EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
COMMERCIAL DIVISION

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHC (Com) No. 119 of 2011

BETWEEN:

SONERA HOLDING B.V.

Applicant/Claimants

and

CUKUROVA HOLDING A.S.

Respondent/Defendants

Appearances: Mr John Carrington QC and Mr Ben Valentin for the Applicant
Mr Kenneth MacLean QC, Ms Arabella di Iorio and Mr David Caplan for the Respondent

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2015: February 12.

JUDGMENT

(Application for injunction restraining further prosecution of foreign arbitration – section 3(2)(b) Arbitration Act 2013 ('the Act') considered – whether section 3(2)(b) disapplied in case of foreign arbitration by section 6(3) of the Act)

[1] **Bannister J [Ag]:** This is an application by Sonera Holdings BV ('Sonera') for an injunction restraining Çukurova AŞ ('Çukurova') from continuing to prosecute an arbitration commenced by Çukurova under a provision in a Draft Share Purchase Agreement ('DSPA') which Sonera claims, but Çukurova denies, became binding between them on 9 May 2005. The subject matter of the DSPA was the sale by Çukurova to Sonera of a controlling stake in Turkey's largest cellphone operator.

Background

[2] For the earlier background to this dispute, the reader is invited to go to the decision of the Privy Council in **Çukurova v Sonera**,[1] but, very briefly, Sonera is the beneficiary of a Convention award delivered by a tribunal appointed under the provisions of a so-called letter agreement ('the letter agreement') entered into between Sonera and Çukurova on 24 March 2005 ('the First Tribunal'). The letter agreement, subject to the fulfillment of certain conditions, bound Çukurova to enter into a Final Share Purchase Agreement ('the Final SPA') substantially in the form of the DSPA, which had been initialed by the parties on the conclusion of the letter agreement. In its First Partial Award the First Tribunal found that agreement had been reached on the terms of a Final SPA on 9 May 2005 and that Çukurova was bound by an obligation to perform it. Çukurova did not do that and by its Second Partial Award the First Tribunal ordered specific performance. That became impossible and on Sonera's abandoning any claim for specific performance the First Tribunal, by its Final Award of 1 September 2011, ordered Çukurova to pay Sonera some US$1 billion (plus interest) as damages for non-delivery. Çukurova did not satisfy that award or any part of it and on 24 October 2011 the award was enforced as a judgment of this Court pursuant to the provisions of the then Arbitration Act 1976 ('the judgment').

[3] Çukurova applied to set aside the judgment on the principal ground (put very shortly) that in making the award of damages which it did the First Tribunal had exceeded its jurisdiction under the letter agreement (which was the only jurisdiction which Sonera had invoked), because its award was for non-performance of the Final SPA, something which only a tribunal constituted under arbitration provisions in the DSPA/Final SPA would be competent to do. This argument had already been run in front of the First Tribunal, which had rejected it It was rejected by this Court and appeals to the Court of Appeal and Privy Council were dismissed. The judgment remains in force.

[4] On 23 December 2011 Çukurova attempted to reopen the first tribunal's award before the Swiss Federal Supreme Court on the grounds of fresh evidence, but that application was dismissed on 30 April 2012. Meanwhile, on 10 April 2012, Çukurova commenced proceedings against Sonera under the arbitration provision in the DSPA, seeking (1) a

[1] [2014] UKPC 15

declaration that Çukurova never entered into any SPA – draft or otherwise – and (2) an award in an equal and opposite amount to the award of the First Tribunal (plus its costs of the first arbitration and of its attempts to have the judgment set aside).

[5] In a written submission dated 9 November 2012, Sonera submitted to the tribunal appointed pursuant to Çukurova's request for arbitration ('the Second Tribunal') that Çukurova's claims should be dismissed as an abuse and also because (1) as a matter of Swiss law[2] there was an identity of parties and subject matter between the letter agreement arbitration and the DSPA arbitration sufficient to operate as an estoppel *per rem judicatam* which precluded the grant of the relief sought by Çukurova; and (2) that a proper application of the *kompetenz-kompetenz* principle meant that the Second Tribunal had no jurisdiction to review the First Tribunal's decision on its own jurisdiction, something which could be done only by the Swiss Federal Supreme Court or by a Court asked to enforce the First Tribunal's awards under Article V of the Convention.

