APPLEBY

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Anti-arbitration injunctions restored to the arsenal of the BVI court

In the latest in the long-running Cukurova saga, the Court of Appeal has reversed a decision of the Commercial Court Judge which found that the (relatively) new Arbitration Act in BVI (2013) had taken away the Court's jurisdiction to grant anti-arbitration injunctions.

Having lost the original arbitration pursuant to an award made in Geneva on 1 September 2011 (**Final Award**); and having failed on their application to set aside the enforcement judgment of the High Court in BVI dated 24 October 2011 (**Enforcement Judgment**) before the High Court in BVI, the Court of Appeal and the Privy Council, Cukurova A.S. commenced arbitral proceedings before a second arbitral tribunal.

One of the arguments raised in Cukurova's failed set-aside application was that the Final Award had been made in excess of the jurisdiction of the first tribunal because it had been constituted under and arbitration clause contained in a letter agreement, but granted remedies for breach of a different agreement – a share purchase agreement (**SPA**). That argument having been rejected the Final Award remains in full force.

Cukurova then had "revision" proceedings rejected by the Swiss Federal Supreme Court, which were dismissed on 30 April 2012, by which time they had instituted the new arbitration proceedings before a second tribunal (**Second Tribunal**) seeking: (1) a declaration that it had never entered into the SPA; and (2) compensation against Sonera Holding B.V. (**Sonera**) in an amount equal to that awarded to Sonera in the Final Award (plus costs).

Sonera raised objections before the Second Tribunal on grounds that (1) the new arbitration was an abuse of process; (2) there was an *estoppel per rem judicatum* which precluded the grant of the relief sought; and (3) that proper application of the *Kompetenz-Kompetenz* principle precluded the Second Tribunal from reviewing the First Tribunal's decision as to its own jurisdiction.

Finding itself not to be bound by those parts of the Final Award that it decided "trespassed" upon matters falling within the SPA arbitration clause, Cukurova scored a partial victory with the Second Tribunal, at least to the extent that the proceedings would not fall at the first hurdle and would proceed to a determination on the merits.

When, however, in compliance with the procedural order made by the Second Tribunal, Cukurova filed its statement of claim, its new claims amounted (on Sonera's case) not to seeking an opposite award to the Final Award effectively to cancel it out, but to a *"serious collateral attack against the Enforcement Judgment"* seeking

to restrain Sonera from relying on that Judgment and ordering them to "unwind" the charging order made final by the BVI Court on 4 November 2014.

In response, Sonera applied in BVI for an anti-arbitration injunction under its general power and s.24 of the West Indies Associated States Supreme Court (Virgin Islands) Act, Cap 80 (**Supreme Court Act**).

That application failed at first instance where the Commercial Court Judge took the view that the BVI's new Arbitration Act (2013) had taken away the Courts' jurisdiction to grant injunctive relief placing reliance mainly on s.3(2)(b) of that Act which provides *"the Court shall not interfere in the arbitration of a dispute save as expressly provided in this Act".*

In its Judgment handed down on 23 June 2016, the Court of Appeal has reversed that decision holding that:

> *"Section 3(2)(b) of the Act does no more than state the policy as to how arbitrations are to be viewed and governed in the Virgin Islands, with a clear prohibition or warning to the court in the seat of the arbitration not to interfere in an arbitration. This warning to the court contained in section 3(2)(b) as a guiding principle informs the Court's approach to an arbitration, be it domestic or foreign. A clear distinction should be drawn, however, between interference with an arbitration on the one hand, and restraining a party who may be using, be it an arbitral process or a court process, in a manner which may be said to be vexatious, or oppressive and abusive of the court's own process, on the other hand."*

The argument that the Arbitration Act ousted the court's existing jurisdiction also failed because it did not meet the standard that a provision of a statute seeking to oust the court's jurisdiction must be expressed in clear terms.

The Court of Appeal also held that, although the seeking of an award in an amount equal to the Final Award was not necessarily or inherently to be considered as being subversive of the Enforcement Judgment, the orders that were in fact sought (which only became clear when Cukurova filed its statement of claim) were aimed directly at the Enforcement Judgment and plainly did not follow the Request for Arbitration which the Second Tribunal had had before it when it decided that the matter could proceed to be determined on the merits.

Plainly, a collateral attack (of the type found by the Court of appeal to exist) is one of the behaviours which anti-suit injunctions are intended to police, and in principle there is no reason why arbitrations brought in these circumstances should be treated any differently from court proceedings – they should have no special protection.

The Court of Appeal has upheld that principle in reversing the decision in the Court below.

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