A Practical Guide to...

A Practical Guide from the Commercial Dispute Resolution Group

2 TEMPLE GARDENS

Anti-Suit Injunctions

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Introduction

An anti-suit injunction is an order which restrains a respondent from pursuing proceedings in another jurisdiction. Where available, it can be an extremely powerful weapon in a litigant's armoury.

This Practical Guide considers the various requirements for an anti-suit injunction, as well as how such an order should be sought (or resisted) in practice.

In short, a successful application for an anti-suit injunction will need to address four distinct questions:

1. Whether the English court has personal jurisdiction over the respondent.

2. Whether the English court has a sufficient interest in the proceedings to justify restraining foreign proceedings.

3. Whether an appropriate ground for obtaining relief can be made out.

4. Even if all the other requirements are made out, whether as a matter of discretion it is appropriate to grant the injunction.

Advising clients in respect of anti-suit injunctions requires an understanding of how the courts approach each of these questions.

Effects of Obtaining an Anti-Suit Injunction

At its most basic, an anti-suit injunction is an injunction ordering a party either not to commence or not to take any further steps in proceedings in another jurisdiction. There may be many reasons why an applicant may want to avoid such foreign proceedings, for example: the perceived injustice of the foreign forum, perceived advantages of suing in England, saving expense, enforceability of the judgment and/or procedural disadvantages.

One of the most frequent circumstances in which an anti-suit injunction may be sought is to ensure that a jurisdiction agreement in a contract is upheld. The injunction can serve to prevent parties from litigating otherwise than in the contractual forum.

Like all injunctions, anti-suit injunctions operate by binding those against whom they are made. The injunction has no automatic effect on any proceedings that might be ongoing in a foreign country, but instead compels the respondent to take no further steps in (or not to bring or to discontinue) any such proceedings.

As with any injunction, breach of an anti-suit injunction can have grave consequences. Failure to comply is a contempt of court, as is assisting or permitting such a failure (e.g. as a director of a respondent company). The courts have broad coercive powers over those in contempt, including sequestrating assets, imposing a fine or even committing an individual to prison. As such, obtaining an injunction provides a powerful compulsion to a respondent to cease pursuing foreign proceedings. This compulsion is particularly powerful if the respondent has close ties to England, for example by reason of domicile or having significant assets or doing a large amount of business in the jurisdiction.

One key advantage of an anti-suit injunction is that if it is breached and judgment obtained in a foreign court, any such judgment will likely be unenforceable in England. An applicant can therefore secure some protection even if a respondent ignores the injunction and continues with foreign proceedings.

Personal Jurisdiction

The first requirement for the granting of an anti-suit injunction is that the English court has jurisdiction over the respondent: relief will not be granted against a respondent upon whom valid service cannot be effected.[1]

Personal jurisdiction in respect of an application for an anti-suit injunction need not be established separately from jurisdiction in respect of a substantive claim to which the injunction is ancillary. If, whether by service in or out of the jurisdiction, an English court has personal jurisdiction over the substance of a dispute, then it will have sufficient personal jurisdiction to grant an anti-suit injunction.[2]

Normally an injunction is sought ancillary to pending English proceedings, and so this jurisdictional requirement will be easily satisfied. This is so even where those proceedings have come to an end before the anti-suit injunction is sought.[3]

Where these are no such pending proceedings, a particular basis of personal jurisdiction must be identified and established before an anti-suit injunction can properly be sought.

Where the Brussels Regime applies, jurisdiction may be established upon the basis of the Recast Brussels I Regulation, for example if the respondent is domiciled in England or the action relates to a contract which was to be performed in England.

In cases outside the Brussels Regime, jurisdiction can be established by service, either within the jurisdiction or (with permission from the court) out of the jurisdiction pursuant to CPR 6.36. Such permission may be granted on a number of grounds, set out in PD6B 3.1.