[6] On 7 May 2013 the Second Tribunal conducted a hearing on these preliminary objections, in the course of which Sonera accepted that the Second Tribunal had jurisdiction over disputes arising out of the DSPA and that it was competent to determine the extent of its own jurisdiction.

[7] On 12 May 2014 the Second Tribunal issued a Partial Award in which it held, by a complex series of arguments relying heavily upon Swiss Federal law and treating itself as being in a position analogous to that of an enforcing Court under Article V(1)(c) of the New York Convention, that it was bound not to 'recognise' those parts of the First Tribunal's series of Awards which trespassed (in the view of the Second Tribunal) upon matter properly falling within the arbitration provisions of the DSPA, such as Çukurova's obligation to *transfer* the shares or its liability in damages if it failed to do so. Since it could not recognize those parts of the First Tribunal's decisions, there could, according the Second Tribunal's reasoning, be no estoppel arising out of them. The Second Tribunal therefore directed that the arbitration proceed to deal on the merits with Çukurova's two claims as set out in paragraph [4] above. No date has yet been set for a hearing on the merits.

[2] the law governing both the arbitrations

[8] On the other hand, the Second Tribunal does appear to have felt able to 'recognise' (and thus to treat itself as estopped by) those parts of the First Tribunal's Awards which concluded that the parties had reached agreement on the terms of a DSPA and that Çukurova was in breach of its obligation under the letter agreement to execute and deliver a final SPA (giving rise, one might have imagined, to the same quantum of damage as the failure to perform the SPA upon which the First Tribunal had grounded its Final Award).

[9] As I read the Second Tribunal's Partial Award, while it decided that the First Tribunal had no jurisdiction to make its Final Award, it did not purport to declare that the First Tribunal's Final Award was a nullity – merely that it did not give rise to an estoppel *per rem judicatam*.

[10] Events moved a stage further on 19 September 2014 when, in compliance with a Procedural Order made by the Second Tribunal, Çukurova produced a statement of claim. That document disclosed, for the first time, an intention to seek from the Second Tribunal, not merely financial compensation designed to wash through the First Tribunal's Final Award, but orders restraining Sonera from relying upon or enforcing this Court's judgment and ordering Sonera to 'unwind' the provisional charging order which this Court granted to Sonera on 31 July 2014 (made final on 4 November 2014 and not appealed) as part of the enforcement of the judgment.

[11] Sonera says that it was seriously alarmed at this turn of events, because the new claims amounted to a serious collateral attack on the judgment and that that is what lay behind the timing of its application, on 27 October 2014, for the anti-arbitration injunction which I am now deciding. I mention these dates because they gave rise to a submission by Mr Kenneth MacLean QC, who appeared, together with Ms Arabella di Iorio and Mr David Caplan, for Çukurova, that it was now far too late for Sonera to seek to restrain further prosecution of an arbitration that has been on foot since April 2012 and to a response from Mr Ben Valentin, who appeared together with Mr John Carrington QC for Sonera, to the effect that it was only when Sonera saw the additional claims for relief in the statement of claim that they appreciated that there was a need for the injunction. I made clear at the hearing that, given the geological timescale of this dispute and the absence of any

prejudice to Çukurova arising from the fact that the injunction had not been sought earlier, I was not interested in Mr MacLean's submission and I have not altered my opinion since.

The Parties' Submissions

[12] Mr Valentin's underlying submission is that the thrust of the proceedings before the Second Tribunal is a collateral attack upon the integrity of the judgment and that the Court should not hesitate to restrain foreign arbitration proceedings having as their object the outflanking of the Court's judgments or orders. He accepts that the authorities emphasise that the jurisdiction is to be exercised with caution and that the general rule is that such injunctions will be granted only in exceptional circumstances and invariably only in cases where the arbitral proceedings infringe a legal or equitable right (or where they threaten to infringe such a right) or if they are vexatious. He submits that this is such a case, since the effect of an award from the Second Tribunal in the sense contended for by Çukurova would be to deprive Sonera of the benefit of the judgment.

