

A PRACTICAL GUIDE TO ANTI-SUIT INJUNCTIONS

A Practical Guide from the 2TG Commercial Dispute Resolution Group

Summer 2022

Introduction

An anti-suit injunction restrains a respondent from starting or pursuing proceedings in another jurisdiction. It can be a powerful and effective tool for parties engaged in litigation with an international element. Moreover, following the United Kingdom's departure from the European Union, anti-suit injunctions are now available in a wider range of cases than previously.

This Practical Guide considers the various requirements for an anti-suit injunction, their relevance to arbitration proceedings, and how such orders should be sought (or resisted) in practice.

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: 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 is sought is to ensure that a jurisdiction agreement in a contract is upheld. The injunction can serve to prevent parties from litigating other than in the contractual forum.

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



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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 English courts have broad coercive powers over those in contempt, including sequestering assets, imposing fines or even committing individuals to prison. As such, obtaining an injunction provides a powerful compulsion to a respondent to cease pursuing foreign proceedings. This will be particularly effective where 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 even if it otherwise satisfied the requirements for enforcement in England. An applicant can therefore secure some protection even if a respondent ignores the injunction and continues with foreign proceedings.

Types of Application

Anti-suit injunction cases fall into one of two categories: contractual cases, where an exclusive jurisdiction or arbitration clause is relied upon, and non-contractual cases.

Contractual Applications

In many cases, an anti-suit injunction is sought by a party to an exclusive jurisdiction clause. Applications for an injunction in these circumstances (and applications pursuant to an arbitration clause, discussed below) should be distinguished from applications where no such clause exists.

If a party to an exclusive jurisdiction clause attempts to bring a claim before the courts of a country other than that which the parties had agreed to, it is now well-established that an English court will ordinarily grant an injunction to hold the parties to that bargain. This is because, in most cases, it will be deemed unconscionable for a respondent to seek to resist the application of that clause. As Jacobs J recently held, *“the starting point is that the court will ordinarily act to protect the integrity of a contractual bargain reached between the parties”*.¹

The general rule therefore is that the burden is on the party seeking to bring or continue the claim in breach of the jurisdiction clause to show that there are *“strong reasons”* displacing the right the applicant would otherwise have to

be sued only in the agreed forum (see *Donohue v Armco Inc* [2002] 1 All ER 749).

In such an application, the crucial consideration for both the applicant and the respondent’s legal representatives will be whether such strong reasons can be demonstrated. The factors to consider at this stage are principally concerned with justifications for suit in the foreign court, rather than general discretionary considerations arising on any application for equitable relief.² Some examples of circumstances which may amount to strong reasons are:

- **Effect on third parties.** Other parties than those bound by an exclusive jurisdiction clause may of course be impacted by the grant of an anti-suit injunction enforcing the clause. In considering whether there are strong reasons not to grant it, the court may take into account any adverse impact on the interests of such third parties.³ 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.
- **Improper conduct of the applicant.** It is possible for the conduct of the applicant itself to provide a sufficient basis for the court 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.⁴ 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. The longer a foreign action continues without an attempt to restrain it, the less likely an injunction will be granted.⁵
- **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. However, if the respondent can show that the disadvantage would be such as to deny him access to justice, perhaps because they would lose the benefit of a particular form of security. The courts will scrutinise carefully any argument made by a respondent on this basis, to

¹ *Catlin Syndicate v AMEC Foster Wheeler* [2020] EWHC 2530 (Comm).

² *Times Trading Corporation v National Bank of Fujairah* [2020] 1078 (Comm).

³ *Hamilton-Smith v CMS Cameron McKenna LLP* [2016] EWHC 1115 (Ch).

⁴ *RBS v Highland Financial Partners and others* [2013] EWCA 328.

