

**THE EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

Claim No: BVIHCM2019/0149

**IN THE MATTER OF KIRKLAND INTERTRADE CORP
AND IN THE MATTER OF THE BVI COMPANIES ACT 2014 (AS AMENDED)**

BETWEEN:

DASELINA INVESTMENTS LTD

Applicant

and

KIRKLAND INTERTRADE CORP

Respondent

Appearances:

Mr. Ryan Hocking and Ms. Laure-Astrid Wigglesworth of Appleby for the applicant
Ms. Dancia Penn QC and Ms. Pamela Rymer-Trumpet of Dancia Penn & Co for
the respondent
Mr. Grant Carroll of Ogier for the would-be liquidators

2019: December 2;
December 17.

JUDGMENT

[1] **JACK, J [Ag.]:** This is an application issued on 9th October 2019 for the appointment of liquidators over the defendant, a BVI company (“Kirkland”).

The facts

- [2] The first litigation relevant to the current application were proceedings (BVIHC (COM) 113 of 2015) issued on 21st September 2015 before this Court. The claimant was Onexim Group Management Ltd (“Onexim”). The defendant was Kirkland. Onexim sought recovery in respect of a \$30 million loan said to have been given to Kirkland in 2012. With interest, a total of some \$35 million was claimed. The loan was guaranteed by Maxim Finskiy, who plays a continuing rôle in the subsequent disputes. Following the issue of proceedings, there were negotiations involving Onexim, Kirkland, Mr. Finskiy, the current claimant (“Daselina”) and others. These negotiations resulted in a compromise contained in a number of agreements made on 24th February 2016. So far as relevant, Kirkland’s indebtedness was reduced; Mr. Finskiy’s guarantee continued; and Onexim assigned its claims under the compromise to Daselina. The compromise agreements provided for disputes to be arbitrated before the London Court of International Arbitration (“the LCIA”) in London.
- [3] On 20th June 2017, Kaye J sitting in this Court stayed the 2015 proceedings, so that the on-going disputes between the parties could be arbitrated before the LCIA. He reserved the costs of the application for a stay. On 18th August 2017, Kirkland and Mr. Finskiy made a request to the LCIA for arbitration against Onexim, Daselina and another company, Intergeo MMC Ltd (“Intergeo”). Pursuant to the LCIA rules, on 7th November 2017 Sir Bernard Eder was appointed as sole arbitrator. (Onexim had no interest in the dispute and took no part in the arbitration. The issues with Intergeo are not relevant to the current application.)
- [4] The arbitration seems originally to have proceeded in the usual way. On 4th January 2019, Sir Bernard heard an application by Daselina and Intergeo that Kirkland and Mr. Finskiy provide security for costs in the sum of \$1.25 million by 15th January 2019. Later that day, he made such an order.
- [5] Instead of complying with the order for security for costs, on 15th January 2019 Kirkland and Mr. Finskiy wrote to the LCIA saying that they were withdrawing their

claims in the arbitration (or at least that is what they purported to do). They alleged that Sir Bernard and the LCIA itself were biased against them. By letter of 1st February 2019 Kirkland and Mr. Finskiy confirmed that their letter of 15th January 2019 should be treated as a challenge to the sole arbitrator.

