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UPDATE

Restraining the pursuit of foreign proceedings in the British Virgin Islands

Update prepared by Shane Donovan (Senior Associate, BVI)

The courts of the British Virgin Islands will, in appropriate cases, act to restrain the bringing or continuing of foreign proceedings, or the enforcement of foreign judgments in the BVI or worldwide, where the claimant in the foreign proceedings is amenable to the BVI court's jurisdiction, and either an injunction is required to protect against the invasion or threat of invasion of a legal or equitable right, or the claimant is guilty of unconscionable conduct. However, any application must be made promptly and before the foreign proceedings are too far advanced.

In *Adamovsky & Stockman Interhold SA v Malitskiy & Filipenko* (Appeal No. BVIHCMAP2014/0031, 3 February 2017), the Eastern Caribbean Court of Appeal confirmed that the principles on which British Virgin Islands (**BVI**) courts will act to restrain the bringing or continuing of foreign proceedings ('anti-suit' injunctions) are the same as those on which they will restrain enforcement of a foreign judgment in the BVI or worldwide ('anti-enforcement' injunctions).

Factual Background

The respondents had obtained a judgment against the appellants in a claim for unfair prejudice in the sum of US$35.8 million from the BVI court on 1 October 2014 (the **BVI Judgment**). The day after judgment was handed down in the BVI, the appellants commenced proceedings against the respondents in Ukraine.

On 5 November 2014, the respondents applied to the BVI court for an anti-suit injunction to restrain the prosecution of the Ukrainian proceedings. That application was to be heard by the BVI court on 20 November 2014. However, the day before the hearing of the respondents' application in the BVI, the Ukrainian court entered judgment in favour of the appellants against the respondents in the sum of US$49.5 million (the **Ukrainian Judgment**).

The hearing in the BVI nevertheless proceeded on 20 November 2014, and by order dated 21 November 2014, the BVI court restrained the appellants from enforcing the Ukrainian Judgment in the BVI and elsewhere in the world (other than Ukraine) (the **Anti-Enforcement Order**).

The Applicable Legal Principles

The Court of Appeal endorsed the general principle as stated in rule 38(5) of *Dicey, Morris & Collins on the Conflict of Laws* (15th Ed.) that:

> *[A]n English court may restrain a party over whom it has personal jurisdiction from the institution or continuance of proceedings in a foreign court, or the enforcement of foreign judgments, where it is necessary in the interests of justice for it to do so.*

It stated that the basis of the jurisdiction exercised by the BVI court in anti-suit cases had been established by Pereira JA (as she then was) in *Krys & Lau v Stichting Shell Pensioenfonds* (Appeal No. HCVAP 2011/036, 17 September 2012), where she said:

> *[20] There is no doubt that the court has jurisdiction in personam, where 'the ends of justice' so require, to restrain a person amenable to its jurisdiction from commencing or continuing with proceedings in a*

court abroad. ... Parameters within which this jurisdiction must be exercised must not be fixed but remain fluid or flexible as equity must adapt and find new solutions to new problems in fulfilling 'the ends of justice'. ...

...

[32] [T]he most obvious example in which the jurisdiction will be exercised is where the conduct of the claimant pursuing foreign proceedings is said to be vexatious or oppressive or otherwise unconscionable.

The Court of Appeal thus stated that there are two threshold requirements to establishing jurisdiction for the purpose of seeking anti-suit/anti-enforcement relief:

1. The person sought to be restrained must be amenable to the court's jurisdiction; and
2. Assuming amenability is established:
   (a) the injunction is required to protect against the invasion or threat of invasion of a legal or equitable right; or
   (b) unconscionable conduct on the part of the person to be restrained is made out.

The Court of Appeal stated that, even where the threshold requirements are satisfied, the court must then go on to evaluate whether it would be a right (i.e. proper) exercise of discretion to grant the order. It said that considerations of comity and the need for caution are critical to this evaluative stage.

Amenability

Generally speaking, there is unlikely to be much difficulty in establishing amenability to the BVI court's jurisdiction where the party sought to be restrained is a BVI incorporated company. In *Adamovsky*, this was not an issue as the appellants had appeared on the anti-suit application and participated in the hearing unconditionally.

