WHITE & CASE

Insight: International Arbitration

November 2013

'Can pay, won't pay' – in the first reasoned judgment of its kind, the English Court of Appeal has imposed conditions on a recalcitrant defendant's permission to appeal a worldwide disclosure order following adverse arbitral awards

Gloster LJ has ordered that the appellants, the losing parties in two London-seated LCIA arbitrations, pay into court the full amount of awards now worth over US$325 million as a condition of proceeding with their appeal against a worldwide disclosure order of their assets (granted by Field J earlier this year in aid of enforcement action by the respondent). The Court of Appeal's decision adds to the growing body of pro-arbitration case law and makes it clear that parties who can but won't pay unchallengeable arbitral awards granted by London-seated tribunals, and who ignore related court orders, will not be permitted to have selective recourse to the English courts.

Background

This decision of the Court of Appeal relates to current multi-jurisdictional enforcement proceedings by Cruz City 1 Mauritius Holdings ("**Cruz City**") in respect of a partial final award and a final award (the "**Awards**") which it obtained in July 2012 against Unitech Limited and two affiliated companies (the "**Unitech Parties**") in London-seated LCIA arbitrations. Pursuant to the Awards, the Unitech Parties were ordered to pay Cruz City US$298 million (plus interest, accruing at 8% per annum, compounded quarterly) in return for shares in a joint venture company, as well as Cruz City's legal costs. Following an unsuccessful jurisdictional challenge before Andrew Smith J in December 2012 and an application under section 66(1) of the Arbitration Act 1996, the Awards are final and binding, and enforceable in the same manner as judgments or orders of the English court.

Yet by the beginning of 2013, the Awards remained unsatisfied, Cruz City had been unable to verify the nature and extent of the Unitech Parties' assets through publicly available documents and the Unitech Parties had begun to run technical arguments regarding service of process. As a result, Cruz City applied to the English High Court for an order to compel the Unitech Parties to disclose their worldwide assets over a specified value threshold to aid enforcement (the "**Worldwide Disclosure Order**") and sought permission to serve its application on the Unitech Parties' English solicitors. Cruz City's application was successful- for further information on the judgment of Field J, please see our previous Client Alert by clicking **here**.

In July 2013, the Unitech Parties obtained permission to appeal Field J's judgment and were granted a stay of execution of the Worldwide Disclosure Order (which, at that point in time, they were in breach of) until the hearing of the appeal. In response, Cruz City applied to the Court of Appeal for an order that the Unitech Parties' permission to appeal Field J's

Jason Yardley
Partner, London
+ 44 20 7532 1804
jyardley@whitecase.com

James Woolrich
Associate, London
+ 44 20 7532 1830
jwoolrich@whitecase.com

Nausheen Rahman
Trainee, London
+ 44 20 7532 1789
nrahman@whitecase.com

White & Case LLP
5 Old Broad Street
London EC2N 1DW
+ 44 20 7532 1000

judgment be conditional on their paying into court all or a substantial proportion of the sums due under the Awards, pursuant to CPR 52.9(1)(c) ("*[t]he appeal court may […] impose or vary conditions upon which an appeal may be brought*").

Placing Conditions on Permission to Appeal

It was common ground between the parties that the court had the power under CPR 52.9(1)(c) to impose conditions on the bringing of an appeal in circumstances where, such as in the present case, conditions were not attached to the original grant of permission. What was disputed was, first, whether there was a "*compelling reason*" to do so (as required by CPR 52.9(2)) and, secondly, whether the court should exercise its discretion to make the order sought.

The Unitech Parties argued that a "compelling reason" was absent on the facts. For example, they contended that their appeal against the grant of the Worldwide Disclosure Order was meritorious and if conditions were imposed on it being brought, the appeal would be stifled. If the amount of the Awards were paid into court as a condition of pursuing the appeal, they argued, there would be no point in their pursuing the appeal- Cruz City would have engineered a fund to take enforcement steps against. In other words, by successfully applying for conditions to be attached to the appeal, Cruz City would have obtained indirectly what it sought to obtain by the claim itself; the payment of the Awards. Further, the Unitech Parties argued that in substance, Cruz City was seeking conditions to be imposed to ensure compliance with awards/orders made in separate proceedings as a condition of the current appeal being allowed to proceed.

Overall, the Unitech Parties contended that the imposition of conditions on the bringing of their appeal would confer a disproportionate benefit on Cruz City.

Decision of the CoA

Gloster LJ, who heard the application, decided to impose conditions on the Unitech Parties' permission to appeal, "*for reasons which reflected the arguments advanced in [Cruz City's] written and oral submissions*".[1]

Her Ladyship found that a "*compelling reason*" existed since, inter alia: (1) the case was on all fours with the factual scenario in the *Masri* cases[2] – as Cruz City put it at the hearing, the present case was, as in Masri, an instance of 'can pay, won't pay'; (2) it was clear that the Unitech Parties "*have thwarted and will continue to thwart, [Cruz City's] attempts at enforcement […] by placing every obstacle in the latter's way*"; (3) there was a real risk that the Unitech Parties may attempt to transfer assets to jurisdictions like India where enforcement may prove to be more difficult; (4) it is the policy of the English court that arbitration awards should be satisfied and executed (and, consistent with that policy, the court ought not to allow a recalcitrant party to seek permission to challenge enforcement orders adverse to its interests while at the same time contriving to "*lightly cock a snook*" at other English court orders requiring it to pay the Awards); and (5) there was no reason to think the appeal would be stifled in circumstances where funds paid into court would be held to the order of the Court of Appeal; the fact the Unitech Parties might not want to run the risk as to what the Court of Appeal may ultimately order in relation to any funds paid in was neither here nor there.

Having found "*compelling reason*" to make the order sought, Gloster LJ found the case to be a straightforward one: there was "*little doubt in [her Ladyship's] mind as to how the discretion should be exercised*" – the order to impose conditions would further the overriding objective that orders of the court should be complied with, and, where a defendant has available funds with which to do so, awards should be paid.

Comment

The Unitech Parties must now choose between either paying the full amount of the sums due under the Awards into court (US$333,620,492 + £182,882) or having their appeal struck out and the stay of execution of the Worldwide Disclosure Order lifted.

Whatever the Unitech Parties' decision will be, this pro-arbitration judgment from the Court of Appeal is of both legal and practical significance. It ought to serve as a general warning that a selective approach to compliance with orders of the English court will not be tolerated. In cases like the present one, where a party ignores awards made by a London-seated tribunal and related orders of the English court while at the same time seeking to use the English court's powers for its own benefit, the message is clear – 'can pay, won't pay' just isn't acceptable.

Cruz City is represented by White & Case LLP and was represented at the hearing by Neil Kitchener QC and Nehali Shah of One Essex Court.

1 Case report: *Cruz City 1 Mauritius Holdings v Unitech Limited & Ors* [2013] EWCA Civ 1512

2 *Masri v CCIC* [2008] EWCA Civ 1367; *Masri v CC(OG)CI* [2009] EWCA (Civ) 36 and *Masri v Consolidated Contractors International Co Sal* [2011] EWHC 409 (Comm)