

DATE: 4 October 2018

B.B. ENERGY (GULF) DMCC v AL AMOUDI AND OTHERS

[2018] EWHC 2595 (Comm)

CASE SUMMARY

BEFORE: MR JUSTICE ANDREW BAKER

An application for a stay of the proceedings in favour of ongoing liquidation proceedings in Morocco was refused. It was unnecessary to determine whether the court has a discretion to stay proceedings within the scope of the Brussels-Lugano regime in favour of insolvency proceedings in a non-Brussels-Lugano state.

The claimant is a Dubai company trading in crude oil, refined oil products and natural gas. The defendants are directors of SAMIR, a Moroccan oil-refining company which is in ongoing judicial liquidation proceedings in Morocco (in which the claimant is a creditor). The matter arose out of claims that the defendants are liable to the claimant in damages in respect of loss occasioned to it through entering into a contract with SAMIR under which SAMIR defaulted. The claimant served each defendant within the jurisdiction and it was accepted that this amounted to valid service.

The defendants sought a stay of these proceedings on four bases:

- a) that England is a *forum non conveniens*;
- b) that the claim should be stayed in favour of the Moroccan liquidation proceedings as a *lis alibi pendens*;
- c) that the Moroccan liquidation proceedings are related proceedings under Article 34 of the Brussels Regulation (recast); or
- d) as a temporary case management measure pending a decision in the Moroccan proceedings as to whether the liquidation of SAMIR is to be extended to the defendants in these proceedings under Article 706 of the Moroccan Commercial Code.

Andrew Baker J refused the defendants' application.

As to the third basis, it was common ground that Article 34 of the recast Regulation did not apply, as the Moroccan proceedings are in the nature of insolvency proceedings which are excluded from the scope of the Regulation. There could be no stay on this ground.

As to the first basis, it had been established in *Owusu v Jackson* (Case C-281/02) [2005] QB 801 that proceedings within the scope of the Regulation brought in England against a defendant domiciled here cannot be stayed on the basis that England is a *forum non conveniens*. There could therefore be no question of staying the proceedings on this ground against D3 and D4 (who were domiciled in England). As to D1 and D2, they had not demonstrated that Morocco was a *forum conveniens* (which would require them to show that it was an available forum in which the claimant could bring its claims); as a result, there was no *forum non conveniens* discretion for the court to exercise in relation to them.

As to the second basis, *Owusu v Jackson* left open the question as to whether a discretion available under national law could be exercised to stay proceedings because of a *lis alibi pendens* where jurisdiction had been founded under now-Article 4 of the recast Regulation and the proceedings in

favour of which a stay was sought were in the courts of a state not privy to the Brussels-Lugano regime. The seemingly unqualified terms in which the CJEU articulated the principle in *Owusu v Jackson* may appear to dictate that the discretion was not available; however, it seems surprising for an English court to be unable, because of the Brussels-Lugano regime, to stay in favour of proceedings in a state not subject to the regime where, on otherwise identical facts, it would have been entitled or perhaps obliged to stay in favour of proceedings in a state subject to the regime.

The staying of proceedings within the scope of the recast Regulation on *lis alibi pendens* grounds where the other proceedings are in a non-Brussels-Lugano state is now dealt with expressly by Articles 33 and 34 of the Regulation. The decision in *Ferrexpo AG v Gilson Investments Limited & Others* [2012] EWHC 721 (Comm), [2012] 1 Lloyd's Rep 588 (decided under the previous Regulation) which treated Article 30 as having a 'reflexive' effect where the *lis alibi pendens* was in a non-Brussels-Lugano state was therefore not good law under the recast Regulation, as the question now under the recast Regulation is whether Article 34 applies. The claimant submitted that, as Article 34 did not apply, there could be no stay. The defendants submitted that, as the reason Article 34 did not apply was that the Moroccan proceedings were insolvency proceedings falling outside the scope of the recast Regulation, it was open to the court to stay the proceedings by reference to a national law discretion relating specifically to insolvency proceedings; and they relied on a principle of 'modified universalism' in cross-border insolvency (see e.g. *In re HIH Casualty v General Insurance Ltd* [2008] 1 WLR 852, *per* Lord Hoffmann at [6]-[7] and [30]). It was unnecessary, however, to determine whether this discretion was available. On the facts, the pursuit of the claims in England did not circumvent or interfere in any way with the Moroccan liquidation.

As to the fourth basis, a stay would not be granted on case management grounds. There was no real prospect of a judgment determining overlapping matters being delivered in Morocco in short order. Were there to be such a judgment during the life of these proceedings, that would not give rise to any particular difficulty in managing the proceedings or any unfairness to either side. Any possible such unfairness would not outweigh the definite unfairness of pausing these proceedings for an unknown, indefinite and possibly extended period with no ability to judge whether any judgment would impact on the issues in these proceedings.

Andrew Baker J also emphasised the importance of applying to the court for permission to rely upon expert evidence, such permission being required for interlocutory hearings as much as for trials.

NOTE This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments of the Commercial Court are public documents and are available at: <https://www.bailii.org/ew/cases/EWHC/Comm/>