In this edition of Addleshaw Goddard's International Arbitration Quarterly Review we consider an interesting case on anti-enforcement injunctions, we explore the issue of the enforceability of emergency orders or awards under English law and finally we report on another significant case that considers res judicata in the context of jurisdictional challenges, and the “one stop / one jurisdiction” presumption.

In this Issue…
► English Court refuses to grant anti-enforcement injunction because of delay
► Enforceability of Emergency Orders and Awards under English law
► English Court’s refusal to re-open arbitrators’ decision on merits despite jurisdictional challenge

English Court refuses to grant anti-enforcement injunction because of delay

In the recent case of Ecobank Transnational Inc v Tanoh [2015] EWHC 1874 (Comm) the English Commercial Court confirmed the Court’s power to grant anti-enforcement injunctions, at least in relation to judgments of non-EU countries. The case also highlights the risks clients may face should they delay making an application for such injunctive relief without good reason, or seek anti-enforcement injunctions as an after the event alternative to anti-suit injunctions.

Background Facts

In March 2014 Ecobank terminated (or purported to terminate) the employment of its Group Chief Executive, Mr Thierry Tanoh. Mr Tanoh, a national of Cote D’Ivoire, was employed by Ecobank pursuant to a Executive Employment Agreement, which provided that “… any and all disputes, controversies or claims arising under or in connection with [the EEA]…” should be referred to arbitration in London under the UNCITRAL rules.

In April 2014, Mr Tanoh commenced proceedings in the Labour Tribunal of Lome in the Togolese Republic for unlawful dismissal. In May 2014, Mr Tanoh also brought a defamation claim before the Abidjan Commercial Court in Cote d’Ivoire (the Ivorian Proceedings). Ecobank unsuccessfully challenged jurisdiction in both sets of proceedings. However (and crucially) Ecobank did not seek an anti-suit injunction from the English courts based on the arbitration agreement within the EEA at any time during these proceedings.

In January 2015 Mr Tanoh was awarded 7.5billion CFA francs (approximately USD 12.8million) by the Ivorian Court and in early February 2015 approximately USD11million by the Labour Tribunal. Ecobank unsuccessfully appealed the Ivorian judgment and is now seeking a further appeal to the Court of the Organisation pour L’Harmonisation en Afrique du Droit des Affaires. Ecobank has also appealed the Labour Tribunal award, and a stay of execution has been granted pending the outcome of this appeal.

In December 2014 Ecobank commenced an arbitration against Mr Tanoh, addressing issues raised in the Togolese proceedings but not including the defamation dispute in the Ivorian proceedings. Following this, in April 2015, Ecobank sought and obtained a worldwide anti-enforcement injunction in relation to the Togolese and Ivorian judgments. This injunction was granted on an interim basis, without notice, pending a full hearing of the application.

Anti-enforcement and Anti-suit injunctions

Section 32 (1) of the Civil Jurisdiction and Judgments Act 1982 provides that a judgment given by a foreign court shall not be enforced or recognised by the English Courts where the bringing of the foreign proceedings was in breach of a valid agreement between the parties to settle the dispute in an other forum (e.g. a valid arbitration agreement).
Under section 37 of the Senior Courts Act 1981, the English Courts also have the power to grant injunctions which restrain one or more parties from continuing foreign proceedings brought in breach of, for example, a valid arbitration agreement. The injunctions are binding on the party, rather than the foreign court or tribunal.

There are two types of these injunctions: an "anti-suit injunction", which is sought before judgment is given by the foreign court or tribunal, and an "anti-enforcement injunction" which is sought post judgment, to restrain enforcement of the foreign judgment.

Issues arising from the case
The Court dismissed Ecobank’s application to continue the interim anti-enforcement injunction on the basis that Ecobank had delayed in bringing arbitration proceedings in England and that it was not arguable that the defamation claim in the Ivorian Proceedings fell within the scope of the arbitration clause.

Key points to note from the judgment are:

1) The English court has power to grant anti-enforcement injunctions.

The Court confirmed that English courts have power to grant anti-enforcement injunctions were it appears necessary to hold a party to its contract, to "enforce the negative right not to be vexed by other proceedings". The fact that there are few reported examples of anti-enforcement injunctions being granted does not affect this position.

