

## Arbitration-related Injunctions

Stephen has been involved in a number of cases in the High Court and Court of Appeal in recent years concerning injunctive and other forms of relief in relation to pending or concluded arbitrations. Most of these concern applications for anti-suit and similar forms of injunctive relief ('ASI' for short); many, but not all, feature arbitration with its juridical seat in this jurisdiction. Such cases often involve associated jurisdictional or procedural issues, such as service of proceedings (e.g. by alternative method) upon foreign defendants, the court's jurisdiction over non-arbitrating / non-contracting parties involved in the relevant conduct, etc. Underlying disputes arise in a variety of commercial contexts, including banking, finance, insurance, corporate mergers, shipping, energy, and sport.

The cases fall into the following broad categories:

### **[1] ASI relief to protect against a 'foreign attack' on an English-seat arbitral award**

*Noble Assurance Co & another v. Gerling-Konzern* [2008] Lloyd's Rep IR 1; [2007] 1 CLC 85 (Toulson LJ) – Acted for Shell and its captive insurer, Noble. Proceedings commenced vexatiously by reinsurers in Vermont seeking to set aside an award in London arbitration (Bermuda Form). Declaratory relief as to the meaning and effect of award granted in favour of both claimants, i.e. the arbitrating party (Noble) and also its parent company (Shell); ASI relief refused on discretionary grounds, including international comity.

*C v. D* [2008] 1 All ER (Comm) 1001; [2008] 1 Lloyd's Rep 239 (CA) – Acted for major pharmaceutical company (insured). Proceedings in New York threatened by insurers by way of attack upon finality of arbitral award made in London (Bermuda Form). Until the subsequent CA decision in *Sulamérica* (see under [2] below), *C v. D* was the leading authority on ascertainment of the proper law of an (English seat) arbitration agreement contained within a substantive contract with an express choice of foreign law.

### **[2] ASI relief to protect pending/prospective arbitration proceedings**

*Sulamérica Cia Nacional & others v. Enesa Engenharia SA & others* [2013] 1 WLR 102; [2012] 2 All ER (Comm) 795; [2012] 1 Lloyd's Rep 671 (CA) – Acted for local insurers in reinsurance-led all risks programme covering construction of hydroelectric facility in Brazil. ASI relief granted to restrain proceedings (including for interim anti-arbitration relief) in

Brazilian courts. CA decision is now the leading authority on ascertainment of the proper law of an (English seat) arbitration agreement contained within a substantive contract with an express choice of foreign law. (First instance decision of Cooke J is reported at [2012] 1 Lloyd's Rep 275.) The decision in *Sulamérica* has been the subject of published academic and practitioner analysis, e.g. *Arbitration International* 2013 (Volume 29 Number 1) at p.115.

*BNP Paribas SA v. OJSC 'Russian Machines' & others* [2012] 1 Lloyd's Rep 649; [2012] 2 CLC 312 (CA) – Acted for major bank seeking ASI (different forms, mandatory & negative, including 'anti-avoidance' injunctions) against six associated corporate defendants on both contractual and non-contractual grounds, including vexatious collusion/conspiracy. Underlying Russian proceedings reached cassation appeal. Jurisdiction and service-related issues, including service by alternative method upon foreign defendants. (First instance decision of Blair J reported at [2012] 1 Lloyd's Rep 61; [2011] 2 CLC 942; [2011] Arb LR 49; see also Teare J's decision on deemed retrospective service [2012] EWHC 1023 (Comm).)

*Ukrainian Dispute (Anonymous)* - Acted on behalf of claimants in November 2012, obtaining urgent parallel ASI relief, i.e. from both LCIA tribunal and Commercial Court on the same day, to restrain pursuit of proceedings brought unlawfully by defendant in the Ukrainian Courts. Underlying dispute concerned escrow regime for retention monies following an asset sale and purchase. Simon J granted an interim order pursuant to s.44(3) of the 1996 Act / s.37 SCA 1981 against both the contracting (arbitrating) party and non-contracting (non-arbitrating) party, involving shareholder / subsidiary context. Proceedings were in private and the identity of the parties remains confidential.

### **[3] Other injunctive relief relating to pending arbitration**

*Digicel v. West Indies Cricket Board* (2008) – Acted for Caribbean telecoms company which was exclusive sponsor of West Indies Cricket Team, seeking interim injunction from Commercial Court under s.44(3) of the 1996 Act in order to hold the ring pending expedited arbitration for final relief. Underling dispute related to the '*Stanford '20/20 for \$20 million'*' cricket match held in Antigua on 1 November 2008 (which the England Cricket Team lost spectacularly). Press coverage included <http://news.bbc.co.uk/sport1/hi/cricket/7662344.stm>

*Telenor East v. Altimo Holdings & another* [2011] EWHC 735 (Comm); [2011] Arb LR 9 (Gloster J) – Acted for defendant shareholder (Altimo) resisting mandatory interim injunction designed to prevent a proposed strategic merger in the mobile telecoms sector, involving VimpelCom and Wind Telecom. Expedited arbitration in London. The merger

subsequently completed in April 2011, creating the world's sixth largest mobile telecoms provider by subscriber numbers at the time.

*Ouais Group Engineering & Contracting v. Saipem* [2013] EWHC 990 (Comm) (Poplewell J) - Acted for claimant seeking interim prohibitory and mandatory injunctive relief to prevent payment out under a series of on demand guarantees / performance bonds issued by Lebanese banks, against backdrop of pending arbitration in London. Underlying dispute concerned termination of contracts for onshore gas field installation and maintenance.

### **Other arbitration-related matters in the High Court**

*The Law Debenture Trust Corp v. Elektrim Finance & another* [2005] 2 All ER 476; [2005] 2 Lloyd's Rep 755 (Mann J) – Acted for major bondholders in pre-emptive proceedings designed to protect proposed arbitration. Decision concerns the interplay of ss.9 & 72 of the 1996 Act, as well as proper construction of a combined jurisdiction and arbitration clause giving one party a unilateral option to select arbitration. Underlying dispute related to default / acceleration under €510m Elektrim bond issue (related HL decision in *Concord Trust v. Law Debenture Trust Corp* [2005] 1 WLR 1591).

*Weissfisch v. Julius & others (later known as "A v. B")* (2006) – Involved in the 'anti-arbitration injunction' aspect of this matter, but did not appear in the Court of Appeal.

Numerous ss.67-69 applications (mostly unreported), for example:

- Acted for FA Premier League (led by Sir Sydney Kentridge QC), successfully resisting s.69 application for permission to appeal against supervisory arbitral decision in respect of disciplinary action against West Ham Football Club (Carlos Tevez / Javier Mascherano affair during 2006/07 football season)
- Acted for successful defendant in *Leibinger v. Stryka Trauma* [2006] EWHC 690 (Comm), striking out a s.67 challenge on procedural grounds and issue estoppel relating to German proceedings (also dealing with proper law of an arbitration agreement appended to a substantive commercial contract)
- *Canadian Forest Navigation v. Minerals Transportation* (Steel J, 6/8/01): successfully resisted application under s.68 of the 1996 Act
- *The 'Trade Nomad'* [1998] 1 Lloyd's Rep. 58 (Colman J): s.69 appeal from arbitrator's award on a standard-form charterparty

Updated 18/6/14