[13] Mr MacLean submits, first, that I have no jurisdiction to make the order sought. He rests this submission upon the terms of section 3 of the Arbitration Act 2013 ('the Act'). In any event, he submits (he does not put it precisely like this) that a Court which is merely the Court which has permitted enforcement of a foreign arbitral award within its jurisdiction is no more than one of potentially many Courts which may be called upon to enforce – or decline to enforce - a Convention award and that the integrity of its decision making process is not affected if other Courts take a different view with regard to enforcement or, for that matter, if the defendant in the original enforcement proceedings obtains an award which gives the original respondent a complete set off against the judgment or, even, orders the holder of the judgment to refrain from enforcement of it. Whether the second judgment or award should be recognized is something to be decided if and when an application is made for recognition or enforcement. Finally, he submits that it would be unjust to interfere with the processes of the Second Tribunal. The Second Tribunal has decided that it has the (exclusive) jurisdiction, if satisfied on the facts, to make an award declaring that Çukurova never came under any obligation to transfer any shares to Sonera. Why should this Court interfere in a process in which it has no interest in order to head off the possibility that the tribunal might reach such a conclusion?

The Jurisdiction Point

[14] It is obviously convenient to take the jurisdiction point first. Section 3(2) of the Act provides as follows:

> *3(2)(b) The Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act.*

[15] It seems to me that the meaning of section 3(2)(b) is clear. Unless the Act expressly provides for the Court to 'interfere' in an arbitration, it must not do so. 'Interference' obviously includes ordering a party to an arbitration to cease participating in it. No distinction is drawn in section 3 of the Act between domestic and foreign arbitrations. I can say at once that there is nothing in the Act expressly providing that the Court may enjoin a party to arbitral proceedings from continuing with them and Mr Valentin does not suggest that there is. Mr MacLean further relies upon section 10 of the Act:

> *Section 10 Article 5 of the UNCITRAL Model law, the text of which is reproduced below, has effect:*
>
> *"Article 5. Extent of court intervention.*
>
> *In matters governed by this Law, no court shall intervene except where so provided in this Law."*

[16] In response Mr Valentin relies, first, upon section 6(3) of the Act:

> *Section 6(3) Where the place of arbitration is outside the Virgin Islands, only sections 18, 19, 43, 58 and 59 and Part X apply to the arbitration.*

He therefore submits that neither section 3(2) nor section 10 has any application in this case, because the place of arbitration is Geneva.

[18] The structure of the Act is to set out, in sections 1 to 5, what are described as 'Preliminary' matters. These include definitions, some other matters of general effect and section 3, which sets out what may be described as policy. That includes, by virtue of section 3(2)(b), a policy of absolute non-interference unless the Act expressly permits it. Section 6

sets out the scope, or extent, of the Act's provisions, which include section 6(3). Sections 7 to 9 and 11 to 16, described as "General Provisions' are plainly matters which can cover only domestic arbitrations, since they deal with matters incapable of having extra-territorial effect. With the exceptions which I will mention in a moment, sections 17 to 79 legislate for matters, such as the composition of tribunals, which are also incapable of having extra territorial effect.

[19] The exceptions are sections 18 (stays to be granted in respect of both domestic and foreign arbitrations agreements); 19 (party's recourse to the Court for interim measures available in both domestic and foreign cases); 43 (Court may grant interim measures in respect of both domestic and foreign arbitrations); 58 (assistance in the gathering and preservation of evidence); and 59 (enforcement of orders made by both domestic and foreign tribunals).

[20] Part X of the Act deals with enforcement of awards. It is expressly made applicable to both foreign and domestic awards and sections 84 to 88 substantially reproduce the provisions of the 1976 Arbitration Act in relation to Convention awards. The remainder of the Act deals with matters which are in their nature incapable of applying to an arbitration having a foreign seat.

[21] As I have already said, section 3 is dealing with policy. It is very difficult to imagine that the legislature envisaged that the policy of the Virgin Islands would fluctuate on a matter like non-interference in the processes of arbitrations depending upon where the arbitration had its seat. It would be even more unexpected to find that its policy was against interference in domestic arbitrations, but to have no objection to interference in foreign ones, which is the result that Mr Valentin's reading of section 6(3) would produce.

