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The 'West Tankers' Saga Continues: Can Damages Compensate for Breach of an Arbitration Clause?

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In the most recent of a long-running series of decisions in the West Tankers saga, the English court has found that the majority of the tribunal was wrong to decline jurisdiction to award equitable damages or to declare a party liable to indemnify the other as a result of the breach of an arbitration clause.

Background to the English court's decision

The protracted history of this dispute will be familiar to many arbitration practitioners worldwide, and particularly to those in Europe. It all began in August 2000, when a vessel owned by West Tankers, under charter to Erg, collided with Erg's jetty in Syracuse, Italy. The charter party was governed by English law and contained an agreement to arbitrate any disputes in London.

Erg claimed compensation from its insurers and also commenced arbitration proceedings in London against West Tankers for the excess in damages above that covered by the insurance. Sometime later, the insurers brought proceedings against West Tankers before an Italian court to recover the sums they had paid to Erg, despite the existence of the arbitration clause. The dispute gained considerable renown when West Tankers' application for an anti-suit injunction restraining the insurers from pursing the Italian court proceedings was refused following a landmark ruling from the ECJ which held that such relief would not be compatible with the Brussels Regulation.

West Tankers subsequently secured a favourable award from the arbitral tribunal holding that it was under no liability to either Erg or Erg's insurers. It then successfully sought to obtain a judgment in terms of that award, using section 66 of the Arbitration Act 1996 (the 'Act'). In the latest proceedings, it sought from the tribunal an award of damages for the breach of the arbitration agreement as well as an indemnity for the costs of defending the Italian proceedings. The tribunal declined jurisdiction to make this award, which prompted West Tankers to file an appeal with the English Court on a point of law under section 69 of the Act. It is that decision which is the subject of the latest judgment of the English court. To date, the Italian court has not yet ruled on whether it has jurisdiction to hear the dispute.

The decision of the English court

In finding that the majority of the tribunal had erred in law, Flaux J determined that there was nothing in the ECJ's judgment (or the Opinion of the Advocate General on which it was based)

which deprived the tribunal of jurisdiction to award relief for breach of the obligation to arbitrate. He relied heavily on the recognition by the ECJ of the possibility of parallel arbitration and court proceedings. Bearing in mind the fact that a tribunal and a court may reach inconsistent decisions on the merits and/or the scope and effect of the agreement to arbitrate, he held that there would be no qualitative difference between inconsistent judgments and an award of damages for breach of the arbitration agreement. In fact, a damages award would be an extension and consequence of the declarations made in the previous award as to the merits of the dispute.

Flaux J considered that the tribunal's decision had been based on a misunderstanding of the principles underlying the ECJ's decision as regards the application of the Brussels Regulation to arbitration. He acknowledged that arbitrators are bound to apply EU law but clarified that arbitration is excluded from the scope of the Brussels Regulation by Article 1(2)(d). In his view, the obligation to uphold the principle of effectiveness and mutual trust between Member State Courts in the context of the Brussels Regulation lies on 'national authorities' (which does not include private tribunals). As such, the tribunal was not obliged to defer to the Italian courts in the same way that an English court would need to under the Brussels Regulation.

But what is the practical effect of this decision?

Flaux J gave permission to appeal and commented that this case is likely to go further. Nonetheless, until any successful appeal, there is scope for a party faced with parallel proceedings in the EU in breach of an arbitration agreement to seek recompense from an arbitral tribunal for that breach, so as to put it (so far as possible) in the position it would have been had the parallel proceedings not been pursued. This would effectively allow it to seek compensation for the legal costs involved in defencing the parallel proceedings to the extent that was not ultimately recovered in the Italian proceedings.

Therefore, where proceedings before a court of a Member State run parallel with arbitration proceedings, the threat of being liable for compensatory damages should the national court decline jurisdiction may discourage parties from pursuing so-called 'torpedo' actions in future.

Does this decision represent progress for arbitration?

Alongside the previous judgment of the English court relating to section 66 of the Act, this is, in many ways, a result which represents progress for arbitration in Europe: parties who find themselves engaged in proceedings in a forum they have not selected will be comforted to know that this remedy may represent a deterrent for their counterparty. It also serves to limit the anti-arbitration ramifications of the ECJ's decision regarding the anti-suit injunction by effectively rendering the Italian proceedings academic even though they cannot be injuncted.

However, it is questionable whether the advantages of this decision are confined to those who seek enforcement locally. Pending the reform of the Brussels Regulation, there is still little clarity on the interface between the jurisdiction of arbitral tribunals and the jurisdiction of the courts. This decision does not fully address what happens in the scenario whereby the court of a Member State accepts jurisdiction (notwithstanding the arbitration agreement), and issues a judgment which is inconsistent with that of an arbitral tribunal. In those circumstances, depending on where the relevant assets are located, the party who has been awarded damages may be left with no option but to return to the same national court which issued an inconsistent judgment in order to enforce this award. This could lead a court of a Member State to be asked to enforce an award which

effectively seeks to undermine its own judgment. The question is then whether that court would be able to resist enforcement, and on what grounds. The New York Convention is likely to compel recognition and enforcement of the award, unless the dissatisfied party can rely on the public policy exception contained within Article V(2)(b). The way in which the court in question would interpret the public policy exception is, of course, an open question. Although generally seen as a last resort, this ground may be a convenient route for the dissatisfied party to negate entirely the effect of this latest judgment.

So, whilst it is on the one hand encouraging that a party faced with parallel proceedings in breach of an arbitration agreement may be entitled to compensation for its troubles in a private forum, it is not yet clear whether this decision will have the teeth required to ensure that it is effective.

This entry was posted on Tuesday, May 1st, 2012 at 10:08 am and is filed under Arbitration clause, Damages, Europe, Jurisdiction
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