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Anti-suit injunction in favour of arbitration agreement breached by intervention in Italian court proceedings

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Introduction

In *LLC Eurochem North-West 2 v Tecnimont SPA and LLC MT Russia*,[(1)] the Court of Appeal dismissed an appeal against a decision by the High Court that a party had acted in breach of an anti-suit injunction granted in support of London-seated arbitration agreements by applying to intervene in proceedings in Italy. The Court also refused to vary the terms of that injunction to permit participation in the Italian proceedings. In doing so, the Court confirmed that anti-suit injunctions are to be construed strictly. The question is simply what the order means, and, in this case, an appellant had breached both the spirit and the letter of the anti-suit injunction.

Background

Section 37 of the Senior Courts Act 1981 permits the Court to grant an anti-suit injunction to prevent a party from issuing proceedings in a foreign jurisdiction in breach of the terms of an arbitration agreement, where it is just or convenient to do so.

The granting of an anti-suit injunction that restrains a party from pursuing court proceedings in EU member states had previously been incompatible with the Brussels Regulation.[(2)] Post-Brexit, the English courts have confirmed that anti-suit relief is available in respect of proceedings in EU member states.[(3)]

Facts

Arbitration and jurisdiction agreements

The appellants, Tecnimont SPA and LLC MT Russia, were engaged by the respondent, EuroChem NW (a Russian company), as contractors in the development of a chemical production plant in Russia. The three contracts between the parties (the contracts) each contained London-seated arbitration agreements. Various banks advanced on-demand payment, performance and retention bonds to the respondent pursuant to the contracts (the bonds). The bonds each contained exclusive jurisdiction clauses in favour of the English courts.

After the appellants suspended work, the respondent gave notice to terminate the contracts and attempted to draw down on the bonds, but several banks refused to make payment on the basis that such payments were prohibited by EU Council Regulations, which imposed an asset-freezing sanctions regime on Russia (the EU sanctions).

English proceedings

Two sets of proceedings were commenced, both of which were ongoing at the date of the Court of Appeal's judgment.

Arbitration proceedings

The appellants commenced arbitration proceedings under the contracts on 15 August 2022, seeking declaratory relief to the effect, among other things, that the respondent's calls on the bonds were unlawful due to the respondent allegedly being owned and/or controlled by individuals who were named as "designated persons" under the EU sanctions. That application was dismissed on the basis that the appellants had failed to establish a good arguable case that it was unlawful for the respondent to demand payment.

Bank proceedings

On 19 August 2022, the respondent commenced Commercial Court proceedings in London against the banks (the bank proceedings). The appellants applied for an order that they be joined to those proceedings, to which the respondent and the banks consented.

ASI

Also in August 2022, the respondent sought and obtained an anti-suit injunction from the High Court (Butcher J) against the appellants on the basis of the London arbitration and/or English exclusive jurisdiction agreements.

The appellants appealed and, later that month, also in the High Court, Bryan J dismissed the appeal and ordered a further anti-suit injunction (ASI).

Paragraph 2 of the ASI (paragraph 2) granted by Bryan J – which was the subject of the appeal – provided that the appellants were not permitted to:

> *commence or pursue any claims and/or proceedings in the court(s) of any jurisdiction for the purpose of restraining, delaying or otherwise impairing payment under the bonds"* save *"by proceedings brought by the [appellants] in the courts of England; by arbitration in London in accordance with the arbitration agreements in the contracts . . . or with the written consent of the [respondent].*

At a further hearing, HHJ Pelling KC concluded that the ASI had been properly granted and should continue on the same terms as ordered by Bryan J.

Italian proceedings

In October 2022, an Italian sister company of the respondent (EuroChem Agro) commenced proceedings before the Italian court. EuroChem Agro, among other things, sought annulment of a decree whereby the Italian authorities had concluded that it was ultimately controlled by a designated person for the purposes of the EU sanctions.

In February 2023, Tecnimont applied to intervene in the Italian proceedings on the basis that it had an interest in the proceedings and invited the courts to uphold the decree.

Contempt application and variation application

The respondent subsequently issued English court proceedings against Tecnimont for contempt of court, seeking an "unless order" that unless Tecnimont withdrew its intervention application, the Court would strike out Tecnimont's defence in the bank proceedings (the contempt application). This was opposed by Tecnimont which sought a variation of the ASI that would permit the appellants to participate in proceedings commenced by the respondent, EuroChem AG or any of EuroChem AG's subsidiaries (the variation application).

The Court declined to make the "unless order" sought by the respondent in its contempt application on the basis that it was unnecessary to do more than to declare that the intervention application amounted to a breach of the ASI; other sanctions would be likely to follow if any intervention persisted. The Court rejected the variation application on the basis that the proposed variation was inconsistent with the London arbitration and, if relevant, English exclusive jurisdiction agreements.

The appellants appealed the Court's decision.

Court of Appeal proceedings

On the contempt application, the appellants argued that:

- paragraph 2 of the ASI (which prohibited either appellant from "pursu[ing] any claims and/or proceedings") did not prohibit Tecnimont from acting as an intervener; and,
- in any event, any participation was not "for the purpose of restraining, delaying or otherwise impairing payment under the bonds" and so fell outside the scope of the prohibition in the ASI.

More broadly, the ASI could not have the scope ascribed to it by the judge because the London arbitration and English exclusive jurisdiction agreements on which it was founded could not have justified an injunction prohibiting Tecnimont's participation in the Italian proceedings. Further, in respect of the respect of the exclusive jurisdiction agreement, the appellants were not party to the bonds and therefore there was no quasi-contractual basis on which to restrain Tecnimont from participation in the Italian proceedings.

