

## English High Court issues anti-suit injunction in respect of Lebanese arbitration: what are “exceptional circumstances”?

In the recent decision in *Sana Hassib Sabbagh v. Khoury & Ors* [2018] EWHC 1330 (Comm), the English High Court issued an anti-suit injunction to restrain parties from pursuing an arbitration seated in Lebanon. The decision confirms that – although “*exceptional circumstances*” are required – the Court has the jurisdiction to do so and is prepared to exercise it in practice. This Alert examines this decision, which may provide a benchmark for the kind of exceptional circumstances required for the Court to restrain a foreign arbitration by way of injunction.

### The claims

The underlying case concerns a dispute between the Claimant and, principally, her brothers, regarding entitlement to the assets of their late father Mr Hassib Sabbagh, founder of the Consolidated Contractors Company (“CCC”) group, the largest group of engineering and construction companies in the Middle East. In 2013, the Claimant commenced proceedings in the English courts against the chairman of the CCC group (the “anchor defendant” on the basis that he was domiciled in England), the Claimant’s brothers, relevant entities of the CCC group, and other directors of the CCC group, as necessary and proper parties to the litigation.

There were two material claims, referred to as the “**asset misappropriation claim**” and the “**share deprivation claim**”. The asset misappropriation claim alleged that the principal Defendants conspired shortly after Mr Sabbagh’s stroke in 2002 to misappropriate assets belonging to him and ultimately to deprive the Claimant of her entitlement to the shares in the CCC group to which she would have been entitled as an heir to her father’s estate. The share deprivation claim comprised allegations that, following Mr Sabbagh’s death in 2010, the Defendants conspired to deprive the Claimant of her entitlement

under Lebanese law to a third of her father’s shares in the CCC group holding company (“CCG”) by an unlawful transfer of all CCG shares to a separate company (“HH”) under the Claimant’s brothers’ ownership and control.

### Lebanese arbitration

Subsequent to the Claimant’s commencement of English proceedings her brothers, together with CCG and HH, commenced an arbitration seated in Lebanon against the Claimant, purportedly on the basis of an arbitration agreement in CCG’s Articles of Association, which covered two kinds of disputes “*arising during the course of the existence of the company or during its liquidation*”: individual disputes of an aggrieved party against the company, and disputes involving the general interests of the company. The Claimant did not recognise the jurisdiction of the tribunal in respect of the matters in dispute and did not engage in the Lebanese arbitration.

### Defendants’ application for stay of English proceedings

In 2014, the Defendants sought a mandatory stay of the English proceedings in favour of the Lebanese arbitration, to enforce the arbitration agreement set out in CCG’s Articles of Association. However, the English High Court<sup>1</sup> in part, and subsequently the Court of Appeal<sup>2</sup> in full, refused a stay, on the basis that the subject-matter of the English proceedings did not fall within the scope of the arbitration agreement.

The Court of Appeal had found that the asset misappropriation claim was not based on CCG’s Articles of Association, and the Claimant was therefore not bound by it given it was common ground she was not a shareholder of the company; rather, this claim was based

1 [2014] EWHC 3233

2 [2017] EWCA Civ 1120

on the general position under Lebanese law on the Defendants' alleged conspiracy to deprive the Claimant of what she ought to have inherited from her father. Accordingly, the arbitration agreement in CCG's Articles of Association could not bind the Claimant and, in any event, the asset misappropriation claim fell outside the scope of the arbitration agreement. Equally, the share deprivation claim was also based on the general position under Lebanese law: the claim was not brought by the Claimant as a CCG shareholder, but rather alleged that the Defendants unlawfully deprived her of this entitlement.

The Defendants had applied for permission to appeal the Court of Appeal's decision to the Supreme Court, but this was refused in March 2018.

### The current application

Meanwhile, the arbitral tribunal seated in Lebanon had ruled that it did have jurisdiction over the dispute, including over the asset misappropriation claim and the share deprivation claim. The Defendants had devoted substantial legal costs in the arbitration, in which the Claimant had continued to refuse to engage, and the tribunal was said to be close to giving its substantive award. Consequently, the Claimant applied to the English court for an interim injunction to restrain the Defendants from pursuing the Lebanese arbitration, to require the Defendants to take steps to stay it, and to restrain them from seeking recognition or enforcement of any award made in the arbitration.

