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ARTICLE

Enforcement of Foreign Judgments in Ireland: Irish Court of Appeal Declines Jurisdiction to Recognise and Enforce a Non-EU/EFTA Judgment where no Apparent Practical Benefit would Accrue to the Appellant

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Synopsis

The Irish Court of Appeal recently upheld the decision of the High Court in *Albaniabeg Ambient Shpk v Enel SpA and Enelpower SpA*[1] confirming that jurisdiction for the purposes of proceedings seeking to enforce a foreign judgment pursuant to Order 11 of the Rules of the Superior Courts ('Order 11') should not be exercised in favour of a plaintiff unless it can show it is likely that some practical benefit would accrue to the applicant.

1. Background

1.1 Kalivac Project and cooperation agreement

In 1997, BEG S.p.A. ('BEG'), an Italian company, sought and obtained a concession for the construction and operation of a hydroelectric power plant in the Kalivac region of Albania (the 'Kalivac Project') from the Republic of Albania. During the period in which BEG was endeavouring to obtain this concession, the Respondents (respectively 'Enel' and 'Enelpower') allegedly expressed their interest in purchasing electricity generated by the power plant and the right to supply it to consumers in Italy.

The Respondents agreed to work with BEG to carry out certain preliminary steps with regard to the Kalivac Project as a precursor to any decision to invest. In 1999, Enel entered into a preliminary cooperation agreement with BEG for a seven month period. In 2000, Enelpower, which replaced Enel, entered into a final cooperation agreement (the 'Agreement') with BEG for a new seven-month term.

1.2 Arbitration and Italian proceedings

Subsequent to the entry into force of the Agreement, it was alleged that the Respondents undermined the completion of the power plant by various acts and omissions which were intended to delay and disrupt its construction. It was also alleged by BEG that the Respondents entered into direct competition with it in Albania in breach of an exclusivity agreement between the parties. BEG then brought arbitration proceedings in Italy against the Respondents alleging breach of the cooperation agreement.

All of the Italian bodies to which BEG referred the case – an arbitral tribunal in Rome (2002), the Rome District Court (2003), the Rome Criminal Court (2005), the Rome Court of Appeal (2009) and the Supreme Court of Italy (2010) – rejected BEG's claim, and found no breach of contract or impropriety in the conduct of the arbitration had occurred.

1.3 Proceedings in Albania

The grievances were pursued afresh in the Tirana District Court of Albania where damages were claimed for, *inter alia*, tort and unfair competition by Albaniabeg Ambient Shpk ('Albaniabeg'), BEG's Albanian subsidiary. In March 2009 the Tirana District Court awarded BEG's Albaniabeg damages against the Defendants for unfair competition and tort. The amount of the judgment was not (for the most part, save the damages allegedly due for 2004) set by the court, but had been calculated in accordance with a formula devised by a court-appointed group of experts. This judgment (the 'Albanian judgment') was upheld on appeal. The ultimate quantum of damages being pursued against the Respondents as part of these enforcement proceedings in respect of the Albanian judgment was calculated by the Albaniabeg as being €433,091,870.00 (a sum equivalent to approximately 5% of the gross domestic product of Albania at that time). On appeal, the Tirana Court of Appeals affirmed the judgment in its entirety. The judgment was in turn appealed by the Respondents to the Albanian Supreme Court, but on 7 March 2011

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1 *Albaniabeg Ambient Shpk v Enel SpA and Enelpower SpA* – Court of Appeal, 26 February 2018.

that Court affirmed the judgment. The Respondents subsequently applied to the Supreme Court requesting it to reconsider its judgment. This application was again refused.

Albaniabeg subsequently attempted to seek enforcement of the Albanian Judgment in a number of other jurisdictions, namely New York, the Netherlands, France, Luxembourg and Ireland.

2. Legal grounds for enforcement of non-EU/EFTA judgment

Since Albania is neither an EU Member State nor a member of the European Free Trade Association ('EFTA'), the grounds for refusing jurisdiction and enforcement in Ireland are broader than would otherwise apply under the Brussels Regulation (EU) No 1215/2012 (recast) (the 'Recast Regulation') and the Lugano Convention.[2] The application to enforce a judgment rendered by a court of that State is therefore governed by the provisions of Order 11 and standard common law principles.

