

# Client Alert

## Anti-arbitration injunctions restraining foreign arbitration

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In the recent case of *Sabbagh v Khoury and others*, [2019] EWCA Civ 1219,<sup>1</sup> the Court of Appeal (“**CoA**”) provided some helpful guidance in relation to when the English courts may grant injunctions to restrain parties from pursuing a foreign arbitration.<sup>2</sup>

In summary, the CoA held that:

- The English courts have a general power, pursuant to s. 37 of the Senior Courts Act 1981, to grant anti-arbitration injunctions to restrain a foreign arbitration;
- The English courts should not exercise this power if the dispute in the foreign arbitration properly falls within the scope of the arbitration agreement (in line with the fundamental principle of respecting arbitration agreements);
- England does not need to be the ‘natural forum’ for anti-arbitration injunctions; and
- The English courts will only use these powers in ‘exceptional cases’ (for example, when continuing with the arbitration proceedings would be oppressive or vexatious).

### Background

The parties in *Sabbagh v Khoury* had been involved in a long-standing dispute in relation to assets distributed following the death of Hassib Sabbagh in 2010. Mr Sabbagh was one of the founders (along with Said Toufic Khoury) of the Consolidated Contractors Company group (“**CCCCG**”), one of the largest engineering and construction businesses in the Middle East.

The recent CoA decision relates to claims made by Mr Sabbagh’s daughter, Sana Hassib Sabbagh, concerning (a) dividends from Mr Sabbagh’s shares in CCCC that were allegedly used by the defendants

<sup>1</sup> The judgment is available [here](#).

<sup>2</sup> The same issues do not apply to English-seated arbitrations, as the English courts will be the supervisory courts in those circumstances.

(mainly members of the Sabbagh and Khoury families) in unauthorised investments, the proceeds of which were allegedly not applied or accounted for her benefit and (b) allegations that the defendants had conspired to deprive her of her entitlement to certain shares Mr Sabbagh had retained in CCCG.

Ms Sabbagh started these two claims in the English Commercial Court in 2013 (on the basis that one of the defendants was resident in England), following which the defendants commenced arbitration proceedings in Lebanon pursuant to an arbitration agreement contained in CCCG's Articles of Association. The claims in that arbitration were similar, but not identical, to those brought by Ms Sabbagh in the English court.

Following a determination of the English courts in 2017 that they had jurisdiction over Ms Sabbagh's claims (notwithstanding the similarity of the claims with those in the Lebanese arbitration), Ms Sabbagh sought, and obtained, an injunction from the English Commercial Court in 2018 restraining the defendants from proceeding with the Lebanese arbitration (on the basis that the disputes in that arbitration did not fall within the scope of the arbitration agreement and the proceedings were therefore "vexatious and oppressive"). That decision was appealed to the CoA.

## The CoA's Judgment

The CoA focussed on the following key points of principle relating to the English courts' ability to restrain foreign arbitration proceedings:

- 1) Do English courts have the power to restrain a foreign arbitration?
- 2) If they do, should the English courts grant such an injunction where the dispute in the foreign arbitration properly falls within the scope of the arbitration agreement?
- 3) Is it a precondition to such an injunction that England be "the natural forum" for the litigation?

### (1) General power to restrain foreign arbitration proceedings

Despite the lack of binding precedent on the English courts' power to restrain a foreign arbitration, the CoA held that such power is conferred by s. 37 of the Senior Courts Act 1981. The CoA reasoned that this section confers the broad power to issue anti-suit injunctions and that this must also apply to foreign arbitrations unless s. 37 had been expressly modified by statute to exclude anti-arbitration injunctions, which it had not (and, in this regard, the CoA paid particular attention to the terms of the Arbitration Act 1996 and the New York Convention 1958).

In its judgment, the CoA noted that if the courts did not have the power to do so, it would mean "*that the English court may restrain a foreign arbitration in aid of the claimant's legal rights, such as those arising under an exclusive jurisdiction clause, but in no circumstances may it grant an anti-arbitration injunction to prevent vexatious or oppressive conduct*". The CoA held that this could not be right.

Nevertheless, the CoA did issue a word of caution that: "*At the same time, it is clear from the principles of international arbitration embodied in the New York Convention and from the English authorities that the court must show great caution and restraint before granting such an injunction*".

### (2) The court's exercise of its power under s. 37 Senior Courts Act 1981

Having decided that the English courts do, in principle, have such a power, the CoA then considered whether it should exercise this power if the dispute in the foreign arbitration properly falls within the scope of the arbitration agreement (in which circumstances the Court would ordinarily be bound under s. 9 of the Arbitration Act (and Article II of the New York Convention) to stay the English proceedings in which the same claim was made). Lord Justice Richards found the argument that the court should not exercise its power in those circumstances to be "*irresistible*". In particular, he reasoned that to grant such an injunction would be contrary to the domestic and international principles of "*respecting and giving effect to arbitration agreements*".

Consequently, and having considered the nature of the disputes in the foreign arbitration, the CoA overturned the Commercial Court’s injunction in relation to the claims in the Lebanese arbitration that the CoA considered to fall properly within the scope of the arbitration agreement. However, the CoA upheld the injunction as regards the claims that had been determined by the English courts in 2017 to fall outside the scope of the arbitration agreement.

### (3) No requirement that England should be the ‘natural forum’

The final point of principle considered by the CoA was whether England needs to be the ‘natural forum’ for an anti-arbitration injunction to be granted (as is the case for injunctions restraining parties from pursuing claims in foreign court proceedings).

The CoA confirmed that it does not, because anti-arbitration injunctions (unlike anti-suit injunctions) do not involve an interference with the jurisdiction of a foreign court (except to indirectly relieve it of its role as the supervisory court for the arbitration). Instead, the concern for the courts in relation to anti-arbitration injunctions is to avoid interfering with the arbitration agreement.

The CoA was, however, also concerned about impinging on the role of the tribunal to determine its own jurisdiction (pursuant to the principle of international arbitration known as ‘kompetenz-kompetenz’). Where there is common ground, or a previous determination, that a dispute falls outside of the scope of the arbitration agreement, the English courts may grant an anti-arbitration injunction in the appropriate circumstances (which was the case in relation to the claims that had previously been determined by the English court in 2017 to fall outside of the Lebanese arbitration). However, where the validity or scope of an arbitration agreement remains in issue (and, because it is a foreign arbitration, the English courts are not the supervisory courts), the CoA held that it would be an “*exceptional course for the English court to decide these issues*”.

## Conclusion

Parties seeking relief from the English courts to restrain foreign arbitration proceedings can take comfort from the CoA’s clarification that the English courts can, in principle, assist. However, parties should approach this with some caution, given the limitations described by the CoA on the exercise of that power. Most notably, the CoA clarified that the English courts should not grant anti-arbitration injunctions where the dispute in the foreign arbitration properly falls within the scope of the parties’ agreement to arbitrate, and (in the absence of a previous determination, or common ground, as to whether the dispute does fall within the scope of the arbitration agreement) it would be an “*exceptional course*” for the English courts to decide that issue in relation to foreign-seated arbitrations.

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