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British Virgin Islands dispute resolution and insolvency client update

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In the October 2016 edition of our dispute resolution and insolvency bulletin we will be focusing on six recent cases from the British Virgin Islands Court of Appeal and British Virgin Islands Commercial Court.

Overview

The cases, include:

- *Sonera Holding BV v Cukurova Holding A.S.*
- *Hualon Corporation (M) Sdn Bhd (in receivership) v Marty Limited*
- *(1) Zorin Sachak Khan (2) Afaque Ahmed Khan (3) Sasheen Anwar v (1) Gany Holdings (PTC) SA (2) Asif Rangoonwala*
- *(1) Alexander Katunin and (2) Sergey Taruta v JSC VTB Bank*
- *Dmitry Garkusha v (1) Ashot Yegiazaryan, (2) Vitaly Gogokhiya, (3) Hackham Invest and Trade Inc, (4) Limerick Business Holding Inc*
- *BVIHC (Com) 2014/0171 - John Shrimpton & Anr v Dominic Scriven & Ors*

Sonera Holding BV v Cukurova Holding A.S.

This Court of Appeal ("CA") decision clarifies and confirms the availability of anti-arbitration injunctions in the BVI notwithstanding language in the BVI's Arbitration Act 2013 (the "Act") preventing the Court from interfering in the arbitration of a dispute.

The facts were complex and related to a long-running dispute between Sonera and Cukurova. In summary, Sonera had prevailed in an arbitration against Cukurova brought under an agreement to arbitrate found in a letter agreement, although the arbitration related to a separate share purchase agreement (the "SPA"). Sonera successfully applied to enforce its arbitral award in the BVI in the same manner as a BVI judgment.

Cukurova's attempts to contest enforcement of the award in the BVI failed. Faced with this, Cukurova launched a second arbitration under the arbitration agreement in the SPA (rather than the letter agreement). In that arbitration Cukurova sought, amongst other things, an award against Sonera in equal amount (and thus cancelling out) the award in Sonera's favour in the first arbitration.

The second arbitral tribunal decided that it was not bound to "recognise" those parts of the first award which "trespassed" on matters falling to be determined under the SPA. The tribunal therefore decided that Cukurova's arbitration under the SPA could proceed to a full determination on the merits.

However, when Cukurova issued its full statement of claim in the second arbitration, it became apparent to Sonera that Cukurova was asking the second tribunal to do far more than simply issue an award that would effectively cancel out the first. The relief that it sought from the second tribunal also sought to prevent Sonera from relying on the BVI Court's order enforcing the first award and on a subsequent charging order issued by the BVI Court.

Sonera therefore issued proceedings in the BVI for an injunction preventing Cukurova from seeking this relief. At first instance the BVI's Commercial Court found that section 3(2)(b) of the Act prevented it from granting an anti-arbitration injunction. That section provides that "the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act".

The CA disagreed with this finding, for two main reasons. One, because it held that the Act could not have ousted the Court's very wide jurisdiction to grant injunctions pursuant to section 24 of the Supreme Court Act, without clear language, and that there is no such language in the Act. Two, because "a clear distinction should be drawn [...] 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 or abusive of the court's own process, on the other hand".

The CA found that the second arbitration, insofar as it was a collateral attack on the on the order enforcing the first arbitration in the BVI, would be "plainly subversive of the [BVI] court's judgment and a direct interference in this court's process" and should be restrained by injunction.

The CA emphasised the sparing nature and exceptional circumstances in which this sort of relief will be granted, particularly given the language in section 3(2)(b) of the Act, and made clear that the injunction was aimed only at the relief sought in the second arbitration to the extent that it constituted an attack on the BVI Court's prior judgment and processes.

Hualon Corporation (M) Sdn Bhd (in receivership) v Marty Limited

In this unusual decision of the BVI's Commercial Court, Mr Justice Leon ordered a stay in favour of arbitration on the application of a claimant in BVI Court proceedings.

