HERBERT SMITH FREEHILLS

INSIDE ARBITRATION: ASIS TO THE RESCUE USING ANTI-SUIT INJUNCTIONS TO PROTECT AN ARBITRATION AGREEMENT

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Legal Briefings

International, commercial parties overwhelmingly elect to arbitrate their cross-border disputes, rather than taking them to court. As a matter of law, an arbitration agreement ousts the jurisdiction of any national court to decide the substance of the dispute. Despite this, our clients increasingly find themselves served with foreign court proceedings, in contravention of their agreements to arbitrate. Fortunately, there are ways to oppose such tactical moves and return the dispute to arbitration. One of the key tools in the arsenal is the anti-suit injunction (ASI).

Asia Head of Disputes Simon Chapman QC and Professional Support Consultant Briana Young examine how these injunctions work, some of the key cases, and how to deploy anti-suit injunctions to enforce your agreement to arbitrate.

WHAT IS AN ANTI-SUIT INJUNCTION?

An anti-suit injunction is an order of a court or tribunal that prevents a party from commencing or continuing proceedings in a jurisdiction or forum other than the contractually agreed forum. Failing to comply with the order can amount to contempt of court, with serious legal consequences for the offending party. These can include fines, seizure of assets and even imprisonment.

Anti-suit injunctions can be used to restrain court proceedings brought in contravention of an exclusive jurisdiction clause. For example, where a contract provides for litigation in the courts of New York and one party sues in the English courts instead, the counterparty can ask the New York courts to injunct the English proceedings.

They can also be used where one party brings a claim in court instead of arbitrating it in accordance with the contract. In this article, we focus on anti-suit injunctions in the context of arbitration.

WHAT IS THE LEGAL BASIS?

Bringing proceedings in a forum other than the contractually agreed forum is a breach of contract. On this basis, courts in common law jurisdictions have historically been willing to restrain foreign court proceedings commenced in breach of a court jurisdiction or arbitration clause. In contrast, civil jurisdictions generally do not recognise this form of relief and civil courts will not typically restrain foreign proceedings in the same way.

WHO CAN GRANT ANTI-SUIT INJUNCTIONS?

A party facing court proceedings in a dispute that is subject to an arbitration agreement has two principal options.

It may ask the arbitral tribunal (once constituted) to order the counterparty to withdraw the court proceedings, or to stay them pending the outcome of the arbitration. An arbitral tribunal can make such an order only if the law of the seat, and any relevant institutional rules, allow it to do so. Tribunals have this power in most major seats and under most key institutional rules, including ICC, SIAC, HKIAC, SCC and LCIA. However there are exceptions, eg Mainland China, so it is important to check the law and rules.

Alternatively, the party can apply to the courts of the arbitral seat for a similar order. If granted, the order will bind the counterparty, not the foreign court. However, the order will usually be sent to the foreign court, so that it is aware the order exists. A recent decision of the English court, *Enka v Chubb*, confirmed that the court of the seat is the appropriate court to grant anti-suit relief; *forum non conveniens* considerations do not apply (see the article ”Party autonomy prevails: revisiting London after the latest Supreme Court decisions” for more on this case).

A third option, where no tribunal is yet in place, is to appoint an emergency arbitrator and apply for an order directing the counterparty to stay or withdraw the court proceedings. The relevant arbitral rules, and the law of the seat, must both permit emergency arbitration. By definition, orders of an emergency arbitrator are made on an interim basis and are subject to review by the full tribunal, once constituted.

Therefore, emergency arbitration is typically considered only where the need for anti-suit relief is urgent.

SHOULD YOU APPLY TO THE COURT OR THE ARBITRAL TRIBUNAL?

The circumstances of your case will determine the best approach. As well as checking whether the law of the seat and the applicable rules allow courts and arbitrators to issue injunctive relief in support of arbitration, there will be a number of other considerations.

