



# A jurisdiction too far: The English Commercial Court declines to continue freezing injunctions in support of foreign and English seated arbitrations

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In *Petrochemical Logistics Ltd & Axel Krueger v PSB Alpha AG & Konstantinos Ghertsos*,<sup>1</sup> the English Commercial Court declined to continue two freezing injunctions against the Defendants in support of both a London-seated LCIA arbitration (as there was an insufficient risk of dissipation) and a Swiss-seated arbitration (due to an insufficient connection to the English jurisdiction). The judgment provides a useful analysis of the factors the English courts will take into account when exercising their jurisdiction to grant interim or emergency relief in support of English and foreign seated arbitral proceedings.

## Background and Share Purchase Agreements

The Claimants were (a) Petrochemical Logistics Ltd, a Gibraltar company (Petrochemical), and (b) Mr Krueger (the Claimants). The Defendants were (a) PSB Alpha AG, a Swiss company with shares in bearer form (PSB Alpha) and (b) Mr Ghertsos, its former shareholder (the Defendants). Importantly, PSB Alpha owned Alpha Terminals BV (Alpha Terminals), a Dutch company, which owned the land in the Netherlands on which a storage terminal for oil and petroleum products was to be built (the Project Land).

On 25 November 2019, Mr Ghertsos (then sole shareholder of PSB Alpha) sold the entire share capital of PSB Alpha to the Mr Krueger pursuant to a share purchase agreement (the November SPA). The November SPA was governed by Swiss law and provided for disputes to be determined by Swiss-seated arbitration. In the event, Mr Ghertsos never delivered the Swiss bearer share certificates to Mr Krueger.

Nevertheless, in reliance on the November SPA, Mr Krueger purported to remove Mr Ghertsos as director of PSB Alpha and appointed himself in his place. Mr Krueger then arranged the sale of PSB Alpha's shares in Alpha Terminals to Petrochemical under the terms of a share purchase agreement dated 16 January 2020 (the January SPA). The January SPA was governed by English law and provided for disputes to be determined by English-seated arbitration.

A dispute arose in relation to both (a) Mr Krueger's authority over PSB Alpha and (b) the validity of the January SPA. In the interim (and as a consequence of the uncertainty over who validly held the shares in PSB Alpha), PSB Alpha purported to transfer its shareholding in Alpha Terminals to AT Holdings BV (AT Holdings), a Dutch company, by way of transfer deed, and updated the Dutch Trade Register to reflect that purported transfer.

## Proceedings before the English Commercial Court

On 13 March 2020, the Claimants successfully applied to the English Commercial Court for a freezing injunction on an *ex parte* basis pursuant to section 44(2)(e) of the Arbitration Act 1996 (the AA) and/or section 37 of the Senior Courts Act 1981 (the SCA) over both (a) the bearer share certificates of PSB Alpha and (b) the shares and assets of Alpha Terminals. Specifically the Court granted an injunction preventing both Defendants from dealing in Alpha Terminal's shares and assets (Injunction A) and a second injunction preventing Mr Ghertsos from dealing with the bearer share certificates of PSB Alpha (Injunction B).

At the return date hearing, the Court stated that the two injunctions had to be considered separately given that Alpha Terminal's shares and assets (to which Injunction A applied) were subject to English-seated arbitration (under the January SPA), whereas the bearer share certificates (to which Injunction B applied) were subject to Swiss-seated arbitration (under the November SPA).

## Jurisdiction of the English Commercial Court to grant injunctive relief

First, the Court considered its jurisdiction to grant injunctive relief in support of arbitration proceedings. In doing so, the Court noted that, by virtue of section 44(1) of the AA, it has the same power to order an interim injunction (such as freezing orders) as it would for the purposes of litigation proceedings. Further, the Court also noted that section 2(3) of the AA grants such powers even if the seat of the arbitration is outside England and Wales (as was the case with the November SPA). Addressing its discretionary powers, the Court noted that section 37 of the SCA permits the High Court to order injunctive relief where it appears "*just and convenient to do so*".<sup>2</sup>

### A real risk of dissipation of assets

Next, the Court considered whether the Claimants could demonstrate a real risk of dissipation of assets with regard to (a) the shares and assets of Alpha Terminals under Injunction A and (b) the bearer share certificates in PSB Alpha under Injunction B.