By the time it applied for a stay, the claimant (Hualon) had issued a claim form and statement of claim, and there had been a considerable number of interlocutory applications, although the respondent (Marty) had not yet filed its defence. Hualon asserted that it had only become aware of the arbitral agreement to which it claimed to be subject after having issued its BVI proceedings. As such, it applied to stay its own claim in favour of arbitration. It might be thought rather peculiar that a party could claim to be unaware of an arbitration agreement but, at the same time, to have been bound by it. However the facts of the case were unusual and the Judge found that Hualon had not been aware of the arbitration agreement and that it was not willfully blind to it.

Marty resisted Hualon's application for a stay. Marty argued that section 18(1) of the Arbitration Act (the "Act") is subject to a temporal limitation. Section 18(1) requires a party to request a referral to arbitration prior to submitting its first statement on the substance of the dispute. Marty argued that because Hualon had already filed its statement of claim it was too late for Hualon to attempt to refer the dispute to arbitration.

The Judge disagreed with this for two reasons.

One, because the temporal limitation in section 18 of the Act is not found in the New York Convention, to which the BVI is a signatory. Although the Act is not expressed to be subject to the New York Convention (contrary to the UNCITRAL Model Law on which the Act is largely based) the Judge found that the New York Convention should nonetheless "trump" the Act in this respect. He reached this conclusion on the basis that he found it to be more consistent with the BVI's pro-arbitration public policy, and because it would result in the BVI complying with its international treaty obligations to other members of the New York Convention.

Two, because the Judge felt that to restrict a claimant to making a referral to arbitration prior to the filing of its statement of claim would render the right for a claimant to refer essentially meaningless, given that this would ordinarily be the claimant's first step in any proceedings in which it might subsequently wish to seek such a referral. Instead the Judge considered that the claimant's first statement on the substance of the dispute should be taken as arising at a later time, such as perhaps the defendant's filing of its defence. As such he found that Hualon was not out of time under section 18(1) in any event.

Furthermore, the Judge found that it was appropriate to stay the BVI proceedings in favour of arbitration pursuant to the Court's general case management powers, given the BVI's pro-arbitration stance.

The Judge also held that when reviewing the existence and scope of an arbitration clause on an application to refer to arbitration, the Court should only undertake a prima facie review of the clause rather than the full merits approach applied in the English courts.

This an unusual case – not least because it involved a claimant in court proceedings asking to refer its own case to arbitration – and is somewhat specific to its facts. Nonetheless it highlights the BVI Courts' continued pro-arbitration stance.

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(1) Zorin Sachak Khan (2) Afaque Ahmed Khan (3) Sasheen Anwar v (1) Gany Holdings (PTC) SA (2) Asif Rangoonwala

In this case the Court of Appeal ("CA") reaffirmed some important principles with respect to evidential presumptions that apply where assets are transferred to trustees, and the fundamental obligation of a trustee to render an account. The case also involved the application of the rule in Re Hastings Bass (dec'd) in the BVI, but leaves much to be desired: the CA held that the effect of the rule is to render void ab initio a trustee's decision given in breach of it, thereby adopting a position inconsistent with the leading case of Pitt v Holt; Futter v Futter, where the UK Supreme Court established that the rule renders such decisions voidable rather than void. The CA also proceeded to make an order removing a trustee without any discussion of the principles to be applied in granting such important relief. As an authority the ruling must therefore be handled with some care.

The case concerned a trust, the ZVM Trust, established by a wealthy businessman from Pakistan. The settlor had passed away, and steps had been taken by the corporate trustee (of which the son was a director) to appoint the assets to the son and terminate the trust in 1998. A dispute broke out between the settlor's daughter (Zorin) and his son (Asif), who were beneficiaries of the trust, concerning whether the assets had been properly accounted for, which was part of a wider dispute about succession to the assets in the settlor's estate. The trustee had resisted Zorin's repeated requests for an account, and she applied to and obtained an interim order from the BVI court that an account be given. Zorin took the view that the account given by the trustee was deficient and sought additional reliefs from the court, including orders to surcharge the account, to set aside the 1998 appointment of assets that terminated the trust, to remove the trustee, and ordering that Asif was liable to account as constructive trustee for assets that he had knowingly received in breach of trust.

