Anti-Suit Injunctions, European Law And London Arbitration

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Where We Are Coming From

The English Courts have been used to give “anti-suit injunctions” against proceedings in foreign courts where the foreign proceedings are in breach of contract or where the English Court considers that England is the “natural forum” for the dispute and that the other proceedings are “vexatious and oppressive.” The foreign proceedings will be “in breach of contract” if the English Court considers there is a binding agreement to submit the case to the English Courts or the Courts of another particular country or to arbitration.

Such an injunction does not prevent the foreign court from carrying on with the foreign proceedings. The injunction will only work if the claimants in the foreign proceedings are located in England, or have assets here, so that the English Court’s injunction can be enforced against them. In particular, an anti-suit injunction can be effective in relation to cargo claims when the claim is for the benefit of an insurer with assets in England, or there is a Club LOU and the LOU is subject to English Court jurisdiction for the purpose of enforcement against the Club.

In effect, such injunctions have been a way of enforcing English law’s understanding of when there is an agreement to London arbitration as against foreign systems of law which may treat arbitration clauses more restrictively, and in particular may not recognise arbitration clauses from charters as incorporated into bills of lading.

Where We Are

This practice remains in full force where the foreign proceedings are outside Europe. However, within Europe (that is, the European Union, Iceland, Norway and Switzerland) the practice is affected by European law.

The European Court of Justice (“ECJ”) gave two judgments in 2003/2004, which will prevent the English Courts from granting anti-suit injunctions on the basis of agreements to the jurisdiction of a particular court, or on the “vexatious and vexatious” ground.

In Ench Gasser GmbH v MISAT SrL 1, the ECJ ruled that where there is alleged to be an exclusive jurisdiction clause, it is for the Court within the European system before which proceedings are first brought (the Court first seised) to decide whether there is a binding agreement to submit the case to some other court within the European system. It is not permitted for the other Court to step in before the Court first seised has decided the question, form its own view of the jurisdiction clause, and assert that it has jurisdiction. This does away, within Europe, with the foundation for any anti-suit injunction based on a jurisdiction clause.

In Turner v Grav 2, the House of Lords in England had confirmed an anti-suit injunction against proceedings in Spain brought by a Spanish company to punish its English ex-employee for obtaining an award from the Employment Tribunal in England. The ECJ held that this injunction was not allowed; although officially the injunction was against the Spanish company, it was an interference with proceedings in the Spanish Court, and within the European zone of mutual trust courts must not interfere with each other in this way.

However, the English courts continue to defend London arbitration agreements with anti-suit injunctions against proceedings within Europe. For instance, in The “Front Comor” 3, which was decided on 21 March 2005, Mr Justice Colman gave an injunction to restrain Italian proceedings brought against a vessel by subrogated insurers of a damaged jetty belonging to the charterers of the vessel. The insurers may have considered on the basis of Italian law and practice that the arbitration clause in the charterparty should not be binding on them as subrogated insurers - they had not agreed to arbitrate this claim in England, and this was not a claim under the charterparty contract itself. However, the Judge granted an injunction to enforce the English law understanding of the arbitration clause and its effect.

The English Courts continue to do this because they consider that arbitration is outside the sphere of “mutual trust”. There is an exception for “arbitration” in the Jurisdiction Regulation and the Brussels / Lugano Conventions.

Where We Are Going

It is overwhelmingly likely that the reasoning of the ECJ in Turner v Grav will extend to barring all anti-suit injunctions in relation to any “civil and commercial” case within Europe.

So long as matters rest at this point, it should still be possible to go to the English Courts and obtain a declaration that there is a binding agreement to London arbitration, and that declaration would mean that the foreign judgment could not be enforced against security which was under the control of the English Court. It might then be possible also to sue for damages for breach of the arbitration agreement, although under English law there are difficulties in the way of such a claim for damages.

However, it is likely that the ECJ may also reinterpret the “arbitration exception” so that the decision whether there is a binding agreement to arbitrate no longer falls outside the European system, and it would be for the “Court first seised” to make this decision according to its law.

It would be prudent now to guard against this prospect by ensuring as far as possible that arbitration clauses will be binding under every system of law within Europe. However, this may not always be practical. In many systems of law what is needed is that the arbitration clause should be set out in the document, in print which is not too small, and signed by the party against whom the clause is being enforced.

It might be relatively easy to change insurance broking practice so that any arbitration clause intended to govern the policy would be set out in full in a proposal form, and this proposal form would be signed in every case. It would be more difficult to alter shipping practice, given that fixtures are usually made by e-mail and a signed charterparty is produced weeks later or not at all. It would be even more difficult for ship owners to produce bills of lading setting out in full an arbitration clause providing for arbitration in a particular place rather than just incorporating “the charterparty” and it might be harder still to ensure that the shipper signed the Bill.

If and when the ECJ reinterprets the “arbitration exception” the only practical advice would be to get one’s court proceedings in first, so that one’s own preferred court is the “court first seised” which will decide whether there is an arbitration agreement.

Things might also be changed by political action to alter European law. A common European law on when there is a binding agreement to arbitrate, parallel to the law on jurisdiction agreements in Article 23 of the Jurisdiction Regulation, might be helpful. A set of binding common standards for civil proceedings, requiring that objections to the jurisdiction of the court first seised be dealt with separately from the merits of the case and within short time limits would certainly help. If common European time limits for dealing with extradition requests have been possible, so should such time...
limits in civil proceedings be possible, although there may be difficulties in enforcing such time limits in the case of civil proceedings, as there seem to be in the case of extradition within Europe.

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1. [2004] 1 Lloyd's Rep 222
2. [2004] 2 Lloyd's Rep 169
3. [2005] EWHC (Comm) 454
See also “Enforcing an Express Jurisdiction Clause”