⁵ *Qingdao Huiquan Shipping Co v Shanghai Dong He Xin* [2019] 1 Lloyd’s Rep 520.

show that the benefit will actually be lost and that this would be unconscionable.⁶

- **Risk of inconsistent decisions.** Where granting relief would create a risk of inconsistent decisions this can, in appropriate cases, give rise to a strong reason not to do so. This is unlikely to be the case if, in particular, it would not be possible to ensure the submission of the entire dispute to a single forum. Some fragmentation may in large multi-party disputes be unavoidable, and is insufficient to prevent the grant of an anti-suit injunction.⁷

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.** It will generally be of little assistance to a respondent to argue that England is not the *forum conveniens* for the dispute.⁸ 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.⁹ 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.¹⁰ 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.
- **Accrual of a limitation defence.** It may be that a cause of action has become time-barred between

the filing of the original claim and the date the injunction is sought. In such cases, it is for the respondent to prove that it was reasonable not to have filed a protective claim form in the contractual forum.¹¹ Even if this is established, the court may still consider it appropriate to grant the injunction.¹²

- **The respondent will not obey the injunction.** If faced with a respondent likely to ignore the injunction, it is unlikely the court will consider the application is therefore pointless and should not be granted. Difficulties in enforcing the injunction are not a strong reason to not grant it, particularly given the implications for enforcement of a judgment obtained in breach.¹³

Unconscionability is ultimately 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 retains an element of discretion as to whether to grant the injunction. 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).

Arbitration Proceedings

The Supreme Court in *Enka Insaat v Chubb* [2020] UKSC 38 has reaffirmed in the strongest terms the ability of the English courts to grant anti-suit injunctions in cases where an English seat of arbitration has been chosen by the parties. The court's power to restrain parties from breaching their arbitration agreements by litigating elsewhere is a key part of its supervisory jurisdiction.

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.

In granting an injunction on the basis of an arbitration agreement, it is not necessary for the arbitral proceedings to have commenced or even be imminent. It is the rights founded on the agreement to arbitrate, rather than any

⁶ See e.g. *Catlin Syndicate*.

⁷ *Riverrock Securities Limited v International Bank of St Petersburg JSC* [2020] EWHC 2483 (Comm).

⁸ *Enka Insaat v Chubb* [2020] UKSC 38

⁹ *Daiichi v Chubb* [2020] EWHC 1223.

¹⁰ *Ecom Agroindustrial Corp Ltd v Mosharaf Composite Textile Mill Ltd* [2013] EWHC 1276 (Comm).

¹¹ *Maersk AS v Mercuria Energy Trading* [2021] EWHC 2856 (Comm).

¹² *The Archangelos Gabriel* [2020] 2 Lloyd's Rep 317.

¹³ *UAU v HVB* [2021] EWHC 1548 (Comm).

arbitral proceedings, which the court protects in granting the injunction.¹⁴

Respondents to applications pursuant to an arbitration agreement will face the same difficulties as in cases founded upon an exclusive jurisdiction agreement. For example, the notion of whether England is the *forum conveniens* has been described as irrelevant where a party has previously agreed to refer a matter to arbitration.¹⁵

Non-Contractual Applications

Anti-suit injunctions are not limited to cases in which the applicant can point to a contractual term breached by the bringing of the foreign action. However, in cases where there is no such clause, a different analysis is required from the “*strong reasons*” test referred to above.

Personal Jurisdiction

The first question which must be answered in any such case is whether the English court has sufficient jurisdiction over the respondent to grant an injunction against it. In cases where there is an English jurisdiction clause or an agreement for English seated arbitration this requirement is unlikely to warrant separate consideration, but in non-contractual applications the court’s jurisdiction must be considered carefully.

Following the UK’s departure from the European Union, jurisdiction in all cases falls to be established by reference to the English “*common law*” regime. Under that regime, jurisdiction is determined by whether a respondent can be validly served with English proceedings. The precise circumstances in which it is possible to establish jurisdiction are outside the scope of this guide, but it should be noted that for parties outside the jurisdiction, Practice Direction 6B defines the circumstances in which permission can be given for such service. Those jurisdictional “gateways” are very broadly drawn, but are subject to the controlling mechanism of the need to also show that England is the proper forum in which to try the parties’ dispute.

Grounds for Relief

An exhaustive list cannot be provided of the circumstances in which the English courts will grant anti-suit injunctions in the absence of a contractual agreement. However, generally no such injunction will be granted unless it can be shown that there is some strong connection of the subject matter to England (usually pending or concluded English proceedings) and some form of conduct deemed

unconscionable.

