An issue of consent? English courts emphasise the importance of party choice in exercise of court's powers in support of arbitration and when balancing competing issues of public policy

Nigel Cooper QC

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The judgment of the Supreme Court in ***Halliburton v Chubb*** is likely to be the subject of critical comment as to whether the test under English law for apparent bias is consistent with the approach of the wider international arbitration community on conflicts of interest. Before that debate becomes too intense, it is a good time to recall the importance that English law gives to protecting parties' choice of arbitration as their means of dispute resolution and within that, their choice of seat and governing law for the arbitration. Two recent decisions of the Commercial Court illustrate that support.

The first in time is that of Foxton J in ***Riverrock Securities Ltd v International Bank*** of St Petersburg, where the court was on familiar territory as to whether it was appropriate to grant an interim anti-suit injunction to restrain insolvency proceedings in Russia aimed at unwinding certain credit transactions which contained an LCIA arbitration clause.

The second decision is the judgment of Andrew Baker J in ***SRS Middle East FDZE v Chemie Tech***. In that case, the principal issue for the judge was whether he should grant anti-suit relief to restrain proceedings brought in Sharjah in breach of an arbitration agreement in circumstances where the Defendant asserted that without substantive proceedings in Sharjah, it would lose the protection of interim measures it had obtained to secure its claims against the claimant.

In both cases, the judges granted the anti-suit relief sought. The common theme was the conclusion of the court that the parties' choice of arbitration was to be protected even if the effect of doing so was to deprive one party of rights and remedies in the foreign proceedings, which were not available in the arbitration or from a court with supervisory jurisdiction.

In ***SRS*** Middle East, the judge was not persuaded that it was in fact necessary for the defendant to bring substantive proceedings in Sharjah to obtain security for its claims. Nevertheless, he also held that, in any event, the defendant had agreed to London arbitration. That choice was to be enforced even if by doing so the defendant was deprived of the security it had obtained in Sharjah. Notably, the judge's principal concern was not to interfere with the power of the arbitration tribunal to grant or refuse interim measures under the ICC Rules.

Accordingly, his order restraining further steps being taken in the Sharjah proceedings, was subject to an exception in respect of any steps which might be directed or permitted by order of the tribunal.

In ***Riverrock***, the court was once again faced with need to determine where the boundary lies between the public policy favouring party autonomy and arbitrability on the one hand and the public policy favouring universalism or at least modified universalism in support of foreign insolvency proceedings. Adopting an approach consistent with the decision of Males J in ***Nori Holdings Ltd v PJSC Bank Otkritie*** and differing from that of the Singapore Court of Appeal in ***Larsen Oil & Gas Pte v Petroprod Ltd***, the judge came down in favour of supporting party autonomy although he did so as a matter of contractual construction rather than as a matter of arbitrability. The judge was prepared to accept that the proceedings in Russia were insolvency proceedings and were being brought by the administrator for the benefit of the insolvency estate as a whole. Nevertheless, the claims being brought were still being brought in the name of the company and were claims which were essentially contractual in nature. Further, the remedies being sought were remedies which it was within the power of the tribunal to grant rather than being remedies of a type which only a court could grant. As such, the claims made were within the scope of the arbitration agreement and capable of being determined by arbitration. If the effect of that conclusion was that the administrator was deprived of causes of action under Russian law which were not available under English law, then that was the consequence of the parties' choice of London arbitration and was not a reason to undermine the arbitration agreement by refusing relief.

The judge left open the question of whether a private law claim to invalidate or set aside a contract vested in an administrator or receiver acting its own name would still meet the privity requirements for anti-suit relief but did indicate that he would regard it as unsatisfactory if the answer to this question depended on the particular legal mechanism adopted in the insolvency legislation.

Both judgments reinforce the fact that English courts are pro-arbitration and sceptical of public policy arguments aimed at undermining the efficacy of arbitration agreements. They also both emphasise a point which is on one level trite but on another level emphasises why arbitration agreements should never be treated as simply "boilerplate". Arbitration agreements inevitably reflect a balance between the rights, remedies and commercial certainties that come with the choice of arbitral institution, seat and governing law on the one hand and on the other the abandonment (or risk of abandonment) of rights and remedies that may be available in another jurisdiction. Parties to an agreement must understand where they have set the balance.

NIGEL COOPER QC

Nigel Cooper QC

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Nigel has a commercial practice predominantly covering the fields of shipping, energy and insurance/reinsurance law. He appears before the business and appellate courts in England & Wales, and has a strong arbitration practice advising on and acting in disputes before all the main international and domestic arbitral bodies. Nigel accepts appointments as an arbitrator and has acted as a mediator and as a party's representative in mediations.

Nigel has considerable experience of handling cases that are factually and technically complex with a corresponding level of documents or which have required him to become familiar with new areas of law (most recently cross-border insolvency). He is known for being approachable and believes in working as a team with those instructing him. Nigel has a global client base and is increasingly instructed for disputes with an overseas seat of arbitration.

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nigel.cooper@quadrantchambers.com