Return of the anti-suit injunction: parallel European proceedings and English forum selection clauses

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In two recent English cases, the High Court has granted injunctive relief to restrain European proceedings in breach of English forum selection clauses. This article compares the position on anti-suit injunctive relief under the Brussels I Regulation Recast and the English common law rules, and the operation of the latter in a post-Brexit landscape. It considers whether anti-suit injunctions to protect forum selection clauses will become the new norm, and suggests that there is Supreme Court authority militating against the grant of such injunctive relief as a matter of course. Finally, it speculates as to the European response to this new English practice. In particular, it questions whether the nascent European caselaw on anti anti-suit injunctions foreshadows novel forms of order designed to protect European proceedings.

Anti-suit injunctions under the Brussels I Regulation Recast

In proceedings commenced in the English courts before 1 January 2021, it is not possible to obtain an anti-suit injunction to restrain proceedings in other EU Member States.

In Case 159/02 Turner v Grovit [2004] ECR I-3565, the Full Court of the European Court of Justice found that it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country. That is so even where that party is acting in bad faith in order to frustrate existing proceedings. The Court stated that the Brussels I Regulation enacted a compulsory system of jurisdiction based on mutual trust of Contracting

States in one another's legal systems and judicial institutions:

> It is inherent in that principle of mutual trust that, within the scope of the Convention, the rules on jurisdiction that it lays down, which are common to all the courts of the Contracting States, may be interpreted and applied with the same authority by each of them… Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

In the subsequent Case 185/07 Allianz v West Tankers [2009] ECR I-00663, the question arose as to whether it was inconsistent with the Brussels I Regulation to issue an anti-suit injunction to restrain proceedings in another Convention country on the basis that such proceedings would be contrary to an English arbitration agreement. In its decision, the Grand Chamber of the European Court of Justice found that notwithstanding that Article 1(2)(d) excludes arbitration from the scope of the Brussels I Regulation, an anti-suit injunction may have consequences which undermine the effectiveness of that regime. An anti-suit injunction operates to prevent the court of another Contracting State from exercising the jurisdiction conferred on it by the Brussels I Regulation, including its exclusive jurisdiction to determine the very applicability of that regime to the dispute. The decision in Allianz v West Tankers represents an extension of Turner v Grovit insofar as it prohibits the issue of anti-suit injunctions in support of English arbitration as well as jurisdiction agreements.

Anti-suit injunctions under the common law rules

The Brussels I Regulation Recast rules govern proceedings commenced in the English courts before 1 January 2021. The regime governing jurisdiction in proceedings commenced after 1 January 2021 comprises the Hague Choice of Court Convention and, more pertinently for present purposes, the common law rules.

At common law, a more flexible approach to parallel proceedings is taken. Anti-suit injunctions may be deployed to ensure the dispute is heard in only one venue. Section 37 of the Senior Courts Act 1981 empowers courts to grant an anti-suit injunction where it appears just and convenient to do so. The ordinary

justification for injunctive relief is protection of the private rights of the applicant by preventing a breach of contract. Where parties have agreed to a forum selection clause, either in the form of a jurisdiction or arbitration agreement, anti-suit injunctions may be available to prevent a breach of contract.

In two recent cases, the English courts have granted injunctive relief to restrain European proceedings in breach of English forum selection clauses. These cases demonstrate clearly the change of position as compared with Allianz v West Tankers and Turner v Grovit, respectively.

Proceedings in violation of English arbitration agreement

In QBE Europe SA/NV v Generali España de Seguros Y Reaseguros [2022] EWHC 2062 (Comm), a yacht allegedly caused damage to an underwater power cable which resulted in hydrocarbon pollution. The claimant had issued a liability insurance policy to the owners in respect of the yacht. That policy contained a multi-faceted dispute resolution and choice of law clause, which provided *inter alia* that any dispute arising between the insurer and the assured was to be referred to arbitration in London.

The defendant had issued a property damage and civil liability insurance policy with the owners of the underwater power cable. The defendant brought a direct claim against the claimant in the Spanish courts under a Spanish statute. The claimant responded by issuing proceedings in England, and applied for an anti-suit injunction in respect of the Spanish proceedings brought by the defendant.