- [6] Under the LCIA rules, that challenge stood to be considered by another arbitrator and on 16th February 2019 Prof Albert Jan van den Berg was appointed to arbitrate this challenge.
- [7] Whilst that was proceeding, Sir Bernard held an oral hearing on 6th February 2019. Daselina and Intergeo attended, but Kirkland and Mr. Finskiy did not. On 18th March 2019 Sir Bernard delivered a partial final award. By this, he dismissed Kirkland's and Mr. Finskiy's claims and ordered that Kirkland and Mr. Finskiy pay Daselina US\$26 million principal, \$10,974,298.66 pre-award interest and continuing interest at 12 per cent calculated on the basis of a 360 day year, compounding at six month rests. There were various subsidiary awards including a provision that Kirkland and Mr. Finskiy had to pay the monies without counterclaim or set off.
- [8] The current application for the appointment of a liquidator is founded on the sums awarded by the partial final award.
- [9] On 10th May 2019 Prof van den Berg rejected the challenge to the impartiality of Sir Bernard Eder and of the LCIA itself. This marked the end of any challenge under the LCIA rules to Sir Bernard's award. The UK Arbitration Act 1996 provides for limited rights of appeal against arbitration awards, but any challenges must be brought within 28 days: section 70(3). Neither Kirkland nor Mr. Finskiy have sought to challenge the partial final award before the courts in London, the seat of the arbitration. Indeed, under Article 26.8 of the LCIA Rules 2014, the parties waived their right to appeal to the English courts on points of law. (Section 69(1) of the UK Act allows such a waiver.)

[10] Daselina served a formal letter of demand for \$36,974,298.66 on Kirkland's registered agent here in Tortola on 23rd September 2019. No monies were paid. Instead a firm of US attorneys, Shutts & Bowen LLP ("Shutts") responded by a letter of 4th October 2019.

Procedural history

[11] On 9th October 2019 Daselina issued the current application for the appointment of liquidators over Kirkland. The application was served on Kirkland's registered agent the following day.

[12] This matter came on before me on 2nd December 2019. Ms. Dancia Penn QC appeared on behalf of Kirkland. She explained that she had only been instructed the previous week and needed more time to present Kirkland's case fully. (In post-judgment submissions, Ms. Penn said that she had not sought an adjournment for this purpose.¹) Kirkland had served an affidavit of Ms. Nisha Telesford and two affidavits of Harold E Patricoff of Shutts. Ms. Penn QC had served a skeleton argument. It seemed to me that Ms. Penn's desire for more time was caused by Kirkland's late instruction of her. Mr. Patricoff and Shutts were closely involved with the representation of Kirkland in the arbitration. He was able to put forward the details of Kirkland's case in opposition to the application. Ms. Penn was unable to identify any specific matters on which she would seek to adduce further evidence on Kirkland's behalf. If she had sought an adjournment, I would have refused it. There would have been little prejudice to Kirkland, but potentially some prejudice to Daselina, if I adjourned the proceedings.

[13] Ms. Penn indicated that she might or might not seek to put in a further affidavit, whilst I considered my reserved judgment. In the event, she has not.

¹ As to Ms Penn QC's further submissions, this is not the purpose of showing the draft to counsel: **R (Edwards) v Environment Agency** [2008] UKHL 22, [2008] 1 WLR 1587 at para [66] ("The purpose of the disclosure of the draft speeches to counsel is to obtain their help in correcting misprints, inadvertent errors of fact or ambiguities of expression. It is not to enable them to reargue the case.") and most recently **Grosvenor London Ltd v Aygun Aluminium Ltd** [2018] EWHC 227 (TCC), [2018] Bus LR 2439 at para [52].

Registration under the New York Convention

- [14] Ms. Penn QC's primary submission was that the Court should not, or at least should not indirectly by means of winding up proceedings, enforce the partial final award without ensuring that Daselina registered the award in accordance with the New York Convention². Until the coming into force of the BVI Arbitration Act 2013 in the following year, she argued (although this is disputed by the applicant), that it was not possible to register a foreign arbitration award in this Territory under the Convention, but that the 2013 Act changed this. This was now, she submitted, the required method of enforcing an award.
- [15] This, she submitted, was the key difference with the Privy Council decision (on appeal from this Territory) in **Vendort Traders Inc v Evrostroy Grupp LLC**³. In that case, Evrostroy on 24th May 2012 served a statutory demand on Vendort based on an arbitration award delivered on 1st November 2011 under the LCIA Rules. Vendort applied to set aside the statutory demand on two bases: firstly that the award had been obtained by fraud and secondly that the award needed to be registered under section 28 of the Arbitration Ordinance. All three instances dismissed the allegation of fraud on the facts. All three instances also held that an award did not need to be registered under the then existing legislation before a statutory demand could be served in respect of it. By contrast, under the 2013 Act, enforcement is now possible under the New York Convention, and this, she argued, is now the only route to enforcement. A failure on the part of the Court to insist on this would be a breach of international law.
- [16] I reject the argument that recognition under the New York Convention is the only means by which this Court can take cognizance of the debt created by the arbitration award. Seeking to appoint liquidators is not a method of enforcement. As Farrara J held in **PT Ventures SGPS SA v Vidatel Ltd**⁴ at para [46]:

² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10th June 1958)

³ [2016] UKPC 15,

⁴ BVIHC (COM) 2015/0117

"[I]t is settled law that winding up proceedings are not, strictly speaking, enforcement proceedings. An unsecured creditor is not going against any specific asset of the company by applying to appoint liquidators. Such proceedings a class of remedy involving all unsecured creditors of the company."

Breach of international law

[17] As to breach of international law, what Article V of the New York Convention provides is:

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

[18] Part X of the Arbitration Act 2013 gives domestic effect to Art 5.

[19] It is trite law that this Court will not appoint a liquidator of a company on a creditor's application if the debt is the subject of a *bona fide* dispute. All of these matters in Article V are grounds on which the Court would refuse to appoint a liquidator: see **GL Asia Mauritius II Cayman Ltd v Pinfold Overseas Ltd**⁵, a pre-2013 Act case where an application for the appointment of liquidators was refused based on the arbitrators' arguably having no substantive subject-matter jurisdiction.⁶ There is thus no inconsistency with international law (even if, which may be doubtful, the Court can take cognizance of international law). I reject the argument based on international law.

The challenge to the partial final award before Prof van den Berg

[20] The key issue is whether Kirkland has proper grounds for disputing the debt established by the partial final award. If there are no proper grounds for challenge of the debt, then (subject to the other matters raised on Kirkland's behalf) Daselina will in my judgment have established a proper basis for seeking the appointment of a liquidator. It is to these grounds of challenge that I now turn.

⁵ BVIHC (COM) 2013/55, judgment of 15th July 2013 (Bannister J)

⁶ Ms. Penn QC in her post-judgment submissions refers to **Pacific China Holdings Ltd v Grand Pacific Holdings Ltd** (HCVAP 2010/0038) (judgment of 14th May 2012), but this was an appeal in respect of the liquidators' costs. She appears to be referring to an earlier appeal between the same parties, where the judgment was delivered on 20th September 2010 (HCVAP 2010/0007). The Court of Appeal in the earlier appeal set aside the appointment of a liquidator on the grounds that there were New York Convention defences. This earlier case is authority for the proposition that an arguable New York Convention defence raises a *bona fide* defence to an application for the appointment of a liquidator. It is not authority that a *not reasonably arguable* Convention defence affords a defence to the appointment of a liquidator.

[21] Mr. Patricoff says that the award is “the product of tainted and biased proceedings”. The basis of this allegation is that Ms. Paula Hodges QC, a partner in the firm of solicitors, Herbert Smith Freehills (“HSF”), was to be (with effect from an announcement to that effect on 18th September 2018), and was, appointed as president of the LCIA in May 2019, having previously served as its vice-president whilst the arbitration was proceeding. HSF had acted for Onexim, Daselina and various associated companies for many years against Mr. Finskiy and various of his companies. Most recently, on 27th December 2018 HSF had issued on Daselina’s behalf in the Odintsovskiy City Court of the Moskow region a claim that Mr. Finskiy had made a fraudulent transfer of assets.