The first instance judge held that the burden of proof was on Zorin to demonstrate that the account given was deficient and she had failed to discharge that burden, and he rejected the claim that the appointment in 1998 could be impugned as a sham or should otherwise be set aside as a breach of trust. It followed that the application for the other reliefs failed. Zorin appealed various findings of fact and law.

The CA re-iterated certain well established principles about the circumstances in which an appellate court will overturn findings of fact made by a trial judge at first instance, emphasizing (among other things) that it should be very reluctant to do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's findings that are sought to be impugned. The CA reaffirmed the important principles in the decision in Re Curteis to the effect that where a settlor has established a trust, any subsequent transfers of assets to the trustee, or any acquisition of property in the name of the trustee by the settlor, are rebuttably presumed to be held by the trustee on the terms of the trust. The judge's finding that the onus was on Zorin to prove the inadequacy of the account was incorrect, and having demonstrated that the trustee held certain assets that did not appear in the account rendered the onus was on the trustee to give an adequate account of these which it had failed to do.

The CA rejected arguments to the effect that the appointment of the trust fund to Asif in 1998 was a sham or that it could be set aside on the basis that the trustee had not applied its mind to what it was doing and simply 'rubber stamped' the appointment. The court did however hold that there was a breach of trust as a result of the trustee's clear failure to take into account considerations relevant to the appointment, namely, what assets it was actually appointing to Asif, and cited the case of Re Hastings Bass (dec'd) in support. The CA went on to hold that the 1998 appointment was "void and liable to be set aside".

The CA dismissed the appeal against the judge's rejection of the knowing receipt claim against Asif, finding that there had been no evidence before the judge on which such a claim could have been sustained. Having rejected the claim that Asif was personally liable to account as constructive trustee for the assets knowingly received in breach of trust, the CA went on to hold that Asif was required to return the trust assets in his possession which were improperly transferred to him. The CA remarked that if Asif asserted that he had parted with the assets, the trustee should be able to follow or trace them with a view to determining the veracity of Asif's contention.

The court then set down the orders it had decided to make, and curiously ordered the removal of the trustee and the appointment of a new trustee in its place without any discussion of the principles on which this was being done.

Comment: While the case is an instantiation of some important trust principles in the BVI context, the CA's holding that the effect of applying the rule in Re Hastings Bass renders the trustee's decision in question void rather than voidable seemingly fails to appreciate that BVI law is now at variance with the position of English law on this issue: the Supreme Court having held the opposite in the leading case of Pitt v Holt; Futter v Futter. No reason was given in the CA decision for this divergence. It is also puzzling that the CA felt able to make the order for the trustee's removal, clearly allowing the appeal on this point, without any discussion of the legal basis or reasons for doing so.

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(1) Alexander Katunin and (2) Sergey Taruta v JSC VTB Bank

The Court of Appeal ("CA") considered the test for submission to the jurisdiction, in a case which helps to clarify the extent to which a party can take action in court proceedings while also seeking to preserve its right to challenge jurisdiction.

Russian bank JSC VTB (the "Bank") obtained a judgment in Russia against Alexander Katunin in his absence. Mr Katunin is a Russian national and resident who owns companies incorporated in the BVI. The Bank brought proceedings to enforce the judgment in BVI, and rather than effecting service on Mr Katunin through government channels pursuant to the Hague Convention (applicable in the BVI and Russia), applied under Civil Procedure Rule ("CPR") 7.8A to serve by an alternative method. The BVI judge ordered that the Bank could serve at the registered addresses of Mr Katunin's BVI companies.

Mr Katunin acknowledged service and reserved his right to challenge jurisdiction and service. The Bank applied for summary judgment, in opposition to which Mr Katunin's BVI lawyers filed an affidavit (the "Affidavit"). Mr Katunin then applied to set aside the alternative service order and challenge jurisdiction. The Bank argued that by filing the Affidavit, Mr Katunin had submitted to the jurisdiction. The first instance judge dismissed Mr Katunin's applications on those grounds.

In relation to jurisdiction, Mr Katunin made three arguments:

- that the Bank had waived its right and was estopped from making the submission argument (by course of conduct and correspondence);
- that the first instance judge had applied the wrong test in determining that the steps taken by Mr Katunin were "inconsistent" with his contention that the court did not have jurisdiction; and
- that the steps taken my Mr Katunin were not wholly unequivocal.