The Invasion of a Legal or Equitable Right

The most common basis upon which anti-suit injunctions are sought is that the party who seeks to litigate a dispute in a foreign court has agreed to arbitrate the dispute or has agreed that the BVI court should have exclusive jurisdiction. However, the *Adamovsky* case did not involve any invasion or threatened invasion of a legal or equitable right of the respondents. Rather, it was alleged that the appellants had acted unconscionably in bringing the Ukrainian proceedings.

Unconscionability

As the Court of Appeal recognised, whether or not unconscionable conduct is established will involve an evaluative assessment of the facts in any given case.

In *Adamovsky*, shortly before the trial of the unfair prejudice claim in the BVI, the first appellant, Mr Adamovsky, had sought permission to amend his counterclaim to add a claim for rescission of a shareholders agreement that he had entered into with the respondents (the SHA). The SHA governed the future relationship between the parties to the agreement so far as it concerned their interest in a group of companies referred to at the trial of the unfair prejudice claim as 'the Holding'. The SHA did not affect the parties' relationships as shareholders of the BVI company to which the unfair prejudice proceedings related. By the terms of the SHA, Mr Adamovsky's share of the profits of the Holding was reduced by 10%, and he was to be compensated commensurately in other ways.

There was no allegation in the body of the proposed amendment that Mr Adamovsky had suffered any loss or damage as a result of entering into the SHA, and there was no claim for payment of any such loss or damage in the proposed amended prayer of relief. Permission to amend was refused by the BVI court. In refusing permission, the court expressed the view that the SHA had nothing to do with the unfair prejudice claim, and that the proposed claim would be more appropriately dealt with, if anywhere, by the Ukrainian courts.

By their Ukrainian proceedings, the appellants sought rescission of the SHA and claimed multiple punitive damages under Ukrainian law by reason of a fraud alleged to have induced Mr Adamovsky to enter into the SHA.

At first instance, the BVI court granted the Anti-Enforcement Order. It held that Mr Adamovsky's motive in commencing the Ukrainian proceedings and for ensuring that the second appellant, Stockman Interhold SA (**Stockman**), which was never a party to the SHA, jointly obtained the benefit of any judgment in the Ukrainian proceedings, was to arm himself and Stockman with a set off for the purpose of extinguishing the BVI Judgment. In so finding, the BVI court found as a matter of fact that: (i) Mr Adamovsky suffered no loss by entering into the SHA; (ii) he was fully compensated for the loss of his 10% by the arrangements contained within the SHA itself; (iii) the arrangements contained in the SHA were carried forward and partially performed in a 'Dissolution Agreement'; (iv) Mr Adamovsky had no difficulty accepting and retaining very substantial benefits under the Dissolution Agreement; and (v) Mr Adamovsky had not received 10% less or any percent less than he would have otherwise received on dissolution of the Holding.

Although the court rejected the respondents' submission that the issues raised in the Ukrainian proceedings had already been adjudicated upon as part of the BVI proceedings, it held, following the decision of the English Court of Appeal in *Masri v Consolidated Contractors International Co SAL* [2009] QB 503, that the court had power over persons properly subject to its in personam jurisdiction to make ancillary orders in protection of its jurisdiction and its processes, including the integrity of its judgments. It held that:

> *Although the sort of behaviour displayed by Mr Adamovsky in this case took the form of obtaining a money judgment rather than re-litigating the merits of the Claimant's claim, as in Masri, I can see no difference in quality between the two types of conduct. One is an attempt to get a foreign Court to declare contrary to the judgment of the home Court, the other is mounting a baseless claim for losses never suffered, or claimed in the original proceedings, or sought to be claimed in the original proceedings for no other purpose than frustrating the Order of the home Court. Each is conduct on the part of someone who has submitted to its jurisdiction designed to interfere with the processes of the Court.*

As regards the question of unconscionability, the Court of Appeal held that:

> *[W]here the alleged unconscionable conduct turns on the hopeless or baseless nature of the claim, the trial judge in assessing this factor, must exercise great care that he does not burrow into the foreign court's jurisdiction and decide issues of fact that fall squarely within the adjudicative role and function of the foreign court applying its law as the forum court.*[1]

The Court of Appeal was of the view that the court below had not been entitled to take a view that the Ukrainian proceedings were baseless as a factor in determining unconscionable conduct. It further held that:

