Case No: 2015-494

Neutral Citation Number: [2015] EWHC 1874 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2015

Before :

MR JUSTICE KNOWLES CBE

- -

Between :

Ecobank Transnational Incorporated	**Claimant**
- and -	
Mr Thierry Tanoh	**Defendant**

- -
- -

Mr Matthew Coleman (of **Steptoe & Johnson**) for the **Claimant**
Mr Vernon Flynn QC (instructed by **Boies, Schiller & Flexner (UK) LLP**) for the **Defendant**

Hearing date: 8 June 2015

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Judgment

Mr Justice Knowles :

Introduction

1. This case concerns an anti-enforcement injunction to uphold an arbitration agreement.

Orders in Ivorian Proceedings and Togolese Proceedings

2. On 15 January 2015 the Abidjan Commercial Court in the Republic of Cote d'Ivoire ordered Ecobank Transnational Incorporated ("Ecobank") and two others to pay 7.5 billion CFA francs in damages to Mr Thierry Tanoh ("Mr Tanoh"). The Abidjan Commercial Court also ordered publication of its decision in the press at the expense of Ecobank and others. These orders were made in proceedings ("the Ivorian Proceedings") commenced by Mr Tanoh against Ecobank and others.

3. On 3 February 2015 the Labour Tribunal of Lome in the Togolese Republic ordered Ecobank to pay Mr Tanoh US$11,547,572. This order was made in proceedings ("the Togolese Proceedings") commenced by Mr Tanoh against Ecobank.

4. Ecobank appealed the decision of the Abidjan Commercial Court made in the Ivorian Proceedings. Ecobank applied on 13 February 2015 for a stay of execution pending the appeal, but this was rejected. The Appeal Court in Abidjan dismissed the appeal on 22 May 2015. Ecobank has stated that it intends to appeal further to the Court of the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA).

5. Ecobank also commenced an appeal against the decision of the Labour Tribunal of Lome made in the Togolese Proceedings. That appeal has yet to be determined by the Lome Court of Appeal. However, on Ecobank's application, the Lome Court of Appeal on 6 February 2015 granted a provisional stay of execution.

The parties and the Arbitration Agreement

6. Mr Tanoh is a national of Cote d'Ivoire. He was formerly employed by Ecobank as its Chief Executive Officer and Group Managing Director. Mr Tanoh and Ecobank entered into a written contract described as an Executive Employment Agreement and dated 15 December 2011 ("the EEA").

7. Clause 26 of the EEA contained an arbitration agreement ("the Arbitration Agreement") in these terms:

> "**Arbitration**
>
> Any and all disputes, controversies or claims arising under or in connection with [the EEA], including without limitation, fraud in inducement of [the EEA], or the general validity or enforceability of [the EEA] shall be submitted to binding arbitration before one arbitrator to be selected by mutual agreement of the parties

or failing mutual agreement to be appointed by the President of the International Chambers of Commerce in Paris, France. The arbitration shall be conducted in London, England under the UNCITRAL Rules and the award of the arbitrator is to be final and enforceable in the Courts of England. Irrespective of the outcome of the arbitration, it is hereby agreed that the parties shall each bear their own costs."

8. Clauses 27 and 28 of the EEA were in these terms:

> "27 **Compliance with Local Law**
> The Company warrants that the terms of this Agreement do not breach any law, regulation or regulatory requirement in Togo.
>
> 28 **Governing Law and Jurisdiction**
>
> This Agreement shall be governed by the laws of England and subject to clause 26 above, the parties hereby submit to the exclusive jurisdiction of the English Courts".

Events leading to the orders in the Ivorian Proceedings and the Togolese Proceedings

9. Ecobank terminated, or purported to terminate, Mr Tanoh's employment from 12 March 2014. Mr Tanoh disputed Ecobank's entitlement to do this. He did not commence an arbitration but instead commenced the Togolese Proceedings before the Labour Tribunal of Lome, on 4 April 2014. In the Togolese Proceedings he contended that the termination of his employment was in breach of the Labour Code in force in Togo and was unfair.

