Anti-arbitration injunctions and stays to arbitration

Sodzawiczny v Smith

In *Sodzawiczny v Smith*,[1] Foxton J provided important guidance on when an anti-arbitration injunction ("AAI") will be granted. It has been said that AAIs "will be granted somewhat more readily [than anti-suit injunctions], as no question of interference with a foreign court is involved".[2] But this only covers circumstances where AAIs are granted to protect a legal right not to have to arbitrate. AAIs may also be granted to prevent the fragmentation of disputes or parties from pursuing claims in arbitration which have previously failed and amount to an impermissible challenge of a court order enforcing the award. In those situations, there is a real risk of trespassing on the tribunal's jurisdiction to determine its own jurisdiction.

Courts enjoy greater flexibility when deciding whether to grant AAIs than they do when considering stay applications under s.9 of the Arbitration Act 1996 ("AA 1996"): when the dispute is "in respect of a matter which under the agreement is to be referred to arbitration" ("an Arbitral Matter") the Court has to order a stay to arbitration. Although it has recently been suggested that a stay might be refused where there is no "real or proper purpose" in seeking it,[3] even if the requirements for a mandatory stay under s.9 are satisfied, this "represents a … controversial development in English arbitration law".[4] It is suggested that Foxton J was right to be cautious about the possibility of refusing a stay on such a basis and sensibly endorsed the view that, if the court were required to grant a stay, then no AAI should be granted. Only in exceptional circumstances, where the court and tribunal have overlapping jurisdiction, and the claim is in substance an impermissible challenge to court judgments, may AAIs be granted, as happened in *Sodzawiczny v Smith*.

Facts

[1] [2024] EWHC 231 (Comm).
[2] *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24; [2023] AC 38, [47].
[3] See, e.g., per Lord Hodge in both *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Co Ltd* [2023] UKPC 33; [2024] Bus LR 190, [64]; and *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32; [2023] Bus LR 1328, [110].
[4] *Sodzawiczny*, [61].

The case had a long history.[5] Mr Sodzawiczny claimed that assets from an alleged profit-sharing agreement had been transferred into the control of Dr Smith and Dr Cochrane (the Respondents) and were held on trust for him. That dispute was settled in 2014 by a "Settlement Agreement" with an LCIA arbitration agreement. Mr Sodzawiczny, Dr Cochrane and various others were parties to that Settlement Agreement but, importantly, Dr Smith was not – although a company controlled by him, "Pro Vinci", was.

In 2016, Mr Sodzawiczny obtained an award against Pro Vinci for the outstanding balance under the Settlement Agreement. Two years later, Mr Sodzawiczny brought claims for breach of trust and dishonest assistance in the Commercial Court against Dr Smith and other parties to the Settlement Agreement. Popplewell J granted a stay of those proceedings,[6] even though Dr Smith was not party to the Settlement Agreement: under the Contracts (Rights of Third Parties) Act 1999,[7] Dr Smith was entitled to enforce certain provisions of the Settlement Agreement in arbitration. Mr Sodzawiczny therefore commenced an LCIA Arbitration against Dr Smith and others which resulted in (i) a partial award ordering Dr Smith to pay Mr Sodzawiczny approximately £18.3m for dishonest assistance in fraudulent breaches of trust; and (ii) a "Final Award" in 2021 ordering Dr Smith to pay interest and costs. The Court made orders for all "Three Awards" (including that against Pro Vinci) to be enforced in the same manner as a court judgment.[8]

In October 2023, Dr Smith issued a claim against Mr Sodzawiczny seeking to set aside the Three Awards. That claim was subsequently withdrawn once the court pointed out that any challenge to the arbitration awards could not be made via fresh proceedings, but had to be in accordance with the carefully circumscribed provisions found in AA 1996, ss.67-70. However, in a further attempt to circumvent those provisions, the Respondents sent a request for arbitration to the LCIA seeking much the same relief, contending that (i) the Settlement Agreement had been induced by a fraudulent statement by Mr Sodzawiczny that he had entered into an oral profit-sharing agreement, and (ii) various court proceedings had been commenced by Mr Sodzawiczny in breach of the Settlement Agreement, including (seemingly) proceedings taken to enforce the Three Awards.[9]

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[5] See too *SMA Investment Holdings Ltd v Harbour Fund II LLP* [2023] EWHC 428 (Comm).
[6] *Sodzawiczny v Ruhan* [2018] EWHC 1908 (Comm); [2018] 2 Lloyd's Rep 280; [2018] Bus LR 2419.
[7] ss.1, 8.
[8] AA 1996, s.66
[9] The Respondents also made various "inconsequential fringe claims" which added little (see [92]-[93]) and are not considered further here.