In respect of the variation application, the appellants argued that the Judge was wrong to refuse to vary the ASI to permit Tecnimont's participation in the Italian proceedings, as otherwise the ASI would go well beyond the scope of the London arbitration and English jurisdiction agreements on which the ASI was premised.

Decision

The Court of Appeal (Carr LJ and Lewison LJ, with Nugee LJ dissenting) dismissed the appeals in respect of both applications.

Carr LJ summarised the principles relevant to construction of anti-suit injunctions:[(4)]

- The terms of an injunction, given the penal consequences of breach, are to be construed strictly.
- The words of the order are to be given their natural and ordinary meaning in their context, which includes the historical context and the object of the order. The proper construction depends on what the language of the order would convey, in the circumstances in which the court made it, so far as those circumstances were before the court and apparent to the parties.
- Rather than looking for ambiguity, the real issue is whether the meaning of any such language is open to question.
- The judgment leading to the order may be used as an aid to construction but will not necessarily of assistance. A court's reasons may be used to interpret language, but not to contradict it. However, the parties' submissions are not a reliable or useful contextual source.
- The question is what the order means. If it is desirable to give it a broader or narrower meaning, one solution will be to vary the meaning for the future, not to give it a different interpretation.

Carr LJ further summarised that a broad and purposive construction is to be adopted when interpreting arbitration agreements, and it is generally to be assumed that parties to a single agreement, as rational businesspersons, would not intend for disputes under the same agreement to be determined by different tribunals.

Carr LJ considered the wider context of the ASI, and the fact that it was founded on the London arbitration agreements. That did not mean, however, that the ASI was necessarily limited in scope to those arbitration agreements. There was nothing to suggest that the decisions of the three previous judges to grant or continue relief in wider terms were anything other than "conscious and deliberate". If there was to be any interference with the wording of the ASI, there needed to be a clear and obvious basis for doing so and there was no evidence of any statement by any of the three previous judges that the ASI ought to be limited by reference to the London arbitration agreements. Accordingly, there was no proper basis for going behind or beyond the simple words of the ASI in the manner submitted by Tecnimont.[(5)]

The majority held that, in any event, Tecnimont's participation in the Italian proceedings involved a breach of the London arbitration agreements because the definition of "dispute" in those provisions was not limited to separate formal proceedings but extended to questions or differences between the parties. The ownership or control issue in relation to the bonds, which was deemed to be central to the proceedings in both London and Italy, was such a question or difference, and Tecnimont was seeking to litigate in Italy issues that under the contracts were to be addressed in London arbitration.[(6)]

Further, the Court rejected Tecnimont's submission that by intervening in the Italian proceedings it did not commence or pursue a claim and/or proceedings.

The majority then considered Tecnimont's purpose in intervening in the Italian proceedings. Tecnimont had argued that its application to intervene in the Italian proceedings was not "for the purpose of restraining delaying or otherwise impairing payment under the Bonds" within the meaning of paragraph 2. The majority disagreed, finding that the intervention was intended to strengthen Tecnimont's position in relation to an issue which was also the subject of the London arbitration and bank proceedings, thereby making it less likely that the banks would need to pay the respondent under the bonds. It was Tecnimont's purpose in intervening, as opposed to the actual outcome of the intervention, that was crucial. As such, it was irrelevant that the Italian proceedings were for different relief and that its outcome might not be binding on the London proceedings. The purpose of the intervention was to impair payment under the Bonds and, in any event, the intervention fell within the scope of the London arbitration agreements.[(7)]

Finally, the Court upheld the decision not to grant a variation of the ASI. The decision was an appropriate exercise of discretion and fell within the scope of reasonably possible decisions.[(8)]

Nugee LJ, dissenting, considered that the third limb of paragraph 2 ("for the purpose of … otherwise impairing payment" of the bonds) was not wide enough to include any proceedings which might be useful to Tecnimont in improving its position in the London arbitration or bank proceedings. In his view, read in the context of the preceding provisions, paragraph 2 should be interpreted as intended only to restrain proceedings concerned with the bonds in which the relief sought included something restraining, delaying or otherwise impairing payment of the bonds.[(9)] Nugee LJ also considered that Tecnimont's intervention in the Italian proceedings would not be a breach of the arbitration agreements, because the Italian proceedings were between the Italian state authorities and EuroChem Agro, neither of which were parties to the arbitration agreements.[(10)]

Comment

The judgment restates that, in interpreting an anti-suit injunction, the English courts will construe strictly the words of the order and give them their natural and ordinary meaning, as against the wider context in which the order was granted. However, the application of these principles is not necessarily straightforward, as exemplified by the dissenting judgment of Nugee LJ, who applied the principles to arrive at a different conclusion. The judgment also illustrates again that the English courts will adopt a broad and purposive construction of arbitration agreements. So too does the judgment demonstrate that the English courts may penalise actions that, to quote the leading judgment, "breach the spirit and the letter" of an anti-suit injunction granted in support of an arbitration or jurisdiction agreement.

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Endnotes

(1) *LLC Eurochem North-West 2 v Tecnimont SPA and LLC MT Russia* [2023] EWCA Civ 688.

(2) Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012; as confirmed in *Allianz SpA v West Tankers Inc* (Case C-185/07).

(3) See:

- *Ebury Partners Belgium SA/NV v Technical Touch BV* [2022] EWHC 2927 (Comm); and
- *QBE Europe SA/NV v Generali España de Seguros Y Reaseguros* [2022] EWHC 2062 (Comm).

(4) *Eurochem*, at paragraph [45].

(5) Paragraphs [55] to [57].

(6) Paragraphs [60] to [64].

(7) Paragraphs [71] to [76].

(8) Paragraph [80].

(9) Paragraph [116] and [123].

(10) Paragraph [120].