[22] The key to construction is the structure of the Act itself, something which I have attempted to summarise above. The Act operates to provide a complete arbitral code for the Virgin Islands, something which it achieves by enacting sections 7 to 92. In introducing that code, the Act, by section 6(3), stipulates which parts of it are to have application with respect to foreign arbitrations. It does this by the device of providing that of the provisions of the code, only those expressly identified in section 6(3) are to apply to foreign

arbitrations. In my judgment, section 6(3) does not extend to any of the Preliminary matters contained in sections 1 to 5. It is doing no more than stipulating which provisions of the new code are to apply in the case of foreign arbitrations. It would be absurd to suppose that the commencement provisions in section 1(2) or the definitions in section 2 have no application in a case involving an arbitration with a foreign seat, which is what Mr Valentin's rigid reading of section 6(3) requires. Section 3(2)(b) is similarly unaffected, in my opinion, by the operation of section 6(3).

[23] It does, however, follow from this analysis that section 10 itself has no application in relation to an arbitration with a foreign seat. Why this particular provision was not expressly extended to the case of foreign arbitrations is unclear, but for the reasons given above that does not detract from the overriding nature of the prohibition contained in section 3(2)(b).

[24] Mr Valentin relies upon **AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC**[3] ('the **AES** case') for a submission that subsection 3(2)(b) of the Act leaves the Court's general power to grant injunctive relief under section 24 of the Supreme Court Act unaffected, but I cannot accept that. In giving the decision of the Supreme Court in that case, Lord Mance drew attention to the difference between the words 'should not' in the corresponding provision to our section 3(2)(b) in the English Arbitration Act 1996 (section 1(c) of that Act) and the words 'shall not' which appear in Article 5 of the UNCITRAL Model Code in support of his opinion that Parliament cannot have intended to abrogate the Courts' traditional resort to section 37 of the UK Senior Courts Act '*sub*,' as he put it, '*silentio* ' on the grounds that had it intended to do so it would have used the word 'shall,'

[25] The draftsman of the Act will have had both the terms of section 1(c) of the English Arbitration Act 1996 and the **AES** case[4] well in mind and in that knowledge will have chosen to use the word 'shall' in section 3(2)(b). There can be no doubt that section 3(2)(b) contains a blanket prohibition on all interference (unless otherwise expressly provided for), irrespective of the source of the power to interfere.

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[3] [2013] 1 WLR 1889

[4] the decision was delivered on 12 June 2013; the Bill had its third reading on 17 December 2013

[26] In my judgment, therefore, Mr MacLean is right when he submits that I have no jurisdiction to make the order sought.

Other Matters

[27] This makes it strictly unnecessary for me to examine Mr Valentin's other arguments in any detail, but in deference to his very careful submissions I think I should express my view upon them.

[28] Mr Valentin relies upon **Claxton Engineering Services v TXM**,[5] where Hamblen J granted an anti-arbitration injunction in circumstances in which the English Commercial Court had held that (the bulk of) the agreements between the parties were covered by an exclusive English jurisdiction clause and that there was no agreement, as the counterclaiming defendant contended, for arbitration under the rules of the Hungarian Chamber of Commerce and Industry. In addition, the defendant was prosecuting an appeal against that decision in the English Court of Appeal. Hamblen J held that the defendant's attempt to arbitrate in Hungary was a clear breach of the claimant's legal rights as defined by the Commercial Court's decision and that it was accordingly one of those rare and exceptional cases where it was appropriate to grant an anti-arbitration injunction.

[29] In **Excalibur Ventures LLC v Texas Keystone Inc**[6] the English Commercial Court restrained arbitration proceedings commenced by a party who had initiated proceedings in that Court and sought extensive injunctive relief from it in circumstances where the Commercial Court found that justice could be done more surely and speedily if the dispute was litigated in the Commercial Court proceedings.

[30] In my opinion **Claxton** and **Excalibur** are in essence decisions about *forum* and case management. I do not find either helpful having regard to the underlying issue in the present case.

