the arbitrator & mediator

Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GmbH [2018] EWHC 2267 (Comm)

By Professor Douglas Jones AO[1]

Abstract

The recent decision of the High Court of Justice in England in Dreymoor considered whether an injunction should be continued to restrain enforcement of a US Court Order. The effect of this Order was to disclose evidence where disclosure would interfere with concurrent foreign litigation and arbitral proceedings. Ultimately, the Court denied the injunction, which is of interest to parties seeking injunctions in respect of concurrent foreign proceedings. The case sheds light on the numerous factors considered in deciding whether enforcement would result in unconscionable interference, including the claimant's conduct in delaying enforcement, the timing of the application and the use of the evidence in foreign proceedings.

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Introduction

The Hydra, a beast of Greek and Roman mythology, was a snake of six heads, renowned for its ability to regenerate two heads in place of one. While usually of a far less insidious nature, international disputes can often appear to have such similar regenerative qualities, where a single core dispute can be the catalyst for multiple additional proceedings addressing tangential matters of substance and procedure. Where concurrent proceedings exist, difficulties can arise in reconciling or enforcing these decisions. This is a problem often experienced in international alternative dispute resolution, and one that can challenge the legitimacy of the process.

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The contention in *Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GmbH* [2018][2] ("*Dreymoor"*) arose from a such a multi-headed dispute, with proceedings commenced in the British Virgin Islands, Cyprus, London and the United States. Here, the High Court of Justice was asked to provide an anti-enforcement injunction to prevent an order made under a unique mechanism in the United States that compels disclosure and testimony from a United States resident, for the purposes of foreign proceedings. The decision provides valuable insights into the English courts' approach to unconscionability when ascertaining whether to enforce or prevent such an order and the complexities that can arise from parallel proceedings.

Material Facts[3]

The initial catalyst for the dispute between the parties was a series of contracts for the sale of fertiliser, entered into between the claimant, Dreymoor Fertilisers Overseas Pte Ltd ("Dreymoor"), the first defendant, Eurochem Trading GmbH ("ECTG") and the second defendant, JSC MCC EuroChem ("Eurochem" and collectively "the defendants"). These contracts were numerous, reaching into the hundreds, and fell broadly into two different categories. The first were contracts for the sale of fertiliser products in India ("India Contracts") and the second were contracts for the supply of these products to the rest of the world ("ROW Contracts"). The substance of these contracts was largely irrelevant in the dispute, except that the majority of these contracts provided for arbitration under the LCIA or ICC Rules.

ECTG alleges that these contracts were vitiated due to Dreymoor's payment of two large bribes to two former senior employees of ECTG. ECTG, alongside Eurochem, therefore bought a claim against Dreymoor in the British Virgin Islands to dispute the ROW Contracts ("BVI Proceedings"). ECTG also commenced ICC and LCIA arbitrations to dispute the India Contracts on a similar basis.

The global scale of this dispute was further extended in May 2017, when ECTG and Eurochem made an application before the United States District Court for the Middle District of Tennessee, pursuant to s 1782 of the United States Code.[4] This authorised the District Court to compel a person residing in its district to provide documentary and/or testimonial evidence for use in a foreign proceeding or international tribunal. ECTG and Eurochem made this application against Mr. Chauhan, who was a former senior executive at Dreymoor, to produce documents and provide testimony with regard to these issues of bribery. With Dreymoor's funding, albeit without its formal involvement in the 1782 proceedings in the United States, Mr. Chauhan attempted to resist the Section 1782 order ("1782 Order"). He has twice been unsuccessful in this pursuit but the potential for further proceedings in the United States looms, including an appeal by Mr. Chauhan to the 6th Circuit Court of Appeals.

It is fair to infer that Mr. Chauhan possesses some potentially adverse information that Dreymoor does not wish to disclose to ECTG and Eurochem. Indeed, the English Court commented on the vast sum of money that Dreymoor has likely spent attempting to resist the 1782 Order both in the United States and England.

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[2] *Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GmbH* [2018] EWHC 2267 (Comm) ("*Dreymoor*").

[3] Ibid [4]-[41] (Males J).

[4] 28 USC 1782.

In light of Mr. Chauhan's unsuccessful attempts to resist the order in the United States, Dreymoor initiated proceedings in England for an injunction to restrain the enforcement of the 1782 Order. The High Court of Justice was therefore tasked with the challenge of untangling this web of proceedings to discern whether any grounds for such an injunction existed.