The question of when there is jurisdiction under the Brussels Regime or at Common law is outside the scope of this Guide.

Sufficient Interest of the Forum

In considering whether to grant an anti-suit injunction, English courts will take into account the principle of judicial comity, which entails acting with respect and courtesy towards the courts and laws of other jurisdictions. It is from this principle that the second requirement for the grant of an anti-suit injunction arises, which is:

[1] *Airbus Industrie GIE v Patel* [1997] 2 Lloyd's Rep 8.
[2] *Masri v CCIC (No 3)* [2009] 2 WLR 669 at [59].
[3] Ibid.

"*that the English forum should have a sufficient interest in, or connection with, the matter in question to justify the direct interference with the foreign court which an anti-suit injunction entails.*"[4]

This requirement prompts an enquiry as to the nature of the substantive proceedings in relation to which relief is sought. There are three main scenarios in which English courts will have a sufficient interest in restraining foreign proceedings:

1. **Pending English proceedings**. If substantive proceedings are pending before an English court, relief sought ancillary to those proceedings may be granted on the basis that the court has an interest in the protection of the integrity of its jurisdiction and its processes.[5] However, where proceedings have only recently been instituted in England, and a challenge to jurisdiction remains possible, a court will only find that it has a sufficient interest in restraining proceedings on this basis where England is shown to be the *forum conveniens* for the dispute.[6]

2. **Concluded English proceedings**. If substantive proceedings have been concluded in an English court, the court will have a sufficient interest in restraining foreign proceedings which involve the relitigation of the same issues as those determined by the English court.[7]

3. **Exclusive jurisdiction**. If the English courts have exclusive jurisdiction over the substance of any dispute between the parties, usually arising from an express jurisdiction agreement, there will be a sufficient interest in preserving that jurisdiction.

Grounds for Relief

After establishing that the English court has personal jurisdiction over the respondent to an application, and has a sufficient interest in restraining foreign proceedings, an applicant must demonstrate that there is an appropriate ground on the basis of which the injunction can be granted: in each case, the applicant must show some form of unconscionable conduct on the part of the respondent.

In considering the different bases upon which unconscionability can be established, a distinction must be drawn between those applications which rely upon pre-existing contractual agreements from those which do not.

Contractual Applications

Where contracting parties agree an exclusive jurisdiction clause and a claim which falls within the scope of that clause is brought before the courts of a country other than the contractual forum, it is now well-established that an English court will ordinarily grant an injunction to hold the parties to that bargain. For the respondent to deny the applicant the benefit of that clause would, in most instances, be unconscionable.

In such a case, the general rule is that the burden is on the party seeking to bring or continue a claim in a non-contractual forum to show "*strong reasons*" displacing the applicant's *prima facie* right to be sued only in the agreed forum and not to be sued elsewhere (see *Donohue v Armco Inc* [2001] UKHL 64).

In such an application, the crucial consideration for both the applicant and the respondent's legal representatives will therefore be whether such strong reasons can be demonstrated. Some examples of circumstances which may amount to strong reasons are:

- **Prejudice to third parties**. If parties other than those bound by the exclusive jurisdiction clause are or would be involved in the foreign proceedings, this may lead to the court refusing to grant the injunction. This is because such third parties, strangers to the jurisdiction agreement, may be prejudiced by the grant of the injunction, usually by reason of the applicant not being a party to a foreign action.[8] The degree of any such prejudice will differ in each case and will be heightened if the same allegations are made against multiple defendants, only one of which is the applicant.

[4] *Airbus Industrie GIE v Patel* [1999] 1 AC 119.
[5] *Masri v CCIC* [2009] 2 WLR 669 at [59].
[6] *Star Reefers v JFC Group* [2012] 1 Lloyd's Rep 376. For a recent case in which the continuation of an injunction was declined on the basis that England was not the *forum conveniens*, see *Vitol Bahrain v Nasdec* [2013] EWHC 3359 (Comm).
[7] *RBS v Hicks and Gillett* [2010] EWHC 2579 (Ch).
[8] *Evans Marshall and Co Ltd v Bertola SA* [1973] 1 All ER 992.

