ENGLISH COMMERCIAL COURT REFUSES ANTI-SUIT INJUNCTION IN RUSSIAN BILLIONAIRE DISPUTE

Rochester Resources Ltd & Ors v Lebedev & Anor [2014] EWHC 2926

Introduction

In Rochester Resources Ltd & Ors v Lebedev & Anor [2014] EWHC 2926 (Comm) (09 September 2014), the English High Court refused to grant an anti-suit injunction (pro-arbitration) restraining a Russian businessman from pursuing or taking any step in the action commenced by him against two other Russian businessmen in the New York courts.

Background

The individuals to the action - Mr Vekselberg, Mr Blavatnik and Mr Lebedev - are well known Russian businessmen.

The present application arose in relation to a dispute resulting from a series of complex arrangements and transactions connected with the oil and gas business in Russia. In about 1997, the Russian Government decided to sell an interest in the oil company OJSC Tyumenskaya Neftyanaya Kompania, also known as Tyumen Oil Company ("TNK"). Mr Lebedev was already the ultimate beneficiary of a minority interest in TNK and also in a subsidiary of TNK. Following discussions between Mr Vekselberg, Mr Blavatnik and Mr Lebedev, Mr Lebedev arranged for the transfer of his interests in TNK and its subsidiary to entities owned by Mr Vekselberg and Mr Blavatnik. On 21 March 2013, Rosneft acquired TNK-BP for $55 billion. Mr Vekselberg's and Mr Blavatnik's joint share of the purchase price was said to be about $13.8 billion.

On 4 February 2014, Mr Lebedev commenced proceedings in New York against Mr Vekselberg and Mr Blavatnik, claiming 15% of the aggregate proceeds received by Mr Vekselberg and Mr Blavatnik as a result of the sale to Rosneft which he estimated to be in excess of $2 billion.

On 9 May 2014, the Claimants filed the present application (pursuant to section 37 of the Senior Courts Act 1981, or alternatively section 44(2) of the Arbitration Act 1996) in which they sought to restrain the New York proceedings on the grounds that Mr Lebedev was bound by the arbitration agreement in an Acquisition Agreement dated 20 June 2003 between Rochester Resources (beneficially owned by Mr Vekselberg and Mr Blavatnik) and Coral (allegedly owned by Mr Lebedev). That Acquisition Agreement related to a promissory note issued by Oil and Gas Industrial Partners ("OGIP"), which held Mr Vekselberg and Mr Blavatnik's interests in TNK.

The Acquisition Agreement provided, at relevant part:

11.2 ***Arbitration****: The Parties agree that any dispute, controversy or claim arising between the Parties out of or in connection with this Agreement or the interpretation, breach, enforcement or termination, thereof, shall be finally settled by arbitration in accordance with the UNCITRAL Arbitration Rules (the "Rules") as at the date hereof in force, by a panel of three arbitrators appointed in accordance with the Rules. The seat of the arbitration panel shall be London, England. The procedural law of any reference to arbitration shall be the law of England. The language of the arbitral proceedings shall be English. The appointing authority for the purposes set forth in Article 7(2) of the Rules shall be the London Court of International Arbitration.*

It was common ground between the parties that if the Court was to grant an anti-suit injunction the Claimants had to establish that there is a high degree of probability that Lebedev is obliged to arbitrate his claims against Mr Vekselberg and Mr Blavatnik under the arbitration clause in the Acquisition Agreement.

Issues

The Court noted that the application raised two key issues:

(1) Was Mr Lebedev bound by the arbitration clause?

(2) Were Mr Vekselberg and Mr Blavatnik bound by the arbitration clause?

The Claimants submitted that:

- Rochester entered into the Acquisition Agreement as agent for Mr Vekselberg and Mr Blavatnik while Coral entered into the agreement as agent for Mr Lebedev, and therefore the parties could enforce;
- Alternatively, if Rochester contracted as principal and only for itself, it could enforce the Acquisition Agreement, including the arbitration clause, against Mr Lebedev for the benefit of Mr Vekselberg and Mr Blavatnik;
- Alternatively, as ultimate beneficial owners, Mr Vekselberg and Mr Blavatnik were Affiliates of Rochester within the definition contained in the Acquisition Agreement and were entitled to enforce the rights conferred on them under section 1 of the Contracts (Rights of Third Parties) Act 1999 and to invoke the arbitration clause against Mr Lebedev under either section 8(1) or (2) of that Act.

Mr Lebedev's position was that:

- Neither Coral nor Rochester had contracted as agent – instead Coral and Rochester were the only parties to the Acquisition Agreement.
- Rochester had no right to enforce the arbitration agreement against Mr Lebedev on their behalf.
- Even if Mr Vekselberg and Mr Blavatnik were to be treated as "affiliates" of Rochester, they were not entitled to invoke the arbitration clause because sections 8(1) and (2) have no application and, in any event, it was not intended that the relevant clauses of the Acquisition Agreement should be enforceable by affiliates.
- No injunction should be granted under section 37 of the Senior Courts Act 1981. Section 44 of the Arbitration Act 1996 was inapplicable.

Decision

The High Court declined to grant the injunction, either under section 37 of the Senior Courts Act 1981, or alternatively section 44(2) of the Arbitration Act 1996.

Construction of the arbitration agreement

Mr Jonathan Hirst QC, sitting as a Deputy Judge of the High Court, found that Mr Lebedev was probably not bound by the arbitration clause, and that it had certainly not been established to a high degree of probability that he was bound. He reached the same conclusion in relation to Mr Vekselberg and Mr Blavatnik.

The starting point was that the Acquisition Agreement was on its face between Coral and Rochester and the individuals were each not a "Party" to the arbitration agreement.

In considering whether, on a proper construction of the arbitration clause, the individuals were otherwise bound, Mr Jonathan Hirst QC noted that there "are limits as to what a Court can properly do to improve a carefully drafted and (at least in this respect) reasonably clear written agreement". It was open to the parties to draft the arbitration clause to bind each of the individuals, and in the absence of the parties having done so, the Court should not impose such a construction.

He further cited Lord Mustill in *Charter Reinsurance Co. Ltd v. Fagan* [1997] AC 313, in which he said *"There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms."*

Role of section 44(2) of the Arbitration Act 1996

The application under section 44 of the Arbitration Act 1996 also failed as it was dependent on Mr Lebedev being a party to the arbitration agreement.

Further, the speech of Lord Mance JSC, giving the judgment of the Supreme Court in *AES Ust-Kamenogorsk Hydro Power Plant LLP v. Ust-Kamenogorsk Power Plant JSC* (SC(E)) [2013] UKSC 35; [2013] 1 WLR 1889, precluded the success of such an application on the basis that:

"Where an injunction is sought to restrain foreign proceedings in breach of an arbitration agreement—whether on an interim or a final basis and whether at a time when arbitral proceedings are or are not on foot or proposed—the source of the power to grant such an injunction is to be found not in section 44 of the 1996 Act, but in section 37 of the 1981 Act. Such an injunction is not "for the purposes of and in relation to arbitral proceedings", but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed."

For further information on this case, see our previous alert **here**.

Concluding observations

This decision once again emphasises the importance of ensuring that an agreement to arbitrate is drafted carefully and precisely to ensure that such an agreement correctly reflects the wishes of the parties in respect of the scope of the clause (both in relation to the disputes covered, and also the parties bound by the agreement).

For further detail on the importance of drafting dispute resolution clauses, please see our previous alerts **here** and **here**.

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