In respect of Injunction A, the Court held that there was insufficient evidence of a risk that the Defendants would dissipate the shares or assets in Alpha Terminals (given that the company's sale to AT Holdings had already occurred). Consequently, the Court did not maintain Injunction A. In contrast, the Court determined that Mr Ghertsos' failure to perform the November SPA evidenced a real risk of dissipation under Injunction B.

### Sufficient connection with the jurisdiction of England and Wales

Next, the Court considered whether there was sufficient connection with the English jurisdiction to maintain Injunction B given that the seat of the arbitration under the November SPA was outside of England and Wales.

In doing so, the Court noted the test set by Walker J in *Mobil Cerro Negro*<sup>3</sup> which provided that the English court "*will only be prepared to exercise discretion to grant an application in aid of foreign litigation for a freezing order affecting assets not located here if the respondent or the dispute has a sufficiently strong link here*" or where "*there is some other factor of sufficient strength to justify proceedings in the absence of such link*".

The Claimants submitted that although there needed to be a connection to the jurisdiction, the threshold was not high pursuant to *Taurus Petroleum*<sup>4</sup>, and that what was required was a long term connection with the jurisdiction. Given the circumstances, they submitted that there was sufficient jurisdictional connection because (a) Mr Ghertsos was a British national, (b) the application for injunctive relief was based on an English law governed contract (the January SPA) and (c) there was a close connection between the January SPA and the November SPA.

In contrast, the Defendants relied upon *ICICI Bank*<sup>5</sup> for the proposition that the English court should only grant injunctive relief in *exceptional circumstances* in situations where the respondent is (a) resident and domiciled outside England and Wales, (b) not subject to the *in personam* jurisdiction of the English court and (c) has no assets in the jurisdiction. Further, the Defendants argued that the Claimants should have first applied for relief from the Swiss court given that there is no reason to believe that the Swiss court would not have acted with appropriate expediency.

In finding for the Defendants, the Court determined that, unlike in *Taurus Petroleum*, there was no "*long term connection with the jurisdiction*" in respect of the shares covered by Injunction B as Mr Ghertsos was neither

domiciled nor resident in England. Further, the Court held that the available evidence did not demonstrate a sufficiently close connection between the November and the January SPAs so as to anchor jurisdiction. Finally, the Court accepted the Claimants' evidence that it was open to Mr Krueger to apply for appropriate relief (including sanctions) from the Swiss courts and declined to order injunctive relief on the basis of the alleged inadequacy of penalty under Swiss law. It considered that: (a) whilst an order of the English court may not interfere with the management of the Swiss arbitration, there remained a risk of overlapping orders being sought in the Swiss courts; and (b) there was no countervailing factor or sufficient connection with this jurisdiction that tipped the balance in favour of an order by the English court. Accordingly, the Court declined to exercise its discretion to order that Injunction B against Mr Ghertsos with respect to the PSB Alpha shares should continue.

## Conclusion

This decision sets out some key limits on the English courts' discretionary power to grant freezing injunctions in support of both English and foreign-seated arbitrations:

- Section 3(2)(b) of the AA permits an English court to issue injunctions in support of a foreign-seated arbitration; however the court must be satisfied that there is sufficient connection with the English jurisdiction in order to exercise its discretion.
- Satisfying the test for sufficient connection will depend on the facts of any given case; however it is clear that nationality alone is not a sufficiently compelling factor and that parties should instead strive to demonstrate a long term connection with the jurisdiction, whether by reference to residency, domicile, conduct (such as established trading patterns) or other means.
- A freezing injunction under the AA in respect of one contract will not automatically extend to other contracts related to that same transaction unless these are expressly stated to be connected to each other.
- A party to a foreign-seated arbitration agreement is deemed to have submitted to the supervisory jurisdiction of the court of that foreign jurisdiction and will therefore need a very good reason to instead seek relief from the English court. For example, the alleged inadequacy of the penalties imposed by the curial court in this case was not sufficient.

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<sup>1</sup>[2020] EWHC 975 (Comm)

<sup>2</sup>The parties had already accepted that the Claimants had a good arguable case and so the Court considered this threshold to be satisfied.

<sup>3</sup>*Mobil Cerro Negro v Petroleos de Venezuela* [2008] 1 Lloyd's Rep 684 at [119]

<sup>4</sup>*Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC at [54]

<sup>5</sup>*ICICI Bank UK plc v Diminco NV* [2014] EWHC 3124 (Comm) at [27]

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