2.1 Jurisdiction pursuant to Order 11 of the Rules of the Superior Court

The High Court held that, whilst Order 11 allows an Irish Court to exercise broad jurisdiction in nineteen specified categories of cases, including the enforcement of foreign judgments, the exercise of that jurisdiction is discretionary and subject to certain requirements. Hogan J for the Court of Appeal upheld the High Court decision that for the Court to exercise its discretion in favour of an application for leave to issue and serve proceedings seeking to enforce a foreign judgment under Order 11, an Appellant must generally establish; (1) that it has a good arguable case; (ii) that it is likely to obtain a practical benefit from the proceedings; and (iii) that it satisfies the comparative cost and convenience requirements of Order 11, Rule 2.

2.2 Common law principles

Hogan J restated the common law principle set out by McDermott J in the High Court that there is 'a disinclination to assert jurisdiction over foreign defendants at common law,' referring to the 1908 case of *The Hagen*.[3] However, Hogan J observed that in 1908 both aviation and telecommunication were in their infancy and the 'concept of a large internal market with free movement of capital and services within Europe would have seemed far-fetched.' Nowadays, however, the burden on a foreign defendant in travelling from either Italy or Albania to answer proceedings in an Irish court is not as great as it might have been over 100 years ago. He also mentioned that other factors must also be taken into account, such as the speed with which large funds can now be electronically transmitted from jurisdiction to jurisdiction and the fact that Dublin has in the last three decades increasingly become a major financial centre. Hogan J accordingly concluded that the old common law principle should not automatically disentitle the Appellant to relief on that basis.

However, because jurisdiction may sometimes be assumed by reference to relatively slender connecting factors, the exercise of a potentially exorbitant jurisdiction is tempered by the requirements of Order 11, Rules 2 and 5 which require the Irish courts to consider 'the comparative cost and convenience of the proceedings in Ireland' and whether they are satisfied the case is a 'proper one' for service out of the jurisdiction. Furthermore, he was of the view that the discretionary nature of the Order 11 jurisdiction has one further implication which is highly relevant to the present case, namely, that the courts will not generally grant leave for service out unless it is clear that the plaintiff has nonetheless at least some prospect of obtaining a benefit thereby. It reflects a more general principle, namely, that a court will not act in vain.

The Court of Appeal then went on to consider the three criteria of relevance to Order 11 which had been used by McDermott J in the High Court.

3. Good arguable case

Hogan J was satisfied that as the Appellant was seeking to enforce the judgment of the Albanian Supreme Court which was claimed to be for a definite sum of money, they had established a good arguable cause of action within the meaning of Order 11. It wasn't considered necessary to express any view as to the scope of any possible defences which might be available to the Respondents.

4. Likelihood of obtaining a legitimate benefit

Hogan J was of the opinion that the real question in the appeal came down to whether enforcement of the Albanian Judgment in Ireland would serve any useful purpose given the apparent absence of any assets on the part of Enel in Ireland. In determining whether to

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2 The Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 21 December 1988 and 2007.

3 *The Hagen* [1908] P 189.

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permit the Appellant to commence the enforcement proceedings, the Court considered two questions; firstly, whether the Respondents must have assets within the jurisdiction; and secondly, whether the *imprimatur* of a neutral, internationally respected court with regard to the foreign judgment was sufficient practical benefit for the Appellant.

4.1 (i) Must the respondent have assets within the jurisdiction?

The Appellant sought, *inter alia*, to rely on the case of *Demirel v Tasarruf Mevduati Sigorta Fonu* ('*Tasarruf*'), where Sir Anthony Clarke MR rejected the submission that it was a necessary precondition to the exercise of jurisdiction that assets be within the jurisdiction. The plaintiff in *Tasarruf* had sought to enforce three judgments in its favour which had been granted by the Turkish Courts. These judgments were based on a finding that Mr Demirel was guilty of fraud, but the defendant resisted enforcement in the English courts on the basis that he had no assets within the jurisdiction.