Where the applicant is unable to rely on an exclusive jurisdiction clause, there is no presumption that the respondent’s conduct in bringing proceedings in another forum is unconscionable such that it should be restrained by an injunction. In those circumstances, the burden is on the applicant to show that the respondent’s conduct is unconscionable, usually by showing the conduct is vexatious or oppressive or that it interferes with the English courts’ due process.

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. 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. 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.

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.

¹⁴ *Ust-Kamenogorsk Hydropower Plant v AES Ust-Kamenogorsk Hydropower Plant LLP* [2014] 1 All ER 335.

¹⁵ *Enka v Chubb*, [179].

To do so, the applicant must show that the respondent is not seeking any “*legitimate juridical advantage*” by pursuing the foreign proceedings.¹⁶ 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. Even without direct evidence, it may be possible to infer from all the circumstances that the proceedings were not commenced in good faith.¹⁷
- **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. 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. Relief can only be obtained on such a basis where the respondent would not suffer an injustice by litigating in England.

European Law and Anti-Suit Injunctions

Prior to the end of the implementation period for the UK’s withdrawal from the European Union (31 December 2020), the CJEU’s decision in C-159/02 *Turner v Grovit* [2004] ECR I-03565 prevented the English courts from granting anti-suit injunctions which would prevent parties from taking steps in litigation before the courts of the EU and EEA Member States.

The basis of that decision (and subsequent decisions such as C-185/07 *Allianz v West Tankers* [2009] ECR I-00663) was the principle of mutual trust and cooperation which existed under the Brussels jurisdiction regime. However, as of 1 January 2021 the European jurisdictional instruments no longer form part of English law, and the principle of mutual trust and cooperation no longer applies.

As such, the English courts are again able to grant anti-suit injunctions in respect of proceedings in courts of any country in the world.

¹⁶ *Star Reefers v JFC Group* [2012] EWCA Civ 14.

¹⁷ *Vitol Bahrain EC v Nasdec General Trading LLC* [2013] EWHC 3359 (Comm).

At present, the prospects of the United Kingdom re-joining the Lugano Convention as a non-EU SIGNATORY appear to be slim. However, in the event that this were to occur, the same principles as under the Brussels jurisdiction regime would likely re-emerge and prevent the grant of injunctions in respect of conduct before the courts of EEA States.

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. There is no requirement that the applicant seek to challenge the jurisdiction of the foreign court before applying for relief.¹⁸

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.¹⁹

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.

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. This will also include most cases where permission to serve out of the jurisdiction will be necessary.

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 will be

¹⁸ *Essar Shipping v Bank of China Ltd* [2015] EWHC 3266 (Comm).

¹⁹ In certain circumstances, an injunction may be sought pursuant to s.42 of the Arbitration Act 1996 in support of an order made by an arbitral tribunal.

required to identify/ disclose all material factual, legal and procedural aspects of his case which go to the merits of the application. 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 the court which decides whether matters are material.²⁰

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 requirements for an anti-suit injunction, 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.

Form of the Order

The usual form of an anti-suit injunction, whether interim or final, 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.²¹

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

An interim order may be sought by application notice in existing proceedings, but the position will be different in respect of final orders. Where an applicant seeks a final order, this should in most cases be claimed in a claim form and particulars of claim; this can be done at the outset of the claim or by amendment, or may in appropriate circumstances be sought as an independent action.

Resisting an Application

Respondents should consider carefully whether the often stringent requirements for grant of an injunction 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. 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. 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 interim anti-suit injunction has been obtained, with or without notice, the respondent must comply with its terms until it is set aside. As such, once the respondent is aware of an order, it must take no further steps in any foreign proceedings covered by the order.

²⁰ *AIG Europe v John Wood Group* [2021] EWHC 2567 (Comm).

²¹ *VTB v Mejlumyan* [2021] EWHC 3053 (Comm).

In contractual cases, the respondent's evidence should be directed to demonstrating that no relevant agreement exists between the parties (on which the applicant will bear the burden of proof) or to establishing that strong reasons exist not to grant the injunction. 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 non-contractual cases, 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.

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.

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