ARBITRATION & ADR - UNITED KINGDOM

Court refuses injunction in support of arbitration proceedings on ground of applicant's delay in seeking relief

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Introduction

A party seeking to avoid being drawn into litigation before a foreign court may apply for an anti-suit injunction from the English courts, ordering the other party not to start or continue the foreign proceedings. However, if the foreign court has already issued an adverse judgment, an anti-suit injunction from the English courts might come too late. In those circumstances, a party may apply for an anti-enforcement injunction instead, ordering the other party not to take any steps to enforce the foreign judgment.

In *Ecobank Transnational Incorporated v Tanoh* [2015] EWCA Civ 1309, the Court of Appeal considered an application for a worldwide anti-enforcement injunction in circumstances where foreign courts had issued judgments even though the underlying contract provided for disputes to be resolved by arbitration. The decision provides useful guidance to the courts' approach when considering such applications for injunctive relief.

Facts

In 2011 Ecobank, a major African bank headquartered in Togo, employed Mr Tanoh as its chief executive officer. The employment contract was governed by English law and provided for disputes to be resolved by arbitration in London. In 2013 the bank was plunged into a governance crisis. In early March 2014 a letter accusing Tanoh of incompetence and dishonesty was leaked to the press. Within the same month, the bank terminated Tanoh's employment.

Tanoh commenced proceedings in the Togo courts for unfair dismissal in April 2014. The bank challenged the court's jurisdiction, relying on the arbitration clause in the employment contract, among other things. The court found that, as a matter of Togolese law, Tanoh was permitted to make a claim in the Togo court notwithstanding the arbitration clause. The bank was ordered to plead to the merits and requested an extension of time to do so. The court ultimately found in Tanoh's favour and ordered the bank to pay damages. The bank appealed and proceedings were stayed.

In May 2014 Tanoh commenced proceedings for defamation in Côte d'Ivoire, alleging that Ecobank had failed to disapprove of the defamatory statements contained in the letter. In October 2014 the bank objected to the jurisdiction of the Ivorian court, relying again on the arbitration clause in the employment contract, among other things. The court dismissed the bank's objections and ordered it to make submission on the merits. Finding in Tanoh's favour, the court ordered the bank to pay damages and to publish the judgment in the media that had reported on the letter. The bank appealed.

In December 2014 – some six or seven months after Tanoh started proceedings in Africa – the bank commenced arbitration proceedings in London. In April 2015 the bank applied to the English High Court for an interim worldwide injunction to prevent Tanoh from taking any action to secure recognition or enforcement of the Togolese and Ivorian judgments. The court declined to grant the injunction on the basis that the bank had left it too late to seek injunctive relief.

The bank appealed. Finding in favour of Tanoh, the Court of Appeal dismissed the appeal.

Decision

The court observed at the outset that the arguments in the appeal focused on four issues:

- Were the claims in Togo and Côte d'Ivoire within the scope of the arbitration clause?
- If so, had the bank lost its right to object to the court's jurisdiction in either country because it had submitted to the jurisdiction?
- What role did the notion of comity play in determining the court's approach to an application for an anti-enforcement injunction?
- Did it matter that the bank had not sought injunctive relief before judgment was given?

Were claims within scope of arbitration clause?

The court confirmed that the law governing the arbitration clause was English law. The threshold test for anti-suit relief was whether there was a high degree of probability that there was an arbitration agreement that governed the dispute in question. It was not appropriate to adopt a lower test in the case for an anti-enforcement application.

As to the claim for unfair dismissal brought in the Togolese courts, the English court held that a dispute as to the validity of the termination of Tanoh's employment was a paradigm example of the type of dispute which the arbitration clause was designed to cover.

Section 32 of the Civil Jurisdiction and Judgments Act 1982 provides that the English courts should not recognise or enforce foreign judgments if the proceedings have been brought contrary to an agreement to settle the dispute elsewhere (unless that agreement was illegal, void, unenforceable or incapable of being performed). Dismissing Tanoh's argument that the arbitration clause was rendered unenforceable in the light of certain articles of the Togolese labour code, the court concluded that the relevant provisions of Section 32 did not apply.

Turning to the claim for defamation brought in Côte d'Ivoire, the English court acknowledged that at first blush a defamation claim was an unusual claim to be the subject of arbitration under an employment contract. However, any justification of the defamatory statements in the letter would require examination of Tanoh's performance of his functions under the employment contract. The defamation claim had a close connection with that contract. The requirement that there was a high probability that the claim fell within the clause was therefore met.

Did bank lose its right to object because it submitted to jurisdiction?

