

Anti-suit injunctions – are they still a useful remedy in the UK?



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The answer, in a nutshell, is yes – very much so.

Introduction

Under English law, if a party to a contract commences court proceedings in a foreign jurisdiction, in breach of an English exclusive jurisdiction agreement (including an arbitration agreement), the innocent party has two choices if it wishes to object.

The first is to lodge an objection before the foreign court where the proceedings have been commenced. Of course, to do so, the innocent party has to appoint local lawyers and incur time and legal costs in making the application. There is, of course, the risk that the foreign court will reject any such application to dismiss the claim. Alternatively, the foreign court may decide not to determine its jurisdiction in advance of its determination of the merits, which has much the same practical effect – the innocent party finds itself having to defend a claim before a foreign court, applying foreign law, in breach of the contractual agreement reached between the parties.

The second option is to make an application to the English court for an anti-suit injunction, restraining the party in breach of the exclusive jurisdiction agreement (or arbitration agreement) from continuing with the foreign proceedings. We look in more detail at this option and how it works in different locations.

The situation within the European Union (EU)

For over 10 years, it has been accepted that the English courts have restricted powers when it comes to issuing anti-suit injunctions within the EU, seeking to restrain *court* proceedings before another EU state.¹ However, what about an anti-suit injunction seeking to restrain the breach of an *arbitration* agreement?

One of the most reported cases in recent years has been the European Court of Justice (ECJ) decision in *The Front Comor*.² In this case, the ECJ, in practical terms, abolished anti-suit injunctions issued in support of arbitration agreements within the EU.

Facts and English proceedings

The Front Comor hit a jetty at a Syracuse oil terminal. The ship was chartered to Erg, which was also the jetty owner. The charter was subject to English law and contained a London arbitration agreement. The jetty owner claimed against its Italian insurers. That policy was limited and Erg started London arbitration proceedings against the owner for the balance of its losses. Erg's insurers then started proceedings in Italy against the owner in order to recover the payments they had made to Erg. The owner's lawyers successfully obtained an anti-suit injunction against the insurers in the English High Court, restraining these Italian proceedings.

They argued that the dispute arose from the charter, which contained an arbitration agreement. Therefore, they said, the insurers were bound by that agreement. The English courts, including the House of Lords, agreed.

The ECJ's 'old' approach

However, the ECJ found that the Italian proceedings were a claim for damages governed by the Brussels Convention and, as such, the applicability of the charter's arbitration agreement came within the scope of the Brussels Convention. Thus, the Italian court alone had the ability to rule upon any jurisdictional objections made to it in relation to the arbitration agreement (including its applicability and validity). The ECJ ruled that such anti-suit injunctions were counter to the mutual trust that the courts in various EU member states enjoyed and were in breach of EU Regulation 44/2001 (the Regulation), which provides a set of uniform rules governing civil and commercial disputes within the EU.

Practical implications and new developments

A common complaint following the decision in *The Front Comor* was that it would have the practical effect, in the future, of there being conflicting decisions in parallel proceedings in the EU. It was feared that the decision in *The Front Comor* would also render London arbitrations vulnerable to 'torpedo' actions and, in effect, render London arbitration agreements worthless. The European Parliament and the European Commission acknowledged this, and in December 2010 the Commission published proposals for reform of the Regulation. These proposals were aimed at improving judicial co-operation within the EU and enhancing the autonomy of arbitration.

Changes have at last been made to the Regulation and a 'recast' Brussels Regulation (1215/2012/EU) came into effect on 10 January 2015. In this new Regulation, the arbitration exception in Article 1(2)(d) of the Regulation has

been clarified in Recital 12, which now confirms as follows (our emphasis):

'This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.'

'A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.'

The 'recast' Brussels Regulation does not expressly deal with anti-suit injunctions however, so it remains somewhat unclear whether they would, in the future, be permitted within the EU in relation to breaches of arbitration agreements. It was hoped that through the most recent decision of *Gazprom OAO*,³ the ECJ would give clarification and confirm that anti-suit injunctions would be permitted within the EU, in support of arbitration agreements.

Unfortunately, the ECJ in this case didn't have to decide the point in arriving at its decision. In *Gazprom*, it was an arbitration tribunal which had handed down an anti-suit injunction against the claimants, who had commenced an action before the Lithuanian courts. The ECJ, therefore, was able to hold that recognition of an arbitral anti-suit injunction fell outside the 'recast' Regulation, without the need to clarify whether or not the same would have been said had the anti-suit been issued by a court in a member state.

Therefore, the question as to whether or not the 'recast' Brussels Regulation has changed matters and now permits anti-suit actions by member state courts, so as to protect arbitration agreements, remains unanswered.

The situation outside the European Union (EU)

The position outside the EU is more straightforward. For example, in 2013,⁴ the English Supreme Court held that the English courts have the power to order anti-suit injunctions in relation to proceedings outside the EU in breach of an arbitration agreement.

In *The Yusuf Cepnioglu*,⁵ following a grounding and total loss of the ship, the subject charterer commenced Turkish court proceedings directly

against the owner's P&I club, pursuant to a recently enacted Turkish statute which gives third parties a right of direct action against insurers. The P&I club in this case successfully obtained an anti-suit injunction from the English court, on the basis that the contract of P&I insurance (between the insured and the insurer, on which the charterer was seeking to rely) provided for London arbitration.

However, for the English courts to grant such an anti-suit injunction the contractual agreement in question must be **exclusive**. By comparison, if the contract is silent on the issue of the applicable jurisdiction, or the clause in question is non-exclusive, then an anti-suit injunction is unlikely to be handed down by the English courts.



- 1 See: *Turner v. Grovit*, Case C-159/02 [2004] ECR I-3565.
- 2 *West Tankers v. Allianz SpA and another*, 2009, Case C-185/07.
- 3 *Gazprom OAO – C-536/13*.
- 4 *Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.
- 5 *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v. Containerships Denizcilik Nakliyat Ve Ticaret AS* [2015] EWHC 258 (Comm).