- **Improper conduct of the applicant**. It is possible for the conduct of the applicant itself to provide strong reasons not to grant an injunction. This will clearly be the case in the event that an interim injunction was obtained dishonestly or on the basis of false evidence.[9] Improper conduct is broader than such behaviour, however, and can be constituted by the applicant failing to make an application timeously, particularly if there is evidence that the delay was deliberate.[10] Delay becomes more significant where it causes or permits a respondent to incur significant costs in foreign proceedings.

- **Disadvantages amounting to injustice**. It will be difficult for a respondent who has entered into a jurisdiction agreement, presumably having considered the advantages and disadvantages of doing so, to argue that an injunction should not be granted because he will be disadvantaged if the agreement is upheld.[11] However, if the respondent can show that the disadvantage would be such as to deny him access to justice, perhaps because an English judgment would be unenforceable, then this may be sufficient to prevent an injunction being granted. This may also be so if granting the injunction would cause the respondent to lose a form of security which would otherwise be enjoyed.[12]

It will be worth considering, prior to making an application, what arguments the respondent is likely to raise and how they might be counteracted. For example, arguments advanced on the basis that security will be lost will carry significantly less weight should the applicant give an undertaking to the court to provide equivalent security.

The following have been found in previous cases not to be sufficiently strong reasons to prevent relief being granted:

- **England is not the natural forum**. As indicated above, it will generally be of little assistance to a respondent to argue that England is not the *forum conveniens* for the dispute.[13] Such a submission is in effect an argument that the respondent should escape its contractual obligations because the contract was not a sensible one to enter into.

- **(Limited) participation in foreign proceedings**. The mere fact of an applicant's participation in the foreign proceedings being restrained has been held not to amount to a strong reason to decline relief. This will especially be the case where such participation is limited and it has been made clear that jurisdiction is in issue in those proceedings.[14] When considering an argument on the basis of such participation, it will be important to scrutinise closely exactly what the nature of the participation has been, and the extent to which any such participation has been truly voluntary.

- **Reliance upon rules only available in the foreign court**. Reliance on some rule which will be applied in a foreign court but not by the contractual forum will generally not be a strong reason to refuse relief.[15] In most cases, such an argument is in fact more likely to indicate a reason to grant the injunction, as the respondent will be characterised as seeking to obtain an advantage by way of that rule.

- **The foreign court's mandatory jurisdiction**. It has been held that, when resisting an application for an anti-suit injunction, it is irrelevant to raise in objection that the law of another country provides for exclusive jurisdiction.[16]

Unconscionability is ultimately, however, an inherently fact-sensitive concept and earlier decisions on the facts therefore only provide limited guidance to different factual scenarios.

Despite the guidance given in *Donohue v Armco*, even if strong reasons are not shown, the court still needs to consider whether to grant the order as a matter of discretion (as to which, see

[9] *RBS v Highland Financial Partners and others* [2012] EWHC 1278 (Comm).
[10] *Shashou v Sharma* [2009] EWHC 957 (Comm).
[11] See e.g. *Konkola Copper Mines Plc v Coromin Ltd* [2006] EWHC 1093 (Comm).
[12] *The Epsilon Rosa* [2003] 2 Lloyd's Rep 509, [2003] EWCA Civ 938.
[13] *Ecom Agroindustrial v Mosharaf* [2013] EWHC 1276 (Comm).
[14] *Bank of New York Mellon v GV Films* [2010] 1 Lloyd's Rep 365.
[15] *Ecom Agroindustrial Corp Ltd v Mosharaf Composite Textile Mill Ltd* [2013] EWHC 1276 (Comm).
[16] *OT Africa Line Ltd v Magic Sportswear Corpn* [2005] 2 Lloyd's Rep 170.

below).[17] In practice, it is very rare for exclusive jurisdiction clauses not to be enforced by way of anti-suit injunctions where there has been a breach of the clause (or a threatened breach).