10. The Ivorian Proceedings were commenced by Mr Tanoh on 12 May 2014. In those he contended that a letter of 1 March 2014, written by a Dr Matjila but on behalf of a company as a director of Ecobank and making allegations about Mr Tanoh's work whilst employed by Ecobank, was defamatory. The letter had been publicised, including through the financial media.

11. Ecobank contested jurisdiction, unsuccessfully, before the Labour Tribunal seized of the Togolese Proceedings. By letter dated 17 November 2014 Ecobank's Togolose lawyers wrote a letter addressed to the President of the Labour Court of Lome requesting additional time for Ecobank to submit submissions on the merits, although it did not in the event submit those submissions and did not plead to the merits in the Togolese Proceedings. Ecobank did not seek an anti-suit injunction from the Courts of England & Wales based on the Arbitration Agreement.

12. In the Ivorian Proceedings Ecobank contested jurisdiction, unsuccessfully, before the Abidjan Commercial Court. It did plead to the merits but in circumstances where the Abidjan Commercial Court had ordered that jurisdiction be joined to the merits. On the evidence before me, under the law of the Cote d'Ivoire to plead to the merits in those circumstances is not a waiver of a right to argue that the dispute must be

submitted to arbitration. Ecobank did not seek an anti-suit injunction from the Courts of England & Wales based on the Arbitration Agreement.

The Arbitration

13. In addition to responding to the Ivorian Proceedings and the Togolese Proceedings in the way I have described, Ecobank commenced arbitration ("the Arbitration") against Mr Tanoh under the Arbitration Agreement.

14. It did not do so until 22 December 2014. In its notice of arbitration (itself disputed) the dispute Ecobank referred to arbitration was the dispute concerning the termination of Mr Tanoh's employment. It did not claim to refer the dispute over its liability in connection with the 1 March 2014 letter. Ecobank does however state in its submissions before me that it is its "intention to claim in the arbitration all losses that it has suffered as a consequence of the Ivorian Proceedings and the Togolese Proceedings". Mr Matthew Coleman, appearing for Ecobank, indicated that it was accepted that to do so would require some amendment. An arbitrator has not yet been appointed in the Arbitration.

The Interim Injunction

15. On an application on 10 April 2015 Ecobank, relying on the Arbitration Agreement, sought and obtained from the Commercial Court in England & Wales an interim worldwide anti-enforcement injunction ("the Interim Injunction") in respect of the orders in the Ivorian Proceedings and the Togolese Proceedings.

16. The application on 10 April was made without notice to Mr Tanoh. The Judge granting the Interim Injunction expressly raised, among other things, the question of delay. The Interim Injunction ordered effectively, and with some interim extensions to enable case management, held the ring to the present hearing, at which both parties were represented and at which the matter was argued for the first time by both parties. Ecobank seeks the continuation of the Interim Injunction. Mr Tanoh seeks its discharge.

Initial points

17. Mr Vernon Flynn QC, appearing for Mr Tanoh, underlined that there are few reported examples of anti-enforcement injunctions being granted.

18. I do not consider that point should affect the preparedness of a court to grant an anti-enforcement injunction where that appears necessary to hold a party to its contract; to "enforce the negative right not to be vexed by [other] proceedings" as it is analysed in AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogosrsk Hydropower Plant JSC [2013] 1 WLR 1889; [2013] UKSC 35 at [46] per Lord Mance JSC. Bank St Petersburg OJSC and another v Arkhangelsky and another [2014] 1 WLR 4360, [2014] EWCA 593 provides an example, although on perhaps rather unusual facts. A

simple example that might be less unusual might be a case where a judgment was obtained too quickly or too secretly to allow an anti-suit injunction to be sought. Of course the present case is different, and more complex than the simple example just given.

