Bannai v Erez - Anti-suit injunctions and foreign insolvency proceedings

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Case: Bannai v Erez (Trustee in Bankruptcy of Eli Reifman) [2013] EWHC 3689 (Comm), 26 November 2013, Burton J

Synopsis: The existence of Israeli insolvency proceedings concerning an individual (which had been recognised by the English court pursuant to the Cross Border Insolvency Regulations 2006) was not a sufficient reason to set aside an anti-suit injunction which had been granted by the English courts in support of an English law arbitration agreement.

Topics covered: Anti-suit injunctions; foreign insolvency proceedings; Cross-Border Insolvency Regulations 2006 ("CBIR"); arbitration agreements.

The Facts

E was theTiB of R, an Israeli national imprisoned in Israel. The Israeli proceedings were said to be the largest bankruptcy proceedings in Israel. R's bankruptcy proceedings were recognised by the English courts under the CBIR. Prior to his bankruptcy, R had entered into a contract with B which provided that B would contribute 35% of the assets of ten specified companies to a joint venture company. No contributions were made and, following the bankruptcy of R, E commenced court proceedings in Israel against B for breach of contract arguing that B had defrauded R. In the meantime, B successfully obtained an ex parte anti-suit injunction from the English court prohibiting the commencement or continuation of court action against him in Israel or anywhere else in respect of any claims arising from the contract, on the basis that: (i) the contract contained an English law arbitration agreement; and (ii) there was an imminent breach of that arbitration agreement. Notwithstanding the existence of the arbitration agreement and the anti-suit injunction, steps taken to uphold the arbitration agreement in Israel had proven unsuccessful and the Israeli court rejected B's application for a stay of the Israeli proceedings.

The English court had to determine, among other things, whether the existence of the Israeli insolvency proceedings was a sufficiently good reason to set aside the anti-suit injunction. One of E's arguments was that he should be given the chance to apply to the Israeli court to override the arbitration clause on the basis that it amounted to an onerous asset capable of being disclaimed pursuant to Israeli insolvency law. While it was not presented before the English court in this way, it could be said that E's argument was that the correct forum for a matter which was closely connected to and directly derived from the Israeli insolvency proceedings (ie Israeli insolvency disclaimer) was the Israeli court.

The Decision

The Israeli bankruptcy proceedings did not amount to a sufficiently good reason for the English court to refuse to grant or continue an anti-suit injunction. It was not appropriate to lift the anti-suit injunction to allow disclaimer proceedings to be commenced in Israel as: (i)

it was not clear that the provision for arbitration was an onerous asset capable of being disclaimed (essentially, in accordance with Israeli legal precedent, it was unlikely that this would be a case in which the Israeli court would uphold an application to disclaim); and (ii) there was no reason why the issues between B and R should not be adjudicated in arbitration. The result of the arbitration proceedings, which could be concluded relatively speedily, would then inform the outcome of the Israeli bankruptcy proceedings. The court also noted that B did not need to actually contemplate or intend to commence arbitration proceedings in order to gain the court's assistance in upholding the anti-suit injunction: the mere fact that B was contractually entitled to have the matter determined by arbitration was sufficient.

In reaching the above conclusion the English court drew considerable comfort from the premise that, if English bankruptcy law were applied to the matter, the arbitration proceedings would be allowed to continue to conclusion. This is because S.349A IA86 provides that, where a bankrupt was a party to a contract containing an arbitration agreement entered into before the commencement of the bankruptcy, any dispute which the arbitration agreement governed would ordinarily be allowed to proceed to arbitration.

E further argued that the cooperation provisions in Art 25 of Sched 1 CBIR, together with the overriding principle of comity, meant that the English court should grant a stay of the English arbitration proceedings in deference to the Israeli bankruptcy proceedings (Art 25 of Sched 1 CBIR provides that *"the court may cooperate to the maximum extent possible with the foreign courts or foreign representatives…".).* This argument was rejected on the basis that neither the CBIR nor comity required the English court not to grant or continue an anti-suit injunction where the Israeli court has failed to grant a stay of Israeli court proceedings against the background of a valid and binding English arbitration agreement. While the English court will always exercise caution before granting an injunction - which may indirectly interfere with proceedings in a friendly court - this was a clear case for the grant (and continuance) of an anti-suit injunction. Given that the arbitration proceedings should be concluded speedily, the court considered that the anti-suit injunction should not cause any material delay in the conclusion of the Israeli bankruptcy proceedings.

Comment

In relation to the question of whether the existence of the Israeli insolvency proceedings was sufficient reason to lift the anti-suit injunction, the court's reasoning seemed to turn on two key points.

First, that the proceedings before the Israeli court did not involve disclaimer (and so were not concerning a unique issue of insolvency law) and, if disclaimer proceedings were allowed to be commenced in Israel, such proceedings would likely be unsuccessful. The English Court doubted whether an arbitration provision would constitute an onerous asset capable of being disclaimed, although it did hear expert evidence on the question. The English court's decision to continue the anti-suit injunction may well have been different if the Israeli court proceedings did encompass an application for disclaimer. Such a matter would likely be viewed as closely connected to and directly derived from the Israeli bankruptcy proceedings. Therefore, an argument could be made that, as there is nothing vexatious or oppressive in a foreign court being allowed to hear a matter that derives directly from and which is closely connected to insolvency proceedings commenced within

its jurisdiction, such actions should not be restrained by an English anti-suit injunction. Indeed the foreign court will usually be the most appropriate forum to hear such matters. Whether the English court was correct to determine whether a disclaimer action brought under Israeli insolvency law would be successful or not, rather than allowing the Israeli court itself to consider the matter, is debateable.

Secondly, the English court took the view that allowing the contractual dispute to be dealt with through English arbitration proceedings (as agreed between the parties) would not cause any material delay to the resolution of the Israeli bankruptcy proceedings. Again the decision may have been different had there been any real fear that the arbitration proceedings would be unnecessarily lengthy, thus giving rise to the potential for the Israeli bankruptcy proceedings to be delayed by the English arbitration.