Exclusive jurisdiction agreements are not the only contractual provisions able to form the basis of a successful application. Non-exclusive jurisdiction agreements have formed the basis of successful applications in the following circumstances:

- **Protecting the right to sue**. Though not creating a right to be sued in the contractual forum, a non-exclusive jurisdiction agreement creates a right to sue in that forum. Therefore, an injunction can be sought to prevent proceedings in a foreign court which seek to restrain proceedings in England pursuant to such a clause.[18]

- **Parallel proceedings**. The courts assume that parties, having entered a non-exclusive jurisdiction agreement, cannot have intended that there be parallel proceedings in the contractual forum and another forum. Therefore, once proceedings have been initiated in the contractual forum, an injunction can be sought to restrain other proceedings in other forums.[19]

While it is not normally a sufficient ground for a successful application that a foreign court would apply a different substantive law to that which would be applied in England,[20] this may not be the case where the parties have previously agreed the law applicable to the dispute. If a choice of law agreement has been entered into which would not be given force by the foreign court, the English courts may grant an anti-suit injunction to protect the applicant's rights under that contract.[21]

Non-Contractual Applications

In applications which do not rely on any such contractual provisions, there will be no presumption that the respondent's conduct is unconscionable and it is for the applicant to show that such conduct has occurred. The courts have declined to define unconscionable conduct, however, it clearly encompasses conduct which is "*oppressive or vexatious*" and conduct which interferes with the English courts' due process.[22]

Interference with due process can take a number of forms. Examples include:

- **Circumventing English orders or process**. The English courts have made it clear that they reserve to themselves alone the right to police the conduct of parties in English proceedings.[23] Any foreign action based on such conduct (for example an action for breach of confidence founded on evidence given in an English case) may therefore be susceptible to an application for an anti-suit injunction.

- **Re-litigation of matters determined**. Where an English court has ruled on an issue, it is unconscionable for a party to seek to have another court in a different forum determine the same issue.[24] Doing so will be viewed as an unconscionable attempt to mount a collateral attack upon the English judgment's integrity.

- **Preventing English courts considering their own jurisdiction**. If the object of foreign proceedings is to prevent the English court from determining some question of jurisdiction of which the English court is already seised, this may properly form the basis for an anti-suit injunction. For example, if the English court is already seised of an action in which an application to stay on *forum conveniens* grounds has been made, the English court may order an injunction to prevent that issue from being determined elsewhere.[25]

Frequently, anti-suit injunctions will be sought to restrain a subsequent foreign action proceeding in parallel with an action already commenced in the English courts. Such parallel proceedings are not, of themselves, vexatious or oppressive and the applicant must demonstrate that bringing or continuing those proceedings is in some way unconscionable.

[17] *Oceanconnect UK Ltd v Angara Maritime* [2010] EWCA Civ 1050.
[18] *Deutsche Bank v Highland Crusader Offshore Partners* [2009] EWCA Civ 725.
[19] *BNP Paribas v Anchorage Capital Europe LLP* [2012] EWHC 3073 (Comm).
[20] *The Western Regent* [2005] 2 Lloyd's Rep 359.
[21] *Cadre SA v Astra Asigurari* [2006] 1 Lloyd's Rep 560.
[22] See e.g. *South Carolina Co v Maatschappij 'De Zeven Provincien' NV* [1987] AC 24.
[23] *Bank of Tokyo v Karoon* [1987] AC 45.
[24] *Masri v CCIC* [2008] EWCA 625.
[25] *Tonicstar Ltd v American Home Assurance Co* [2004] EWHC 1234 (Comm).