For example, your counterparty may file court proceedings before an arbitration is commenced, or before the tribunal is constituted. In such circumstances, you could seek an injunction from the court at the arbitral seat. In addition, courts have more robust powers than arbitral tribunals to enforce their own orders. Understandably, even once the tribunal is constituted, many parties prefer to seek anti-suit relief from a body that can fine, or even imprison, non-compliers. Arbitral tribunals are limited to drawing adverse inferences or penalising the offender in costs, and many are reluctant to impose cost consequences until the end of the case.

However, there will be times when parties need, or prefer, to apply to the arbitral tribunal. This may be for a number of reasons, including a desire to preserve confidentiality, or to avoid the time and expense of instructing local lawyers to file a court application. The tribunal will likely already be familiar with the parties and the facts of the case, and therefore able to issue a decision quickly. In a recent case, our client's counterparty started proceedings in the domestic courts of its home jurisdiction, in breach of an arbitration clause. In that case, we obtained anti-suit relief from the arbitral tribunal, and in parallel lodged an objection to the jurisdiction of the domestic court.

Even if the relevant court has power to order anti-suit relief, there may be concerns about local influence, corruption, or other considerations that mitigate against applying to the court. It is important to take advice on your specific circumstances to establish the best way forward.

WHAT MUST YOU SHOW?

The exact requirements will vary depending on the forum in which you apply. It is important to check carefully, and make sure your application meets all the necessary criteria.

In England and other common law jurisdictions, you must satisfy the court:

- that there is a valid arbitration agreement;
- that it binds the party bringing the foreign court proceedings; and
- that the judicial proceedings amount to a breach of the arbitration agreement.

The court must be satisfied that the arbitration clause is not null and void under the law which governs it. You must also demonstrate that the clause binds your counterparty, either as an original party or as a third party (as a result of novation or assignment, applicable third party rights legislation, or otherwise).

In English law, there is no general requirement to show that the judicial proceedings are vexatious or oppressive. Rather, the burden is on the respondent to establish that there is a "strong reason" why the injunction should be refused.

The final point requires the applicant to demonstrate that the claim before the court falls within the scope of the arbitration clause. This involves demonstrating that the substance of the claim is covered by the wording of the arbitration clause. In the majority of commercial arbitration cases, this should not be unduly difficult. Most modern arbitration agreements are drafted broadly to cover disputes "arising out of or relating to" the relevant contract, or similar. Well-drafted clauses also expressly include both contractual and non-contractual claims. Moreover, in keeping with the principle established in *Fiona Trust & Holding Corp v Privalov* [2007] Bus LR 1719, the English courts (and the courts of many other leading seats) will assume that commercial parties intended any dispute arising from their relationship to be resolved in a single forum. As a result, your counterparty would have to show that the substance of the court claim is either clearly outside the contractual relationship, or not arbitrable.

It is important to apply for anti-suit relief promptly, and before the court proceedings are too far advanced. Any delay is likely to discourage the court or tribunal from granting the relief.

It is also essential that you do not voluntarily participate in the proceedings you seek to injunct. Doing so will reduce – often significantly - your chances of obtaining an injunction. However, you may take steps in the court proceedings if there will be adverse consequences for failing to do so. For example, certain courts require the defendant to acknowledge service, or to take some other step to recognise that the proceedings have been filed. Alternatively, you may need to file an objection to the court's jurisdiction to avoid the court concluding that you accept it. Always check carefully and seek local law advice.

WHAT FORM DOES THE INJUNCTION TAKE?

The exact form is dictated by the procedures of the relevant court. Broadly, though, an anti-suit injunction will be in the form of an order that the respondent cease and desist from pursuing the court proceedings, and take all steps necessary to stay the court proceedings, pending final resolution of the arbitration. It may impose a time limit for taking those steps, and require the respondent to notify the claimant when they are complete. Finally, the injunction will usually order the respondent not to bring any additional proceedings in respect of disputes that are subject to the arbitration agreement.

