

# Weekly update



Welcome to the fifth edition of Clyde & Co's (Re)insurance and litigation caselaw weekly updates for 2012.

These updates are aimed at keeping you up to speed and informed of the latest developments in caselaw relevant to your practice. Please follow [this link](#) for further details of the following recent cases:

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# Nomihold Securities v Mobile Telesystems

## Application for anti-arbitration injunction where an arbitration award already made

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/130.html>

The agreement between the parties provided for LCIA arbitration. Following a dispute, the claimant received an award from a LCIA tribunal in its favour and sought to enforce that award. The defendant then sought to commence two further LCIA arbitrations and the claimant applied for an anti-arbitration injunction from the courts. The case is unusual in that the parties had already arbitrated their dispute once and the claimant was trying to prevent, in effect, a re-arbitration of the dispute. Smith J held as follows:

- (1) The court did have jurisdiction to grant the injunction under section 37 of the Senior Courts Act 1981. It has been established by prior caselaw that the court may make an anti-arbitration injunction if (a) the arbitral proceedings are an infringement of a legal or equitable right of a party; or (b) the proceedings are, or would be, vexatious, oppressive or unconscionable. The judge agreed that it is a breach of an arbitration agreement to bring proceedings in “an unlawful attempt to invalidate the award” or to make a “collateral attack on a binding judgment or award of a properly constituted tribunal”. Both criteria had been satisfied and there was no basis for concluding that the court did not have jurisdiction for making an order preventing the arbitration of matters already determined between the parties. Thus there was jurisdiction so long as section 9 of the Arbitration Act 1996 (or any other statute) did not curtail that jurisdiction.
- (2) Section 9 of the Arbitration Act provides that “a party to an arbitration agreement against whom legal proceedings are brought...in respect of a matter which under the agreement is to be referred to arbitration” may apply for a stay of those legal proceedings. The defendant argued that it was entitled to a stay of these proceedings while the further arbitrations proceeded. Smith J was not required to decide the point, but he expressed his opinion that “legal proceedings” included an application begun by an application notice (rather than a claim form).

Smith J accepted that the LCIA tribunal would have power to decide the claimant’s argument that, for example, issue estoppel arose in this case (ie because the claims had already been determined in the earlier arbitration). However, that was not enough to establish that these legal proceedings were in respect of matters “to be referred” to arbitration. It also had to be shown that the parties had agreed that these matters should (only) be arbitrated and the defendant could not satisfy this test. Smith J concluded that the court was not precluded by the arbitration agreement from determining this application as it was intended to protect the arbitration award and to support its enforcement. In other words, both the arbitral tribunal and the English court (exercising its supervisory jurisdiction) could hear these matters. Accordingly, the defendant was not entitled to a stay of these proceedings.

- (3) However, it was not just and convenient for the court to order the anti-arbitration injunction in this case. The arbitrators would have adequate powers to hear the new arbitrations and the judge was not persuaded that the facts of the case justified the exceptional order being sought.

# Navios International v Sangamon Transportation

## Exercise of the court's discretion under section 70(4) of the Arbitration Act 1996

<http://www.bailii.org/ew/cases/EWHC/Comm/2012/166.html>

Section 70(4) of the Arbitration Act 1996 provides that, where there is an application or appeal under sections 67, 68 or 69 of the Act, if it appears to the court that the award does not contain the tribunal's reasons or does not set out the tribunal's reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

In this case, it was common ground that it would not be sufficient if it would be helpful for the court to have such reasons - it is only if the court is otherwise unable properly to consider the application/appeal that the power to order further reasons is available. Hamblen J also noted that "It is a power that the Court will exercise very sparingly given in particular that applications for reasons are costly, incur delays and run counter to the purpose and policy of the 1996 Act of conferring finality on awards".

On the facts, the judge was not persuaded that an order under 70(4) was necessary. In any event, he would not have regarded this as an appropriate case for the exercise of his power because of (amongst other reasons):

- (1) The lateness of the application. The application should have been made at the time of the respondent's notice and on any view prior to the determination of the permission application
- (2) The fact that the order sought was not simply for further reasons, but would also have required further evidence
- (3) The sum in dispute was relatively small (just under USD 135,000) and the costs of a remission would be disproportionate
- (4) It would be burdensome to ask the tribunals in question to give further reasons for their awards given the interval that has since elapsed

The judge concluded that this had been attempt to adduce further evidence and seek further findings from the tribunal when these had not been considered necessary at the time of the arbitrations. Therefore, "the parties must live with the case which was put at the time".

### Further information

If you would like further information on any issue raised in this newsletter please contact:

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