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Anti-suit injunction granted in support of arbitration agreement despite 13-month delay

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Introduction

In *Africa Finance Corporation and others v Aiteo Eastern E & P Company Ltd*,⁽¹⁾ the Commercial Court granted the applicants a final anti-suit injunction and dismissed the respondent's application to set aside an interim anti-suit injunction that had been granted on an ex parte basis. In so doing, the Court considered that the delay of 13 months between the commencement of proceedings in Nigeria and the bringing of the application was not a "strong reason" for declining to grant the relief. The parties had been engaged in commercial negotiations and the foreign proceedings were not yet far advanced. In exercising its discretion, however, the Court emphasised that delay can be fatal to an application for an anti-suit injunction.

Background

Under section 37 of the Senior Courts Act 1981, the English courts may grant anti-suit injunctions restraining foreign proceedings brought in breach of an arbitration agreement. To do so, a court must be satisfied that:

- an arbitration agreement exists;
- the respondent is bound by the arbitration agreement; and
- the foreign proceedings constitute or will constitute a breach of the arbitration agreement.

In circumstances where a court is satisfied that the above criteria has been met, it is likely to exercise its discretionary power and grant an anti-suit injunction unless the respondent can establish a "strong reason" for not doing so.

One possible "strong reason" for not granting an anti-suit injunction is delay by the applicant in bringing the anti-suit injunction. *The Angelic Grace*⁽²⁾ established the principle that an application should be brought promptly and before the foreign proceedings are too far advanced.

Facts

The dispute concerned two facility agreements entered into variously between nine lenders (the claimants) and a borrower (the defendant) to the value of \$2 billion for the purchase of an interest in Nigerian oil fields. Arbitration clauses in those facility agreements provided for London-seated arbitration under the Arbitration Rules of the International Chamber of Commerce (ICC).

The procedural history of the claim was complex, involving multiple appeals, interim applications and hearings over two years. The key events were as follows:

- On 31 October 2019, the borrower commenced proceedings against the lenders in the Nigerian Federal High Court, seeking declaratory relief to the effect that it was not liable to repay the lenders. On the same day, the borrower obtained an ex parte interim injunction in Nigeria, restraining the lenders from taking any steps to enforce its rights in respect of the alleged indebtedness.
- On 12 November 2019, the lenders challenged these proceedings in the Nigerian Federal High Court based on the arbitration agreement between the parties and, in the case of one lender only, that it was immune from the Nigerian court's jurisdiction. The lenders also sought a stay of the proceedings and the execution of the interim injunction until final determination of their appeals.
- On 19 November 2019, the lenders' appeals were transferred to the Nigerian Court of Appeal. This suspended the Nigerian Federal High Court proceedings until final determination by the Nigerian Court of Appeal.
- Between early November 2019 and November 2020 (when the lenders brought an anti-suit injunction application before the English court), the parties engaged in commercial negotiations to restructure the facility agreements and bring the Nigerian proceedings to an end.⁽³⁾
- In December 2020 and following the continued impasse between the parties in the commercial negotiations, the lenders initiated two arbitrations pursuant to the facility agreements and successfully obtained an interim ex parte anti-suit injunction. This prevented the borrower from continuing the Nigerian Federal High Court proceedings and from bringing any claims outside of London-seated ICC arbitration. On 5 January 2021, the borrower applied to set aside the interim anti-suit injunction.
- On 17 February 2022, the Nigerian Court of Appeal rejected the borrower's injunction application on the grounds that the facility agreements contained arbitration clauses.

In the present case, the Commercial Court considered the lenders' application for a final anti-suit injunction and the borrower's application to set aside the anti-suit injunction granted on an ex parte basis.

The borrower contended that the final anti-suit injunction should not be granted because:

- the lenders had waived their right to arbitration under the facility agreements by appealing the Nigerian Federal High Court decision (rather than seeking to stay the proceedings under the Nigerian Arbitration and Conciliation Act). The borrower considered that this constituted the lenders taking a step in the Nigerian proceedings.⁽⁴⁾
- the 13-month delay in seeking the anti-suit injunction was a strong reason for not granting the final injunction and there was no adequate justification for the delay. In particular, the borrower argued that the lenders were not justified in:
 - appealing the Nigerian court decision, rather than making the challenge on the return date at first instance;
 - taking a year to seek legal advice in respect of their jurisdictional rights or substantive position under English and Nigerian law;
 - delaying their application for an anti-suit injunction to maximise the prospects of a favourable negotiated settlement; and
 - delaying the anti-suit injunction application until they were in a position to initiate arbitration proceedings.⁽⁵⁾

The lenders advanced that:

- the borrower had breached the arbitration agreement by commencing proceedings in the Nigerian Federal High Court and that the lenders had not waived their right to arbitrate by submitting an appeal to the Nigerian Court of Appeal.
- there were not strong reasons for refusing to grant an anti-suit injunction. In this regard, the lenders argued in respect of their delay in seeking relief that "promptness is not an end in and of itself" and that the Commercial Court should consider:
 - whether the delay was justifiable or excusable;
 - the balance between delay and the importance of upholding arbitration agreements; and
 - what resources of foreign courts may have been wasted as a result of the delay.⁽⁶⁾

Decision

In his judgment dated 1 April 2022, Sir Nigel Teare, sitting as a judge of the High Court, granted the lenders a final anti-suit injunction and dismissed the borrower's application to set aside the interim anti-suit injunction.