An anti-suit injunction binds the respondent, ie the party that commenced foreign court proceedings. It cannot legally bind the foreign court. However, if the respondent fails to suspend the proceedings, you may consider applying to the court directly, using the injunction to support your application. Again, the exact procedure will be determined by the rules of the relevant court.

WHEN ARE ANTI-SUIT INJUNCTIONS NOT AVAILABLE?

We increasingly see counterparties engaging in tactical litigation to avoid or delay arbitration. Often, this takes the form of bringing parallel civil proceedings against a contractual party, or one of its affiliates, in a foreign court. In these cases the anti-suit injunction can usually provide a quick and effective remedy, depending on the scope of the underlying agreement to arbitrate.

There may, however, be instances where anti-suit proceedings are not appropriate, or are unlikely to be effective. In some jurisdictions, for example, it is common for parties to lodge criminal proceedings in parallel to any civil suit as a way of increasing pressure on a counterparty to settle. Even if the criminal complaints are groundless, they are founded in a separate cause of action to the arbitration and, in any event, are unlikely to be arbitrable. Consequently, an anti-suit injunction will not generally be appropriate, although the existence of such proceedings may still be brought to the attention of the arbitral tribunal, and may be a factor considered in the final assessment of costs.

We are also aware of cases where a counterparty has launched regulatory proceedings as a tactic to delay or divert resources from an arbitration. Although such complaints may be baseless, they cannot be referred to arbitration and must instead be dealt with by the relevant regulator. Therefore, they do not fall within the scope of the arbitration clause and cannot support an application for anti-suit relief. The same applies where a counterparty brings a claim based on a cause of action that only a court can determine, such as breach of statutory duty.

WHAT IS THE POSITION IN THE EU?

The availability of anti-suit injunctions in the European Union is a complex topic. As noted above, anti-suit injunctions are overwhelmingly a common law remedy. As a result, European courts will not generally restrain proceedings in a foreign court.

In addition, EU law (including the Recast Brussels Regulation and the European Court of Justice decision in *Allianz SpA v West Tankers Inc* (Case C-185/07)) effectively prohibits a court in one member state from restraining the pursuit of court proceedings in another member state. There is an “arbitration exception”, but the *West Tankers* decision held that it does not permit member state courts to grant anti-suit injunctions to protect arbitration agreements, and subsequent decisions have left the position uncertain.

However, following Britain's exit from the EU, UK courts should be able to issue anti-suit relief in respect of court proceedings in an EU member state, including to protect an arbitration agreement.

Damages may be available for breach of an arbitration agreement, even where anti-suit relief is not available.

WHAT IF THE COURT PROCEEDINGS INVOLVE THIRD PARTIES?

It is not uncommon for our clients to find themselves sued in a foreign court alongside an affiliate that is not party to the arbitration agreement. Alternatively, claims which clearly fall within the scope of the arbitration clause may be brought only against an affiliate in an effort to avoid the agreement to arbitrate. Fortunately, the courts of most key seats have taken a robust approach to the non-party issue.

Recent anti-suit cases in Hong Kong, England and Singapore confirm that the courts are generally willing to injunct proceedings brought outside the agreed forum if their substance is covered by a valid arbitration clause. The addition of extra parties is typically not a bar to granting such relief.

In England, *Donohue v Armco* [2002] 1 All ER 749 established that a party sued in a forum other than the agreed forum is entitled to an injunction restraining the foreign proceedings. This is the case even if the claim is made against more than one defendant, only one of whom is party to the jurisdiction agreement. The judge in that case stated:

"IN MY OPINION, AN EXCLUSIVE JURISDICTION CLAUSE IN THE WIDE TERMS OF THAT WITH WHICH THIS CASE IS CONCERNED IS BROKEN IF ANY PROCEEDINGS WITHIN THE SCOPE OF THE CLAUSE ARE COMMENCED IN A FOREIGN JURISDICTION, WHETHER OR NOT THE PERSON ENTITLED TO THE PROTECTION OF THE CLAUSE IS JOINED AS DEFENDANT TO THE PROCEEDINGS" (*EMPHASIS ADDED*).