19. There was, rightly, reference by both advocates to comity. This is, of course, an aspect of real importance. It bears early emphasis that, as is widely appreciated, an anti-enforcement injunction is directed to a party and not to the foreign court or tribunal that has made the order that the injunction would require the party not to enforce: see Ellerman Lines v Read [1928] 2 KB 144 (CA) at 155 (per Atkin LJ); Bank St Petersburg OJSC v Arkhangelsky (above) at [35] per Longmore LJ with whom Kitchin and McCombe LJJ agreed.

20. However it is possible for the position to become at least more complex the more the foreign court or tribunal has spent time on the dispute and the more it has decided, especially where it has done so with all parties engaged. Once matters have reached the stage of a judgment of a foreign court "it is plainly a very serious matter for the English court to grant an injunction to restrain enforcement in a foreign country of a judgment of a court of that country": Masri v Consolidated Contractors International (UK) Ltd and Others (No 3) [2008] EWCA Civ 625; [2009] QB 503 at [93] per Lawrence Collins LJ. But "there is no general principle that even in such a case no injunction will be granted": Masri v Consolidated Contractors (above) at [94].

21. It is clear on authority that an applicant for an anti-suit or anti-enforcement injunction should apply "promptly and before the foreign proceedings are too far advanced": see The Angelic Grace [1995] 1 Lloyd's Rep 87 (CA) at 96 per Millett LJ; and The Skier Star [2008] 1 Lloyd's Rep 652 at [37] per Teare J. However Mr Coleman, for Ecobank, submits that delay does not include any period during which the applicant sought to challenge the jurisdiction of a foreign court and the period pending the foreign court's decision on that challenge.

22. I cannot accept that proposition. Leggatt LJ in The Angelic Grace (above, at 95) described graphically the "reverse of comity" were the English court "to adopt the attitude that if [a foreign court] declines jurisdiction,that would meet with the approval of the English court, whereas if [the foreign court] assumed jurisdiction, the English court would then consider whether at that stage to intervene by injunction". As Christopher Clarke J said in Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd [2009] EWHC 3629 at [78] "… comity, which involves respect for the operation of different legal systems, calls for challenges … to be made promptly in whatever is the appropriate court". Advent Capital plc v GN Ellinas Importers-Exporters Ltd [2003] EWHC 3330; [2004] I. L. Pr. 23 (Morison J), cited by Mr Coleman in support of his submission, was a decision on its facts and is not authority for a principle in the form of Mr Coleman's proposition. It is of note that Morison J included a quotation of Leggatt LJ's reference to the "reverse of comity".

23. Mr Coleman sought to draw on a separate discussion of (the defence of) laches in Fisher v Brooker and another [2009] 1 WLR 1764; [2009] UKHL 41 at [64], to develop the proposition that delay alone was not sufficient to deny an applicant for an anti-suit or anti-enforcement injunction because detrimental reliance upon the delay must (he submitted) also be shown.

24. I am not able to accept that proposition. It is not supported by authority in the area under consideration, and as a matter of principle it would unnecessarily restrict the approach of the courts. The position is best left that the presence of detrimental reliance may be a relevant circumstance to be taken into consideration, but it is not an essential condition to the preparedness of the courts to uphold or decline to uphold an arbitration agreement (or other jurisdiction clause).

Decision

25. In the circumstances of this case I have concluded I should refuse Ecobank's request to continue the Interim Injunction.

(a) The Togolese Proceedings

26. As regards the Togolese Proceedings, there was an important question whether the dispute was one that Togolese law required, and required for reasons of policy of the employment law of the Republic, where Mr Tanoh was employed, to be decided by a Labour Tribunal rather than by arbitration.

