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Arbitrator not an employee

The Supreme Court has reversed the decision of the Court of Appeal in *Nurdin Jivraj v Sadruddin Hashwani* [2011] UKSC 40, which was reported in the last issue of this newsletter. The Court of Appeal had confirmed a first instance decision that an arbitrator was employed to provide a service and contracted to do the work personally, and that accordingly Regulation 7 of the Employment Equality (Religion or Belief) Regulations 2003 applied.

The case involved an arbitration agreement which had stipulated that the arbitrators had to be members of the Ismaili community and for them to be respected members of the community and holders of high office within it.

The Regulations prohibit such discrimination. There is an exception where being of a particular religion or belief is a genuine occupational requirement, or where an employer has an ethos based on religion and being of a particular religion or belief is a genuine occupational requirement. That was held to be inapplicable by the Court of Appeal which felt that membership of the Ismaili community was clearly not necessary for the discharge of the arbitrator's functions.

The Supreme Court instead held that an arbitrator was not "employed" within the meaning of the Regulations. The role of an arbitrator was not naturally described as employment under a contract personally to do work. He was an independent provider of services and not in a relationship of subordination. Rather, he was a quasi-judicial adjudicator and an independent provider of services.

In any event, according to the majority of the Justices of the Supreme Court, the "Ismaili community" requirement would have fallen within the exception for genuine occupational requirements. As the judge at first instance had established, there was in the Ismaili community an enthusiasm for keeping dispute resolution within the community that amounted to an "ethos based on religion". ■

Foreign orders no defence to contempt of court

In the long running matter of *Masri v Consolidated Contractors and others* [2011] EWHC 1024 (Comm) the court had made orders in support of a judgment, including two receivership orders, various freezing orders and orders requiring the provision of affidavits of assets.

The defendants were Lebanese and, after the English orders were made against them, they obtained orders from the Lebanese courts to the effect that they could not provide the information, nor account to the court appointed receivers, unless the initial order had obtained recognition or exequatur in Lebanon. In the circumstances, compliance with the English court's orders would expose the defendants to criminal sanctions in Lebanon. The defendant companies were placed under a Lebanese judicial administration which also prevented compliance with the English orders.

The defendants argued that, since they owed their primary allegiance to the Lebanese courts, they could not be found to be in contempt, or should not be punished for their contempt, for their failure to comply with the English orders.

In response, the English court held that it was not the case that the English court was unable to require a person to do, or not to do, an act which may be in breach of the law of some foreign jurisdiction. The court has discretion. When making the orders which were the subject of a contempt application, the English court may already have taken into account the possibility of such a conflict. It would be at that stage for the defendant to consider whether the order may cause him

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problems in a foreign jurisdiction, and he can then try to persuade the English court not to make the order, or to vary it.

The court was concerned that foreign companies incorporated in "jurisdictions of convenience" would easily be able to obtain blocking orders. Instead the court "*should give little weight to the protestation of contemners that they are bound by restrictions obtained at the behest and with the approval of themselves and their shareholders. A party cannot suffer himself to be bound in chains, from which he could, if he wished, release himself*".

Accordingly, the defendants were held to be guilty of contempt, with sanctions to be imposed at a further hearing. ■

Second Court is Second Seised

The Court of Appeal has reversed the decision reported in the last issue of this newsletter headed *Second Court is First Seised*.

The case concerned Article 28 of the Brussels Regulation which is about "related proceedings". It provides that "(I) where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings … (III) For the purpose of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear them together to avoid the risk of irreconcilable judgments resulting from separate proceedings".

Article 30 provides that a court will be deemed to be seised at the time when the necessary documents are lodged with the court, provided that there has been no failure to take subsequent steps, or if the document has to be served before being lodged at court, when it is received by the responsible authority for service.

In *Stribog v FKI Engineering* [2011] EWCA Civ 622, proceedings had been commenced in Germany, and subsequently "unrelated" proceedings between the same parties were commenced in England. The German proceedings were then amended to include issues raised in the English proceedings, and so made them related. An application was then made under Article 28(1) for the English court to stay its proceedings. The court at first instance held that although the German proceedings were first to be commenced, the court that was first seised of the relevant issues was the English court, therefore it was not able to stay the proceedings.

The Court of Appeal has decided that that is the wrong approach. Rix LJ held that the correct question was *"Once you have found two related and pending actions and seek to stay one of them, invoking Article 28, which of the two courts was the first to achieve seisin of one or other of those actions?"* That is determined by Article 30 which refers to the proceedings, and the timing of their initiation.■

Enforcing a declaratory award

The Commercial Court has confirmed that declaratory arbitration awards may be enforced by the court under section 66 of the Arbitration Act 1996, where there is a reasonable prospect of the award creditor establishing the primacy of the award over an inconsistent judgment.

In *West Tankers v Allianz SpA* [2011] EWHC 829 (Comm) there was a London arbitration and, in breach of the arbitration clause, the defendant commenced parallel proceedings in the Italian courts. The English court granted an anti-suit injunction restraining the pursuit of the Italian proceedings, but the European Court of Justice held that that was in breach of the Brussels Regulation. The anti-suit injunction was discharged and the Italian proceedings continued.

By taking the novel step of applying for an English court judgment to confirm the declaratory arbitration award, the claimant would be able to rely on Article 34(3) of the Brussels Regulation which precludes the enforcement of a judgment of another European State if it is "irreconcilable with a judgment given in a dispute between the same parties in a Member State in which recognition is sought".

The court held that it was free to enforce a declaratory award if to do so would make a positive contribution to securing the material benefit of the award. ■

Comment: *This is a convenient device to overcome the problem caused by the prohibition on inter-European anti-suit injunctions for breach of arbitration agreements.*

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Human rights and foreign judgments

The Commercial Court has refused to recognise a judgment of the Supreme Commercial Court of Ukraine, on the ground that it breached the right to a fair trial, as set out in Article 6 of the European Convention on Human Rights.