2) Applicants for anti-enforcement injunctions should not delay.

The Court outlined that applicants had to apply for anti-enforcement injunctions "promptly and before the foreign proceedings are too advanced." He did not accept Ecobank’s argument that, when considering whether the applicant has delayed, "delay" does not include any period during which the applicant sought to challenge the jurisdiction of the foreign court and the period pending the foreign court’s decision on that challenge. The Court held that it would be the "reverse of comity" for the English courts to “...adopt the attitude that if [a foreign court] declines jurisdiction, that would meet with the approval of the English court, whereas if [the foreign court] assumed jurisdiction, the English Court would then consider whether at that stage to intervene by injunction.”

Time will therefore run from the date the foreign proceedings are started. In this case, Ecobank had delayed, having waited over 8 months before commencing the arbitration and nearly a year before making the application for an anti-enforcement injunction.

3) Detrimental reliance does not need to be shown.

Ecobank advanced the argument that delay alone was not sufficient to deny an applicant an anti-suit or anti-enforcement injunction; detrimental reliance on such a delay must also be shown. The Court did not accept this proposition, commenting that it would " unnecessarily restrict the approach of the Courts." As such, "...the presence of detrimental reliance may be a relevant circumstance to be taken into consideration, but it is not an essential condition..." to the Court granting or denying such injunctions.

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1 Foreign proceedings for these purposes cover foreign proceedings brought in a jurisdiction not covered by the Brussels Regulation and Lugano Convention.
4) There must be a “high degree of probability” that the subject matter falls within the scope of the arbitration agreement.

The Court confirmed the position in *Fiona Trust & Holding Corporation v Primalov* [2007] UKHL 40 that there is a presumption that the parties intended for all disputes arising out of their relationship to be resolved in a single forum. However, there must also be a high degree of probability that the subject matter of the dispute falls within the scope of the arbitration agreement. In this case, the Court did not consider it realistic that the defamation claim brought in the Ivorian Proceedings (which Ecobank had not included in its arbitration) was not arising under or in connection with the EEA.

At the time of writing the judgment has been appealed. The hearing of this appeal in the Court of Appeal is due to begin in early November 2015.

Enforceability of Emergency Orders and Awards under English law

In recent years there has been a trend amongst international arbitral institutions to create new powers and procedures for a single arbitrator to grant orders or awards very rapidly in cases of emergency. Whilst these new procedures grow in popularity, national laws have not necessarily caught up, creating uncertainties concerning enforcement of these orders or awards. This article focuses on the rules of the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA) to illustrate some of the difficulties that arise under English law.

Emergency Arbitrator Rules

Both the ICC and the LCIA added a new emergency procedure when they revised their arbitration rules in 2012 and 2014, respectively. Many international institutions now have emergency arbitrator provisions within their rulebooks. This includes the Stockholm Chamber of Commerce (SCC), the International Center for Dispute Resolution (ICDR) from the American Arbitration Association, the Netherlands Arbitration Institute (NAI) and the WIPO arbitration rules. Further East, emergency procedures are provided for in the rules of the Singapore International Court of Arbitration (SIAC) as well as in the rules of the Hong Kong International Court of Arbitration (HKIAC).

**ICC Rules**

Since the new rules came into force in 2012, parties have been able to make an Article 29.1 application for urgent interim or conservatory measures that cannot be left until after the constitution of an arbitral tribunal. The emergency arbitrator is appointed by the President of the ICC. Article 29.2 states that his decision "shall take the form of an order" and that the parties "undertake to comply with any order made by the emergency arbitrator". However, the arbitral tribunal constituted to deal with the dispute can subsequently modify, terminate or annul the order (Article 29.3).

**LCIA Rules**

If an emergency arises, Article 9.4 of the 2014 LCIA rules entitles parties to apply to the LCIA Court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation of the arbitral tribunal. Article 9.8 empowers the emergency arbitrator to make any order or award which the arbitral tribunal could make under the relevant arbitration agreement, except as regards certain costs. If the arbitrator chooses to make an award, rather than an order, under Article 9.9 the emergency arbitrator must do so in the appropriate form (specified under Article 26.2) and the award then takes effect as an award that is final and binding. Nevertheless, Article 9.11 goes on to state that orders or awards from the emergency arbitrator "may be confirmed, varied, discharged or revoked, in whole or in part, by order or award made by the Arbitral Tribunal".
Unlike the ICC rules, the LCIA rules give the emergency arbitrator the choice to grant either an order or an award. This was probably done with a view to enforcement under the Arbitration Act 1996 (AA). This is explained further below.

