As SDHX's claim was substantively based on the settlement agreement, they were also effectively bound by its English law and arbitration clause (even though SDHX claimed they were not party to the agreement). This decision is in line with earlier decisions in *West Tankers*, the

[2] [2009] EUECJ C-185/07

case of *The Angelic Grace*[3], and applied in several following cases including *The Jay Bola*[4] and more recently *The Yusuf Cepnioglu*[5] where a principle has been established that (a) where an agreement is in place containing an arbitration clause for the settlement of disputes and (b) any party (including a third party) brings proceedings based on the agreement itself in contravention of that clause (i.e. as in this case, in a foreign jurisdiction) then (c) this provides the court with sufficient grounds to provide an anti-suit injunction, on the basis that the court must protect the applicant's contractual right to settle disputes in accordance with the agreement.

"SDHX COULD NOT "PICK AND CHOOSE" WHICH CLAUSES OF THE SETTLEMENT AGREEMENT WERE APPLICABLE AND WHICH WERE NOT. IF THEY WISHED TO BASE THEIR CLAIM ON THE TERMS OF THE SETTLEMENT AGREEMENT, THEY COULD NOT ACT INCONSISTENTLY WITH ITS ENGLISH LAW AND ARBITRATION CLAUSE."

As a result of this principle, SDHX could not "pick and choose" which clauses of the settlement agreement were applicable and which were not. If they wished to base their claim on the terms of the settlement agreement, they could not act inconsistently with its English law and arbitration clause. The English courts would therefore step in to protect the Owners' contractual preference for dispute resolution under the agreement to be settled through arbitration.

Regarding whether there was any strong reason not to grant the injunction, the Owners were notified of the Chinese proceedings in July 2017 but did not apply for an anti-suit injunction until August 2018 (i.e. more than a year later). The English court remarked that it could be said that Owners should have made the application as soon as they became aware of the Chinese proceedings. However, in this particular case Owners had waited for the Chinese court's decision confirming that SDHX's claim in China was substantively based on the settlement agreement. This ultimately strengthened Owners' position in the anti-suit injunction application. The Chinese court's decision was made in June 2018 and Owners promptly made their application to the English court in August 2018. The English court therefore decided that Owners had not unduly delayed making the application.

Equally, there was no suggestion that Owners had effectively accepted the Chinese court's jurisdiction over the claim. At the time that the application was made, the Chinese court had not yet decided on the effect of the English law and arbitration clause and had therefore not decided whether it had jurisdiction over the claim. As a matter of procedure the Chinese proceedings were in the preliminary stages when Owners made their application to the English court, and had not reached the point where Owners were required to defend SDHX's substantive claim.

Accordingly, the English court issued an anti-suit injunction against SDHX, restraining them from continuing the Chinese proceedings.

Practical implications

This case clarifies that if (a) there is a contract subject to English law and arbitration and (b) a third party agent or associated party (who is not party to the contract) commences foreign legal proceedings in which their claim is substantively based on that contract, then the English court will grant an anti-suit injunction restraining the third party from continuing the foreign court proceedings unless there is a strong reason not to do so.

[3] [1995] 1 Lloyd's Rep 87
[4] [1997] EWCA Civ 1420
[5] [2016] EWCA Civ 316

Respondents who are unwillingly made party to foreign proceedings should clarify the basis of the claim presented to the foreign court as soon as possible in order to determine whether the claimant substantively relies on the terms of a contract that contains an English law and arbitration clause. If that is the case, it may be possible to apply to the English court for an injunction restraining the claimant from pursuing the foreign court proceedings, even if they are not party to the agreement.

"ANY APPLICATION MUST BE MADE PROMPTLY IN ORDER NOT TO JEOPARDISE ITS CHANCES OF SUCCESS."

Any application must be made promptly in order not to jeopardise its chances of success. The best time to make the application should be assessed on a case by case basis. In this case, waiting for the Chinese court's decision on the nature of the claim was helpful to Owners' case. That said, often we would recommend making the application as soon as possible after becoming aware of the foreign court proceedings and in any event before steps are required to defend the substantive claim (such as serving defence submissions). A party may have no choice but to participate in the foreign court proceedings in order to protect its interests in the event of an adverse judgment and/or to mitigate its losses resulting from the breach of the English law and arbitration clause. In such circumstances, we would recommend (1) putting the counterparty on notice that they are in breach of the English law and arbitration clause, (2) reserving rights to challenge the foreign court's jurisdiction and to claim damages resulting from the breach, and (3) challenging the foreign court's jurisdiction over the claim at the earliest opportunity and at each stage of the proceedings in order to pre-empt any suggestion that the foreign court's jurisdiction over the claim has been accepted.

Finally, in order to effectively enforce the anti-suit injunction, it should contain a penal notice. If the claimant in the foreign court proceedings does not comply with the order, they may be held in contempt of court and their directors/officers may face criminal charges in the UK. There have been instances where individuals have been arrested for contempt of court upon entering the UK as a result of failing to comply with an anti-suit injunction order. Emphasising the potentially serious consequences of failing to comply with an anti-suit injunction order is often used as a means of ensuring that the foreign court proceedings commenced in breach of an English law and arbitration clause are promptly stayed or discontinued.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this briefing, please speak with a member of our team below or your regular contact at Watson Farley & Williams.

ANDREW HUTCHEON
Partner
London

+44 20 7814 8049
ahutcheon@wfw.com

RICHARD JOHNSON-BROWN
Senior Associate
Athens

+30 210 4557300
rjohnson-brown@wfw.com

Publication code number: Europe\64449904v1