> *To pursue a juridical advantage in a foreign court which is the court of forum is not, without more, unconscionable conduct. The fact that the appellants filed the claim in Ukraine the day after the judgment of 1st October was handed down is not sufficient to draw a conclusion that the jurisdiction of the courts of Ukraine was cynically invoked.*[2]
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> ...
>
> *[O]btaining the Ukrainian judgment in the circumstances in which they did, was not tainted by unconscionable conduct. It was conduct in pursuit of legitimate legal claims before a foreign court of competent jurisdiction in which they had the juridical advantage and which the BVI court had declared was the forum court. There could be nothing unconscionable about that.*[3]

As regards the court below's reliance on the *Masri* principle, the Court of Appeal said that it *does not provide the court with a roving charter to protect its process including its judgments from any subjectively perceived undermining assault as the trial judge seemed to think.*

The Court of Appeal therefore found that the court below had been wrong to conclude that the appellants had acted unconscionably in bringing the Ukrainian proceedings.

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[1] Paragraph 36

[2] Paragraph 46

[3] Paragraph 48

The Exercise of the Discretion

The Court of Appeal also held that the court below had erred in the exercise of its discretion by failing to take into account and give sufficient weight to the following factors:

1. The court had previously ruled that Ukraine was the proper forum for SHA disputes.
2. The court had ruled that the claim in Ukraine was never adjudicated upon by the BVI court and as such there was no cause of action estoppel, no issue estoppel and no Henderson v Henderson abuse of process. In relation to the latter, the court had underscored the fact that Mr Adamovsky had tried to litigate the rescission claim in the BVI but had been refused permission.
3. The court had ruled that there was never any justification for restraining Mr Adamovsky or Stockman from litigating the rescission claim in the Ukrainian Court.
4. That these rulings meant, in effect, that the respondents had no equitable right to restrain Mr Adamovsky and Stockman from bringing the proceedings in the Ukraine.
5. That the judgment of the Ukrainian Court was already in existence.
6. It was given in proceedings begun by Mr Adamovsky in a jurisdiction where he was entitled to avail himself of whatever juridical advantages the law of that jurisdiction gave him.
7. It was a final judgment (subject to the right of appeal) of a court of competent jurisdiction given on the merits untainted by any vitiating factors.
8. The correctness of the Ukrainian judgment as a matter of Ukrainian law could not be questioned.
9. The foregoing factors in combination would militate against a conclusion that the Ukrainian proceedings were not an attempt to litigate genuine rights but were designed to frustrate (in the sense of preventing enforcement of) the BVI Judgment.

Conclusion

This case provides a welcome reminder of the principles upon which anti-suit or anti-enforcement relief will be available.

The Court of Appeal's finding that there is no significant difference in the thresholds for granting anti-suit or anti-enforcement relief accords with the decision of the English Court of Appeal in *Ecobank Transnational v Tanoh* [2016] 1 WLR 2231, which was delivered in the period between the hearing of the appeal in *Adamovsky*, and the delivery of judgment.

Cases in which anti-enforcement injunctions have been granted are few and far between. As the English Court of Appeal said in the *Ecobank Transnational* case:

> *This dearth of examples is not surprising. If … an applicant for anti-suit relief needs to have acted promptly, an applicant who does not apply for an injunction until after judgment is given in the foreign proceedings is not likely to succeed. But he may succeed if, for instance, the respondent has acted fraudulently, or if he could not have sought relief before the judgment was given either because the relevant agreement was reached post judgment or because he had no means of knowing that the judgment was being sought until it was served on him.*[4]

An applicant for anti-suit relief should therefore act promptly and claim relief at any early stage. The longer a foreign proceeding is permitted to continue without any attempt to restrain it, the less likely the BVI court is to grant an injunction. Importantly, the Ecobank Transnational case (which would be of persuasive value in the BVI) suggests that any time during which the foreign jurisdiction is being challenged will not be left out of account when considering the question of delay.

Considerations of comity will also assume greater force the longer the foreign proceedings are allowed to continue, as the court will be entitled to take into account significant wasted costs incurred in the foreign court proceedings, and the wasted resources and time of the foreign court, which could have been avoided had the applicant acted sooner.

[4] Paragraph 19

For these reasons, if someone is considering seeking anti-suit or anti-enforcement relief from the BVI courts, they should seek BVI legal advice at the earliest possible stage.

Contacts

Eleanor Morgan
Partner, Mourant Ozannes
BVI
+1 284 852 1712
eleanor.morgan@mourant.com

Shane Donovan
Senior Associate
BVI
+1 284 852 1731
shane.donovan@mourant.com

2021934/73156024/1