ETHICS

SANDRA OKE sandra.oke@norfolk-partners.com

The Use of Anti-suit Injunctions in International Arbitration

Neil Dowers in his article titled "The Anti-suit Injunction and the EU: legal tradition and Europeanisation in International Private Law" states that an "anti-suit injunction is a court order awarded against a private party with the aim of either preventing that party from raising an action in another forum, or forcing that party to discontinue such an action if already started."

Anti-suit injunctions have been used as a tool by the courts to protect the sanctity of arbitration agreements between parties. Essentially, it prevents a party from instituting foreign proceedings thus frustrating the arbitration clause. It is used to prevent multiple litigation especially if the party has business, assets, or even prospects in the issuing forum. Justin Michaelson and Gordon Blanke in their article titled *"Anti-suit injunctions and the Recoverability of Legal Costs as Damages for Breach of an Arbitration Agreement"* state categorically that, "The anti-suit injunction is not an interference with the actions of another court, or another State. It is a personal remedy, against a breaching party, preventing them from continuing to breach a bargain that just so happens to involve a promise regarding where to arbitrate or sue."

The English Courts

Recently, there has been an increase in the use of anti-suit injunctions by courts in common law jurisdictions. Many courts seem to use anti-suit injunctions to stop the arbitration process or resist the enforcement of an arbitral award. The English courts have displayed a particular affinity for anti-suit injunctions but their enthusiasm has been met with resistance from the European Courts. English case law suggests that the courts consider the order to be addressed only to a party over whom the English court enjoys in personam jurisdiction and not to the foreign court, and therefore any interference with the foreign judicial process is not unwarranted.

However the Brussels Regulations have limited the ability of the English Courts to grant anti-suit injunctions. In **TURNER v GROVIT** [2001] UKHL 65, [2002] 1 WLR 107 an anti-suit injunction prohibiting a party from bringing proceedings in the court of another EU Member State was regarded as an interference with the jurisdiction of that court, and contrary to the principles underlying the Brussels Regulation, which governs civil and commercial claims. Similarly, in **WEST TANKERS INC v ALLIANZ SPA AND OTHER** [2012] EWHC 854 (Comm) the Court of Justice held that, because the Italian courts would have had jurisdiction over the substantive dispute under the Brussels I Regulation but for the arbitration clause, the English courts could not interfere in its decision whether or not to exercise that jurisdiction; that would amount to an interference with the effectiveness of the Regulation.

Notwithstanding the fact that the English courts were prevented from granting anti-injunctions with regards to litigation they were able to grant anti-suit injunctions in relation to arbitration, their reasoning was based on the fact that arbitral proceedings were excluded from the scope of the Brussels Regulation and that there was "nothing in the Convention to prevent the courts of a contracting state from granting an injunction to restrain a claimant from beginning proceedings…in breach of an arbitration clause."

The Nigerian Courts

Anti-suit injunctions can be used to either safeguard arbitral proceedings in Nigeria or to terminate proceedings in other jurisdictions if it is likely to cause harm, prejudice the subject matter of the dispute or have a negative effect on the arbitral process.

There have been instances where anti-suit injunctions were granted against Nigerian parties for example in **TRAVELPORT GLOBAL DISTRIBUTION SYSTEMS BV v BELLVIEW AIRLINES LTD** 2012 WL 39258556 (SDNY Sept 10 2012) the travel port Global Distribution system sought an order to compel Bellview to honour the arbitration clause as set out in the terms of the party's distribution agreement. The facts of the case are that Travel port entered into a Distribution agreement with Bellview in which Bellview was to distribute a computerised travel reservation system

The Distribution Agreement contained the following provision (the "Arbitration Provision"): 19. GOVERNING LAW; JURISDICTION AND ARBITRATION 19.1 This Agreement and all disputes arising under or in connection with this Agreement, including actions in tort, shall be governed by the laws of the State of New York, United States of America. 19.2 Any dispute or controversy, or claim arising out of or related to this agreement, or the breach, termination or invalidity thereof, may be submitted to arbitration in the United States in accordance with the UNCITRAL Arbitration rules in force at the date of reference. The Appointing Authority shall be the United States Council of Arbitration and such appointment will be in accordance with its "Procedures for Arbitration.

Travel Port advised Bellview that it would terminate the Distribution Agreement because Bellview had breached multiple obligations under the contract. Bellview denied that it was in breach of the agreement. The agreement was subsequently terminated by Travelport as a result Bellview instituted an action in the Federal High Court. Bellview sought a declaration that a dispute had arisen between the parties and that Bellview was entitled to refer the dispute to arbitration, along with an order for injunctive relief. The court issued a restraining order preventing Travelport from terminating the agreement. Thereafter, Travelport's applications for dismissal of the order was rejected. Travelport served a notice of arbitration on Bellview seeking damages, costs, and a declaration that Travelport

lawfully terminated the Distribution Agreement. In response, Bellview stated its intention to continue the Nigeria Action because it decided that the arbitral body specified in the Distribution Agreement, the United States Council of Arbitration, is a "non-existent body" and the Arbitration Provision was therefore "incapable of being performed."

An application for an anti-suit injunction was made at the District Court in New York. The Court observed that "Petitioner requests an order compelling the respondent to dismiss, or cause to be dismissed, the Nigeria Action. Although "it is beyond question that a federal court may enjoin a party before it from pursuing litigation in a foreign forum," so, too, must courts be cognisant that "principles of comity counsel that injunctions restraining foreign litigation be used sparingly and granted only with care and great restraint"

In granting the application the court stated that "The Nigeria Action also creates a serious risk of inconsistency and a race to judgment." The court further stated that if it refused to grant the anti-suit injunction, "the Nigerian High Court could go forward and try the case notwithstanding this Court's determination that arbitration is mandatory. Accordingly, it is proper to enjoin Bellview from further pursuing the Nigeria Action, or any other action that would interfere with the parties' arbitration proceedings in New York."