27. Ecobank did not commence the Arbitration so as to enable consideration of the question within the Arbitration. Ecobank argued the question before the Labour Tribunal. The Labour Tribunal was against its argument. This Court is not bound by the decision of the Labour Tribunal (see section 32(3) of the Civil Jurisdiction and Judgments Act 1982), but is required to make an evaluative judgment as to whether the decision should be recognised (see AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropwer Plant JSC [2011] EWCA Civ 647; [2012] 1 WLR 920 at [149(iii)], [150] and [165] per Rix LJ).

28. That employment law should require particular disputes to be allocated to particular tribunals is neither unknown nor objectionable. The question was not a question to which Togolese Law was irrelevant even under the EEA, given the terms of Clause 27 of that agreement. Examination of the decision of the Labour Tribunal shows, in my judgment, that forum to have reached a decision on the question without difficulty and on a straightforward application of the Labour Code. I do not think a different decision is to be preferred. And given the decision, I do not find, in the present case, expert evidence filed by the parties to be of material assistance.

29. It is not essential to Ecobank's case that it have commenced the Arbitration, but it is relevant that it waited as long as 8 months before doing so, and longer still to approach the English court. And in the meantime it sought an extension of time from the Labour Tribunal for submissions on the merits. Ecobank has now asked the Lome Court of Appeal to rule in favour of its argument that jurisdiction lies with the Arbitration and not with the Labour Tribunal. And Ecobank currently has the benefit of a stay of execution from the Lome Court of Appeal.

30. All these circumstances, taken together, in my judgment provide strong reasons against the continuation of the Interim Injunction.

(b) The Ivorian Proceedings

31. As regards the Ivorian Proceedings, even at this date Ecobank has not sought to refer the subject matter of those proceedings to arbitration. Again it is not essential that it have done so, but this, and the timing of its approach to the English court, is very considerable delay.

32. Further I cannot say I am surprised that it has not to date sought to refer the subject matter of those proceedings to arbitration. At least on the argument I have heard, I do not regard it as arguable (still less that there is a "high degree of probability": Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd (above) at [52] per Christopher Clarke J) that the subject matter of those proceedings fell within the Arbitration Agreement.

33. The construction of the Arbitration Agreement should "start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal": Fiona Trust and Holding Corpn and others v Privalov and others [2007] UKHL 40; [2007] Bus LR 1719 at [13] per Lord Hoffmann. Even applying that assumption, I do not consider it is realistic to treat a claim for defamation in the Ivorian Proceedings as a claim "arising under or in connection with" the EEA, to use the language of the Arbitration Agreement.

34. It is one thing for the language to extend to a claim that the agreement between the parties had been induced by misrepresentation (Donoghue v Armco Inc and others [2001] UKHL 64; [2002] 1 All ER 749 at [60] was cited by Ecobank; the clause in the Arbitration Agreement expressly references inducement by fraud); it is another thing to conclude that the parties would have contemplated that were there to be allegations of defamatory behaviour that would be a matter for the arbitrator. That such conduct is, at least in some senses, independent of "the relationship into which [the parties] have entered" under the EEA is further illustrated by the point that there were two other parties also said to be liable in defamation. Neither of those could be required to arbitrate because neither is party to the EEA or to the Arbitration Agreement found within it.

35. Ecobank argues that all the allegations made in the 1 March Letter relate to Mr Tanoh's employment by Ecobank, and that the Ivorian Proceedings could have been framed in contract (and by reference to the implied duty of trust and confidence owed to an employee) rather than the tort of defamation. I do not think that argument takes Ecobank very far, even if it was technically correct. An employee who has a cause of action in defamation against his employer or former employer is prima facie entitled to pursue that cause of action.

36. Ecobank suggested that an arbitrator could address issues of non-monetary remedies in the same way as could a court, for example by ordering publication of the outcome of the hearing, or of an apology. This does not go to the key question, which is whether the claim fell within the Arbitration Agreement. It is also the case that a public hearing (not just publication of the outcome of the hearing, or of an apology) may be important where reputation is involved.

37. The circumstances here, in my judgment, point even more strongly against the continuation of the Interim Injunction.