[31] **Nomihold Securities Inc v Mobile Telesystems Finance SA**[7] concerned a share sale agreement coupled (I am simplifying) with a put option entitling the claimant, ('Nomihold')

[5] [2011] 1 Lloyd's Rep 503
[6] [2011] 1 Lloyd's Rep 289
[7] [2012] 1 Lloyd's Rep 442

to put the remaining issued share capital of the company, 51% of whose shares were the subject of the share sale agreement, to the defendant ('MTSF'). There were arbitration provisions in both the share sale agreement and the option agreement. Nomihold secured an award from an LCIA tribunal to the effect that MTSF was obliged to purchase the additional option shares. That award was granted after the tribunal had considered and rejected a submission from MTSF to the effect that the option agreement was bad because it depended and was predicated upon the share purchase agreement, which MTSF contended was void or voidable for misrepresentation and mistake. MTSF subsequently commenced what were described as 'new arbitrations' under the two agreements, claiming that they were void for illegality. Nomihold applied for an injunction restraining the new arbitrations on the grounds that they were a collateral attack upon the first award.

[32] In the course of the proceedings MTSF gave an undertaking that it would not seek to obtain in the new arbitrations any relief releasing it from its obligation to perform the first award. It did not, however, undertake not to pursue claims for rescission of the option agreement and for damages or for an award based upon unjust enrichment.

[33] In the light of this undertaking Andrew Smith J refused to stay the new arbitrations, accepting along the way that he was prepared to assume that MTSF intended to use all legal routes available to it to prevent enforcement of the award. Any complaint that that the prosecution of the new arbitrations amounted, in the light of the fact that Nomihold had already obtained an award, to a breach of the arbitration agreements by attempting to re-arbitrate their subject matter could be dealt with by the tribunal set up to hear the references in the new arbitrations.

[34] A second bite at the cherry was, however, restrained by Flaux J in **Injazat Technology Capital Ltd v Najafi**,[8] but the case is unsatisfactory as the defendant did not appear. Flaux J did, however, express the view that, but for the undertaking offered by MTSF, Andrew Smith J would have granted the injunction sought in the **Nomihold** case. I am not so sure about that. I do not, however, think that either case is in point. They are, in my opinion, examples of a supervisory Court exercising, or refraining from exercising, jurisdiction to protect the integrity of arbitral awards which had their seat within the Court's

[8] [2012] EWHC 4171

jurisdiction or, looking at it from a slightly different angle, protecting the beneficiary of an award made within their jurisdiction from being vexed by duplicative proceedings elsewhere. This Court is not concerned with the integrity of any award. Nor, in my view, is it any part of this Court's general function to protect Sonera from having to go through the mill of the second arbitration. The seeds of that situation were sown in March 2005, when Sonera entered into the arrangements which, on its case, resulted in it becoming bound by clause 12.8 of the DSPA.

[35] However, Mr Valentin also relied upon well known statements in **Turner v Grovit**[9] about the need to protect the integrity of English proceedings by restraining, where necessary, unsuccessful parties from re-litigating abroad. He also referred me to **Masri v Consolidated Contractors**[10] and its statement of principle that the Court will act where necessary to protect its jurisdiction, its processes and its judgments.

[36] It seems to me that it is the principle underlying these two last cases that has the closest connection with the issues which have been canvassed in the present case, where what Sonera is complaining about is the fact that the processes of the DSPA tribunal are inherently subversive of the judgment – which is plainly so. In that regard it may be worth bearing in mind that the judgment is not like the judgment which fell to be considered by the 5th Circuit Court of Appeals in the **Pertamina**[11] case, which seems, for all that that decision discloses, to have been the result of a run-of–the-mill box-ticking exercise under Article V of the Convention. It was secured only after lengthy argument upon (among other questions) the issue whether the First Tribunal had had jurisdiction to make its Final Award and after a reasoned decision that it had.

[37] That distinction may mean that, while the Court is in no position to grant a restraining injunction in this case, Çukurova may face difficulties if it attempts to deploy in this jurisdiction any award which it may obtain against Sonera from the Second Tribunal. That, however, is not something which is before me and I say no more about it.

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[9] [2002] 1 WLR 107
[10] [2009] QB 503
[11] 335 F. 3rd 375

Conclusion

[38] For the reasons given above, this application is dismissed.

Commercial Court Judge

12 February 2015