More recent decisions adopt the same approach. For example, in *GM1 and GM2 v KC* [2019] HKCFI 2793, the Hong Kong Court of First Instance held that anti-suit relief may be granted against a third party if the arbitration agreement can be construed to cover claims against the non-contracting affiliates or associates of the contracting party (citing *Giorgio Armani SpA v Elan Clothes Co Ltd* [2019] HKCFI 530). The Singapore Supreme Court confirmed that "*[i]n cases involving an arbitration agreement or an exclusive jurisdiction clause, it would suffice to show that there was a breach of such an agreement, and anti-suit relief would ordinarily be granted unless there are strong reasons not to*" (*Sun Travels & Tours v. Hilton International Manage* [2019] SGCA 10).

In other words, the courts will look to the substance of the dispute. If it falls within a valid arbitration clause and one party is entitled to rely on the clause, that may be sufficient grounds for restraining the foreign court proceedings. Put another way, the party to the arbitration clause has a contractual right to have any claims arising out of or relating to the contract determined in arbitration. The launch of court proceedings is a breach of that contract, for which anti-suit injunction is an available remedy. The party may also be entitled to damages.

The courts will also consider whether the third party is asserting a right under a contract that contains an arbitration clause. If so, they will generally hold that the party is bound by the arbitration clause. In *Dickson Valora Group (Holdings) Co Ltd v Fan Ji Qian* [2019] HKCFI 482, the Hong Kong Court issued an injunction against a non-party who had commenced court proceedings in Mainland China, holding that since the non-party was asserting his right to a success fee, the conditions integral to this right (ie the arbitration clause) also bound him. *AIG Insurance Hong Kong Ltd v Lynn McCullough and William McCullough* [2019] HKCFI 1649 adopted a similar approach. Where a non-party to an insurance agreement was claiming rights under that agreement, she was bound by the arbitration clause in the agreement. The court therefore issued an injunction restraining proceedings that the non-party had commenced in the USA (this case is on appeal).

WHAT IF YOU ARE SUED IN THE COURTS OF THE ARBITRAL SEAT?

Anti-suit injunctions are an appropriate remedy for a party sued in a foreign court, ie a court outside the seat of arbitration. If you are sued in the courts of the seat, you may apply to the court to stay its proceedings in favour of arbitration. The courts of most major arbitral seats must stay their proceedings if the applicant demonstrates that the dispute is covered by a valid arbitration agreement. This obligation is set out in Article 8 UNCITRAL Model Law, s.9 English Arbitration Act, s.20 Hong Kong Arbitration Ordinance, and other modern arbitral statutes.

IS IT POSSIBLE TO INJUNCT AN ARBITRATION?

This is a question of the applicable law. In England and other common law jurisdiction, it is possible but unusual.

In 2019, the English Court of Appeal provided guidance in *Sabbagh v Khoury and others* [2019] EWCA Civ 1219. It held that an anti-arbitration injunction may be granted where it is "just and convenient" to do so.

Where it is clear that the dispute is within the scope of the arbitration agreement, no injunction should be granted. Where it is clear that the dispute falls outside the arbitration agreement, the court may grant an injunction but only if the circumstances of the case require it (eg when the arbitration proceedings are considered oppressive and vexatious). However, the Court emphasised that the grant of an anti-arbitration injunction remains an exceptional step.

CONCLUSION

The anti-suit injunction is an equitable remedy rooted in the common law. Where such injunctions are available, the court will exercise its discretion when deciding whether to grant the relief in any specific case.

However, our own experience and recent case law both demonstrate an encouraging trend among courts in key jurisdictions, which have repeatedly shown themselves willing to protect commercial parties and their contractual rights to arbitrate.

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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