Why Litigants Continue To Use Anti-Suit Injunctions

Law360, New York (March 14, 2014, 12:45 PM ET) -- Courts occasionally are asked to intervene in a pending arbitration and exercise their injunctive powers. In some cases, litigants seek to have the courts aid the arbitral process by stopping foreign proceedings that interfere with a pending arbitration. In others, courts are asked to enjoin arbitration itself. Decisions in both the U.K. and the U.S. in 2013 underscore the delicate relationship between the courts and arbitration and reveal a reluctance on the part of the courts to undermine arbitral agreements.

The U.K.

Enjoining Litigation in Non-European Courts: The dispute in AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35, concerned a long-term contract allowing a private company to operate a hydroelectric project in Kazakhstan. Although governed by Kazakh law, the parties' contract provided that their disputes would be subject to arbitration in London administered by the International Chamber of Commerce (ICC).

When a dispute arose, the Kazakh owner, rather than commence an ICC arbitration, brought proceedings against the owner in the courts of Kazakhstan. Although the operator argued that the dispute belonged in London arbitration, the Kazakh Supreme Court ruled that (1) the London arbitration clause was invalid on grounds of public policy and (2) the reference in the contract to the ICC was not a binding submission to arbitration administered by the ICC.

The operator, however, sought and obtained an anti-suit injunction from the High Court of England enjoining the Kazakh proceedings, arguing that the Kazakh owner breached the agreement to arbitrate. The anti-suit injunction was affirmed by the English Court of Appeal, which held that it was not bound by the conclusions of the Kazakh Court as to the validity of the clause — and added that neither ground of invalidity was sustainable. The decision was then appealed to the U.K. Supreme Court.

The U.K. Supreme Court considered whether English courts could validly enjoin Kazakh court proceedings, even where none of the parties had commenced or intended to commence arbitration proceedings. In upholding the anti-suit injunction, the court held that an arbitration agreement represents a binding undertaking to seek relief only within the prescribed forum — and a concomitant obligation to refrain from seeking relief in another forum. The fact that the claimant had not commenced a London arbitration was not relevant to the exercise of the court's power to uphold the parties' agreement.

This was a significant case for U.K. arbitration practitioners because it confirmed the power of English courts to grant anti-suit injunctions to enjoin proceedings in non-European courts that violated a London arbitration clause. (An earlier decision, West Tankers Inc. v Allianz SpA [2009] AC 1138, had indicated that English courts are prohibited by the U.K.'s treaty and EU obligations from granting similar injunctions to

enjoin proceedings in courts of European Union and European Free Trade Association countries — even when such proceedings are brought in violation of a London arbitration clause).

The ability of English courts to enjoin non-European proceedings in such circumstances was further reflected in another English case in 2013, Bannai v Erez [2013] EWHC 3689 (Comm), in which the Commercial Court enjoined the commencement of legal proceedings in Israel with respect to matters falling within the scope of an arbitration agreement governed by English law.

The court stated: "If it was not already clear, the fact that an arbitration clause contains within it a 'negative promise not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed' is now clear at English law."

Recalling the principle stated by Lord Millet in The Angelic Grace [1995] 1 Lloyds Law Rep 87, the Commercial Court held that, although the jurisdiction of the courts to grant such injunctions is discretionary and not to be exercised as a matter of course, good reasons must be shown as to why it should not be exercised in a case where an arbitration agreement is being violated.

Another 2013 decision addressed the phenomenon of "anti-arbitration injunctions," i.e., judicial orders restraining a pending arbitration. The dispute, British Caribbean Bank Ltd. v. Belize, originated in 2009, when certain measures were taken by the government of Belize to compulsorily acquire foreign-owned interests in the telecommunications sector. This prompted British Caribbean Bank, a Turks and Caicos Islands company that owned investments affected by these measures, to raise a series of challenges.

One challenge involved an effort to declare the laws invalid in the Belize courts. Another challenge was the commencement of an arbitration alleging a violation of the U.K.-Belize Bilateral Investment Treaty (which was applicable to it by virtue of an agreement to extend it to the Turks and Caicos Islands, a U.K. dependency). The BIT specified that investor-state disputes were subject to arbitration under the rules of the United Nations Commission on International Trade Law. Thus in 2010, a UNCITRAL tribunal, based in The Hague, was constituted to hear BCB's treaty claims.

Rather than participate in the arbitration proceeding, however, the government of Belize sought to enjoin it. In December 2010, it obtained an injunction from the Supreme Court of Belize, restraining BCB from proceeding with the UNCITRAL arbitration.

