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Industry Information

Anti-suit injunction preventing foreign arbitration - a Bermuda first

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In a first of its kind for Bermuda, Taylors successfully obtained an anti-suit injunction preventing a foreign arbitration, in favour of Bermuda Court proceedings.

The Plaintiffs in *AK Bakri & Sons Ltd (& Ors) v Asma Abdul Kader Bakri Al Bakri (& anor)* [2017] SC (Bda) 40 Com, sought to stay Bermuda court proceedings they had commenced, in favour of arbitration in Saudi Arabia. The Defendants, represented by Taylors, opposed the stay application and also applied for an anti-suit injunction preventing the arbitration.

Mr Justice Hellman's decision to grant the anti-suit injunction and to refuse the stay, turned on whether there were 'exceptional circumstances' both for justifying a stay, and for granting the injunction, per the reasoning of Madam Justice Gloster in *Excalibur Ventures LLC v Texas Keystone* [2012] All ER (Comm) 933 QB.

In late 2016, the Defendants, two siblings of a Saudi family, discovered that they had been removed from the register of members of the First Plaintiff, a Bermuda holding company for Al Bakri group entities, and that their shares had been transferred to the second and third Plaintiffs (the Defendants' brothers).

The Defendants were met with originating proceedings seeking, *inter alia*, a declaration that they were not entitled to rectification of the share register.

The Plaintiffs subsequently served a statement of claim making detailed references to a Shareholders Agreement alleged to bind the Defendants (a point of dispute which was not necessary for the Court to determine), and relied on certain Saudi Powers of Attorney purportedly granted in favour of their father, as authority for the transfer of the Defendants' shares. The statement of claim did not plead an arbitration agreement.

After serving the statement of claim, the Plaintiffs discovered the arbitration clause contained in the Shareholders Agreement, which provides for settlement of all disputes before a Saudi arbitral tribunal. They sought to stay their own court proceedings, claiming they were not aware of the Shareholders Agreement or the arbitration clause within it, when the proceedings were commenced; a situation aptly described by their counsel during the course of the hearing as a 'legal blunder'.

The Plaintiffs contended that i) given their claim relies on principles of Sharia law; ii) the dispute concerns Saudi family members; iii) witnesses live in Saudi Arabia and speak Arabic; and iv) there are a number of related proceedings being litigated in Saudi Arabia, Saudi arbitral proceedings were the appropriate forum for the issues to be determined.



The Defendants submitted that the filing of the statement of claim comprised a *first statement on the substance of the dispute* pursuant to Article 8 of the UNCITRAL Model Law on International Commercial Arbitration, with which the court agreed, but determined that this did not restrict the Court's discretion to refer the matter to arbitration, if appropriate.

The Court was however persuaded by the reasoning in *Excalibur*; authority for the position that where a claimant applies to stay proceedings voluntarily brought by it, it must establish 'special', 'rare' or 'exceptional' circumstances to justify a stay. *Excalibur* further provides that even where there are cogent reasons for a stay, it should only be granted if the benefits of doing so clearly outweigh any disadvantage to the other party, and will not generally be appropriate if the other proceedings will not finally resolve all of the issues in the case.

Justice Hellman found that the circumstances advanced by the Plaintiffs as connecting the dispute with Saudi Arabia were generic rather than exceptional, and he did not therefore need to go on to consider the second step of whether he would have granted a stay had exceptional circumstances been found.

The Defendants' anti-suit application mirrored the Plaintiffs' stay application regarding the applicability of *Excalibur*. The Bermuda Supreme Court has power to grant an injunction under s19(c) of the Supreme Court Act 1905 and following *Excalibur*, will only do so in exceptional circumstances, including where the dispute concerns the question of whether the parties are bound by the arbitration agreement, as is the case in *Al Bakri*.

In finding exceptional circumstances in favour of the Defendants, Justice Hellman highlighted that the Plaintiffs knew or ought to have known when they commenced Bermuda proceedings, those factors which were later relied upon to argue that a Saudi arbitral tribunal is the convenient forum, and they ought to be held to that choice. He further observed that it would be oppressive for the Defendants to be subjected to arbitral proceedings relating to the same dispute.

While it wasn't necessary at this stage for the Court to address the validity of the arbitration clause and consequently the jurisdiction of the Saudi tribunal, Justice Hellman foreshadowed his view that the Saudi tribunal's competence to rule on its own jurisdiction is not exclusive, implying that should the question come before him, he may exercise jurisdiction to determine it.

The Plaintiffs have sought leave to appeal the decision.

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