To do so, the applicant must show that the respondent is not seeking any "*legitimate juridical advantage*" by pursuing the foreign proceedings.[26] This can be shown in a number of ways, the most obvious being the following:

- **Bad faith**. In some cases, there will be direct evidence that the purpose of commencing the foreign proceedings is to interfere with the already pending English proceedings, for example by exerting extreme pressure in terms of costs and expense.[27] Even without direct evidence, it may be possible to show from the all the circumstances that the proceedings were not commenced in good faith.[28]

- **Pointlessness**. There can be no legitimate interest in pursuing a claim which is bound to fail, and it has been held that to pursue such a doomed claim is itself unconscionable.[29] There can, of course, be difficulties in establishing that a claim in a foreign court is in fact doomed to fail.

An injunction may also, subject to certain conditions, be granted where the litigation of a matter in another forum would involve denying the applicant access to justice, such as where joining a third party to the action would not be possible in the foreign court.[30] Relief can only be obtained on such a basis where the respondent would not suffer an injustice by litigating in England.

The Court's Discretion

Until the Court of Appeal's decision in *Star Reefers v JFC Group*,[31] courts would sometimes regard the establishing of a ground of relief as the end of the enquiry as to whether an anti-suit injunction should be granted. However, in that decision, the Court of Appeal stressed that the court's discretion is to be considered separately; this is so even where a court has found that a respondent's conduct has been found to be vexatious or oppressive.

In considering whether to exercise its discretion, the court will of course have regard to all the circumstances of the case. However, certain matters frequently arise in the context of anti-suit injunctions.

The Court of Appeal in *Star Reefers* stressed that, at the discretionary stage, judges should consider the principle of judicial comity, respecting the processes of other forums. It is not sufficient to assume that, because the court has a legitimate interest in granting the injunction, all questions of comity have been answered. The foreign court's right to determine its own jurisdiction, and the likely perception by a foreign court of an English anti-suit injunction, are relevant.

At this stage a court is also likely to have regard to any legitimate advantages which might be enjoyed by the respondent in a foreign court unavailable in England, such as the possibility of asserting a relevant security or of joining a particular additional party. Such injustice to a respondent is not necessarily a bar to the injunction being granted; however, this is a factor which a judge will weigh in exercising his or her discretion.

A further element which a court will consider is whether granting an injunction will, in practice, have any effect. An order's enforceability will often be determined in part by the assets and interests of the respondent within the jurisdiction. However, as the effects of breaching an order are wide-ranging, and may involve a severe hindering of a party's ability to do business in England, courts may be persuaded that the injunction will be effective even in circumstances where the respondent's ties to England are limited.

Arbitration Proceedings

Where parties have entered into an agreement creating an enforceable right to refer disputes to arbitration, that agreement may be enforced by anti-suit injunction in the same manner as an exclusive jurisdiction agreement. As such, relief will normally be granted in the absence of strong reasons not to do so.

Respondents to applications pursuant to an arbitration agreement will face the same difficulties as in cases founded upon an exclusive jurisdiction agreement. For example, an argument by a respondent who has previously agreed to refer a matter to arbitration will likely

[26] *Star Reefers v JFC Group* [2012] EWCA Civ 14.
[27] *Cadre SA v Astra Asigurari SA* [2006] 1 Lloyd's Rep 560.
[28] *Vitol Bahrain EC v Nasdec General Trading LLC* [2013] EWHC 3359 (Comm).
[29] *Glencore International v Exeter Shipping* [2002] EWCA Civ 528.
[30] *Aérospatiale v Lee Kui Jak* [1987] AC 871 (PC).
[31] [2012] EWCA Civ 14.

fail to succeed on an argument that the foreign court is the dispute's natural forum.

In the recent case of *Ust-Kamenogorsk Hydropower Plant v AES Ust-Kamenogorsk Hydropower Plant LLP* [2014] 1 All ER 335, the Supreme Court held that there is no requirement for such an injunction to be granted that arbitration have already been commenced or even be imminent. It is the agreement to arbitrate, rather than the arbitral proceedings, which gives rise to the right not to be sued other than in such proceedings.

