The trial must go on – UK High Court makes "exceptional" ruling that Claimants cannot discontinue claim in *Anatolie Stati and others v. The Republic of Kazakhstan* [2018] EWHC 1130 (Comm)

In what circumstances might a Claimant not be permitted to discontinue its claim? This is rarely a live issue, given that the withdrawal of legal claims is generally welcomed by Defendants. In the recent decision of *Anatolie Stati and others v. The Republic of Kazakhstan*, however, the English High Court set aside the Claimants' Notice of Discontinuance in proceedings commenced in the English courts to enforce an arbitration award, and ordered that the parties should proceed to trial despite the Claimants' wish to withdraw from the proceedings. This Update examines the reasons for this decision and its potential implications.

Background

In December 2013, following an international investment arbitration seated in Sweden, an award for $500m (the "**Award**") was made in favour of the Claimants against the Republic of Kazakhstan (the "**State**"). A few months later, the Claimants applied to the English courts for permission to enforce the arbitration award (pursuant to section 101(2) Arbitration Act 1996). As usual for this kind of application, it was made without notice to the State. The order for enforcement was granted.

The State, in turn, applied to set aside the order, on the basis that the Award had been obtained by fraud. Consequently, it was directed that the matter should proceed to trial as to whether the Award had been obtained by fraud. In making that direction, the Court had held there was *prima facie* evidence of fraud and of fraud on the arbitral tribunal such that the alleged fraud (if established) would have made a difference to the Award. The Court had found that the State had had no access to evidence of the alleged fraud prior to the Award being made, nor could it have reasonably discovered the fraud prior to the Award.

Meanwhile, the Claimants had also brought similar enforcement proceedings against the State in respect of the Award in the courts of various jurisdictions around the world, resulting in attachment orders to the value of around US$28 billion of State assets in total.

The trial in England was listed to commence on 31 October 2018 but, in February 2018, shortly before the parties were due to provide disclosure, the Claimants filed a Notice of Discontinuance (the "**Notice**") without explanation. The State applied to set aside the Notice, such that the trial should proceed, pursuant to CPR r. 38.4(1): "*where a Claimant discontinues under Rule 38.2(1), the Defendant may apply to have the notice of discontinuance set aside*". The State wished to have the allegations of fraud determined in England in order to assist it in resisting enforcement proceedings elsewhere.

Argument

In resisting the State's application, the Claimants provided two explanations for their wish to discontinue the proceedings in England, but for which they would "*relish the opportunity to proceed to trial with respect to the fraud allegations*":

1. The Claimants do not have adequate resources to continue to a trial in England;
2. The attachment orders in other countries mean that there is no longer a practical need for the Claimants to enforce in England.

The Claimants in fact undertook to the Court not to pursue further proceedings in England against Kazakhstan for all time and in any circumstance, if permitted to discontinue, and also offered to pay the State's legal costs at least on the standard basis of assessment.

The State argued that dealing with cases justly may require the Court to take account of legitimate private interest and wider public interest: if a *prima facie* case of fraud is established against an award creditor, it should not be allowed simply to disengage. The State argued that there were good reasons for the matter to proceed to trial: not only had the State already been put to substantial expense in establishing its fraud claim, but - with the benefit of disclosure and the hearing of full evidence at trial - the Court's findings may assist courts seised of related enforcement proceedings elsewhere. Further, the outcome is important to the State given the reputational risks that had been involved in publicly refusing to pay an international investment arbitration award.

Ruling

Both of the Claimants' explanations as to why they wished to discontinue at this stage were rejected by the Court. The Court noted that no documents had been provided in evidence to support the assertion that the Claimants could no longer afford to litigate in England, and the explanation did not sit credibly with the timing of the Notice, given that much time and money would already have been spent preparing for disclosure. Nor did the timing of the Notice sit credibly with the assertion that it was a consequence of attachments obtained in other jurisdictions, given that it was not served only once attachments had been achieved against State assets in other jurisdictions. The Court concluded that the true explanation for the Notice was that the Claimants did not wish to take the risk that the trial in England might lead to findings adverse to them and in favour of the State which might affect proceedings elsewhere.