The English Court of Appeal in finding for *Tasarruf*, observed that in such cases it is often difficult to locate a defendant's assets and further noted that judgment debtors were often reluctant to advertise the nature and whereabouts of their assets. However, Hogan J distinguished *Tasarruf* from the case at hand on the basis that the decision in *Tasarruf* appeared to have been influenced by the finding of fraud and deception in the hiding of assets from execution.

The Appellant pointed to certain factual matters in order to demonstrate that certain companies in the Enel group have or previously had a connection with Ireland, and in this regard, the Appellant's principal argument was that it had identified that one of the Respondents (as well as other Enel group entities) had listed bonds on the Irish Stock Exchange which it said provided a sufficient connection with Ireland.

The Respondents explained to the Court that bonds by their nature constitute liabilities rather than assets, in that the bonds reflect funds which must be repaid to the bond holders upon maturity, so it would not be possible to seek execution against the redemption amount of such bonds. Furthermore, the listing of a bond in Ireland does not mean that any funds realised upon issue would ever come to be in or flow through Ireland (and this was the position as a matter of fact in respect of the bonds in question in this case). Accordingly, there no evidence to the effect that there would ever by any resultant assets in Ireland to be derived from such bonds.

The Appellant also referred to the fact that an Italian subsidiary of one of the Respondents had an Irish branch with a fixed term contract to provide services in Ireland and that this constituted a sufficient connection with Ireland. It was suggested by the Appellant that it could potentially look to pierce the corporate veil to get access to the subsidiary's assets. The court concluded that this point was moot on the basis that by the time the motion was heard, the contract in question had terminated. Accordingly, even if the corporate veil could be pierced (and there was no basis put forward as to how this might be done), there would be no resultant benefit to the Appellant.

Whilst he agreed with *Tasarruf* that it was not an absolute requirement that the Respondents have assets in the jurisdiction, Hogan J concluded that the underlying principle is that 'there must be some prospect that a judgment creditor will obtain a benefit from commencing enforcement proceedings in respect of the foreign judgment in question.' He further noted that whilst the bar regarding the grant of leave under Order 11 is a low one, it is 'not asking too much of that litigant to demonstrate that it stands to obtain some practical benefit from those enforcement proceedings, even if that benefit is an indirect or prospective one.'

Hogan J said his conclusion was warranted on two grounds.

Firstly, if every foreign judgment creditor in whose favour an award has been made in a commercial dispute could seek enforcement in the Irish courts, regardless of whether there was any prospect of recovery or material benefit, this would increase costs unnecessarily for both themselves and the judgment debtor.

Second was the fact that the courts are under a duty to manage their own affairs such that scarce judicial resources are conserved and are best utilised for the benefit of all litigants. He noted: 'those resources are generally not well utilised where judicial energies are expended on an issue with no real connection with Ireland and where the prospects of a judgment creditor recovering assets in Ireland are remote or tenuous'.

4.2 (ii) Imprimatur of a court of an EU Member State

In this regard, the Court considered the judgment of Kelly J in *Yukos Capital S.A.R.L. v OAO Tomskneft VNK*[4] *('Yukos')* where it was noted that it might in certain cases be appropriate to permit enforcement proceedings on the basis that the Irish court is internationally recognised and this would be a sufficient benefit for the judgment creditor.

Hogan J concluded that it was clear from a review of the entirety of the relevant passage from the judgment in *Yukos* that whilst Kelly J. conceded that in some circumstances it might be appropriate to permit enforcement proceedings on the basis that the fact that

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4 *Yukos Capital S.A.R.L. v OAO Tomskneft VNK* [2014] IEHC 115.

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a neutral, internationally respected court might give its *imprimatur* to a foreign judgment or award was a sufficient benefit for the judgment creditor, the general tenor of this passage nonetheless is that a court should hesitate to allow enforcement proceedings on that basis alone.