Mr Sodzawiczny applied for an AAI to prevent the Respondents from pursuing the arbitration. Dr Smith applied for a stay of enforcement of the Three Awards.

Stay application

Foxton J dismissed Dr Smith's application for a stay, since the relevant proceedings had not been brought in respect of an Arbitral Matter. The judge applied the recent guidance from *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Co Ltd*[10] and *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)*[11] and concluded that the enforcement of the Three Awards was a matter for the court, especially since the awards had been the subject of orders under AA 1996, s.66 and so were already enforceable as judgments. It is clearly not appropriate for the enforcement of court judgments to be referred to arbitration.

As a result, it was not necessary to consider what the position would have been if the claims did concern an Arbitral Matter. In both *FamilyMart* and *Mozambique*, Lord Hodge, obiter, raised the possibility that that the court might refuse a stay where there is no "real or proper purpose" in seeking it.[12] Mr Sodzawiczny naturally relied upon this suggestion to argue that the court should refuse the stay application because Dr Smith was trying to evade the requirements of AA 1996, ss.67-70 and improperly challenge the Three Awards.

Foxton J diplomatically commented upon the "real or proper purpose" limitation as follows:[13]

> "This represents a significant and, it is respectfully suggested, controversial development in English arbitration law. The courts have yet to have the opportunity to explore its full ramifications, including the legal basis for such a principle (whether a rule of court process, an implied term of the arbitration agreement or some other basis) and the precise circumstances in which it can avail a court claimant."

[10] [2023] UKPC 33; [2024] Bus LR 190; noted A. Briggs [20224] LMCLQ 30.
[11] [2023] UKSC 32; [2023] Bus LR 1328; noted A. Briggs [20224] LMCLQ 30.
[12] See *supra*, fn.3.
[13] *Sodzawiczny*, [61].

The High Court of Justice of the Isle of Man, in litigation arising out of some of the same facts, has similarly refused to express a view on its merits, recognising only that "there is an arguable basis of law and fact on which to advance this novel ground".[14]

It is understandable why courts are reluctant to expand upon the idea floated by Lord Hodge unless it is necessary for the outcome of the case. But it is also predictable that litigants will seize upon this new possibility try to avoid a stay to arbitration. The exercise of establishing the foundation and boundaries of the "real or proper purpose" exception will be very time-consuming and costly. Prior to the decisions in *FamilyMart* and *Mozambique*, the orthodox approach would have been to grant a stay without considering the applicant's motivation, since AA 1996, s.9 provides that the court must grant a stay to arbitration if seised of an Arbitral Matter "unless it finds that the said agreement is null and void, inoperative or incapable of being performed". That reflects the mandatory language in Art.II(3) of the New York Convention.[15] Neither the New York Convention nor AA 1996 provides that the party requesting a stay must have a proper purpose. The basis for this *obiter* suggestion in *FamilyMart* and *Mozambique* therefore remains murky at best. And distinguishing "real and proper" motives from other motives is a very difficult exercise. In principle, this suggestion should therefore be rejected by lower courts. At the very least, it is to be hoped that courts will be slow to reject an application for a stay on the ground that it lacks a "real or proper purpose".

The AAI application

Foxton J was clear that the AAI application was not an Arbitral Matter,[16] emphasising that English courts have supervisory jurisdiction over arbitrations seated in England, and that the exercise of that jurisdiction is a matter for the courts, not an arbitral tribunal.