Enforceability under English law

Enforceability of an arbitration award under English law is governed by section 66(1) of the AA which provides that an "award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect".

Therefore only an award from a tribunal is enforceable under the AA. We look at these two terms in turn.

What is an "award"?
The term "award" is not defined in the AA 1996. In Ranko Group v Antarctic Maritime SA [1998] A.D.R.L.J. 135 the English court held that the correct approach was to ask whether the decision would have been understood by its recipients as intended to be the tribunal's final adjudication. This approach was affirmed in Michael Wilson & Partners Ltd v Emmott [2008] EWHC 2684 (Comm). It seems the terminology is not conclusive and therefore this principle could arguably apply to an "order" from an emergency arbitrator granted under either the LCIA or the ICC Rules. In fact, the US Court of Appeals for the Seventh Circuit in Publicis Communication v. True North Communications Inc. [2006 F. 3d 725 (14 March 2000)] declared the distinction between "orders" and "awards" to be artificial and it upheld the tribunal's interim measures as final for enforcement purposes. This latter decision however is not binding on English courts. Therefore it remains uncertain whether an order would be treated in the same way as an award in England and Wales on the basis that parties consider the order to be final and binding.

Regardless of issues concerning terminology, the major difficulty with an award or order rendered by an emergency arbitrator is the fact that it can be subsequently varied by the arbitral tribunal, making it difficult to argue that it is final. An award by an emergency arbitrator is in fact more akin to a provisional award under section 39 of the AA. Interestingly, section 39 is entitled "Power to make provisional awards" but it refers to the tribunal making orders that are subject to final adjudication. Although there are dissenting views, most commentators consider that provisional awards are not enforceable because they are not final. A reason often cited for this view is the ambiguity caused by the use of both the terms "award" and "order" within section 39.

It seems that those who drafted the LCIA rule attempted to bypass this difficulty by providing that an award from an emergency arbitrator in the correct form is to take effect as a final award. This has yet to be tested in the English courts and therefore the uncertainty remains as to whether an award from an emergency arbitrator could be enforced as a final award under section 66 of the AA.

Is the emergency arbitrator a "tribunal"?

Under section 15(3) of the AA an arbitral tribunal can be made up of a number of arbitrators or a sole arbitrator. The AA however does not define the term "arbitrator" and it makes no reference to an emergency arbitrator. It would be difficult to imagine an English court considering that an arbitrator selected by the LCIA Court or the ICC President does not fit the requisite criteria to be a "tribunal" under the AA. Nevertheless there is not yet authority on this point. In this context, it is interesting to note that in Singapore, changes were made to the International Arbitration Act to clarify that an emergency arbitrator does fall within the definition of "arbitral tribunal" for the purposes of enforcement. This was clearly aimed at ensuring that orders from emergency arbitrators are enforceable.
Comments

It is uncertain whether orders or awards rendered by an emergency arbitrator under the rules of an international institution would be enforceable under English Law. This is because such orders/awards are not necessarily "final" and the Arbitration Act 1996 only allows final awards to be enforced: also an emergency arbitrator may not fall within the definition of an arbitral tribunal under the Arbitration Act 1996.

In practice, this may turn out to be a non-issue given that English courts are supportive of arbitration. English judges are therefore more likely to recognise that the primary purpose of arbitration legislation is to respect the parties’ agreement to arbitrate, which would appear to lend support in favour of the enforcement of emergency arbitrators’ orders and awards. This will be a particularly strong argument if parties have chosen the rules of an institution that provides for emergency arbitration.

The real issue lies more in the fact that this uncertainty gives ammunition to an uncooperative party willing to frustrate the arbitration process. Such a party could cause considerable delay by refusing to be bound by an emergency order or award and by raising objections to enforcement.