In *Yukos* Kelly J. found that it was not appropriate to grant leave in such a case, because the judgment creditor had already applied to the French courts for recognition on this very basis and failed. Kelly J said the failure to get recognition in the French Courts is 'a matter capable of being taken into account when considering the exercise of the discretion to permit service out in this country.'

Hogan J noted that Ireland was the fifth jurisdiction in which the Appellant had applied for the recognition and enforcement of the Albanian Judgment and that all other four jurisdictions (New York, The Netherlands, Luxembourg and France) are all highly respected venues for the resolution of international commercial disputes. Following *Yukos*, he held it would rarely be correct to permit enforcement proceedings when such proceedings have been determined or are pending in the courts of other third country jurisdictions.

Since the question of whether recognition or enforcement in Ireland would be a 'judgment' for the purposes of Article 2(a) of the Brussels Regulation (Recast) (thereby allowing recognition and enforcement in other EU Member States) was not specifically argued in this case, the Court chose to express no view on this.

5. Comparative cost and convenience

The Court finally considered the issue of cost and convenience of enforcing the judgment in accordance with Order 11, Rule 2. The Court noted that the Appellant is an Albanian company while the Respondents are Italian. It further observed that if leave were to be granted for the enforcement of the Albanian Judgment in this jurisdiction, the Irish court would have to consider a number of matters in light of the prospective defences which the Respondents would raise.[5]

Given the nature of the defence which would have been raised, the Irish courts would effectively have had to conduct a full hearing with witnesses and evidence concerning the underlying dispute between the parties. Hogan J was of the view that the proceedings would be lengthy and complex and likely involve evidence being given in Albanian or Italian.

Furthermore, on the basis that enforcement proceedings had already issued in a variety of other jurisdictions, Hogan J ultimately agreed with the High Court's ruling. He pointed to the unfairness of requiring the Respondents to defend yet another round of enforcement proceedings given the cost implications and the lack of any prospect of success for the Appellant.

6. Significance of the judgment

This judgment is significant for a number of reasons.

Firstly, the Court of Appeal affirmed that no *ex ante* rule exists requiring the presence of assets within the jurisdiction before leave to commence proceedings seeking to enforce a foreign judgment under Order 11 can be allowed.

Secondly, the Court of Appeal affirmed the criteria used by the High Court to determine if jurisdiction should be assumed. The criteria set out by McDermott J require:

(i) a good arguable case to be made;

(ii) the plaintiff to show some prospect of securing a material benefit, even if that benefit is indirect and prospective only; and

(iii) regard to be had to the issues of comparative cost and convenience in the manner required by Order 11, Rule 2.

Thirdly, the Court of Appeal clarified that, whilst to obtain the *imprimatur* of the foreign judgment by a neutral, internationally respected court might in certain cases constitute a legitimate benefit for the judgment creditor, (i) a court should hesitate to allow enforcement proceedings on that basis alone and (ii) leave should not normally be granted in cases where enforcement proceedings have already been determined or are pending in other jurisdictions.

It is of note that the question of whether recognition or enforcement in Ireland would be a 'judgment' for the purposes of Article 2(a) of the Brussels Regulation (Recast) (thereby allowing recognition and enforcement in other EU Member States) was not specifically argued or adjudicated upon in this case.

The Judgment is now the leading authority for the proposition that, before an Irish court will assume jurisdiction pursuant to Order 11, a plaintiff must be able to demonstrate to the Court that some legitimate benefit will accrue to it from an Order recognising and enforcing a non-EU/non-EFTA judgment in Ireland.

Notes

5 The Respondents intended raising the following defences, amongst others:
(a) The Albanian Judgment was repugnant to the basic principles of International law and natural justice;
(b) The judgment was contaminated by egregious breaches of fair procedure;
(c) The Appellant's cause of action was res judicata having already been determined in Italy; and
(d) The judgment sum (to the extent that it was calculated by a panel of non-judicial experts) is unenforceable in Irish law and the amount calculated in the Albanian Proceedings had not actually been qualified, or was capable of qualification, by the Albanian Court.

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