Judgment

The Court identified that its power to grant the injunction stemmed from s 37 of the *Senior Courts Act*, which provides that an injunction may be granted "in all cases in which it appears to the court to be just and convenient to do so".[5] The Court noted this power to be less constrained than that of s 44 of the *Arbitration Act 1996*,[6] which requires the consent of the arbitrators for an injunction unless the case is "urgent".

Under s 37, an English court will order an injunction to support a legal or equitable right, or to prevent unconscionable conduct. Indeed, Males J was unequivocal that the Court had "a legitimate interest in … protect[ing] the fairness and integrity of its own proceedings and of London arbitration proceedings over which it has a supervisory jurisdiction".[7] The relevant question was therefore whether the defendants' 1782 Order against Mr. Chauhan constituted unconscionable interference, posing a danger to the arbitration proceedings supervised by the English courts.

As has been noted in previous English authority, a 1782 Order is not in itself unconscionable conduct. This reflects the logical position that a foreign lawful procedure is not carried into the realm of unconscionability simply because it is unfamiliar to a jurisdiction. However, the somewhat unique power provided by a 1782 Order can present problems for the English legal system. Two distinct risks that may suggest unconscionability were identified in *Omega Group Holdings Ltd v Kozeny* ("*Omega*"):[8]

1. That a US deposition prior to an English trial would lead to an "unwarranted double cross examination"; and

2. That a witness, having had a taste of the experience of cross-examination, may be dissuaded from appearing in the English court.

Both of these risks were arguably present in the current case. Nevertheless, taking the circumstances as a whole, and for ten enumerated reasons, the Court did not find unconscionability.[9] Seemingly foremost among these considerations was that the 1782 Order was primarily for the purpose of adducing evidence for use in the BVI Proceedings. The Court found that this was distinguished from other cases and that the Court should not have a role in "policing a party's attempts to obtain documents for foreign proceedings" and especially, that it should not interfere with a concluded United States' court decision on whether the

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[5] *Senior Courts Act 1961* (UK) s 37.

[6] *Arbitration Act 1996* (UK) s 44(3)-(4).

[7] *Dreymoor* [2018] EWHC 2267 (Comm), [71] (Males J).

[8] *Omega Group Holdings Ltd v Kozeny* [2002] CLC 132, [23] (Mr. Peter Gross Q.C.).

[9] *Dreymoor* [2018] EWHC 2267 (Comm), [70]-[83] (Males J).

1782 procedure could be used for that purpose. [10] Males J considered that this would be a breach of comity.[11]

The London arbitrations also had a bearing on the conclusion.[12] Dreymoor attempted to argue that the 1782 Order would interfere with its preparation for the main evidentiary hearings in these arbitrations. Males J was unsympathetic to this position, viewing this as a problem of Dreymoor's own creation, through its "sustained resistance" to the 1782 Order.[13] It was also noted that as ECTG and Dreymoor were the only parties to the arbitrations and, as such, they were not the "lead proceedings" through which the parties' liability was to be established.[14] Furthermore, the Redfern Schedules from the arbitrations indicated that the proposed disclosure in the arbitrations was narrower than that to be adduced under the 1782 Order, meaning that the utility of the 1782 Order was not undermined by the arbitral disclosure process.[15] It was therefore concluded that the arbitrations presented no barriers to enforcement of the 1782 Order.

The other particularly salient issue addressed by Males J was the prospect that Mr. Chauhan would be subjected to two cross examinations: in a US deposition and in an eventual cross-examination in the arbitrations.[16] However, this was viewed to be mitigated on account of Dreymoor's position that the deposition would be allowed to occur eventually (just after the arbitrations) and that most witnesses would in any event be subject to double cross examination due to the concurrent BVI and arbitral proceedings.

Thus, applying a holistic analysis to the circumstances, Males J rejected the anti-enforcement injunction.[17]

Analysis

On its face, the High Court of Justice's failure to grant an anti-enforcement injunction over the 1782 Order may be viewed as unsatisfactorily protecting the legitimacy of the arbitral process. The decision also contrasts with the earlier English decisions of *Omega* and *Benfield Holdings Ltd v Richardson*,[18] wherein emphasis was placed on different factors: the existence of the disclosure and evidence procedures

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[10] Ibid [71].

[11] Ibid [73].

[12] Ibid [74], [76]-[77].

[13] Ibid [74].

[14] Ibid [76].

[15] Ibid [77].

[16] Ibid [81].

[17] Ibid [83].