The court found that the claims advanced by the defendant in the Spanish proceedings were contractual in nature, as the Spanish statute provided the defendant with a right to directly enforce the contractual promise of indemnity created by the insurance contract. The matter therefore concerned a so-called 'quasi-contractual' anti-suit injunction application, as the defendant was not a party to the contractual choice of jurisdiction in issue. Nevertheless, the right which the defendant purported to assert before the Spanish court arose from an obligation under a contract (the claimant's liability insurance policy) to which the arbitration agreement is ancillary, such that the obligation sued upon is said to be 'conditioned' by the arbitration agreement.

That the defendant was seeking to advance contractual claims without respecting the arbitration agreement ancillary to that contract provided grounds for granting

an anti-suit injunction. As such, the position under English conflict of laws rules is that the court will ordinarily exercise its discretion to restrain proceedings brought in breach of an arbitration agreement unless the defendant can show strong reasons to refuse the relief (see Donohue v Armco Inc [2001] UKHL 64). The defendant advanced several arguments, which were dismissed as failing to amount to strong reasons against the grant of relief. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining Spanish proceedings brought by the defendants.

Proceedings in violation of exclusive English jurisdiction agreement

In Ebury Partners Belgium SA/NV v Technical Touch BV [2022] EWHC 2927 (Comm), the defendants were interested in receiving foreign exchange currency services from the claimant company. The claimant submitted that the parties had entered into two agreements in early 2021.

The first agreement was a relationship agreement entered into by the second defendant Mr Berthels as director of the first defendant Technical Touch BV. Mr Berthels completed an online application form for currency services, agreeing to the claimant's terms and conditions. These terms and conditions were available for download and accessible via hyperlink to a PDF document, though in the event Mr Berthels did not access the terms and conditions by either method. The terms and conditions included an exclusive jurisdiction agreement in favour of the English courts.

The second agreement was a personal guarantee and indemnity given by Mr Berthels in respect of the defendant company's obligations to the claimant. This guarantee also included an exclusive English jurisdiction agreement.

When a dispute arose in April 2021 as to the first defendant's failure to pay a margin call made by the claimant under the terms of the relationship agreement, the defendants initiated proceedings in Belgium seeking negative declaratory relief and challenging the validity of the two agreements under Belgian law. The claimant responded by issuing proceedings in England, and applied for an interim anti-suit injunction in respect of Belgian proceedings brought by the defendants. The claimant submitted that the Belgian proceedings were in breach of exclusive jurisdiction agreements in favour of the English court.

An issue arose as to whether there was a high degree of probability that the English jurisdiction agreement was incorporated into the relationship agreement, and which law governed the issue of incorporation. It is not within the scope of this article to consider this choice of law issue in depth. For present purposes, it is sufficient to note that the court decided that it was not unreasonable to apply English law to the issue of incorporation, and that on this basis, there was a high degree of probability that the clause was incorporated into the relationship agreement.

As in QBE Europe, the court approached the discretion to award injunctive relief on the basis that the court will ordinarily restrain proceedings brought in breach of a jurisdiction agreement unless the defendant can show strong reasons to refuse the relief. No sufficiently strong reasons were shown. Therefore, the court found that it was appropriate to grant the claimant an anti-suit injunction restraining the Belgian proceedings.

Anti-suit injunctions to protect forum selection clauses: the new norm?

It is plainly important to the status of London as a litigation hub in Europe that English forum selection clauses maintain their security and enforceability. The Brussels I Regulation Recast provided one means of managing parallel proceedings contrived to circumvent such clauses. Absent the framework provided by the Brussels I Regulation Recast; the English courts appear to be employing anti-suit injunctions as an alternative means of protecting English forum selection clauses. This ensures that litigants are still equipped to resist parallel proceedings brought to 'torpedo' English proceedings.

