No role for anti-suit injunctions under the TTPA to enforce exclusive jurisdiction agreements

Australian and New Zealand courts have developed a practice of managing trans-Tasman proceedings in a way that recognises the close relationship between the countries, and that aids in the effective and efficient resolution of cross-border disputes. This has been the case especially since the implementation of the Agreement on Trans-Tasman Court Proceedings and Regulatory Enforcement, which was entered into for the purposes of setting up an integrated scheme of civil jurisdiction and judgments. A key feature of the scheme is that it seeks to "streamline the process for resolving civil proceedings with a trans-Tasman element in order to reduce costs and improve efficiency" (Trans-Tasman Proceedings Act 2010 (TTPA), s 3(1)(a)). There have been many examples of Australian and New Zealand courts working to achieve this goal.

Despite the closeness of the trans-Tasman relationship, one question that had remained uncertain was whether the TTPA regime allows for the grant of an anti-suit injunction to stop or prevent proceedings that have been brought in breach of an exclusive jurisdiction agreement. The enforcement of exclusive jurisdiction agreements is explicitly protected in the regime, which adopted the approach of the Hague Convention on Choice of Court Agreements in anticipation of Australia and New Zealand signing up to the Convention. Section 28 of the Trans-Tasman Proceedings Act 2010 (NZ) and s 22 of the Trans-Tasman Proceedings Act 2010 (Cth) provide that a court must not restrain a person from commencing or continuing a civil proceeding across the Tasman "on the grounds that [the other court] is not the appropriate forum for the proceeding". In the secondary literature, different opinions have been expressed whether this provision extends to injunctions on the grounds that the other court is not the appropriate forum due to the existence of an exclusive jurisdiction agreement: see Mary Keyes "Jurisdiction Clauses in New Zealand Law" (2019) 50 VUWLR 631 at 633-4; Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, 2020) at [2.445].

The New Zealand High Court has now decided that, in its view, there is no place

for anti-suit injunctions under the TTPA regime: *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] NZHC 736 at [4]. Justice O'Gorman reasoned that the TTPA involves New Zealand and Australian courts applying "mirror provisions to determine forum disputes, based on confidence in each other's judicial institutions" (at [4]), and that anti-suit injunctions can have "no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction" (at [17]).

A-Ward Ltd, a New Zealand company, sought an interim anti-suit injunction to stop proceedings brought against it by Raw Metal Corp Pty Ltd, an Australian company, in the Federal Court of Australia. The dispute related to the supply of shipping container tilters from A-Ward to Raw Metal. A-Ward's terms and conditions had included an exclusive jurisdiction clause selecting the courts of New Zealand, as well as a New Zealand choice of law clause. In its Australian proceedings, Raw Metal sought damages for misleading and deceptive conduct in breach of the Competition and Consumer Act 2010 (Cth) (CCA). A-Ward brought proceedings in New Zealand seeking damages for breach of its trade terms, including the jurisdiction clause, as well as an anti-suit injunction.

O'Gorman J's starting point was to identify the different common law tests that courts had applied when determining an application to the court to stay its own proceedings, based on the existence (or not) of an exclusive jurisdiction clause. While *Spiliada* principles applied in the absence of such a clause, *The Eleftheria* provided the relevant test to determine the enforceability of an exclusive jurisdiction clause: at [16]. The alternative to a stay was to seek an anti-suit injunction, which, however, was a controversial tool, because of its potential to "interfere unduly with a foreign court controlling its own processes" (at [17]).

Having set out the competing views in the secondary literature, the Court concluded that anti-suit injunctions were not available to enforce jurisdiction agreements otherwise falling within the scope of the TTPA, based on the following reason (at [34]):

1. The term "appropriate forum" in ss 28 (NZ) and s 22 (Aus) of the respective Acts could not, "as a matter of reasonable interpretation", be restricted to questions of appropriate forum in the absence of an exclusive jurisdiction agreement. This was not how the term had been used in the common law (see *The Eleftheria*).