[22] This was the first ground argued before Prof van den Berg. He rejected the challenge based on Ms. Hodges’ holding an office in the LCIA. He concluded:

“79. There is... no basis for Claimant’s assertion that ‘[t]he LCIA Court under the direction and control of the Respondents’ counsel is a legal representative of the Respondents.’ Ms. Hodges QC cannot be equated with the LCIA Court as a whole, and the Sole Arbitrator cannot be equated with the interests or position of Ms. Hodges QC or Respondents. The LCIA Court is not under the direction and control of Respondents’ counsel, and the LCIA Court is not (and cannot be analogised to) a legal representative of Respondents.

80. Ms. Hodges QC is currently one of seven Vice Presidents of the LCIA Court, among over thirty-five members of the Court. Article D(6) of the Constitution of the LCIA Arbitration Court provides that:

‘No member or former member of the Court who has a connection with an arbitration in relation to which the LCIA exercises any functions of any kind may participate in or influence any decision of the Court relating to such arbitration.’

...
84. ...[T]he fair-minded and informed observer, considering the facts, would not conclude that there was a real possibility that the Sole Arbitrator was biased in favour of Respondents.”

[23] The award of Prof van den Berg is in my judgment binding between the parties. By agreeing to the LCIA rules, the parties agreed that differences between them

as to, inter alia, the partiality or otherwise of an arbitrator should be resolved in the way adopted. Even if I were wrong on this and had to reach my own decision, I would have no hesitation in adopting the reasoning of Prof van den Berg as my own. There is in my judgment no basis for seeing any bias or risk of bias either on the part of the LCIA or on the part of Sir Bernard Eder.

[24] Mr. Patricoff then repeats the other matters argued before Prof van den Berg. The second ground was that the making of an order for security for costs against Kirkland on 4th January 2019 was evidence of bias and forced Kirkland to abandon its claim in the arbitration. I, like Prof van den Berg, consider this without merit. At the telephone hearing, following which Sir Bernard made the order for security, Kirkland's counsel did not suggest that Kirkland would have any difficulty complying with such an order. The making of the order did not, as Kirkland submitted, force the withdrawal of Kirkland's claim. Kirkland do not even begin to make an arguable case that ordering security for costs was outwith the sole arbitrator's powers.

[25] The third ground is that the arbitrator included an assessment of damages, when he had earlier indicated he would determine liability and quantum separately. Like Prof van den Berg, I reject this ground. (a) Sir Bernard disputes that any order to that effect was made. Rather, the question of quantum being determined in a second phase would only be decided if it was appropriate. Kirkland adduce no hard evidence to gainsay this. (b) In any event, since Kirkland and Mr. Finskiy absented themselves from the last oral hearing, it is impossible to see what prejudice they have suffered. The arbitrator was bound to consider quantum once he had determined liability. There was no purpose making a partial award on liability and then another, separate, award on quantum. (c) Further such a matter of procedure is primarily for the arbitrator. It is only in a gross case of failing to observe a fair procedure that this Court could refuse to recognize an award on grounds of public policy under Art V(2)(b) of the New York Convention. This is particularly so, when Kirkland has not sought to attack the award on this ground before the courts of the seat of the arbitration in London. However, I am wholly

unconvinced that there was any unfairness at all in the procedure adopted by Sir Bernard.

The challenges under the New York Convention

- [26] In para 39 of his first affidavit, Mr. Patricoff says that there are multiple grounds under Art 5 of the New York Convention to oppose enforcement of the partial final award.⁷ If any of these grounds of opposition were reasonably arguable, then I agree with him that the application for the appointment of a liquidator would stand to be dismissed and Daselina would have to apply to register the award in the usual way, but in my judgment they are not reasonably arguable. He says that under Art 5(1)(a) “the subject agreements are not valid under English Law, in the manner in which the Arbitral Tribunal interpreted the subject agreements.” No explanation is given of what he means by this. It is simply a bald assertion with no facts outlined to explain it, so I can give it no credence. Further, this is a matter about which Kirkland and Mr. Finskiy could and should have complained to the English Courts under section 67 of the UK Act.
- [27] He says under Art 5(1)(b) “the party against whom the award is being invoked was not able to present its case, due in part to the actual bias against Kirkland and lack of independence of the Arbitral Tribunal and the LCIA Court.” This is just a repeat of the matters which I have rejected above.
- [28] Likewise the assertion that under Art 5(1)(c) “recognition... is improper because it contains decisions on matters beyond the scope of the submission to arbitration” is just a repeat of the Art 5(1)(a) complaint.
- [29] Mr. Patricoff says under Art 5(1)(d) “the composition of the arbitral authority and arbitral procedure was not accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the