The decision of the court to grant the anti-suit injunction cannot be faulted because it sought to safeguard the arbitration agreement between the parties and provide a relief for the petitioner would had incurred delays and costs arising from litigating in an unfamiliar jurisdiction.

In the case of **THE OWNERS OF MV LUPEX v NIGERIAN OVERSEAS CHARTERING & SHIPPING LTD** (2003) 15 NWLR (pt. 844) 469 the plaintiff who is the respondent in this appeal claimed damages for the loss it suffered as charterer of the defendant's ship. This was in breach of a charter party executed by the parties. After filing the suit the respondent applied ex-parte for the arrest of the vessel and the application was granted. Thereafter the respondent made an application for the release of the vessel and for the matter to be adjourned. The appellant argued that that there was an arbitration clause stipulating that the arbitration should be carried out in London under English law. The appellant further posited that when the court made the order for the arrest of the vessel, it was not in possession of all the relevant facts of the case especially that arbitral proceedings had already commenced in London. The appellant's application was declined at both the trial court and court of appeal. However the Supreme Court unanimously allowed the appeal and adjourned the litigation to enable the parties continue their arbitration proceedings in London.

The Hon. Justice Utham Mohammed JSC reading the lead judgment stated that: - "These uncontroverted facts explain clearly that by submitting to arbitration the respondent had compromised its right to resort to litigation in court…Where parties have chosen to determine for themselves that they would refer any of their dispute to arbitration instead of resorting to regular courts a prima facie duty is cast upon the courts to act upon their agreement. See Willesford v. Watson (1873) 8 Ch. App.47325"

Although, the decision of the Supreme Court in **THE OWNERS OF MV LUPEX v NIGERIAN OVERSEAS CHARTERING & SHIPPING** is laudable for seeking to protect arbitration agreements. There are other decisions where the courts have not been favourable towards applications for arbitration in a foreign forum for example **MV PANORMOS BAY & ORS v OLAM & NIGERIA PLC** and **LIGNES AERIENNES CONGOLAISE v AIR ATLANTIC & NIGERIA LIMITED** are instances in which the Court of Appeal refused to enforce foreign arbitration clauses in maritime claims on the basis that section 20 was also applicable to such clauses.

Conclusion

The use of anti-suit injunctions in certain circumstances is imperative to stop parallel proceedings in foreign jurisdictions which undermine the advantages of arbitration Margaret Moses in her article *"Barring the Courthouse Door? Anti-Suit Injunctions in International Arbitration"* explains this succinctly as follows "having parallel proceedings undermines the purposes of arbitration, which are to have the dispute resolved in a neutral forum, to have confidentiality, to have a faster, more efficient, and less costly proceeding. So parallel proceedings create delays, inefficiencies, costs, and also the uncertainty that you may end up with conflicting decisions. That is what anti-suit injunctions are supposed to stop."

SAN TASK LAWYERS TO TAKE THEIR PROFESSION MORE SERIOUSLY CONTINUED FROM PAGE 5

have the existence of today as an opportunity to redress the past

"It is what is being done now that ultimately counts. How glorious yesterday was, the poor use of today can pollute or degrade the good of yesterday.

"The law "today" continues to use the vast reservoir of yesterday for the purpose of making laws to improve the society and positively affect the citizenry. It is obvious that law is a flowing river that constantly gathers the flotsam of yesterday, learns from the mistake that brought them forth and clears them away with the powerful current of today's flow of fresh waters.

"The impact of continuing legal education is seen only in the "today" of the lawyer, since it recognises that the application of law to conduct within the society constantly faces resistance, brought about by the complexity of human activity both in the individual and in relationships. The result is that yesterday departs leaving in its wake the debris of error both from the bar and the bench. Some of these errors are costly. They might have resulted in wrongful convictions, deprivation of settled rights and some others acts of misfortune.

The beauty of today is that it prevents a repetition or perpetuation of such errors bringing about new life for tomorrow which is evident in law reforms, judicial activism and intellectual reviews", Ogunde stated.

The Vice Chancellor of the University, Professor Abdulganiyu Ambali congratulated the leadership and the entire members of the society for making the University proud as the best law faculty in the country as recently declared by the Council of Legal Education and urged them to keep it up.

He also admonished the students to equip themselves sufficiently, reading voraciously, learning vigorously and prepare seriously for the future.

Ambali also charged the students to emulate the honoree, Mr. Layi Babatunde (SAN) who he described as a scholar of high repute that has edited and published 480 editions of the judgment of the Supreme Court of Nigeria (S.C.Report) with 22 indexes dating back to 1972.

Also, the Dean of the Law Faculty, Dr. Yusuf Arowosaiye thanked the student for their thoughtfulness in recognising leading men of character and integrity who deserved to be honoured for their contributions to the development of law profession and Nigeria law and jurisprudence.

"The Jurist, our signature students' publication has proud 20 years history of existence with this year 20th edition in honour of a well- deserved legal icon, Mr. Layi Babatunde SAN.

The Jurist has experienced changes in terms of the quality of its content and production since it's first issue. This a welcome development and I am hopeful that very soon the Jurist will compete favorably well with other leading and reputable students publication such as Havard Law Review, Honk Kong Law Review, The Idaho Law Review to mention but few", Ambali noted.