Anti-suit Injunctions: Limits of the Court’s Generosity Tested

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The recent decision in Ecobank Transnational v Tanoh [2015] EWHC Civ 1309 reiterates the importance of bringing an application for injunctive relief promptly, as unnecessary delay can prevent an otherwise strong application. This was a case in which the Court of Appeal upheld the decision of the Commercial Court to dismiss the anti-enforcement injunction citing both general discretionary considerations and the need for comity.

Facts

Mr Tanoh was employed by Ecobank under an Executive Employment Agreement (EEA) dated 15 December 2011. In Article 26 of the EEA, the parties agreed that all disputes or claims arising under or in connection with the EEA would be resolved by arbitration in London under UNCITRAL Rules (and Article 28 agreed English law). On 12 March 2014 Ecobank purported to terminate Mr Tanoh’s contract. Proceedings followed:

- On 4 April 2014 Mr Tanoh commenced proceedings in Togo alleging that the termination was in breach of Togo Labour Code. Shortly thereafter on 12 May 2014 Mr Tanoh also commenced a further set of proceedings in the Ivory Coast, alleging a director of Ecobank had written a defamation letter about him and that Ecobank were guilty of a tort of action by failing to disprove the letter.

- In both sets of proceedings Ecobank attempted to challenge jurisdiction of the foreign courts. In the proceedings in Ivory Coast Ecobank also pleaded its position as to the merits. Ecobank failed on all counts with the courts in Togo and Ivory Coast ordering Mr Tanoh to be paid approximately US$11 million in February 2015 and US$12.8 million in January 2015 respectively.

- Ecobank commenced arbitration proceedings in London against Mr Tanoh on 22 December 2014 for claims which overlapped with those brought in the proceedings in Togo but not of those in the Ivory Coast. It was not until 10 April 2015 that Ecobank sought an interim worldwide anti-enforcement injunction in respect of both sets of proceedings commenced by Mr Tanoh. The injunction was granted (without notice) pending a full hearing.

- In the Commercial Court, Knowles J dismissed the injunction, holding that while the English Court had the power to order an anti-suit injunction, an application had to be brought without delay and once matters had reached the stage of a foreign judgment it became a serious matter for the English Court to intervene and grant an injunction. Ecobank appealed the decision.

The Decision

Before considering delay, Christopher Clarke LJ first considered whether the application met the other requirements to successfully obtain relief, finding that:

- The claims brought in Togo and the Ivory Coast did fall within the arbitration clause.

- Regarding the Civil Jurisdiction and Judgments Act 1982, Section 32 applied such that the English Courts were not bound to follow the decision/s of the foreign courts.

- In considering whether Section 32 applied, Clarke LJ considered whether Ecobank had lost its right to object to jurisdiction. The fact that Ecobank had pleaded the merits of the cases in the proceedings in Ivory Coast did not illustrate they submitted to the jurisdiction of the foreign court since the foreign court had requested that Ecobank plead out their merits (and their application to have jurisdiction determined separately, prior to merits, was rejected). Ecobank had made it clear that they were objecting to jurisdiction throughout.

Clarke LJ went on to consider the threshold for ordering an anti-enforcement injunction and the impact of the issue of delay in the circumstances. Clarke LJ found that:

- The test for ordering an anti-enforcement injunction is no lower than that for an anti-suit injunction, in both cases the English Court would be interfering with the output of a foreign court.

- Whilst delay is not necessarily a bar to relief, the requirement to act promptly meant that an applicant was unlikely to succeed where they did not apply until after judgment in the foreign proceedings.

- As such, it was rare for the English Courts to grant anti-enforcement injunctions. No authority had been cited where an anti-enforcement injunction had been granted because simply the proceedings sought to be restrained had been commenced in breach of arbitration or an exclusive jurisdiction clause. Indeed they had only been ordered in specific circumstances, such as where (1) the respondent has acted fraudulently, or (2) it was not possible for the applicant to have sought relief before the judgment was given.

- The courts, could in their discretion, take into account the impact of delay, including to what extent Mr Tanoh incurred expense prior to the application being made, and the interests of the foreign court. A relevant factor is, therefore, the longer the delay the greater amount of labour and cost will have spent which could have been avoided.

- In considering delay, it is not a precondition to find detrimental reliance by the party against whom the injunction is sought. In any event, in this case some prejudice was suffered firstly by Mr Tanoh, since although Ecobank raised jurisdiction challenges in the foreign proceedings it was not apparent they were ever going to seek injunctive relief, and secondly to the foreign courts, for their labour time and cost.

- The tenor of modern authorities is that an applicant should act promptly and claim injunctive relief from an early stage, and should not adopt an attitude of waiting to see what the foreign court decides. On the issue of comity, reference was made to an earlier decision in which it was said [The Argyle Grace (1995) 1 LLR - Leggatt LJ] it would be patronising and the reverse of comity for the English Court to not grant injunctive relief until it was apparent whether the foreign court was going to uphold the objection to its exercising jurisdiction and only do so if and when it failed to do so.

In conclusion, Clarke LJ dismissed the appeal on the basis that there was no good reason for Ecobank to have delayed in seeking anti-suit relief in England. It was noted that delay should be avoided for a number of reasons, namely to avoid prejudice, detriment, waste of resources, the need of flexibility and considerations of comity.
Comment
The decision reiterates the modern trend of the courts reluctance to grant relief where an applicant has waited to see what the outcome of an application opposing jurisdiction in the foreign courts will be prior to applying to the English Courts for injunctive relief.
Those finding themselves in a position where proceedings have been brought somewhere other than where the parties had agreed, should promptly decide whether or not to bring an anti-suit injunction.

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