The CA dismissed the waiver/estoppel ground and stated that the Bank was entitled to run the argument. However, the CA found that the first instance judge had applied the wrong test, and clarified the position, stating that any conduct said to amount to submission to the jurisdiction must be wholly unequivocal, in the sense that a disinterested bystander with knowledge of the case would be in no doubt about it. On the facts of the case, the CA found that the test was not met:

- at all stages Mr Katunin made it clear that he wished to challenge jurisdiction and reserved his right to do so;
- the Affidavit was not filed in support of any application by Mr Katunin, rather in respect of the Bank's summary judgment application; and
- in the Affidavit, Mr Katunin expressly reserved his right to challenge jurisdiction, and he made such an application shortly thereafter within the time period prescribed in the CPR. Therefore, this was not wholly unequivocal submission.

The CA also allowed the appeal regarding service out and alternative service. Pursuant to CPR 7.8, an alternative service order should only be made where it was impracticable to effect service, in this case via the Hague Convention. The CA found that:

- there was no evidence to show that such service was impracticable (rather than inconvenient), and
- there was no evidence to show that Mr Katunin was attempting to evade service in Russia (despite not having turned up to the original hearing in Russia).

The result (pending any further appeal) means that, in order to enforce the Russian judgment in the BVI, the Bank would have to serve Mr Katunin via the Hague Convention, who would then have the right to challenge jurisdiction afresh.

Dmitry Garkusha v (1) Ashot Yegiazaryan, (2) Vitaly Gogokhiya, (3) Hackham Invest and Trade Inc, (4) Limerick Business Holding Inc

The Court of Appeal ("CA") considered the breadth of an exclusive BVI jurisdiction clause in relation to an application to service out of the jurisdiction, and whether BVI is the appropriate forum for a variety of tortious claims.

Mr Garkusha and Mr Yegiazaryan, two Russian nationals living in Russia at the time, became involved in a project to renovate a hotel in Moscow in 2002. Mr Garkusha arranged finance through various companies. Hamfast Investment Limited ("Hamfast"), a BVI company, wholly owns a company called Blidensol Trading and Investment Limited ("Blidensol"), which received a US$100 million loan from Deutsche Bank. Mr Garkusha claims (personally) to have loaned US$154 million to another BVI company called Hackham Invest and Trade Inc ("Hackham"). Hamfast, Blidensol and Hackham were used to invest in the hotel project. Mr Garkusha claims to be the beneficial owner of these companies (which is now disputed by Mr Yegiazaryan).

In 2008, Mr Garkusha entered into an agreement to transfer 100% of Blidensol to Mr Yegiazaryan, in return for a 2.75% interest in his BVI company called Limerick Business Holding Inc ("Limerick") (the "2008 Agreement"). The 2008 Agreement is one page long and contains no governing law or jurisdiction clause.

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Later in 2008, Mr Garkusha entered into two share purchase agreements with the friend (and likely nominee) of Mr Yegiazaryan, Vitaly Gogokhiya:

- to transfer 100% of Hamfast for US$1 million; and
- to transfer 100% of Hackham for US$1 million (the "SPAs"). The SPAs have BVI governing law clause, and an exclusive jurisdiction clause, which states as follows: "Any disputes, differences or claims arising out of or in connection with this Agreement, including with respect to its performance, breach, termination or invalidity, shall be settled in the courts of the British Virgin Islands."

Relations soured and Mr Garkusha claimed that he only entered into the 2008 Agreement and the SPAs as a result of threats of violence, intimidation and financial pressure. In 2014, he brought proceedings in BVI against Mr Yegiazaryan (who had moved from Russia to California), Mr Gogokhiya, Hackham and Limerick, for duress (seeking rescission), and torts including conspiracy to injure and unlawful interference. The first instance judge refused permission to serve out of the jurisdiction on the basis that:

- the tort claims do not fall within the jurisdiction clauses in the SPAs;
- the BVI companies have no value or prospect therefore it would be a waste of the court's time to allow the claims;
- although Mr Garkusha had lost his share in the BVI companies, his real economic loss took place in Russia (the loss of receivables due to those companies); and
- Russia, not BVI (or California) is the most appropriate forum. Mr Garkusha appealed.

