Case No: 2014/1276

Neutral Citation Number: [2015] EWHC 1665 (Comm)

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

7 Rolls
Building
Fetter Lane
London, EC4A 1NL

Date: Thursday, Thursday 16th April 2015

BEFORE:

MR JUSTICE PHILLIPS

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BETWEEN:

H & C S HOLDINGS PTE LIMITED **Claimant**

- and –

RBRG TRADING (UK) LIMITED **Defendant**

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MR CHIRAG KARIA QC (instructed by **Jackson Parton**) appeared on behalf of the **Claimant**
MR TIMOTHY YOUNG QC (instructed by **Stephenson Harwood**) appeared on behalf of the **Defendant**

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Judgment

(As Approved)

MR JUSTICE PHILLIPS:

1. On 6 November 2014 Eder J, on a without notice application by the claimant, ordered that the claimant (a Singapore company) have leave to enforce an arbitration award against the defendant (an English company) in accordance with sections 101, sub-section 2 and 101 sub-section 3 of the Arbitration Act 1996. The award was for US $1,900,000 together with interest and was made by Mr Francis Xavier SC in a Singapore arbitration; the award being dated 2 January 2014. The award related to a contract for the sale of Brazilian iron ore entered on 25 September 2009 and numbered 1446.

2. In the early part of 2015, one year after the award and after the order giving leave to enforce, the defendant commenced its own arbitration in Singapore in respect of an earlier contract for the sale of Brazilian iron ore dated 11 September 2009 and numbered 1440. The defendant claimed US $1.5 million, which was said to be an admitted debt in relation to that contract plus damages for non-performance of approximately US $900,000.

3. The defendant now applies, whether by setting aside or varying the order of Eder J, for a stay of execution of the award for any English judgment based thereon pending determination of its new arbitration claim. The defendant offers to pay the full amount of the award and costs into court as a condition of the stay. Mr Timothy Young QC, who appears today for the defendant, does not suggest that there is any concern as to

the enforcement of any award it may obtain in the new arbitration against the claimant and states that the practical purpose of the stay would be to ensure that the claimant is motivated to cooperate in the pursuit of the second arbitration and not to delay its outcome.

4. Mr Young accepts that any such stay would be pursuant to or governed by the principles in CPR Part 83, Rule 7, subrule 4 which provides that the court may grant a stay of execution of a judgment if the court is satisfied that there are special circumstances which render it inexpedient to enforce the judgment or order. Mr Young contends that the special circumstances in this case are that the contracts in question were closely linked such as would give rise to an equitable set off in relation to claims arising from these contracts had they been litigated together. They were not so litigated together (he says) because the rules of the Singapore arbitration did not permit the defendants to bring such cross claims arising from a different contract.

5. However, this is a belated claim which was not foreshadowed in any way during the preceding five years. Although contract 14.40 was referred to briefly in the transcripts of the hearing in the arbitration relating to contact 14.46 there was no suggestion of a claim arising from 14.40. Mr Young says this was because the defendant understood that the US $1.5 million was admitted by the claimant and therefore it was unnecessary to advance or indeed refer to a claim for that sum, but no evidence of that belief was put before me and I have to assume that had such a belief indeed been held, the defendant's representatives would have ensured that it was attested to in the witness evidence which was filed. At the end of the day, what the defendant's submission amounts to is that it should be entitled to a stay of execution of an award and of an English judgment based thereon for no more than the tactical purposes of giving the claimant an incentive not to delay the defendant's new arbitration.

6. In my judgment, that position does not disclose any special circumstances which would favour a stay and certainly not such as would render the enforcement of the award inexpedient. That would be the case in relation to any English judgment, all the more so given that this is a convention award where there is a clear statutory provision that such award should be enforced, save in very limited circumstances. This was recognised by Potter J in Far Eastern v Sovcomflot [1995] 1 Lloyd's Rep 520 where he said at page 524 that the court will:

> "...rarely, if ever, regard it as appropriate to make such an order [for a stay] in respect of a Convention award, when, by definition, under the Convention, the time for enforcement has arrived. Plainly the rationale for the Convention is aimed at the enforcement of foreign arbitral awards unless the unsuccessful party is seeking to have it set aside in the country where the award was made (in which case an adjournment of the enforcement proceedings under s.5(5) may be appropriate) or there is some fundamental ground of objection on the grounds provided for in s.5 (2)-(4).
>
> I do not venture to speculate in what circumstance if any, might induce a Court in another case to grant a stay in respect of a judgment upon a Convention award properly obtained. I am certainly satisfied that none such exists in this case."