### PRINCIPLES OF THE APPLICATION

The Judge noted the following principles regarding anti-suit injunctions, including as refined by recent authorities:

- i. the Court's power to grant the injunction sought is exercisable where it appears to the Court just and convenient to do so, pursuant to section 37(1) Senior Courts Act 1981;
- ii. where the injunction sought would restrain participation in an arbitration with a foreign (i.e. non-English) seat supervised by a foreign jurisdiction, the Court would require exceptional circumstances and even then would exercise its power with caution;

- iii. in particular, exercise of the power in such circumstances may be appropriate if continued pursuit of an arbitration would be vexatious and oppressive, which may be the case where there was no (binding) arbitration agreement.

### APPLICATION OF THE PRINCIPLES

The Judge drew the following conclusions in respect of the present application.

The Judge agreed with, and affirmed, the Court of Appeal's previous findings in the Defendants' stay application that the claims litigated in England (i.e. the asset misappropriation claim and the share deprivation claim) fell outside the scope of the arbitration agreement and did not bind the Claimant: *"The reasoning of the Court of Appeal shows why a conclusion of the Tribunal in the Lebanese arbitration that it has jurisdiction is wrong. The arbitration claimants do not accept that, but they should. They have deployed their argument about Article 45 [of CCG's Articles of Association] and it has been shown to fail"*.

In considering the argument that the English court ought not to issue the injunction because it should effectively defer to the possibility that a Lebanese court - as the court of the seat of the arbitration - might consider the scope of the arbitration agreement, the Judge held that *"the correct way to look at the matter is to treat the conclusions of the Court of Appeal as conclusions that a Lebanese court would have reached had it looked at the matter. What matters is not which court decided them, but that they are correct conclusions of Lebanese law"*. At any rate, the Judge accepted the Claimant's expert evidence that no application may be made at this stage to a Lebanese court, thus ruling out the possibility that the matter might in fact engage the Lebanese court.

It was relevant to note that there had been no undue delay by the Claimant in seeking this injunction that would affect the justice or convenience of the granting of it, given that the Court of Appeal's decision had only been handed down in July 2017. In this regard, the Judge remarked that the Defendants' continued pursuit of the Lebanese arbitration following the Court of Appeal's decision *"attracts the sense of abuse*

*of the court's process that the authorities show is part of the way in which the terms vexation and oppression are used in the present context*" – effectively (if not actually) a finding that the Defendants' conduct had been vexatious and oppressive.

Accordingly, the Judge ruled that it was just and convenient in the circumstances to grant the injunction sought and that, although the circumstances of the case were exceptional, it was "*a plain and compelling case for the exercise of my discretion*".

## Conclusion

The decision shows that the English courts, if asked, will not allow arbitration to be used as a tool of vexation and oppression (if there are findings of such conduct), even where the English courts are not the supervisory courts for the arbitration in question, and even where the key question of whether or not there was a binding arbitration agreement is a matter of foreign law. Although the decision is likely to be confined to its circumstances, as the exception rather than the rule, it may also serve as a yardstick in future cases to illustrate whether and when the threshold requirements are met. The decision may therefore be of assistance both to parties seeking injunctive relief to enforce a foreign arbitration agreement and to those seeking protection from a foreign arbitration to which they did not agree or submit.

The Court's judgment appears at pains to recognise the "*significance*", i.e. potentially impolitic appearance, of a court that is not the supervisory court injuncting parties from pursuing a foreign arbitration - potentially impolitic in appearance both because it is the Lebanese (not English) courts that have supervisory jurisdiction over the Lebanese arbitration (and so the bare result might be viewed cursorily as overreach of the English courts' jurisdiction), and more generally due to the risk of the decision being perceived as not "*arbitration-friendly*". It was perhaps with this in mind that the Judge expressed his hope that the decision was "*not one that involves any undue assertion of the jurisdiction of the courts of England and Wales*". In this regard, the Judge was careful in making clear that his decision was grounded on the fact that all parties had submitted to the English courts the question of whether the two claims fell within the arbitration agreement during the Defendants' unsuccessful application for a stay of the English proceedings, and again on appeal.

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