PRIVATE INTERNATIONAL LAW – THE POWER OF A STATE COURT TO GRANT PROVISIONAL OR CONSERVATORY MEASURES, WHERE AN ARBITRATOR HAS JURISDICTION

Even where courts have no jurisdiction over the merits, courts, in some jurisdictions, will nonetheless have the power to grant provisional or conservatory measures such as, *inter alia*, interlocutory injunctions, Anton Pillar orders and seizures before judgment. In many cases, without these remedies, pursuing a lawsuit or claim could prove fruitless, irreparable damage is done, documents vanish, money and assets disappear.

In Quebec, a court however, has ruled that where the parties, by agreement, are bound by an arbitration clause, the courts did not have the power to issue an interlocutory injunction. The case is *Jefagro Technologies inc.* vs. *Vetagro s.p.a.* [2012] QCCS 2945.

The facts

An Italian company signed a 15 year licensing agreement with a Quebec company allowing the latter to make and distribute products over which the Italian company held certain intellectual property rights. Alleging that the Italian company had illegally cancelled the licensing agreement after only a few years, the Quebec company sued, in Quebec, the Italian company and one of the Quebec company's ex-employees, the latter bound by a non-competition and a non-solicitation clause in his employment contract.

The Quebec company sought an interlocutory injunction against the Italian company seeking an order for specific performance under the licensing agreement, and against the ex-employee (who went to work for the U.S. subsidiary of the Italian company) to stop violating the non-competition and non-solicitation clauses in the employment contract. Since the licensing agreement contained an arbitration clause, the Italian company argued that the Quebec Superior Court had no jurisdiction over it. Furthermore that the court could not render an interlocutory injunction despite Article 3138 of the *Quebec Civil Code*, because of the arbitration clause.

The decision

The court did not apply Article 3138, sided with the Italian company, declined exercising the power to grant the interlocutory injunction and dismissed the lawsuit of the Quebec company.

Article 3138 of the *Quebec Civil Code* reads as follows:

> "Art. 3138. A Québec authority may order provisional or conservatory measures even if it has no jurisdiction over the merits of the dispute."

Another article of the *Quebec Civil Code* – Article 3148 – provides as follows:

> "Art. 3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where
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> (1) the defendant has his domicile or his residence in Quebec;
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> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
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> (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
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> (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
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> (5) the defendant submits to its jurisdiction.
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> However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority."

The last paragraph of this article in essence says that where another forum has been chosen by the parties, the courts have no jurisdiction, in personal actions of a patrimonial nature.

Reading Article 3138 in conjunction with Article 3148, one would perhaps conclude that if the court has the power to put in place provisional or conservatory measures, "even if it has no jurisdiction over the merits of the dispute", it would still have that power where it has no jurisdiction because of the existence of an arbitration clause.

Are the two articles inconsistent? The judge, in deciding there was no inconsistency, did not break new ground, he simply followed a Supreme Court of Canada decision which said that Article 3148 prevailed over Article 3139 of the *Quebec Civil Code*. And since Article 3138 was similar to Article 3139, the judge applied the reasoning of the Supreme Court of Canada. This is the case of *GreCon Dimter* vs. *J.R. Normand Inc. et al.* [2005]2 SCR 401.

The facts were that a Quebec sawmill operator entered into a contract with a Quebec supplier of woodworking machinery for the purchase of equipment. In turn, the Quebec supplier ordered the equipment from the German company that manufactures the equipment in question. Delays occurred in the delivery by the German manufacturer, the operator sued the Quebec supplier who in turn made a third party or warranty claim against the German manufacturer. The contract between the supplier and the German

manufacturer contained a choice of forum clause and a choice of law clause. The forum clause gave jurisdiction to the German courts and the choice of law clause stipulated that any dispute would be decided in accordance with German law.

The German manufacturer sought by application, the dismissal of the third party claim against it on the basis of the choice of forum clause. The Superior Court of Quebec dismissed the application stating that the unity of the actions provided in Article 3139 must prevail over the contractual choice of court provided for in Article 3148, para. 2. The Quebec Court of Appeal affirmed that decision.

The Supreme Court of Canada allowed the appeal of the German manufacturer, ruling that it was the reverse, Article 3148, para. 2 prevailed over Article 3139.