[18] [2007] EWHC 171 (QB).

in the other proceedings, the risk of "double cross examination" and the logistical pressures placed on the parties in preparing for the other proceedings.[19]

However, two important factors must be recalled, which are relevant to parties engaged in international alternative dispute resolution and must be borne in mind by parties seeking to enforce or restrict 1782 Orders or other orders arising under the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matter* ("the Hague Convention")[20] in English Courts.

First, that the purpose of s 1782 and its theoretical underpinnings, is not fundamentally at odds, but instead largely aligned with facilitating the integrity of foreign proceedings. In the United States it has been elaborated that s 1782 has two purposes: providing efficient support to foreign proceedings, and encouraging other jurisdictions to provide reciprocal support to United States proceedings.[21] There of course remains a dispute in the United States as to whether arbitration comes within the scope of a "foreign proceeding" for the purpose of s 1782,[22] but it is nevertheless clear that the purpose of a 1782 Order is not incompatible with the integrity of global arbitration practices.

Second, that as the decision of *South Carolina Co v Assuriantie Maastrchappij*[23] highlights, the mere use of s 1782 does not give rise to unconscionability for the purpose of an anti-enforcement injunction.[24] This reflects the logical position that each case must be taken on its own facts and that the practical ramifications of a 1782 Order are usually the focus of the Court. Thus, in the present circumstances, where concurrent proceedings were already afoot, Dreymoor had been the catalyst for any logistical difficulties posed by the 1782 Order and where its utility was not displaced by the arbitral disclosure process, it seems difficult to conclude that the failure to prevent the enforcement of the 1782 Order presents an undue interference of the arbitral process. This conclusion is further strengthened, and should be borne in mind by the parties, that the arbitral tribunal possesses its own independent capability to decide on the evidence that should be admissible in those proceedings.

It follows that parties seeking to enforce or restrain a 1782 Order, or indeed other foreign orders of similar operation, such as those made pursuant to the *Hague Convention*,[25] should closely consider the impact that order will have on the affected proceedings and consider whether that collectively arises to unconscionability.

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[19] *Benfield Holdings Ltd v Richardson* [2007] EWHC 171 (QB), [23] (Langley J); *Omega Holdings Ltd v Kozeny* [2002] CLC 132, [23] (Mr. Peter Gross Q.C.).

[20] *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, signed 18 March 1970, UNTS 37/1976 (entered into force 7 October 1972).

[21] *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992).

[22] *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v JAS Forwarding (USA) Inc* (11th Cir. No. 11-12897, 25 June 2012) held an arbitral tribunal came within the scope of s 1782; *Intel Corp v Advanced Micro Devices Inc.*, 542 US 241 (2004) held that decisions of the European Commission and the EU Courts constitute 'tribunals' for the purpose of s 1782. *NBC v Bear Stearns & Co*, 165 F.3d 184 (1999) held that an arbitral tribunal did not come within the scope of s 1782.

[23] [1987] 1 AC 24.

[24] *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" N.V.* [1987] 1 AC 24 (Lord Brandon of Oakbrook, Lord Goff of Chieveley & Lord Mackay of Clashfern).

[25] Legislation in Australia gives force to the *Hague Convention*; see eg. *Evidence on Commission Act 1995* (NSW).

The decision in *Dreymoor* also presents several indicia that will likely have significant bearing in swaying English courts to find against the granting of an anti-enforcement injunction for said orders. These should be borne in mind by parties to foreign proceedings that intend to rely on or contest a 1782 Order or another order of similar nature. The first of which is where the US courts have found that a party is entitled to a 1782 Order in relation to a foreign proceeding which is not in the United Kingdom. In such circumstances, where the English Court is not necessarily exercising its jurisdiction to protect proceedings in England or proceedings over which it has supervisory jurisdiction (English seated arbitrations), it appears that courts will be unlikely to intervene. Furthermore, where such a "fully reasoned" decision from the US courts exists, the decision of *Dreymoor* indicates that, pursuant to the principle of comity, English courts may be hesitant in interfering with that decision.

Conclusion

Concurrent or satellite proceedings can pose unique challenges for courts, requiring them to reconcile multiple proceedings. The decision in *Dreymoor* offers valuable insights for parties engaged in international alternative dispute resolution, into how the English courts will navigate anti-enforcement injunctions against 1782 and other similar orders. The approach in *Dreymoor* further illustrates the granular and case-by-case approach that the court will apply when considering such applications. Such an approach is no doubt key in preserving the integrity of foreign dispute resolution processes.