7. In my judgment, no such grounds exist in this case either and I would refuse to exercise my discretion to grant a stay of execution. Mr Karia QC, who appears for the claimant today, submits that there is not in fact even a discretion to order a stay of enforcement of execution in respect of an arbitration award or English judgment based thereon. Given the views I have expressed above, it is not necessary for me to decide that point; however, I would record that Mr Karia's argument is that the grounds on which the English court can refuse to recognise or enforce an award are comprehensively and exclusively contained in section 103 of the Arbitration Act 1996 which gives effect to the provisions of the New York Convention. He submits that as it is common ground that none of those grounds arises in this case; there is simply no power or discretion which would permit the court to refuse to enforce this award. However, in Far Eastern Shipping Company v Sovcomflot cited above, Potter J said it as follows:

> "It seems to me that, having elected to convert an award into an English judgment, the plaintiff ought in principle to be subject to the same procedural rules and conditions as generally apply to the enforcement of such judgments and I do not consider that the wording of the 1975 Act dictates a different conclusion.
>
> Section 3(1) of the 1975 Act provides for enforcement either by action or in the same manner as the award of an arbitrator is enforceable by virtue of s. 26 of the Arbitration Act, 1950. Section 26 of the Arbitration Act, 1950 provides:

> (1) An award on an arbitration agreement may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in the terms of the award.

Taken separately or together, there is nothing in the text of either of those sections to suggest that, once judgment has been entered in terms of the award, it shall for the purposes of enforcement be treated in any different manner from any other judgment or order, (and thus be subject in its turn to O.

47, r. 1). Nor do I consider that the terms of s. 5(1) achieve, or are intended to achieve, a different result. It seems to me that the "enforcement" which "shall not be refused" as therein referred to, is intended simply to refer to the enforcement contemplated by the sections I have just quoted. This seems to me to be inherent in the structure of s. 5 itself, in which sub-s. (2) Plainly refers to a number of grounds of fundamental objection or defect which it contemplates as justifying the Court to refuse to make an order for enforcement at all. Equally, sub-s. (5) Is addressed to the power of stay open to the Court before enforcement of the award is ordered; it does not purport to deal with the regime of enforcement after entry of judgment.

Nor am I driven to a contrary conclusion by reference to the New York Convention itself. Article III which

imposes the obligation of mutual recognition upon Contracting States provides:

> Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Thus, while the Convention is concerned to see that the rules of the enforcing State do not impose "more onerous conditions" than in respect of domestic awards, it does not require that a regime any more advantageous to a foreign judgment creditor be created in respect of Convention awards.

In the course of his argument, Mr. Boyd submitted that, to grant a stay upon a judgment enforcing a Convention award was, in effect, to refuse enforcement of it (contrary to s. 5(1)). His submission was that, on any ordinary understanding of the word, “enforcement” means "immediate enforcement". Whereas that may be so in other contexts, I do not think it is a correct interpretation in the context of enforcement by execution following entry of judgment. Accordingly I consider that the Court has, in principle, jurisdiction to entertain and accede to an application of this kind.”

8. The distinction drawn by Potter J between the restrictions on the court refusing to make an order for enforcement on the one hand and a regime for enforcement after entry of judgment on the other hand appears clear and entirely logical and none of the authorities or other materials to which Mr Karia has referred today, in my judgment, undermine that clear distinction. The approach of Potter J was followed by Hamblen J in Continental Transfer Technique Limited v The Federal Government of Nigeria [2010] EWHC 780 (Comm) at paragraph 14 where he said:

> “Given that a judgment has already been entered in terms of the award pursuant to section 103(3) of the 1996 Act and CTTL is now seeking to enforce that judgment, the relevant discretion is that which can be invoked to stay enforcement of any judgment of the court, namely that provided by RSC Order 47 Rule 1(1), which is not yet replaced by an equivalent provision in the CPR. This is confirmed by the decision in Far Eastern Shipping Company v Sovcomflot [cited above].”

9. Since that decision, Order 47, Rule 1(1) has been replaced by CPR Part 83, to which I refer above. Had it been necessary to do so, I would have followed the reasoning of Potter J and Hamblen J, but as I say, it is not necessary for me to formally decide that point. For those reasons, this application is dismissed.