Article 3139 of the Quebec Civil Code reads as follows:

> "Art. 3139. Where a Québec authority has jurisdiction to rule on the principal demand, it also has jurisdiction to rule on an incidental demand or a cross demand."

The Court considered that the Quebec legislature by enacting Article 3148, para. 2 (quoted above), recognized the primacy of the autonomy of the parties in situations involving conflicts of jurisdiction, in order to foster foreseeability and certainty in international legal transactions; that it is the expression of a "legislative policy of respect for the autonomy of the parties." The Court stated that it should therefore be interpreted broadly.

The purpose of Article 3139, says the Court, is "primarily to ensure the efficient use of judicial resources, and the provision is the product of domestic procedural considerations". That since this provision is an exception to the principle that a court must determine its jurisdiction on a case-by-case basis, it should be interpreted narrowly. The Court determined that Article 3139 "confers a discretion for the judge" who can decide to sever the principal action from the incidental action and that its language indicates its permissive nature.

In essence, the Court said that the choice of forum made by the parties should be respected despite procedural provisions. It applied the principle of the primacy of the autonomy of the parties.

It is also interesting to note that the Court disagreed with the Court of Appeal, as well, on the application of Article 3135 of the *Quebec Civil Code* which codifies the doctrine of forum non conveniens. The Court of Appeal had applied it to reconcile Article 3148, para. 2 with Article 3139. But the Supreme Court disagreed, stating that Article 3135 has "a suppletive function and is applicable only where the jurisdiction of the Quebec court has first been established". Which was not the case in that instance.

Commentary

Based on this jurisprudence, the rule set out in Article 3138 that a Quebec court may order provisional or conservatory measures even where it otherwise would not have jurisdiction over the dispute, is valid law and applicable where the parties have not chosen a forum.

It is meant to provide quick remedies to prevent damage or preserve the *status quo*, while the case on the merits winds its way through a foreign court, where the rules of conflict of jurisdictions give no jurisdiction to the Quebec courts.

But should this goal set aside the will of the parties who have chosen another forum? According to the Supreme Court, no.

In the case before the Supreme Court, where the issue was whether or not the Quebec court would hear both the principal action and the third party claim, the consequences of separating them relate to cost and efficiency, since two courts instead of one will hear the parties' respective claims.

But ruling that where there is arbitration, no provisional or conservatory measures can be obtained, the consequences can be simply disastrous. Indeed, as mentioned above, not being able to apply to a Quebec Court for provisional or conservatory measures, a party to a dispute may suffer irreparable damages or be unable to enforce its judgment on the merits obtained from a court in a foreign jurisdiction, or an arbitrator.

Other countries

France

In France, Article 1449 of the Code of Civil Procedure partially deals with the issue. It reads as follows (simple translation):

> As long as the arbitration tribunal is not yet constituted, the existence of an arbitration agreement does not prevent a party from applying to a state court in order to obtain instructions or a provisional or conservatory measure.

This provision was passed on January 13, 2011, as part of a reform of the French law on arbitration and codified established court precedent.

According to this text, the state courts only have the power to intervene in the context of an arbitration to make provisional or conservatory orders, before the arbitration tribunal is constituted.

It would therefore seem that the French state courts are excluded as soon as the arbitration tribunal is constituted.

Germany

With respect to Germany, the relevant provision is found in Article 1033 of the Code of Civil Procedure which reads as follows (simple translation):

> An arbitration agreement does not prevent a court from ordering provisional or conservatory measures in respect of the subject matter of the arbitral proceedings before or during arbitration, if there is an application from one of the parties.

Under German law, therefore, the German state courts have the power to intervene before the constitution of the arbitration tribunal, as well as during arbitration, to make provisional or conservatory orders.

United Kingdom

In the United Kingdom, arbitration is governed by the Arbitration Act 1996.

Article 44 of this statute provides that state courts have the power to intervene during arbitration and issue provisional or conservatory orders, such as Anton Pillar orders, the seizure of property, interlocutory injunctions, the nomination of receivers, etc.

The parties to the arbitration agreement however, have the right to exclude the powers of the state courts listed in Article 44. The English state courts therefore, do have the power to intervene at any stage of the arbitration process, unless the parties have agreed otherwise.

The Act applies to any arbitration seated in the United Kingdom.

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