English Court's refusal to re-open arbitrators' decision on merits despite jurisdictional challenge

In C v D1, D2, and D3 [2015] EWHC 2126 (Comm) the Court found that where the parties entered into two agreements and the second agreement was intended to terminate the business relationship created by the first agreement, the presumption of “one stop / one jurisdiction” should apply such that the arbitration clause contained in the second agreement would cover claims arising out of the first agreement. The Court affirmed that section 67 of the Arbitration Act 1996 (AA) allows a challenge to the jurisdiction of a tribunal but does not allow the Court to reopen the merits, even where the issue may be relevant to the jurisdiction challenge. Finally, the Court found that a tribunal could join a non-signatory of the arbitration agreement as a party to arbitration proceedings.

Background

The Parties

C is a Nigerian company whose parent company is an oil and gas major. D1 and D3 are affiliated companies, each incorporated in Nigeria and engaged in the exploration, drilling and production of crude oil. D2 is the parent company of D1 and D3 and incorporated in the Cayman Islands (D1, D2 and D3 together: the Defendants).

The Product Sharing Contract:

In 2005, C, D1 and D3 (together: the Parties) entered into a Product Sharing Contract (PSC) whereby C was to act as the operating contractor to carry out works at an offshore oilfield in Nigeria, the rights to which were owned by D1, with D3 also having a small participating interest. The PSC was governed by Nigerian law and subject to arbitration in Paris.

The Share and Purchase Agreement

In 2011, the Parties decided to end their joint operations of the offshore oilfield. They entered into a Share and Purchase Agreement (SPA) whereby C was to cease to act as operating contractor and sell and novate its interests to D1 by way of a deed of novation following execution of the SPA. The Parties each gave reciprocal indemnities at clause 11 of the SPA. D2 guaranteed D1’s payment obligations. The SPA and guarantees were governed by English law and LCIA arbitration. D3 was not a party to the SPA.
The Dispute

In 2013, C commenced LCIA arbitration against D1 and D2 seeking performance of D1’s payment obligations and D2’s guarantee obligations. In turn, the Defendants introduced counterclaims alleging C had breached the PSC by not carrying out works in accordance with internationally acceptable standards and sought indemnity under clause 11 of the SPA for alleged breaches of the PSC. The Defendants further sought the joinder of D3 to the arbitration. C disputed the Tribunal’s jurisdiction over the counterclaims and the joinder of D3.

On 21 October 2014, the Tribunal issued a Partial Award finding that:

► It had jurisdiction over the counterclaims.
► The indemnities in clause 11 of the SPA covered the alleged breaches of the PSC.
► It had jurisdiction to join D3 to the arbitration without the consent of all existing parties.

The issues before the Court

C challenged the Award in the Commercial Court with respect to the Tribunal’s jurisdiction and the joinder of D3 under sections 67 and 68 of the AA.

Issue: The scope of the indemnity

C did not expressly challenge the Tribunal’s decision as to the indemnities at clause 11 of the SPA and this was not an issue raised in the written submissions. However, at the hearing C sought clarification from the Court that the Tribunal’s jurisdiction over the indemnity claims under section 11 of the SPA was limited to granting a declaration as to D1’s entitlement, rather than to jurisdiction of the underlying claims. C argued that because the challenge under section 67 of the AA is a rehearing not a review, the Court has the power to determine any relevant issues, including in relation to the indemnities regardless of the Tribunal’s decision on that issue. C followed its submission in writing, arguing that once the Court is to determine a jurisdictional issue by way of rehearing, no relevant issue can be res judicata or subject to an issue estoppel and therefore the Court can determine the meaning of any clause in the SPA, unfettered by the Tribunal’s previous findings. C went on to argue that the indemnities did not extend to its alleged breaches of the PSC but should be confined to third party claims only.

Decision

The Court rejected C’s arguments and held that the Tribunal’s decision gave rise to estoppel on that issue. The Court found it to be a settled position that clause 11 extends to breaches of the PSC and, as C expressly stated there was no challenge to the Tribunal’s decision in that respect, the Tribunal’s decision was final and binding.

Issue: Breach of the PSC

C claimed that the Tribunal did not have jurisdiction to make decisions relating to breaches of the PSC. As noted above, the PSC contained its own dispute resolution provisions.

The Court considered case law on the issue and provided a summary of the relevant principles.