Section 32 of the Civil Jurisdiction and Enforcement Act 1982 also provides that the English courts should not recognise or enforce foreign judgments if proceedings have been brought by the person against which judgment had been given or if that person has agreed to proceedings being brought or has otherwise submitted to the jurisdiction of the foreign court. Section 33 of the act makes clear that a person should not be regarded as having submitted to the jurisdiction if it has appeared in the proceedings to contest jurisdiction or to ask the court to dismiss or stay proceedings on the ground that the dispute should be submitted to arbitration or court proceedings elsewhere.

The court confirmed that a broad test was to be applied as to the purpose of the steps taken in the foreign court. Submission was not to be inferred from the fact that the defendant had appeared in foreign proceedings in circumstances that were obviously and objectively inconsistent with a submission to that jurisdiction.

The court concluded that the bank had not submitted to the jurisdiction in Togo or in Côte d'Ivoire – or at least it was highly probable that the bank had not done so.

What role did comity play in application for anti-enforcement injunction?

The court observed that the attitude of the English courts to the grant of injunctive relief has developed over the years. Initially, there was some reluctance to grant anti-suit injunctions on the grounds that it would have the appearance of interfering with the proceedings of the foreign court and would be inconsistent with the comity that ought to exist between courts.

The courts' reluctance diminished where anti-suit relief was granted in support of an arbitration agreement (or an agreement that the English courts should have exclusive jurisdiction) – in breach of which the foreign proceedings had been brought. The injunction was not directed at the foreign court, but acted *in personam*, enjoining the party that sought to litigate elsewhere from doing so in order to enforce the contractual undertaking to arbitrate (or litigate) in the English courts. The court rejected the bank's argument that the true role of comity is to ensure that the agreement of the parties is respected and that delay is no bar to injunctive relief unless there has been detrimental reliance by the party sought to be enjoined. The court confirmed that comity and delay are linked. It would be a strong move to preclude a defendant from pursuing foreign proceedings where the foreign court was already seised of those proceedings. It would be an even stronger move if that court had already made a decision on the defendant's case and decided against it.

While in a case where there is an arbitration agreement or exclusive jurisdiction clause, comity may play a reduced role, considerations of comity nonetheless remain important. Cases in which the English courts have granted anti-enforcement applications are few and far between; examples concerned a judgment obtained by fraud and an attempt by a party to execute a judgment after promising not to do so. Further examples might include judgments that were given too quickly or secretly for an earlier anti-suit injunction to be obtained. The court concluded that none of these examples was relevant to the present case.

Did it matter that bank had not sought injunctive relief before judgment was given?

The court confirmed that an injunction is an equitable remedy and that in determining whether it is appropriate to grant it, the court must take into account all relevant considerations, including whether the party seeking the relief has acted with appropriate speed. If applicants (eg, the bank) were permitted to await the outcome of the foreign proceedings, they could have two bites of the cherry. The court found that there was no good reason for the bank's delay in seeking anti-suit relief in England, the jurisdiction whose law governed the employment contract. It could have applied for an injunction as soon as proceedings had been commenced.

Tanoh suffered prejudice from the bank's failure to seek injunctive relief before judgment was granted. While he knew of the bank's objections to the foreign courts' jurisdiction, it was not apparent that the bank would seek injunctive relief until it did so.

The prejudice extended to the foreign courts. In the case of anti-enforcement injunctions, the application will be made after rival proceedings have run to judgment. The grant of an injunction would mean that the cost of those proceedings and the rival courts' resources would have been wasted. While it would preclude the enforcement of existing (potentially inconsistent) judgments, the injunction would not avoid the risk of inconsistent decisions.

The court concluded that the appeal should be dismissed.

Comment

The English court made clear that it was concerned with proceedings in Africa. Different considerations will apply, for example, where proceedings in the European Union are concerned.

The court's ruling confirms that – at the stage of negotiating the underlying contract – parties should consider the types of dispute that might arise. If the intention is for them to be resolved by arbitration, the arbitration clause will need to be drafted broadly and should seek to exclude the jurisdiction of any relevant local courts to determine the merits of the dispute.

The court's decision also makes clear that – once a dispute has arisen and one party has referred it to a foreign court in breach of the underlying arbitration agreement – any application for injunctive relief to restrain that party from pursuing the foreign proceedings must be brought promptly. If

granted and complied with, it can bring the foreign proceedings to an end.

Consideration should also be given to commencing arbitration proceedings in accordance with the arbitration clause without delay.

If a foreign judgment has already been granted, an anti-enforcement injunction may be available – but only if good reasons for the delay in seeking the relief can be made out.

Finally, if enforcement of the foreign judgment is already underway, the party seeking to resist the judgment may be able to challenge its enforcement. The grounds on which enforcement of a foreign judgment can be challenged will depend on the laws of the jurisdiction where enforcement is sought.

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