Foxton J divided AAI applications into three categories of case. Category 1 is the most important (and likely to be the most straightforward to obtain), as it essentially involves holding parties to their promises. For example, an applicant may have a contractual right not to be

[14] *McNally v Glen Moar Properties Limited* 2DS 2023/04, [101] (Judge of Appeal Cross KC; Acting Deemster Sir Nigel Teare; Acting Deemster Moran KC).
[15] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).
[16] Following *Sheffield United Football Club v West Ham United Football Club Plc* [2008] EWHC 2855 (Comm); [2009] 1 Lloyd's Rep 167 and *Nomihold Securities Inc v Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm); [2012] 1 Lloyd's Rep 442.

subject to an arbitration (due to an agreement to bring the claim elsewhere or not to arbitrate at all) or a contractual right that AA 1996 will apply (from an agreement that the arbitral seat will be in England and Wales) such that an AAI may restrain a "Non-Compliant Challenge"[17] from being brought or a statutory right to pursue the challenges permitted by AA 1996, ss. 67-68 (such as where the challenge is to the validity of the arbitration agreement itself).[18]

"Category 2" covers cases where the AAI applicant contends that the arbitral tribunal would have no jurisdiction to decide the dispute, without suggesting that it enjoys a contractual right to have the dispute determined in another forum. This may be because there is no binding arbitration agreement. However, AA 1996 carefully delineates the means by which issues of jurisdiction are determined by the court.[19] As a result, caution is required before an AAI is granted which would preclude the exercise of the *Kompetenz-Kompetenz* jurisdiction of the arbitral tribunal. Some additional factor is required to justify AAI relief; as set out further below, *Sodzawiczny* provides some guidance as to what such a factor could be.[20]

Cases where the complaint relates to matters which the tribunal would have jurisdiction to determine but which is an attempt to re-litigate matters already decided in a prior award or judgment fall within Category 3. Foxton J recognised two important difficulties here. First, res judicata arguments do not raise issues going to the tribunal's jurisdiction but a defence to the merits. Second, the court should not grant AAIs in respect of claims which, if brought in English proceedings, would require the court to grant a stay under AA 1996, s.9.[21]

If arguments of res judicata are Arbitral Matters, the question then becomes whether the court has power under s.9 to refuse a stay. As Foxton J observed, this would once have been considered a *"*challenging proposition"[22] but may now be arguable on the basis of a lack of "real or proper purpose".[23] Nevertheless, he sensibly refused to define Category 3 by reference to an application's improper purpose and "tie the exercise of this important jurisdiction to a

[17] i.e., not in accordance with AA 1996, ss.67-70.
[18] *Minister of Finance (Incorporated) 1Malaysia Development Berhad v International Petroleum Investment Company Aabar Investments PJS* [2019] EWCA Civ 2080; [2020] 1 Lloyd's Rep 93.
[19] Under s.32 (during the arbitral proceedings with the agreement of the parties or with the permission of the tribunal); under s.67 (by way of a challenge to the award, to be brought within a strict time limit); or under s.72 (which is only available to a party "who takes no part in proceedings").
[20] Foxton J only cited one case where AAI relief was actually granted - *Albon Naza Motor Trading Sdn Bhd* [2007] EWCA Civ 1124; [2008] 1 Lloyds Rep. 1, [17] – but in that case the parties had agreed that the question whether the arbitration agreement was forged would be determined by the English courts.
[21] *Sabbagh v Khoury* [2019] EWCA Civ 1219; [2019] 2 Lloyd's Rep 178, [92-93].
[22] *Sodzawiczny*, [76].
[23] See *supra*, text to fnn 12-15.

controversial and embryonic legal principle".[24] Unless and until the basis and scope of the "real and proper purpose" restriction expounded in *FamilyMart* and *Mozambique* is clearly established, it would be inappropriate to use that as a justification for granting AAIs.