⁷ In her post-judgment submissions, Ms Penn QC submits that Mr. Patricoff was merely pointing out that there were various New York Convention defences potentially available to Kirkland. No doubt, but it was incumbent on him to show by evidence that there was (at least arguable) *substance* to the defences. This in my judgment he failed to do. A *potential* defence is not an *actual* defence.

arbitration took place.” No particulars or evidence of this are adduced, so I reject this assertion. Again, no challenge was brought in the English courts under sections 67 and 68 of the UK Act.

[30] He further asserts that under Art 5(1)(e) “recognition of the Partial Final Award is improper because the Partial Interim Award has not yet become binding on the parties.” I am afraid I do not understand this argument. The partial final award is expressed to be binding on the parties. The relevance of the partial interim award is unclear to me.

[31] Under Art 5(2)(b) he says that “the recognition or enforcement of the award would be contrary to the public policy of the BVI.” However, he fails to identify against which aspects of this Territory’s public policy recognition of the award would offend. On the contrary, in my judgment, public policy in this jurisdiction favours the enforcement of properly obtained arbitral awards.

[32] Lastly, he repeats the claim that it was wrong for Daselina to “short-circuit the process [of recognition and enforcement] and jump to the end, depriving Kirkland of its right to avail itself of the Defences available to it under Art V of the New York Convention.” Again, I have rejected this submission above. I have considered the Art 5 defences (which are reproduced in the 2013 Act).

Parallel proceedings

[33] In para 43ff of his first affidavit, Mr. Patricoff says that Daselina “has filed parallel actions against Kirkland (and Mr. Finskiy) in other jurisdictions, seeking essentially the same relief against them.” He gives examples of bankruptcy proceedings brought in Russia against Mr. Finskiy and recognition proceedings against Kirkland brought in the US District Court for Southern Florida.

[34] In my judgment, these parallel proceedings are irrelevant in the current case. It is legitimate for Daselina to seek to enforce its award wherever it thinks it is to its advantage to do so. It might be possible to imagine a case where a debtor’s

resources were being deliberately stretched, so as to make a defence to a claim in this jurisdiction difficult or impossible. The current case is not in this category of abusive behaviour. Kirkland has been able to instruct counsel and put forward its case.

Kirkland is not insolvent

- [35] Mr. Patricoff's last assertion in his first affidavit is that Kirkland is not insolvent. The basis of this is two-fold. Firstly, Kirkland is involved in unrelated litigation before the Supreme Court of New York where it is counterclaiming against the plaintiff in that action for in excess of \$185 million. Secondly, Kirkland has claims against a Mr. Prokhorov for claims in excess of \$130 million. Kirkland attempted to arbitrate these claims against him in the LCIA arbitration before Sir Bernard Eder, but the LCIA by a decision of 2nd May 2018 decided it had no jurisdiction over Mr. Prokhorov.
- [36] In my judgment, the existence of these claims does not answer the question of Kirkland's solvency or otherwise. Section 8(1)(c) of the Insolvency Act 2003 provides that a company is insolvent if "either (i) the value of the company's liabilities exceeds its assets; or (ii) the company is unable to pay its debts as they fall due."
- [37] The existence of these two claims by Kirkland may be relevant to the first alternative (whether Kirkland is balance sheet solvent), but is irrelevant to the second alternative. In the current case, there is an arbitration award (unchallenged in the seat of the arbitration), which Kirkland has not paid. Mr. Patricoff appears *sotto voce* to be accepting that, without recovery in the New York litigation or against Mr. Prokhorov, Kirkland cannot pay Daselina. Even if he is not saying that, it is an inference which I draw from all the evidence. Accordingly, in my judgment Kirkland is insolvent under section 8(1)(c)(ii).
- [38] If there were evidence that Kirkland was able to pay its debts to Daselina within a short period of time, then that might give a reason to adjourn the case for that

