

CAYMAN ISLANDS

GRAND COURT

In the Matter of an Application of BDO Cayman Ltd concerning Argyle Funds SPC Inc

INJUNCTIONS – ANTI-SUIT INJUNCTIONS – INJUNCTION AGAINST FOREIGN PROCEEDINGS

An anti-suit injunction is known to be a powerful tool in a litigator's toolkit, and it has been proven so in a recent judgment issued by the Grand Court of the Cayman Islands (the "Court"). In *In the Matter of an Application of BDO Cayman Ltd concerning Argyle Funds SPC Inc* ("BDO and Argyle")¹ the Grand Court granted an anti-suit injunction against Argyle Funds SPC Inc (in Official Liquidation) ("Argyle"), preventing the liquidators of Argyle (the "Liquidators") from continuing proceedings they had commenced in the Supreme Court of New York (the "New York Proceedings") against, among others, BDO Cayman Ltd ("BDO Cayman"). The Court found that the letter of engagement between BDO Cayman and Argyle required all disputes to be resolved by arbitration in the Cayman Islands ("Cayman") and restrained Argyle from further pursuing the New York Proceedings.

Background

An anti-suit injunction is a long-standing and well-recognised order which directs a party not to commence or continue proceedings. In Cayman, the Court is commonly asked to make anti-suit injunction orders restraining foreign proceedings brought in violation of arbitration agreements governed by Cayman law, although its discretion is not limited to this category of case. In any event, such orders are not seen as violating the jurisdiction of foreign courts: the orders are granted "*in personam*", that is, against the relevant parties themselves who are subject to the Court's jurisdiction.

In BDO and Argyle, BDO Cayman applied to the Court for an anti-suit injunction restraining Argyle from continuing the New York Proceedings. Argyle, acting by the Liquidators, had commenced the New York Proceedings in June 2017, alleging that BDO Cayman and three other related entities (the "Other Entities") had engaged in gross negligence and/or intentional and fraudulent misconduct by failing to alert Argyle and its investors to very significant acts of fraud that had taken place and ultimately caused catastrophic loss to Argyle (and led to the appointment of the Liquidators). On this basis, Argyle was

claiming from BDO Cayman and the Other Entities damages of at least US\$86 million.

BDO Cayman's application to the Court was founded upon the engagement letters between BDO Cayman and Argyle ("Engagement Letters"). BDO Cayman put forward what it said was a very simple case: BDO Cayman and Argyle had agreed under the Engagement Letters that any dispute or claim arising out of or in relation to the Engagement Letters would be resolved by binding arbitration seated in Cayman, and Argyle had commenced the New York Proceedings in breach of those provisions. Further, in relation to the Other Entities, a sole recourse clause in the Engagement Letters stated that BDO Cayman was to be solely responsible for its acts and those of any assignees. As such, Argyle had effectively agreed to pursue all of its claims by arbitration against BDO Cayman alone. BDO Cayman argued that those provisions also operated to the extent that if claims were not resolved by the arbitral tribunal, they were to be resolved by the Court in accordance with Cayman law.

Argyle's Case

The Liquidators raised four key arguments on behalf of Argyle in opposition to the case put forward by BDO Cayman:

1. Argyle was a "consumer" under Cayman's *Arbitration Law, 2012* ("Arbitration Law"). Therefore, Argyle was protected by the right to consider, after a dispute has arisen, the agreement to refer the matter to arbitration and, further, was required to certify it agreed to be bound by the arbitration clause. It had not done so.
2. The Liquidators were not bound by the arbitration clause under the Engagement Letters as they had not adopted the contracts by reason of Section 7 of the Arbitration Law.
3. As a matter of construction, the arbitration provisions in the Engagement Letters did not mandate an arbitration unless mediation had failed or the parties had declined to mediate. No such action had occurred.

¹ Unreported, FSD 13 February 2018, Parker J.

4. Even if the arbitration clause applied, the Court should not exercise its discretion as it could not grant relief sought against the Other Entities, and the New York Court was in any event perfectly capable of applying Cayman law and dealing with cases of this nature.

The Grand Court's Findings

The Court, relying on both Cayman and English authorities, found that the Court's jurisdiction to grant anti-suit injunctions to restrain foreign proceedings brought in violation of an agreement to arbitrate is "long-standing and well-recognised", but also discretionary and will not be exercised as a matter of course. If the Court finds that there is a binding arbitration or jurisdiction clause identifying a forum, then the Court will ordinarily grant the injunction to enforce the contractual right that a party has bound itself to, unless there are good reasons why that should not be done. In the present case the Court found that there was a binding arbitration clause to be enforced. In relation to the arguments raised by Argyle:

1. Argyle was not a "consumer" under the Arbitration Law. The provision relied on by Argyle was found to give additional protection to natural persons entering into contracts that contained arbitration provisions where they are contracting as consumers, not businesses. Accordingly, it did not apply to Argyle.
2. If a liquidator sues on a contract which has within it an arbitration clause, then the liquidator will be bound by the arbitration clause as well. No special procedure or formality was therefore required by the Liquidators to give effect to the "adoption" of the contract.
3. Even if the language of the arbitration provisions operated to require mediation as a condition precedent, such a requirement was waived by Argyle when it commenced the New York Proceedings. Such conduct had clearly evidenced an intention by Argyle not to be bound by any agreement to mediate first.
4. The sole recourse clauses in the Engagement Letters confirmed that BDO Cayman was solely responsible for the services provided pursuant to their terms. Accordingly, to the extent that the Other Entities provided services, they would be protected by those clauses.

Argyle's arguments were therefore dismissed, and the Liquidators were restrained from continuing the New York Proceedings. As the Honourable Justice Parker noted, the case concerned "*audits of a Cayman fund by Cayman statutory auditors pursuant to Cayman law under Engagement Letters governed by Cayman law with Cayman jurisdiction and arbitration clauses*" and it followed that "*litigation in New York is not the regime that was agreed to in the contractual documents*".

Conclusion

The judgment is a salient reminder of the power of anti-suit injunctions and the Court's readiness to hold parties to their contractual bargains in the absence of any strong reasons not to do so. The injunction granted in this case not only prevented Argyle from pursuing BDO Cayman in the New York Proceedings, it also prevented Argyle from proceeding against the Other Entities, as they were protected under the Engagement Letters. Dispute resolution procedures specified in the contracts governed by Cayman law therefore remain paramount and cannot be deviated from easily or without consequences, including the imposition of anti-suit orders.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.