2. The structure of the TTPA regime reinforced this point, because it is on an application under s 22 (NZ)/ s 17 (Aus), for a stay of proceedings on the basis that the other court is the more appropriate forum, that a court must give effect to an exclusive jurisdiction agreement under s 25 (NZ)/ s 20 (Aus).
3. Sections 25 (NZ) and 20 (Aus) already provided strong protection to exclusive choice of court agreements, and introducing additional protection by way of anti-suit relief "would only create uncertainty, inefficiency, and the risk of inconsistency, all of which the TTPA regime was designed to avoid".
4. The availability of anti-suit relief would "rest on the assumption that the courts in each jurisdiction might reach a different result, giving a parochial advantage". This, however, would be "inconsistent with the entire basis for the TTPA regime – that the courts apply the same codified tests and place confidence in each other's judicial institutions".
5. Australian case law (*Great Southern Loans v Locator Group* [2005] NSWSC 438), to the effect that anti-suit injunctions continue to be available domestically as between Australian courts, was distinguishable because there was no express provision for exclusive choice of court agreements, which is what "makes a potentially conflicting common law test unpalatable".
6. Retaining anti-suit injunctions to enforce exclusive jurisdiction agreements would be inconsistent with the concern underpinning s 28 (NZ)/ s 22 (Aus) about "someone trying to circumvent the trans-Tasman regime as a whole".
7. The availability of anti-suit relief would defeat the purpose of the scheme to prevent duplication of proceedings.
8. More generally, anti-suit injunctions "have no role to play where countries have agreed on judicial cooperation in the allocation and exercise of jurisdiction".

The Court further concluded that, even if the TTPA did not exclude the power to order an anti-suit injunction, there was no basis for doing so in this case in relation to Raw Metal's claim under the CCA (at [35]). There was "nothing invalid or unconscionable about Australia's policy choice" to prevent parties from contracting out of their obligations under the CCA, even though New Zealand law (in the form of the Fair Trading Act 1986) might now follow a different policy. The

TTPA regime included exceptions to the enforcement of exclusive jurisdiction agreements. Here, A-Ward seemed to have anticipated that, from the perspective of the Australian court, enforcement of the New Zealand jurisdiction clause would have fallen within one of these exceptions, and the High Court of Australia's observations in *Karpik v Carnival plc* [2023] HCA 39 at [40] seemed to be consistent with this. The "entirely orthodox position" seemed to be that the Federal Court in Australia "would regard itself as having jurisdiction to determine the CCA claim, unconstrained by the choice of law and court" (at [35]).

Time will tell whether Australian courts will agree with the High Court's emphatic rejection of anti-suit relief under the TTPA as being inconsistent with the cooperative purpose of the scheme. The parallel debate within the context of the Hague Choice of Court Convention – which does not specifically exclude anti-suit injunctions – may be instructive here: Mukarrum Ahmed "Exclusive choice of court agreements: some issues on the Hague Convention on choice of court agreements and its relationship with the Brussels I recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT" (2017) 13 Journal of Private International Law 386. Despite O'Gorman J's powerful reasoning, her judgment may not be the last word on this important issue.

From a New Zealand perspective, the judgment is also of interest because of its restrained approach to the availability of anti-suit relief more generally. Even assuming that the Australian proceedings were, in fact, in breach of the New Zealand jurisdiction clause, O'Gorman J would not have been prepared to grant an injunction as a matter of course. In this respect, the judgment may be seen as a departure from previous case law. In *Maritime Mutual Insurance Association (NZ) Ltd v Silica Sandport Inc* [2023] NZHC 793, for example, the Court granted an anti-suit injunction to compel compliance with an arbitration agreement, without inquiring into the foreign court's perspective and its reasons for taking jurisdiction. O'Gorman J's more nuanced approach is to be welcomed (for criticism of *Maritime Mutual*, see here on The Conflict of Laws in New Zealand blog).

A more challenging aspect of the judgment is the choice of law analysis, and the Court's focus on the potential concurrent or cumulative application of foreign and domestic statutes (at [28]-[31], [35]). The Court said that, to determine whether a foreign statute is applicable, the New Zealand court can ask whether the statute applies on its own terms (following *Chief Executive of the Department of*

Corrections v Fujitsu New Zealand Ltd [2023] NZHC 3598, which I criticised here on The Conflict of Laws in New Zealand blog, also published as [2024] NZLJ 22). It is not entirely clear how this point was relevant to the issue of the anti-suit injunction. The Judge's reasoning seemed to be that, from the New Zealand court's perspective, the Australian court's application of the CCA was appropriate as a matter of statutory interpretation and/or choice of law, which meant that the proceedings were not unconscionable or unjust (at [35]).