► The basic approach for contractual interpretation is to ascertain the meaning which the document would convey to a reasonable person having the background knowledge which was available to the parties at the time.
► The interpretation of the arbitration agreement requires a careful and commercially minded construction. The intention of the parties must be determined objectively as revealed in the agreements and construed in light of the transaction as a whole.
► In construing an arbitration clause, a broad and purposive construction must be followed.
The starting point for determining the scope of arbitration agreements is the "one stop / one jurisdiction" presumption in *Fiona Trust & Holding Corporation v Primalov [2007] UKHL 40*, where Lord Hoffmann noted “the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered ... to be decided by the same tribunal”, unless the language of the agreement makes clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. Although *Fiona Trust* concerned a single agreement, it may apply to multiple agreements and parties to an arrangement set out in multiple agreements do not generally intend a dispute to be litigated in two different tribunals.

Where there are a number of related but inconsistent agreements and it is not clear under which agreement the dispute arises, it may be necessary to locate the centre of gravity of the transaction, it is the arbitration agreement in that agreement which will cover all issues.

*Fiona Trust* may not apply where there are multiple agreements with separate and distinct dispute resolution provisions addressing parallel but different aspects of the parties' ongoing relationship.

The presumption of a one stop jurisdiction may be particularly potent where an agreement is entered into for the purpose of terminating an earlier agreement. The arbitration agreement in a settlement agreement should be construed on the basis the parties intended it to supersede the dispute resolution procedure in the underlying agreement and apply to all disputes arising out of both agreements.

**Decision**

The Court found that the arbitration agreement in the SPA did cover claims relating to breaches of the PSC.

Relying on the presumption set out in *Fiona Trust*, the Court found that the Tribunal was right in finding it had jurisdiction over the counterclaims. Firstly, the centre of gravity of the disputes lies with the SPA, not the PSC, demonstrated by the parties' relationship and the structure of the agreements. Secondly, once the Tribunal had found that the indemnities at clause 11 of the SPA covered breaches of the PSC, the PSC was considered to “arise out of or in connection with” the SPA. It would be impractical and un-commercial to consider that the Tribunal had authority to make a declaration in relation to the indemnity but did not have jurisdiction to adjudicate the underlying claims. Thirdly, other provisions on the SPA pointed to issues under and relating to, the PSC being decided by a Tribunal appointed in accordance with the SPA. Finally, the Court identified additional fragmentation considerations which would risk increased costs and inconsistent outcomes which go against the principles of case law identified.

**Issue: Joinder of D3**

C argued that the Tribunal did not have power to join D3.

**Decision**

The Court found that the Tribunal's decision as to the joinder of D3 was not open to challenge under section 67 of the AA as the objection did not relate to the substantive jurisdiction of the Tribunal. Further, although it has been suggested in legal commentary that it is unclear whether the “substantive jurisdiction” set forth in section 30 of the AA is exhaustive, the Court did find the section 30 list to be exhaustive. The Court further found that the issue of joinder is not to be covered by such list.

The Court commented that the decision may theoretically be open to challenge pursuant to section 68(2)(b) of the AA as an excess of power, however, this was not the case in this arbitration as the parties had agreed to the application of LCIA arbitration, including Article 22.1(h) of the LCIA rules which allows joinder and which had not been disapplied by the Parties.
The other issues

If C were to win on the other issues, the Court was asked to decide whether the Tribunal had jurisdiction to decide claims brought by, rather than brought on behalf of, D3. In the event, the decision was not necessary. However, the Court noted that the question of whether any claims brought by D3 may properly be brought was not a question of jurisdiction but a question on the merits which the Tribunal had identified as an issue to be dealt with in due course.

Finally, the Court was also asked to decide whether C had lost its right to challenge the Award as a result of its post-Award conduct. The Court found that C had not lost its right to challenge based on its conduct but in the event the challenge failed on the merits.

Comments

The issues raised in this case are not novel. The Court reaffirmed the presumption of a one stop jurisdiction where multiple contracts are involved. The Court has also confirmed that it may not reopen issues on the merits, providing a detailed and useful summary of the relevant case law. The Court also clarified that section 30 of the AA is to be regarded as an exhaustive list of the definition of substantive jurisdiction.
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