Kluwer Arbitration Blog

Damages as a Sanction for Commencing Court Proceedings in Breach of an Arbitration Agreement

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Arbitration proceedings sometimes spawn a host of parallel court proceedings. It is not unheard for parties to seek to instrumentalise courts, sometimes with the complicity of the courts themselves, to escape the jurisdiction of an arbitral tribunal. Such conduct may, however, expose parties to liability for breach of the arbitration agreement, as was confirmed by a recent decision of the Swiss Supreme Court (4A_232/2013 of 30 September 2013).

In many cases, parties referring a dispute which is covered by an arbitration agreement to a state court do it for tactical reasons, with the hope of obtaining a more favourable decision from the courts in their home jurisdiction than from a neutral arbitral tribunal, or at least of derailing or delaying any arbitration proceedings (for some inspiration as to such tactics, see Horvath & Wilske (Editors), *Guerilla Tactics in International Arbitration*, Kluwer, 2013). Anti-suit injunctions are an arrow in the quiver of modern-day arbitral tribunals seeking to respond to such attempts to sabotage arbitral proceedings (Maples/Goldfarb, *Anti-suit injunctions: expanding protection for arbitration under English law*, Dispute Resolution International, Nov 2013, 169; Lévy, *Anti-suit injunctions issued by arbitrators*, in Anti-suit injunctions in international arbitration, (Gaillard, Ed.) IAI Series on International Arbitration, vol. 2 (2005); Scherer/Jahnel, *Anti-suits and Anti-arbitration injunctions in International Arbitration*, International Arbitration Law Review 2009, 66). However, even if granted and complied with, they do nothing to address the costs incurred in the court proceedings by the parties seeking the injunctions, which in practice can represent a significant burden.

Certain arbitral tribunals have, however, considered that commencing court proceedings that are incompatible with the arbitration agreement amounts to a breach of the agreement, and therefore triggers the plaintiff's liability to compensate the other party for the costs it incurred in the proceedings (see Fierens/Volders, *Monetary Relief in Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements*, Revista Brasileira de Arbitragem 2012; Bollée, *L'arbitre peut-il octroyer des dommages-intérêts pour violation de la convention d'arbitrage*, Rev. arb. 2012, 819). This was the approach taken by the ICC tribunal which rendered the award at issue in the Swiss Federal Supreme Court's decision of 30 September 2013 (4A_232/2013). In fact, the tribunal (composed of Michael M Collins, Lord Hoffmann, and Pierre-Yves Gunter), which had its seat in Switzerland, not only ordered the respondent to pay costs for the proceedings it had initiated before a Greek court, but ruled that the claimant could seek, in the arbitration, compensation from the respondent for an amount equivalent to any payments that the Greek court might order it to make. In addition, the tribunal's order was not limited to the Greek court proceedings, which were pending at the

time, but extended to any other court proceedings that the respondent might initiate in the future, regardless of the outcome.

The Supreme Court decision described the background of the arbitration as follows:

In 1997, Z Ltd. (United Kingdom) entered into a distribution agreement with X S.A., a Greek company. The contract provided for ICC arbitration in Geneva, and was governed by "the laws of England and Wales except for those matters, if any, which can only be governed by the laws of the Territory" (namely, Greece). In 2010, Z Ltd. terminated the distribution agreement.

X S.A. objected to the termination and sought a decision from a Greek court declaring it to be unlawful and ordering Z Ltd. to make certain payments. Z Ltd. initiated ICC arbitration seeking damages for breach of the arbitration agreement as a result of X S.A.'s action before the Greek courts, as well as the payment of outstanding invoices. In its final award dated 25 February 2013, the arbitral tribunal found the termination to be lawful. Applying the governing substantive law (English law) and relying on two precedents of the English courts (which are not identified in the Supreme Court decision), the arbitrators concluded that the arbitration agreement covered disputes relating to its breach. The arbitral tribunal stressed that in reaching its conclusion, it was not encroaching on the Greek court's jurisdiction to fix the costs pertaining to the court proceedings.

The Greek party challenged the award before the Swiss Federal Supreme Court (which has exclusive jurisdiction to deal with requests for annulment of international arbitral awards rendered in Switzerland) on the ground of lack of jurisdiction. According to X. S.A., the arbitrators had overstepped their jurisdiction, first by deciding on the costs relating to proceedings before another tribunal, namely the Greek court, and, second, by awarding hypothetical costs for future court proceedings.

The Supreme Court rejected the first ground, finding that the arbitral tribunal had "clearly and in a convincing manner" stated in the award that it did not encroach on the exclusive jurisdiction of the state courts to deal with the costs of the proceedings. The finding is in line with that of other tribunals, although the Supreme Court's reasoning is somewhat circular, since, unfortunately, it does not set out what the arbitral tribunal's "clear and convincing" arguments actually were.

X. S.A. notably argued that it was entitled to bring a claim for payment under criminal law against Z Ltd. before a Greek criminal court. The point here was probably that the arbitral tribunal had no jurisdiction to deal with criminal law or monetary sanctions related to a crime. The argument has some merit, but the Supreme Court could not consider it, since it had not been advanced in the arbitration proceedings, and had been raised for the first time before the Supreme Court.

The second ground on which X S.A.'s challenge was based was also rejected. The Supreme Court found that X S.A. had not shown that under English law it was not possible to award damages stemming from a hypothetical and future breach of the arbitration agreement. In addition, proceedings in Greece had already been introduced and were still pending. The breach of the arbitration agreement was real, not hypothetical.

What lessons can be drawn from the reported decision? Seizing a state court in the face of a valid arbitration agreement without any reasonable ground to do so might not go unpunished if the arbitral tribunal is sufficiently "robust". Pragmatic considerations might, however, persuade a party to nevertheless seize a state court, especially if the court is likely to favour the local party because of a lack of impartiality (particularly if the party is a state agency or state-owned

company), or because of specificities of the local law, which may also simply be invoked to disguise a lack of impartiality. The attractiveness of such court proceedings will be heightened if the other party has assets in the country of the court, while the seizing party has none outside.

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