European Law and Anti-Suit Injunctions

The relationship between the English courts' jurisdiction to grant an anti-suit injunction and the Brussels jurisdictional regime is an uneasy one.

In C-159/02 *Turner v Grovit* [2004] ECR I-03565, the CJEU held that to grant relief to restrain proceedings in Spain which were within the Brussels I Regulation's material scope would constitute an interference with the Spanish court's ability to determine its jurisdiction under the Regulation, thereby undermining the principle of mutual trust between the courts of the different Member States. As such, it was held that the English courts had no power to grant such an injunction.

Subsequently, in C-185/07 *Allianz v West Tankers* [2009] ECR – I-00663 the CJEU, again relying upon the principle of mutual trust and the fact that the injunction sought, if granted, would prevent the Italian courts from exercising jurisdiction under the Brussels I Regulation, confirmed that the *Turner* prohibition extends to issuing injunctions to restrain proceedings in other Member States in order to hold parties to an agreement to arbitrate.

The effect of the Recast Brussels I Regulation on this prohibition remains to be seen. Attempts were made to introduce wording into that Regulation permitting the granting of anti-suit injunctions; however, these attempts were not successful and the final text does not explicitly address anti-suit injunctions.

The decision in *Turner* is not affected by the Recast Regulation. As such anti-suit injunctions in relation to proceedings in other Member States, falling within the scope of the Recast Brussels I Regulation, remain unavailable.

By contrast, there is real reason to question the continuing correctness of the *West Tankers* decision. This is largely as a result of Recital 12 of the Recast Regulation, which states that the Regulation should not apply to arbitration (as provided by Article 1(2)(d)) and goes on to set out some of the practical implications of that position. The second paragraph of the Recital states that rulings in Member States as to whether or not arbitration agreements are null and void, inoperative or incapable of being performed should not be subject to the Regulation's rules of recognition and enforcement. This appears to be inconsistent with the rationale for the decision in *West Tankers*, which was founded in part upon the premise that decisions as to the applicability of arbitration agreements could be so recognised and enforced.

In C-536/13 *Gazprom OAO*, the Lithuanian courts referred to the CJEU questions concerning the compatibility of anti-suit injunctions issued by arbitral tribunals with the Brussels I Regulation.

AG Wathelet delivered a detailed opinion,[32] going far beyond the strict scope of the questions referred. He stated that, in his view, the decision in *West Tankers* was incompatible with Recital 12 of the Recast Regulation and that under the Recast Regulation the *Turner* prohibition would not have been applied in that case, indicating that courts do have the power to restrain proceedings in other Member States for the benefit of arbitration proceedings.

The CJEU, in its judgment in that case,[33] declined to consider this broader issue, instead confining itself to answering the questions referred. As such, whether the Recast Regulation permits the English courts to grant injunctions restraining proceedings in another Member State for the purpose of holding parties to an arbitration agreement remains very much an open question.

A further, and controversial, result of the interplay between European law and anti-suit injunctions is illustrated by the Court of Appeal's controversial decisions in *Samengo-Turner*[34] and *Petter*.[35] These cases appear to

[32] Opinion of 4 December 2014.
[33] Judgment of 13 May 2015.
[34] *Samengo-Turner v Marsh and Maclennan* [2007] EWCA Civ 723.
[35] *Petter v EMC Corporation* [2015] EWCA Civ 828.

establish that where the Recast Regulation provides for the mandatory, exclusive jurisdiction of the English courts regardless of the existence of a contrary jurisdiction agreement (for example in employer-employee disputes within Section 5 of the Regulation), the courts not only can but must grant an anti-suit injunction to restrain proceedings outside the European Union.[36]

Procedure

Once the need for an anti-suit injunction is identified, an application must be made promptly. The further foreign proceedings have advanced, the more difficult it will be to obtain the order.[37] There is no requirement that the applicant seek to challenge the jurisdiction of the foreign court before applying for relief.[38]

All anti-suit injunctions will generally be sought pursuant to the High Court's power under s37(1) of the Senior Courts Act 1981 to grant an injunction in all cases where it is just and convenient to do so.