short period. However, there is no adequate evidence of this. Mr. Patricoff suggests that the New York litigation might be resolved quickly by settlement or summary judgment, but this appears to be speculation. There is no solid evidence of either settlement negotiations taking place or of any motion for summary judgment being issued on Kirkland's behalf.

- [39] I should add that, even if I were wrong on section 8(1)(c)(ii), I would not consider that there was adequate evidence to show that Kirkland was balance sheet solvent under section 8(1)(c)(i). The value of the claims in New York and against Mr. Prokhorof is not sufficiently established to show balance sheet solvency. The figure of \$185 million counterclaimed in New York is unexplained. No evidence has been adduced to support the amount or the prospect of making any recovery on any judgment obtained. No litigation has even been commenced against Mr. Prokhorof. The same points apply to the claim against him.

Outstanding costs

- [40] In his second affidavit, Mr. Patricoff points out that Kirkland has a costs order in its favour against Daselina for \$79,124.42. That obviously does not help the company defeat an application for the appointment of a liquidator based on an award of in excess of \$36 million. He also points out that this Court on 20th June 2017 reserved the costs of Kirkland's application to stay the 2015 proceedings in favour of the LCIA arbitration. He exhibits a draft application to determine the reserved costs and for summary assessment of the same.
- [41] It is unclear if the application has actually been issued, but even if it has been, no schedule of costs has been exhibited for the purposes of summary assessment. In these circumstances, I can properly ignore this outstanding order for reserved costs. It is at least doubtful whether Kirkland does have a good claim for the reserved costs issue to be resolved in its favour, in the light of Kirkland's subsequent purported withdrawal from the arbitration. At best Kirkland have a contingent claim under the reserved costs order. However, even if it did have a

good claim, it is fanciful to suppose that the costs which might be assessed in its favour would be any more than a tiny fraction of \$36 million.

[42] Lastly, Ms. Penn QC submits that in the exercise of the Court's discretion I should refuse to appoint a liquidator, or at least adjourn the application. I accept that section 167(1) of the Insolvency Act 2003 gives the Court a discretion whether to appoint a liquidator, but (as Ms. Penn accepts) it is a discretion which must be exercised judicially. If there were arguable defences under Art V of the New York Convention (or Part X of the 2013 Act), then the application to appoint a liquidator would stand to be dismissed (as a matter of right, I should have thought, rather than discretion). However, I have found that there are no arguable Art V (or Part X) defences shown. In these circumstances, it would in my judgment be quite wrong to dismiss the application.

[43] Whilst the Court has a wide discretion to adjourn an application for the appointment of a liquidator, it is one which must be exercised for some proper purpose. Ms. Penn QC drew my attention to the Australian case of **Commissioner of Taxation v Bay Connection Property Developments Prop Ltd**⁸. In that matter, the respondent to a winding up application based on unpaid taxes was granted an adjournment based on there being an outstanding review being conducted by the tax authorities which might reduce or eliminate the debt on which the winding up application was based. That is an obviously proper purpose for granting an adjournment. Likewise, in the current case, if there were an outstanding application to the English courts to disturb Sir Bernard Eder's award, that might well give a good reason to adjourn the current application. However, in the absence of any such an attack on the award, the position in my judgment is that there is a debt owed to Daselina by Kirkland, which, I find, is not disputed on *bona fide* grounds. There is no reason to adjourn the application.

⁸ [2012] FCA 363

Conclusion

[44] Accordingly, I shall grant the application to appoint a liquidator.

Adrian Jack [Ag.]
Commercial Court Judge

By the Court

Registrar