Proceedings in which there is an exclusive English forum selection clause represent among the most compelling circumstances in which the court might grant an anti-suit injunction. In those circumstances, the court is likely to grant injunctive relief to protect the substantive contractual rights of the applicant. The presence of an exclusive forum selection clause is a powerful ground for relief which tends to overcome arguments as to comity and respect for foreign courts. As noted in the joint judgment of Lord Hamblen and Lord Leggatt (with whom Lord Kerr agreed) in Enka Insaat Ve Sanayi A.S. v OOO Insurance Company Chubb [2020] UKSC 38, citing Millett LJ in Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep 87, a foreign court is unlikely to be offended by the grant of an injunction to restrain a party from

invoking a jurisdiction which he had promised not to invoke and which it was its own duty to decline.

Nevertheless, it is not to be assumed that injunctive relief will always be granted to enforce English forum selection clauses. As Lord Mance (with whom Lord Neuberger, Lord Clarke, Lord Sumption and Lord Toulson agreed) stated in Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35, at paragraph [61]:

> In some cases where foreign proceedings are brought in breach of an arbitration clause or exclusive choice of court agreement, the appropriate course will be to leave it to the foreign court to recognise and enforce the parties' agreement on forum. But in the present case the foreign court has refused to do so, and done this on a basis which the English courts are not bound to recognise and on grounds which are unsustainable under English law which is accepted to govern the arbitration agreement. In these circumstances, there was every reason for the English courts to intervene to protect the prima facie right of AESUK to enforce the negative aspect of its arbitration agreement with JSC.

It is too early to say whether anti-suit injunctions will be granted as a matter of course in circumstances such as those in QBE Europe and Ebury Partners. The judgment of Lord Mance indicates that there is a residual role for comity and respect for foreign courts even in cases of breach of a forum selection clause. The English court should not necessarily assume that its own view as to the validity, scope and interpretation of a forum selection clause is the only one. In some instances, it will be appropriate to allow a foreign court to come to its own conclusion, and consequently to refuse injunctive relief. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022) 117-124] It is clear, at least, that anti-suit injunctions have returned to the toolbox.

The European response: anti anti-suit injunctions?

It seems likely that English anti-suit injunctions will be met with resistance by European courts who find their proceedings obstructed by such orders. As a matter of theory, it is now possible for European courts to issue anti-suit injunctions to restrain English proceedings: the inapplicability of Allianz v West

Tankers and Turner v Grovit vis-à-vis England cuts both ways. However continental European legal systems have traditionally regarded anti-suit injunctions as being contrary to international law on the basis that they operate extraterritorially and impinge on the sovereignty of the State whose legal proceedings are restrained.

It is more plausible that European courts would deploy anti anti-suit injunctions to unwind offending English orders. [see Mukarrum Ahmed, *Brexit and the Future of Private International Law in English Courts* (OUP 2022) 50] Assuming that the grant of anti-suit injunctions becomes a regular practice of the English courts in these circumstances, this could provide the impetus for legal developments in this direction across the Channel. In recent years both French and German courts have issued orders of this kind in the context of patent violation. In a December 2019 judgment, the Higher Regional Court of Munich issued an anti anti-suit injunction to prevent a German company from making an application in US proceedings for an anti-suit injunction (see Continental v Nokia, No. 6 U 5042/19). In a March 2020 judgment, the Court of Appeal of Paris issued an anti anti-suit injunction ordering various companies of the Lenovo and Motorola groups to withdraw an application for an anti-suit injunction in US proceedings (see IPCom v Lenovo, No. RG 19/21426).

However, neither decision endorses the general availability of anti anti-suit injunctions outside of the specific circumstances in which relief was sought in those cases. It remains to be seen whether European courts will be willing to utilise anti anti-suit injunctions in circumstances wherein parties have agreed to English forum selection clauses. At this stage, it can only be said that there is a possibility of an undesirable tussle of anti-suit injunctions and anti anti-suit injunctions. This would expose litigants to increased litigation costs, wasted time and trouble, uncertainty as to which court will ultimately hear their case, and the spectre of coercive consequences in the event of non-compliance. Furthermore, a move towards relief of this kind would have a profound impact on the security of English jurisdiction and arbitration agreements. Developments in this area should be watched with interest.