AN INJUNCTION TOO FAR: *C v D*

Cy Benson, partner of Gibson Dunn & Crutcher LLP, offers a different perspective on this recent UK appellate decision. Did the judges rewrite the parties' agreement?

In *C v D* (2007 EWCA Civ 1282), the English Court of Appeal upheld the issuance of an injunction restraining the respondent in a London arbitration from seeking to:

- challenge the arbitrators' partial award in the courts of the US; or
- resist enforcement of the award in the US courts on any grounds other than those set out in the New York Convention 1958.

The first element of this injunction has received some attention, virtually all favourable. The second, however, has largely escaped comment, even though it suggests an exercise of judicial power that is unwarranted, unprecedented and potentially dangerous if other courts follow suit.

A bit of background. *C v D* featured a "Bermuda form" contract of insurance between D, a US insurer, and C, a US named insured. The definition of the insured included both C and numerous identified subsidiaries, affiliates or associated companies (more than 300 of which were incorporated outside the US). The policy was to be "governed by and construed in accordance with the internal laws of the State of New York", with any disputes to be "fully determined in London, England under the provisions of the English Arbitration Act". In due course, C sustained damages as a result of claims made against it, along with a subsidiary with European operations, D refused to pay under the policy and C commenced arbitration. C won.

D then threatened to challenge the award in the US courts, asserting that the award was a "non-[New York] Convention award", the parties had agreed to the application of the US Federal Arbitration Act and, therefore, they had agreed to permit a challenge to the award in the US on any ground available under US law, including "manifest disregard of the law" by the arbitrators.

The English courts determined that New York and US law were irrelevant to the issues before them. The high court made the following points among others:

- *It is undisputed that the curial law of the arbitration, which took place in London, is English law and that the arbitration had to be conducted in accordance with the provisions of the Arbitration Act of 1996, as the policy expressly provided.*
- *The agreement to the seat and the curial law therefore necessarily imports that, with the result that challenges to any award are governed by the relevant sections of the Act, as amended by the parties' agreement where the Act itself allows it.*
- *The significance of the 'seat of arbitration' has been considered in a number of recent authorities. The effect of them is that the agreement as to the seat of an arbitration is akin to an agreement to an exclusive jurisdiction clause. Not only is there agreement to the arbitration itself but also to the courts of the seat having supervisory jurisdiction over that arbitration. By agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration.*

> An agreement to arbitrate in London pursuant to the English Arbitration Act represents an agreement to abide by that act and conduct the arbitration according to its provisions, including those relating to challenges

As to these points (and putting aside whether the term "supervisory" suggests a role rather more intrusive that the "supporting" role many would see as the ideal), the English courts are no doubt correct and it is difficult to comprehend quite how D was able to take a contrary position. It therefore followed that D's threat to challenge the award in the US prompted the high court to the following determination:

> *Whilst a challenge to the award in accordance with the terms of the arbitration agreement (here the Arbitration Act 1996) or in accordance with the law of the agreed supervisory jurisdiction (here English law) does not constitute a breach of contract, the attempt to invoke the jurisdiction of another court is such a breach, of the contract to arbitrate, the agreement to refer and the agreement to the curial law. Such a challenge usurps the function of the English court which has power to grant injunctions to protect its own jurisdiction and the integrity of the arbitration process. In such a case there is an infringement of the legal rights of C (both contractual and statutory rights) under English law and an abuse of the process of this court in the usurpation of its exclusive jurisdiction to supervise arbitrations with their seat in this country.*

D was, accordingly, enjoined from commencing a set-aside proceeding in the US by the UK high court. But the high court went further, and considered arguments relating to enforcement. C argued that not only was England the exclusive jurisdiction to entertain a challenge to the award, but "the only permissible challenges to enforcement in other countries, which are parties to the 1958 Convention (as is the US), are those which arise under article V of the Convention". This argument was accepted by the high court.

Consequently the injunction issued also acted to prevent D "from relying on the law of New York in *any* application [by C] to *enforce* the partial award" (quote from Lord Justice Longmore in the Court of Appeal; my italics). The high court emphasised, however, that "[n]one of this of course impacts upon any challenge D may be able to mount to enforcement in a foreign jurisdiction under part V of the 1958 [New York] Convention on the grounds therein set out".

So D was told it might rely on international law (ie, the New York Convention) in resisting enforcement of the award by C, but was enjoined from asserting any defence premised on New York law. This "anti-defence" injunction was the subject of little discussion in the Court of Appeal, Lord Justice Longmore merely remarking, for example, that "the judge was right not only to grant a final injunction but to frame it in the way in which he did".