Instead, Foxton J recognised that Categories 3 and 1 overlap: the attempt to re-litigate the contents of the earlier award may fairly be characterised as an attempt to challenge the earlier award by a Non-Compliant Challenge. The English court's supervisory jurisdiction therefore overlaps with that of the arbitral tribunal before which a plea of legal preclusion might be advanced. Whilst unusual, such overlapping jurisdiction is not unique and might explain why a defendant to court proceedings who admits the claim will not obtain a stay under AA 1996, s.9, even though an arbitral tribunal would have jurisdiction to issue an award for that claim in the face of a similar admission.[25]

Foxton J held that the substantive effect of the orders sought in arbitration by Dr Smith would be to prevent Mr Sodzawiczny from enforcing his rights under the Three Awards. Dr Smith could not complain about being bound by the Three Awards since he had successfully relied upon the Contracts (Rights of Third Parties) Act 1999 in obtaining a stay under s.9 in respect of Mr Sodzawiczny's claim against him. By relying on the arbitration agreement, Dr Smith acceded to the obligation not to bring a Non-Compliant Challenge to any of the awards; this was such a challenge, and therefore a breach of Mr Sodzawiczny's rights under AA 1996. Mr Sodzawiczny's application therefore fell within Category 1 and the judge granted an AAI.

The claims also fell into Category 2: Dr Smith was not a party to the arbitration agreement in the Settlement Agreement, yet sought to pursue claims in arbitration over which the arbitral tribunal would have no jurisdiction. To the extent that any claims did not fall within Category 1, the issue of jurisdiction could have been left to the arbitral tribunal. But there were additional, unusual factors which justified the grant of an AAI: the underlying intent of Dr Smith was to bring a Non-Compliant Challenge; the core claims being pursued in the arbitration breached Mr Sodzawiczny's rights under AA 1996; and an AAI was to be granted in respect of the majority of claims, which fell within Category 1.

Relationship between the application for a stay and application for AAI

[24] *Sodzawiczny*, [77].
[25] *Halki Shipping Corp v Sopex Oil Ltd* [1998] 1 Lloyd's Rep 465; [1998] 1 WLR 726; *Tjong Very Sumitomo v Antig Investments Pte Ltd* [2009] SGCA 41; [2009] 4 SLR(R) 732.

Until recently, the relationship between an application for a stay and an application for an AAI was clear. Where a claim raises an Arbitral Matter, a court is required under AA 1996, s.9 to stay the court proceedings. It would be illogical for a court both to grant a stay and an AAI. If a court has to grant a stay under s.9, it should not grant an AAI.

However, this strict approach may in future be affected by that favoured by Lord Hodge in *FamilyMart* and *Mozambique* to stay applications: a "no real or proper purpose" exception might introduce the sort of flexibility and discretion into stay applications which courts are able to exercise when considering AAIs. But creating an exception that has no basis in the legislative regime is problematic. It also seems unnecessary. For instance, Lord Hodge considered that a stay application might lack a "real or proper purpose" where the application related to "issues which were peripheral to the legal proceedings".[26] But such issues are unlikely to be Arbitral Matters and therefore a stay under AA 1996, s.9 would not be mandatory. And, if the Arbitral Matters are also matters over which the Court has supervisory jurisdiction, and there is an additional factor justifying the Court's exercising jurisdiction (as in *Sodzawiczny*: the claims being part of a broader request for arbitration the purpose of which is to bring a non-compliant challenge which the Court ought not to sanction), a court may grant an AAI to prevent the pursuit of an arbitration which is "vexatious and oppressive".[27]

Lord Hodge also thought that the "no real or proper purpose" exception was required to address a situation where the stay applicant would face the same issues in court proceedings brought by another party even if a stay were granted.[28] However, there is nothing inherently wrong with parallel proceedings, unless they are abusive or vexatious. If the issues raised in arbitration proceedings are the same issues raised in the court proceedings, because the arbitration proceedings are in fact an improper attempt to challenge a previous award, then they are abusive[29] and the appropriate relief is an AAI on the basis that the arbitration proceedings infringe the party's legal rights. By basing the relief granted on a party's legal right to have any challenge brought in the English courts, any interference with parties' agreements to arbitrate

[26] *FamilyMart,* [64].
[27] *Sodzawiczny,* [63].
[28] *Mozambique*, [110].
[29] For example, because they infringe the legal right for AA 1996 to apply which arises from the agreement that the legal seat will be in England and Wales.

is kept within clear parameters, rather than based on a controversial discretionary test of improper purpose.

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