Where an interim (rather than final) injunction is sought, the applicant will usually be required to give a cross-undertaking in damages: if the interim injunction is subsequently discharged and the respondent suffers damage, the court may order the applicant to compensate the respondent for such losses. Depending on the applicant's financial standing, the court may require the applicant to give some form of security to fortify the undertaking (particularly where the applicant is a foreign entity based outside the EU).

Ex Parte and Inter Partes Applications

Applications for anti-suit injunctions should normally be made on notice. Even if urgency means that full notice cannot be given, informal short notice should be given if possible.

However, in some circumstances urgency may require applications to be made wholly without notice. Caution should always be exercised in considering whether it is necessary to make the application without notice. This will generally only be justified where there is genuinely insufficient time to give notice, or where doing so would defeat the purpose of the application (e.g. by causing the respondent to take some irreversible step).

Where making an application without notice, an applicant must comply with his duty to make full and frank disclosure to the court. This is not to be treated as an afterthought, but as a crucial part of any such application. The applicant must show the utmost good faith and will be required to identify/ disclose all material factual, legal and procedural aspects of his case which go to the merits of the application.[39] This will include identifying arguments the respondent might raise (which can of course then be countered).

Particular points to consider when making an *ex parte* application for an anti-suit injunction include:

- Any (actual or potential) dispute as to the validity of any contractual clause relied upon.
- Any legitimate advantages available to the respondent in the foreign proceedings, e.g. the availability of security.
- The stage to which foreign proceedings have advanced.
- Potential prejudice to third parties, including other defendants in foreign proceedings.

Applicants are always wise to err on the side of caution in making this disclosure to the court: it is no excuse once non-disclosure is discovered for an applicant to say that he was unaware of the importance of matters not raised.[40]

Once an *ex parte* application has been granted, the matter will proceed to a return date at which the respondent will be present and will advance its own arguments. The application should not be regarded as being successful until the injunction is continued at the return date. The obligations of full and frank disclosure continue until the return date.

Necessary Evidence

In addition to providing evidence in relation to the 4 requirements for an anti-suit injunction,

[36] See, in particular, *Petter* at [31].
[37] *Rec Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2011] 1 Lloyd's Rep 410.
[38] *Essar Shipping v Bank of China Ltd* [2015] EWHC 3266 (Comm).
[39] *Memory Corporation v Sidhu* [2000] 1 WLR 1443.
[40] *Siporex Trade SA v Comdel Commodities Ltd* [1986] 1 Lloyd's Rep 428.

and any necessary full and frank disclosure, an applicant will need to demonstrate by way of evidence either that proceedings have been commenced in a foreign jurisdiction or that there is a real risk that steps will shortly be taken to commence such proceedings.

If it is sought to rely on some feature of the foreign system, and/or to suggest that the foreign claim would be bound to fail, it may be necessary to adduce expert evidence as to foreign law. Particular care should always be exercised as to foreign law evidence. It should be tested carefully to ensure that it is accurate and not based on any misunderstanding.

In terms of structure, it is usually sensible to create separate headings in the statement for each of the requirements, as this helps the court see that the requirements for the order have been met.

Form of the Order

The usual form of an anti-suit injunction is prohibitory in nature, ordering the respondent not to commence or take further steps in foreign proceedings. In some circumstances, it may be appropriate to also obtain a mandatory injunction ordering the respondent to discontinue proceedings which have already been commenced. However, courts are likely to require greater persuasion to grant a mandatory injunction, particularly on an interim basis; this is because a mandatory injunction will in most instances dispose entirely of the foreign proceedings to which it is directed.