Waiver of arbitration agreement

When determining whether the lenders had waived their arbitration agreement, the Court considered separately each of the facility agreements:

- The English law-governed offshore facility agreement concluded between one of the nine lenders and the borrower.
- The Nigerian-law governed onshore facility agreement concluded between the borrower and the remaining eight lenders.

Offshore facility agreement

Arbitration proceedings relating to the offshore facility agreement had been commenced on 11 December 2020 and a partial award on jurisdiction had been issued by the arbitral tribunal on 15 March 2022. In the partial award, the arbitral tribunal held that the lender's appeal in the Nigerian courts manifested their intention to insist on arbitration and that there had been no waiver of the right to arbitrate.⁽⁷⁾ The Court ruled that the partial award was binding on the parties and that, accordingly, the borrower was in breach of the arbitration agreement at the time of the lenders' anti-suit injunction application.⁽⁸⁾

Onshore facility agreement

Given that the onshore facility agreement was Nigerian law-governed, the Court considered Nigerian law evidence on whether failure to apply for a stay pursuant to the Nigerian Arbitration and Conciliation Act amounted to taking a step in the proceedings and a waiver of a right to arbitrate. The Court ruled that it did not.⁽⁹⁾ This was on the basis of Nigerian case law supporting the view that "taking a step" involved taking action in advancing a defence, rather than insisting on arbitration.⁽¹⁰⁾ The Court also noted that the Nigerian Court of Appeal judgment dismissing the borrower's application for injunctive relief preventing the lenders from pursuing the arbitrations further supported the view that the lenders had not waived their right to arbitration.⁽¹¹⁾

Strong reasons

Having established that there was no waiver of the right to arbitrate and that the borrower had breached the arbitration agreements, the Court went on to consider whether the 13-month delay in seeking the anti-suit injunction constituted a strong reason for not granting it.

Relying on the authoritative discussion of the relevance of delay in the context of anti-suit injunctions in *Ecobank Transnational Inc v Tanoh*,⁽¹²⁾ the Court applied the relevant considerations to be taken into account. Those included:

- the extent to which the respondent incurred expense prior to the application being made;
- the interests of third parties, including foreign courts;
- the effect of any order on what has already happened during the dispute;
- whether the applicant acted with appropriate speed;
- comity between courts; and
- whether there was good reason for the delay, which must be established objectively.⁽¹³⁾

While acknowledging that the lenders had failed to act promptly,⁽¹⁴⁾ and that substantial delay can be a bar in itself to a court granting an anti-suit injunction, the Court nevertheless held that on the facts of the case there was a reasonable explanation for this. In particular, the Court ruled that the ongoing commercial negotiations between the parties from November 2019 into 2020 were a reasonable excuse for the lenders' delay in seeking the anti-suit injunction. This was because the purpose of the negotiations had been to restructure the facility agreements, assist the borrower in repaying its debts and bring the Nigerian proceedings to a close. The Court further concluded that the relatively late granting of the anti-suit injunction would not waste legal costs on the part of the parties or effort on the part of the Nigerian court; no steps had been taken in the Nigerian proceedings to resolve the merits of the dispute. The Court also concluded that:

- the granting of the anti-suit injunction would not offend the Nigerian courts as the Nigerian Court of Appeal had recently upheld the arbitration agreements; and

- the English court should recognise the desirability of upholding rights granted under arbitration agreements.⁽¹⁵⁾

Comment

The case confirms that anti-suit injunctions in support of an arbitration agreement may be granted even in instances where a party does not seek relief promptly, if the delay is justified and foreign proceedings brought in breach of an arbitration agreement are not yet far advanced.

This judgment helpfully sets out the principles and considerations that the English court will apply when considering delay in bringing an application for an anti-suit injunction and powerfully highlights how fact sensitive this exercise is. Where foreign proceedings brought in breach of an arbitration agreement are at an advanced stage, the courts may be unwilling to grant an injunction.

While the case illustrates the importance that the Court attaches to upholding parties' rights under arbitration agreements, parties facing proceedings brought in breach of an arbitration agreement should generally apply for anti-suit relief promptly. To delay an application runs the risk of relief being refused.

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Endnotes

(1) [2022] EWHC 768 (Comm).

(2) [1995] 1 Lloyd's Reports 87.

(3) Para 94.

(4) Paras 49-50.

(5) Para 67.

(6) Para 67.

(7) Para 42.

(8) Para 65.

(9) Para 63-64.

(10) Paras 57- 61.

(11) Para 62.

(12) [2016] 1 WLR 2231.

(13) See paras 70-75.

(14) Para 74.

(15) Para 94.