Kluwer Arbitration Blog

Damages for breach of the obligation to arbitrate: a step forward of national courts in favour of arbitration?

Manuela Caccialanza (Linklaters) · Tuesday, May 27th, 2014 · Linklaters

By Manuela Caccialanza and Alessandro Villani, Linklaters LLP

Another chapter of the never-ending West Tankers saga has recently concluded, seemingly scoring a success as to protection of a party's right to arbitrate.

On 4 April 2012 the High Court of Justice determined the appeal brought by West Tankers against the arbitration award that had denied the right to claim damages against the party who has brought proceedings in ordinary courts in breach of an arbitration agreement.
More specifically, after being sued by its insurers in the Italian court of Siracusa in spite of the existence of an arbitration clause, West Tankers commenced arbitration proceedings against the same insurers to claim compensation for the damages suffered, consisting of the legal fees and expenses incurred in connection to ordinary proceedings as well as indemnification against any liability established by the court which should be greater than that established in the arbitration. In so doing, West Tankers argued that the insurers were bound to the arbitration agreement contained in the main lease contract (as it was later recognized by the same Italian court, which sustained the defendant's objection of lack of jurisdiction) and should have therefore submitted their claims in arbitration.

The arbitration proceedings were determined on 14 April 2011 with a decision whereby the tribunal excluded its own jurisdiction in relation to a damage claim for breach of the obligation to arbitrate, based on the assumption that the West Tankers decision, excluding the compatibility of the "*anti-suit injunctions"* with the European legal system, implicitly recognized the existence of a right deriving from European law to sue before the courts specified under the EC Regulation No. 44/2001, such right prevailing over domestic rules recognising the defendant's right to be sued in arbitration in accordance with an arbitration clause.

More specifically, according to the tribunal's reasoning, in accordance with the settled predominance of European law over domestic laws the right to bring proceedings in courts having jurisdiction under the EC Regulation 44/2001 must prevail over the right, enforceable under national law, to be sued before a tribunal in the presence of a valid and binding arbitration agreement. On this assumption, the tribunal denied the existence of a right to claim damages for the breach of the right to arbitrate, which has a "recessive" nature if compared to the rights deriving from the mentioned EC Regulation 44/2001.

West Tankers appealed against the decision of the tribunal, submitting to the High Court of Justice, *inter alia*, the issue "*whether the arbitral tribunal is deprived of jurisdiction to award equitable damages for breach of an obligation to arbitrate by reason of EU law*".

The English Court finally upheld the appeal, finding that "*the answer to the question of law is that the tribunal was not deprived, by reason of European law, of the jurisdiction to award equitable damages for breach of the obligation to arbitrate*", on the following grounds.

First, it is recognised that the possibility exists of conflicting decisions by an arbitral tribunal on the one hand and a national court on the other, not only as to the existence and validity of an arbitration agreement but also on the merits of the dispute, as the tribunal and the court operate in different and parallel spheres. This having been said, the English court observed that there is no difference between a decision rendered by an arbitration tribunal on the merits of a dispute, contrasting with the contents of a decision of an ordinary court as to the merits of the same dispute, and a decision of a tribunal declaring that the defendant should indemnify the claimant in respect of any liability the ordinary court may lay on the claimant. Consequently, a decision of a tribunal which recognizes the effectiveness of an arbitral agreement and awards damages for the breach thereof, even if conflicting with a decision rendered by an ordinary court, would not contrast with the EC Regulation 44/2001.

Furthermore, the English Court rejected the reasoning of the tribunal, according to which the philosophy underlying the West Tankers decision is that the right of the claimant to bring proceedings in the court seized under the EC Regulation 44/2001 should take precedence over any proceedings before an arbitral tribunal. In so finding, the English Court recognized that the rules set out by the EC Regulation No. 44/2001 merely establish which are the courts having jurisdiction in civil and commercial matters, without ruling the existence of a substantial right of the litigants to seize the courts specified therein notwithstanding the presence of an arbitration agreement entered into by the parties.

Finally, the English judge held that ECJ denied the legitimacy of the *anti-suit injunctions* on the ground that such injunction, preventing a party from commencing proceedings before national courts, is detrimental to the *kompetenz-kompetenz* principle established by the European law, pursuant to which national judges must have exclusive jurisdiction in ruling upon their own jurisdiction. On the contrary, the *kompetenz-kompetenz* principle is in no way affected by the tribunals' jurisdiction to award equitable damages for breach of the obligation to arbitrate, as such a decision would not stay ordinary proceedings that may be already commenced, nor prevent the seized court from ruling in its turn upon its own jurisdiction.

In Italy, a similar outcome seems to have been achieved by the Court of Verona, which on 22 November 2012 issued a judgment whereby, ruling on a dispute relating to an assumed breach of contract, sustained the defendant's objection regarding the existence and effectiveness of an arbitration clause and awarded the defendant damages under Article 96 of the Italian Code of Civil Procedure, which provides that the party which has sued or appeared in court with fraud or negligence – namely being aware of the groundlessness of its claims – must be condemned to pay damages to the other party.

More specifically, in the case at issue the Court found that the claimant had speciously defended his right to sue in ordinary courts, notwithstanding the existence of a valid and binding arbitration agreement, while, if acting in good faith, he should have adhered to the objection of lack of

jurisdiction of ordinary courts raised by the defendant and submit his claims in arbitration. Consequently, the Court held the claimant eligible for "punitive" damages under Article 96 of the Italian Code of Civil Procedure, which is meant to sanction whoever harms the principles of fair trial and streamlined procedure.

The mentioned decision is remarkable as it represents the first precedent known in Italy where a court has recognized the right of a person sued in ordinary courts in breach of the obligation to arbitrate to be awarded damages (to be liquidated by the court on an equity basis).
It is worth noting that the two decisions mentioned herein are grounded on different assumptions and are aimed at protecting different interests.

On the one hand, in fact, the decision rendered by the High Court of Justice is intended to protect the effectiveness of a party's right to arbitrate instead of being sued in ordinary courts, in the presence of an arbitration agreement which is binding and enforceable between the parties; accordingly, the principle established by the English judge is that the party which has suffered a prejudice from the breach of the obligation to arbitrate is entitled to be restored to the same position existing before the commission of such breach (being awarded damages corresponding to the costs and fees that party incurred to defend itself before the court plus any liability hypothetically recognized by the court heavier than that eventually found by the tribunal).

On the other hand, the decision issued by the Italian Court is intended to protect the general and public interest in an efficient running of the judicial system, as the Italian judge applied the remedy provided for by Article 96 of the Italian Code of Civil Procedure, which provides a sort of "punitive damages" having the purpose of dissuading a party's attempt at abuse of trial (regardless of whether the non-culpable party has demonstrated to have suffered an actual damage as a result of the other party's misconduct or not).

However, both decisions seem to be deeply significant for practitioners in the arbitration field, as, although through different means, they certainly show an opening of national courts toward the enforcement of the parties' obligation to comply with an arbitration agreement.

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