In considering the State's argument that the Court should exercise its power to set aside the Notice so as to allow the trial to take place, the Court noted that CPR 38.4(1) must be construed, as with all CPR provisions, with the aim of furthering the overriding objective of dealing with cases justly and at proportionate cost. In particular, the Court rejected the Claimants' argument that the key consideration here is the presence or absence of abuse of process. The Court held that a litigant is not entitled *as of right* simply to discontinue proceedings without explanation: although there is no express requirement under the CPR that a party must provide an explanation when serving a Notice of Discontinuation, if there is an application to set aside the notice, the Court will examine what the notice was attempting to achieve and the reason for it. Importantly, the Court considered that, in furthering the overriding objective, it may be required to consider the potential impact of its decision, at least generally, on other cases.

The Court noted the related enforcement proceedings on foot in other jurisdictions, and concluded that it is at least possible that an English judgment following a trial on whether or not the Award had been obtained by fraud may be of assistance to courts elsewhere and be given some weight in disposing of the various proceedings. Accordingly, the Court ruled that the Notice should be set aside, and the matter should proceed to trial in October 2018, on the basis that the State had a legitimate interest in seeking to set aside the order of enforcement on the merits. In reaching this decision, the Court had found it relevant to note that the parties were virtually ready to provide disclosure and were already heavily invested in the proceedings, and that the State's allegations were far from speculative; all factors indicating that progression to trial would not be disproportionate in the circumstances. Remarking on the unusual nature of a decision effectively to force a now unwilling Claimant to proceed to trial, the Court acknowledged that "*if this is an exceptional conclusion, this is an exceptional case*".

Conclusion

As observed at the outset, the question facing the Court in this case does not arise in practice very often. In the majority of cases, it is a common sense proposition that a Claimant who does not wish to continue pursuing a claim that it commenced should have a general right to discontinue the proceedings

(usually subject to meeting the Defendant's legal costs). This does justice to the parties, and furthers the public policy of ensuring that the court system and its finite resources are used and allocated efficiently. This decision should therefore be viewed in the context of the "*exceptional*" surrounding circumstances, and does not signal a fundamental shift in the manner in which the vast majority of applications under CPR 38.4(1) to set aside Notices of Discontinuance will be judicially considered.

The decision provides clarification on such applications. The only cases regarding CPR 38.4 cited in the guidance to the CPR involve allegations that discontinuance would be an abuse of process. As now confirmed, the allegation of abuse of process is not the key consideration, and (as here) the presence or absence of such allegations is not determinative of an application under CPR 38.4. In this respect, this decision may be of interest to Defendants in proceedings where (as here) reputational issues are at stake, and the Defendant wishes to avail itself of a publicly available court judgment following a trial despite the Claimant's wish to discontinue. Equally, the decision may be helpful to award debtors in that it may further deter enforcement proceedings (in England at least) of arbitral awards improperly obtained.

More generally, the decision demonstrates the English courts' support of arbitration as a means of dispute resolution. The courts should not and will not blindly enforce an arbitration award if there are grounds to suspect that it may have been improperly obtained. On the other hand, it should be borne in mind that an award debtor may not unduly prevent or delay enforcement by making meritless allegations that the award was obtained by fraud: a *prima facie* case of fraud is required, and professional standards rules restrict practitioners to allege fraud only where there is (objectively) reasonably credible material establishing a *prima facie* case of fraud (in contrast to other jurisdictions, for example, where allegations of fraud may be made on the basis of a party's "information and belief"). That the courts are willing to exercise their discretion to set aside a Notice of Discontinuance in order to see that the issue is properly heard and justice is done, in a way that does not cut across the governing law of the contract or the law of the arbitral seat, can only strengthen the integrity of arbitration awards and promote confidence in the arbitration process.

If you have any questions or comments in relation to the above, please contact Mark Stefanini or Stephen Moi, or your usual Mayer Brown contact.

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