In *Merchant International Company Ltd v Natsionalna Aktsionerna* [2011] EWHC 1820 (Comm) the claimant sought to enforce in England a Ukrainian judgment obtained against the defendant energy company in 2006. The claimant had been unable to enforce in the Ukraine because Ukrainian law protected energy companies against the execution of judgments.

The English action was brought as a common law "action on a judgment", and an English judgment was obtained by default.

The defendant then applied to have the English judgment set aside on the ground that the defendant had applied to the Supreme Commercial Court of Ukraine to set aside the original Ukrainian judgment. In the event, and before the application was heard, the Supreme Commercial Court of Ukraine had set aside the judgment and remitted it for a retrial. The original 2006 judgment was therefore no longer final.

The claimant argued that English courts should not recognise the Supreme Commercial Court of the Ukraine decision. The court held that it was a well established principle that a foreign judgment was impeachable on the grounds that its recognition would reach public policy. Under section 6 of the Human Rights Act 1998, which incorporated the ECHR into English law, it is unlawful for public authorities to act in a way that is incompatible with the ECHR. Accordingly, if a foreign judgment breached the ECHR, it would not be recognised.

The court held that the Supreme Court's decision was a "clear disregard of the principles of legal certainty", and should not be recognised. Accordingly the application to set aside the default judgment was dismissed. ■

Sanctioning scheme of arrangement

In the matter of *Rodenstock GmbH* [2011] EWHC 1104 (Ch) the court was asked to sanction a scheme of arrangement of a solvent German company.

Its "centre of main interest" was in Germany and it had no establishment or assets in the United Kingdom. However, it had a significant debt which had been advanced with the facilities expressed to be governed by English law and containing an English exclusive jurisdiction clause. The majority of the senior lenders under the facility were situated in England, and the company therefore applied for a sanction of the arrangement pursuant to the Companies Act 2006.

A hub of legal expertise

Statistics contained in a Ministry of Justice paper "*Plan for Growth: Promoting the UK's Legal Services Sector"* demonstrate the importance of London as a centre for international dispute resolution.

- Over 200 foreign law firms now have offices in London.
- More international and commercial arbitrations take place in London than in any other city in the world.
- 90% of commercial cases handled by London law firms now involve an international party.
- The total number of disputes resolved through arbitration and mediation in the UK reached 34,541 in 2009, up from 19,384 in 2007.

The court facilities in London now include the recently opened Rolls Building, in Fetter Lane, which houses the Admiralty and Commercial Court, the Mercantile Court, the Technology and Construction Court, Patents Court and the Chancery Division. Its spaciousness and hi-tech and hi-spec facilities are an enormous improvement compared to St Dunstans House, the cramped and shabby building for too long endured by international litigants.

In considering its jurisdiction and discretion there were three important issues: (1) there was no comparable jurisdiction under German law to sanction schemes of arrangement for solvent companies; (2) in a similar case, the German court had recently declined to recognise an English judgment sanctioning a solvent scheme; and (3) a minority of the companies' creditors opposed the scheme and opposed the application for sanction.

The test for whether the English court had power to sanction a scheme was based on the company being "liable to be wound up". The European Insolvency Regulation had substantially reduced the jurisdiction of the court to wind up overseas companies based elsewhere but there remained the entitlement to wind up on the public interest ground, since that was not a "civil and commercial matter" within the meaning of the Regulations. Apart from that, if a company continued to have both its seat and centre of main interest in Germany, and no establishment in the UK, the English court had no jurisdiction to wind it up.

However, there was nothing in the Regulation which restricted or excluded the courts from exercising jurisdiction in relation to sanctioning schemes of arrangements, as long as the company was "liable to be wound up", albeit in Germany. The choice of English law and the exclusive jurisdiction clause provided sufficient connection to enable the court to exercise its discretion to sanction the scheme. In the circumstances, it was appropriate for the court to do so. ■

Bank's claim justiciable

The Commercial Court in *JSC BTA Bank v Mukhtar Ablyazov and others* [2011] EWHC 202 (Comm) has refused to stay proceedings brought by a Kazakh bank against its former Chairman.

The bank had been nationalised in February 2009, and the defendant was previously its Chairman and a political opponent of the Kazakh government. The claim was for monies allegedly taken by the defendant.

The defendant argued that proceedings should be stayed as an abuse of process and contrary to public policy. There had been a flagrant breach of international law and proceedings were brought for the collateral purpose of political oppression. They mounted to an indirect enforcement of a penal, revenue or other public law, which could not therefore be entertained, and in all the circumstances they were a breach of the defendant's rights under Article 6 of the European Convention on Human Rights, as it would not be possible to have a fair trial.

The court directed that two issues be determined first: (1) whether it was arguable that the proceedings involved indirect enforcement of a foreign penal, revenue or other public law; and (2) whether the stay application raised issues which were not justiciable.

On the first issue, the court considered whether the central interest in bringing the claim was governmental in nature. It drew a distinction between the bank and its shareholders, and took the view that the bank's claims had potentially existed before the bank was nationalised and had not changed. The claim appeared to be in the interests of the bank. A large proportion of any recovery would go to the bank's creditors rather than to the government. Accordingly, the court was not prevented from dealing with the claim.

On justiciability, the bank argued that the application for the stay would require the court to rule on the legality of the nationalisation of the bank, which involved the exercise of sovereign power within a state's territory. The court agreed that the circumstances did not fall within any exceptions to the act of state doctrine and so the court would not hear claims that involved inviting the court to decide whether the nationalisation of the bank was valid. ■

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