The injunction later was upheld by the Belize Court of Appeal, which by majority justified the injunction on the grounds that, although a right to arbitrate existed under the BIT, the UNCITRAL/BIT claims should not be allowed to proceed until the dispute had "ripened" through the litigation of BCB's challenge to the telecommunications laws in the Belize courts. BCB took its case to the Caribbean Court of Justice, which recently has been granted final appellate jurisdiction over Belize disputes (thus supplanting the U.K. Privy Council).

In a 2013 judgment, the court held that the BIT constituted a "legally binding agreement by the state of Belize to submit to arbitration" of treaty claims by investors such as BCB. Noting that "[t]he approach to modern arbitration agreements contained in investment treaties is for the court to support, so far as possible, the bargain for international arbitration," it held that the Belize courts' intrusion into the matter had proceeded under an erroneous view of the BIT, and was inconsistent with the doctrine of kompetenz-kompetenz, which left the determination of appropriate jurisdiction to the arbitrators.

It also noted that the issues in dispute in the BIT proceeding were qualitatively different from those in the local Belize courts. Accordingly, the anti-arbitration

injunction was vacated, and the BIT arbitration resumed.

The U.S.

In the United States, courts likewise have been willing to grant anti-suit injunctions when parties engage in tactics aimed at threatening arbitral proceedings. For example, in Bailey Shipping Ltd. v. American Bureau of Shipping, No. 12 Civ. 5959 (KPF), 2013 WL 5312540 (S.D.N.Y. Sept. 23, 2013), the U.S. District Court for the Southern District of New York granted an anti-suit injunction enjoining the parties from proceeding with certain actions filed in Greece with respect to specific claims that were governed by the arbitral agreement.

At the same time, federal courts have shown a reluctance to grant anti-suit injunctions against a pending or threatened foreign arbitration. For example, in Citigroup Inc. vs. Abu Dhabi Investment Authority, 13 Civ. 6073, (S.D.N.Y. Nov. 25, 2013), the Southern District dismissed an application to enjoin an arbitration proceeding brought by a sovereign wealth fund under an investment agreement, even though the bank already had obtained an award in its favor in a prior International Centre for Dispute Resolution arbitration under the same contract.

The court reasoned that, although the bank might be correct that the second arbitration was barred by the doctrine of "claims preclusion," this was a "merits" issue properly left to the arbitrators, once appointed. And in Sanofi-Aventis Deutschland GMBH v. Genentech Inc., 716 F.3d 586 (Fed. Cir. 2013), the U.S. Court of Appeals for the Federal Circuit affirmed a California federal court's refusal to enjoin an ICC arbitration in Zurich, even though the U.S. courts had granted declaratory relief on the substance of a related patent dispute.

The Federal Circuit held that any potential preclusive effect of the prior U.S. court order was a matter for the ICC arbitral tribunal to consider. The Federal Circuit expressed reluctance to frustrate U.S. federal policy in favor of enforcing forum selection clauses, and thus the court did not deem it appropriate to relieve the defendant from its contractual obligation to "settle such disputes at the ICC" — a forum to which the parties assented in their agreement.

Finally, one litigant attempted to obtain an "anti-anti-suit injunction" in connection with arbitration in 2013. In Maroc Fruit Bd. SA v. M/V Almeda Star, No. 11-12091-JLT, (D. Mass. Aug. 19, 2013), a lawsuit was brought in the U.S. District Court for the District of Massachusetts for breach of a sale of goods contract.

In August 2013, the plaintiff discovered that the defendant was considering bringing a proceeding in the English courts to enjoin the Massachusetts lawsuit on the grounds that the sale of goods dispute was covered by a London arbitration clause.

The plaintiff asked the Massachusetts federal court for an injunction to enjoin the defendant from bringing an anti-suit injunction in the London courts (effectively, an "anti-anti-suit injunction"). Rejecting this application, the Massachusetts federal court noted that the plaintiff "faces a very high bar in seeking an international anti-suit injunction."

Relying on U.S. Court of Appeals for the First Circuit precedent, the court held that, although the plaintiff had satisfied the threshold showing for an injunction (namely, similarity of parties and issues), it had failed to demonstrate that the balance of equities favored an injunction. The court added that, because no English injunction proceedings had yet been commenced, it was not willing to engage in an "arms race."

These cases reveal that courts on both sides of the Atlantic will be reluctant to use anti-suit injunctions to stop arbitration. However, upon a sufficient showing (and where jurisdiction exists), courts will be prepared to issue anti-suit injunctions to restrain foreign judicial proceedings that unreasonably threaten to undermine an arbitral agreement — even if no arbitration proceeding is under way.

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