As a practical matter, the English courts' anti-defence injunction applies to the situation where C, a US party, commences an enforcement proceeding against D, another US party, in the US courts. An agreement to arbitrate in London pursuant to the English Arbitration Act represents an agreement to abide by that act and conduct the arbitration according to its provisions, including those relating to challenges. But the English Arbitration Act says nothing about the manner, means or grounds on which awards rendered in England may be enforced, or enforcement resisted, in other jurisdictions. In short, the fact that the underlying arbitration occurred in London does not confer "supervisory" jurisdiction on the English courts with respect to enforcement proceedings brought elsewhere. The defences that may be raised to resist enforcement are questions for the courts where enforcement is sought.

"If D was entitled as a matter of contract to take the steps that it says it is entitled to take, then no question of oppressive or vexatious conduct would arise"

As difficult as it is to see how D arrived at the position that it might challenge the award outside of the English courts, it is equally difficult to see how it would be breaching any agreement (express or implied) by asserting in a US enforcement proceeding any defences that are available to it under US law.

In fact, without such a breach, or other "vexatious and oppressive" conduct designed to interfere with due process of the English courts or legal rights vested in C, there should be no basis for an English court to enjoin D from asserting whatever defence to enforcement it wishes (and this is true no matter which side of the civil/common law divide on anti-suit injunctions one prefers). As the high court itself recognised: "If D was entitled as a matter of contract to take the steps that it says it is entitled to take, then no question of oppressive or vexatious conduct would arise."

Practical implications

As D pointed out in its (ill-conceived) challenge argument, US law does not automatically apply the New York Convention to all foreign arbitral awards. Title 9 of the US Code, chapter 2, section 202, entitled "Agreement or awards falling under the Convention", provides that:

> *An agreement or award arising out of such a [commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless the relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.*

The fact that an agreement provides for arbitration in London is not, alone, such a "reasonable relation", even where the agreement is expressly governed by English law (see *Jones v Sea Tow Services*, 30 F3d 360 (2d Cir 1994)). More is required. (See, for example, *Freudensprung v Offshore Technical Service*, 379 F3d 327 (5th Cir 2004), in which a "reasonable relation" was found where the agreement envisioned performance in West Africa.)

In this case, therefore, and assuming C commenced enforcement proceedings in the US, it would be open to D to argue that the New York Convention fails to apply because the award has no "reasonable relation" with a foreign state. In that event, C would be required to enforce the award under the Federal Arbitration Act in the same manner as a domestic award, with D being entitled to the benefit of any defences available thereunder, including manifest disregard of the law.

In all likelihood, such an argument by D would fail as many of the insureds under the policy were located outside the US and claims asserted against one such insured were at issue in the arbitration. But what if the facts were different and there was no reasonable relation with a foreign state other than the parties' choice to arbitrate in London? In that scenario, D would be faced with a conundrum (as it may be, anyway). If D asserted the non-convention argument under US law and succeeded in demonstrating "manifest disregard of the law", it might successfully resist enforcement of the award – but at a price, namely the threat of sanction for contempt of the English court injunction. On the other hand, compliance with the injunction would require D to forfeit potentially valuable rights under US law.

It is unclear whether the English courts meant to subject D to this conflict. Perhaps it arises from the courts' view (expressed by the high court) that: "If D is right in its first contention [that the award is a non-Convention award under US law], the USA has not, at least to English eyes, properly fulfilled its treaty obligations under the New York Convention." That may be so, but with all due respect, it is not for the English courts to punish D, a private litigant, for a treaty violation made by the state in which it and C reside. Furthermore, when C and D contracted they must have been seen to recognise the possibility of award enforcement in the US. They would have known, or are properly charged with knowing, that not all foreign awards in proceedings exclusively between US parties are enforceable under the New York Convention. They could not reasonably have foreseen that the exercise of their rights available under US law in US enforcement proceedings might be enjoined by a foreign court.

US parties contracting together and selecting arbitration in London should be on notice that their legal rights to resist enforcement under US law may be worth less than they assume

For the English courts to alter that balance in favour of one of the parties is not a proper exercise of judicial power. It disrupts the legal framework underpinning the parties' commercial relations thus, in important respects, changing their bargain. (One may contrast this position with Lord Justice Longmore's observation that "the impetus for London arbitration [in Bermuda-form agreements] may have arisen from a certain disenchantment with the expansionist scope of American jury and judicial decision-making".) Equally, it may encourage courts in other nations to engage in similar "meddlesome" conduct. One would hope that it will remain unique and merely reflects a misapprehension of, or lack of proper attention to, the practical consequences of the relief requested and ultimately granted. In the meantime, US parties contracting together and selecting arbitration in London should be on notice that their legal rights to resist enforcement under US law may be worth less than they assume.