If an interim injunction is sought, the relief must be genuinely interim in nature.[41] Such orders are therefore generally expressed to be "*until trial*" or "*until further order*".

Resisting an Application

Respondents should consider carefully whether the 4 requirements have been met. If, for example, there is no personal jurisdiction over the respondent, the court cannot go on to consider the merits of the application. Moreover, the precise circumstances in which the order is sought are crucial.

Where an interim injunction has been obtained on an *ex parte* basis, the respondent should consider whether the applicant complied with its obligations in obtaining the order. The respondent is entitled to be provided with a complete set of all papers relied upon at the without notice hearing, including the judgment, any skeleton argument and a full note of the hearing.[42] Any failure on the part of the applicant to make full and frank disclosure may justify the injunction being discharged, even without regard to the underlying merits of the application for the injunction.[43] However, respondents should be careful not to take technical or unmeritorious points in this regard; points on non-disclosure should only be taken if they are sensible and likely to be regarded by a judge as being material.

Where an anti-suit injunction has been obtained without notice, the respondent must comply with its terms until it is set aside. As such, once an order is made the respondent must take no further steps in any foreign proceedings which are the subject of the order.

Ordinarily, the burden will be on the applicant to demonstrate that the interests of justice require that the injunction be granted. The respondent's evidence should, therefore, generally be directed towards persuading the court either that the particular ground for relief relied upon has not been made out, or that justice would best be served by refusing to grant the injunction.

The exception is in cases where an injunction is sought pursuant to an exclusive jurisdiction agreement. In such cases, a respondent will need to establish strong reasons why the injunction should not be granted. Attention should be directed towards both the applicant's conduct, including any delay in seeking the injunction, and other factors such as prejudice to third-parties which may persuade a court not to grant the injunction.

In many cases, it will be sensible to consider whether the respondent's best option would be to give appropriate undertakings to the court. Depending on the case, this will not necessarily require an undertaking not to pursue foreign proceedings, but can, for example, be accomplished by giving an undertaking not to pursue some advantage only available in the foreign courts (such as punitive damages), thereby eliminating the potential injustice to the applicant.

[41] *The Eras Eil Actions* [1995] 1 Lloyd's Rep 64.

[42] *Flightwise Travel Service Ltd v Gill* [2003] EWHC 3082 (Ch).

[43] *Brinks MAT v Elcombe* [1988] 1 WLR 1350.

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"He's phenomenally talented but also very approachable, very clear with his advice and technically brilliant"; "a persuasive and fluent advocate";" delightful to work with and very impressive as he's hard-working and has good judgement." "He is bright, approachable and very responsive."; "extremely effective."; "He gives very good advice which cuts through the detail - he is able to distil his advice down in a way that lay people can understand"; "Technically excellent and a pleasure to work with." Chambers UK 2016

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Alistair graduated with a First Class degree in Law from Gonville and Caius College, Cambridge, and is a scholar of Gray's Inn. He brings excellent academic credentials and a practical approach to each instruction.

He has a busy commercial practice, with a particular emphasis on private international law. He deals with a wide range of commercial disputes, including insurance and professional negligence. He regularly acts in cases raising serious allegations of commercial fraud, and has experience of obtaining committal orders against parties acting in breach of injunctions.

Alistair was recently instructed in an appeal to the High Court against an arbitral tribunal's findings in an action concerning cross-border commodities sales. Other recent instructions include acting for a high-profile individual seeking an injunction for the delivery up of irreplaceable goods and successfully resisting a claim for contribution by one co-guarantor against another.

Alistair regularly acts as sole and junior counsel in cases in which the English courts' jurisdiction and the correct applicable law are disputed. He is currently instructed as junior counsel in multiple appeals on points under the Rome II Regulation, which are pending before the Supreme Court and the Court of Appeal.

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