The CA found that pre contract events, such as tortious conduct inducing contract, and the rescission claims, could fall within the jurisdiction clauses in the SPAs, allowing a broader interpretation than the first instance judge. Considering the test under CPR 7.3 for service out of the jurisdiction, it found that:

- there is a serious issue to be tried regarding a foreign defendant (including disputed ownership of the BVI companies);
- the tort and rescission claims fall within classes of claim listed in the service out gateways in CPR 7.3; and
- in all the circumstances, BVI is clearly and distinctly the appropriate forum, because although the closest factual connections are to Russia, the parties bargained for the jurisdiction clauses and there are no exceptional circumstances why they should not apply. Noting that the court has a final overriding discretion even if CPR 7.3 is satisfied, the CA found that the first instance judge was wrong to refuse permission to serve out, on the basis that the BVI companies do have a potential value (at least claims to recover receivables) and although Mr Yegiazaryan was not a party to the SPAs, the counterparty, Mr Gogokhiya, was clearly his nominee.

However, the CA refused to allow permission to serve out in relation to the claims under the 2008 Agreement (which did not have a jurisdiction clause). It noted that the first instance judge had applied the correct test (the usual Spiliada test), and that an appeal court should rarely interfere with findings of fact. Accordingly, it accepted the first instance judge's conclusion that the wrongdoing relates to property in Russia, the relevant acts took place in Russia, the documents are in Russia and written in Russian, no relevant persons are situated in the BVI, the only connection with the BVI is entirely formal (place of registered companies), and the close contractual connection between the 2008 Agreement and the SPAs is irrelevant. Accordingly, the CA agreed that these claims should properly be heard in Russia, despite the fact that they were likely to be time-barred in that jurisdiction.

BVIHC (Com) 2014/0171 - John Shrimpton & Anr v Dominic Scriven & Ors

This case is based on a claim by Mr Shrimpton (the 'Respondent' to the application in question) under the unfair prejudice provisions of section 184I of the BVI Business Companies Act, 2004 for a buy-out of his shares in Dragon Capital Group Limited with no discount to reflect his minority status.

Messrs Scriven and Pasikowski (the respondents to the unfair prejudice claim) applied for summary judgment under the EC CPR 15.2(a) on two main bases. Namely, that the affairs between the parties were not conducted in accordance with a quasi-partnership and/or informal understandings; and that any such quasi-partnership and/or informal understandings could not have survived the later execution of a shareholders' agreement.

This judgment highlights the importance of the overriding objective to deal with cases justly by ensuring that they are dealt with expeditiously and save expense. The Judge's view was that, in the circumstances, a document-intensive summary judgment application in a case that was going to go to trial in any event was not in accordance with the overriding objective. In any event, the summary judgment application failed.

On consideration of the first issue of whether a quasi-partnership existed, the Court took the view that such a fact intensive enquiry ought to be dealt with at trial and not by way of summary judgment.

The second and what was deemed the more appropriate issue to be dealt with by way of summary judgment was whether the quasi-partnership existed after the formation of a shareholders' agreement. This issue was descried as "a more fertile ground on which such an application can be made, because it is largely concerned with questions of construction rather than evidence of fact".

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The Respondent's position was that the quasi-partnership did not cease to exist once the shareholders' agreement took effect. It was argued that where contracts are ambiguous, the court will look to extrinsic evidence, including relevant conduct before and after the execution of the contract. Although the latter would not be admissible under BVI law, it might be under New York law which was the governing law of the contract. Based on the conduct of the parties before and after the execution of the agreement, there was an argument that a quasi-partnership appeared to continue to exist.

The Court noted that, on a summary judgment application the court must take into account not only the evidence actually placed before it but also the evidence that can reasonably be expected to be available at trial. The Judge concluded that the argument about the existence of a quasi-partnership after the conclusion of the shareholder's agreement was one that was suitable to be determined at trial.

The summary judgment application was dismissed on the ground that the relief sought based on the existence of a quasi-partnership had realistic as opposed to fanciful prospects of success at trial.

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