Anti-suit Injunctions: Expanding Protection for Arbitration under English Law

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Introduction

Where parties have agreed to resolve a particular dispute through arbitration, an attempt to pursue related proceedings that are inconsistent with that agreement may be actionable by an aggrieved party. The basis and scope of the power to protect the efficacy of an arbitration agreement has been the subject of detailed consideration of the English court in a number of recent decisions.

This article considers the availability and use of anti-suit injunctions, being an injunction restraining a person from commencing and/or pursuing legal proceedings, in the context of arbitration. In particular, we focus on the circumstances in which an anti-suit injunction can be obtained against a person who is not party to the arbitration agreement that the injunction seeks to protect.

Background

There are two separate legal foundations for the use of anti-suit injunctions in an arbitration context under English law. The first lies in the court's power to protect the contractual rights and obligations contained in the arbitration agreement itself. In addition, there exists a second, more general power to prevent vexatious and oppressive conduct that, in this context, has the effect of undermining an arbitration agreement.

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The contractual approach

An agreement between parties to resolve disputes through arbitration has both positive and negative aspects. The positive obligation to settle a dispute in a particular forum has its corollary in the related negative obligation not to seek relief in an alternative forum.[1] It follows that there is a cause of action for breach of contract where a party subject to an arbitration agreement commences court proceedings in breach of the agreement to arbitrate.

In practice, the breadth of the jurisdiction to protect an arbitration agreement against such breach of contract depends on the class of persons who are considered subject to the arbitration agreement. It is clear that those who are directly party to an arbitration agreement are bound by the requirement to arbitrate. However, the contractual approach is inevitably limited under English law by the doctrine of privity. It follows that any attempt to restrain a person not party to an arbitration agreement from taking steps which undermine that agreement must look elsewhere for its cause of action.

The non-contractual approach

A number of authorities demonstrate the existence of a cause of action, pursuant to which the court has jurisdiction to issue anti-suit injunctions to restrain vexatious and oppressive proceedings.[2] This right is broader in its scope than the contractual rights which parties to an arbitration agreement may enforce against each other. Blair J has characterised the distinction between the contractual and non-contractual situations as being:

> '… between cases (i) where there is a legal right not to be sued in the foreign court where, for example, the foreign proceedings are a breach of a jurisdiction or arbitration clause, and (ii) where there is no legal right not to be sued in the foreign court, but there is an equitable right because the pursuit of proceedings in the foreign court is vexatious and oppressive…'[3]

The application of this second cause of action in the field of arbitration is still developing and will be considered in greater detail below. For now, it is sufficient to note that, in contrast to the role played by privity in respect of the contractual approach considered above, there is no obvious limit to

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1 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, at 1.

2 *Joint Stock Asset Management Company "Ingosstrakh Investments" v BNP Paribas SA* [2012] EWCA Civ 644; *Kallang Shipping SA v Axa Assurances Senegal* [2007] 1 Lloyd's Rep 160, at [20]; *REC Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2011] 1 Lloyd's Rep 410, at [26]–[27]

3 *Joint Stock Asset Management Company "Ingosstrakh Investments" v BNP Paribas SA* [2011] EWHC Civ 308, at 63.

the class of persons against whom an anti-suit injunction may be issued for vexatious and oppressive conduct.

Territorial scope

Anti-suit injunctions in favour of arbitration will invariably be sought from the English court in restraint of competing foreign court proceedings or arbitration. This is because, pursuant to the Arbitration Act 1996, the English court is independently required to stay proceedings in respect of a matter subject to an arbitration agreement unless it is satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.[4]

The Brussels Regulation on jurisdiction and the recognition and enforcement of judgments[5] (the 'Brussels Regulation') has limited the use of anti-suit injunctions to areas outside of the European Union.[6] The relationship between the Brussels Regulation and anti-suit injunctions in an arbitration context had been subject to significant uncertainty following a series of cases before the English court and the European Court of Justice.[7] However, following the decision of the ECJ in *West Tankers*[8] and its application by the Court of Appeal in *National Navigation Co v Endesa Generacion SA*,[9] it is now settled that the grant of anti-suit injunctions by an English court in respect of proceedings in another Member State is precluded by the Brussels Regulation.

Remedy

Injunctive relief may be the only effective remedy available to protect the efficacy of an arbitration agreement. Even in circumstances where a party brings proceedings in breach of contract, a claim for damages may be of limited utility. It may be difficult to prove substantive damages resulting from breach of an arbitration agreement and, in any event, the requirement to prove such damages requires the parties to litigate in court in further violation of the very purpose of the agreement to arbitrate.

4 Section 9(4), Arbitration Act 1996.

5 Council Regulation (EC) No 44/2001.

6 And any other territories that are signatories to the Lugano Convention on jurisdiction and the enforcement of judgments.

7 See, for example, *Gasser GmbH v MISAT srl*, Case C-116/02; *Turner v Grovit*, Case C-159/02; *Through Transport Mutual Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67. The European Court of Justice is now known as the Court of Justice of the European Union.

8 *Allianz SpA v West Tankers Inc*, Case C-185/07.

9 [2009] EWCA Civ 1397.

Recent case law

(a) The Hydropower Plant case

The Supreme Court recently considered the source of the power to grant an anti-suit injunction in English law in the *Hydropower Plant*[10] case. The dispute arose between the owner (the appellant) and the operator (the respondent) of a hydroelectric power plant in Kazakhstan under a concession agreement which contained an English law arbitration agreement. After the owner brought court proceedings against the operator in Kazakhstan, the operator obtained an anti-suit injunction from the High Court restraining the appellant from continuing with the Kazakh proceedings. The owner's appeal to the Court of Appeal was dismissed.

In its appeal to the Supreme Court, the owner argued that English courts do not have jurisdiction to grant an anti-suit injunction to restrain foreign proceedings in circumstances where no arbitration had commenced (or even been sought). The owner's case was based on the contention that the jurisdiction of the court to issue anti-suit injunctions relating to an arbitration agreement was exclusively governed by the Arbitration Act 1996. The relevant power to grant injunctions under the Act is contained in section 44 and it was common ground that the court had no power under section 44 because it only applied to actual or potential arbitrations (and not in circumstances where there was no arbitration and no possibility of arbitration).[11]

The Supreme Court unanimously dismissed the owner's appeal holding that:

(i) It was well established that the English courts would give effect to an arbitration agreement where necessary by injuncting foreign proceedings brought in breach of the agreement.[12]

(ii) The grant of an anti-suit injunction was part of the court's general power to grant injunctive relief under section 37 of the Senior Courts Act 1981.[13]

(iii) There was nothing in the Arbitration Act 1996 that limited that general power in circumstances where no arbitration was on foot or in prospect.[14]

Though the Supreme Court did not consider anti-suit injunctions granted in restraint of vexatious and oppressive proceedings in the absence of a breach of contract, its reasoning on the power conferred by section 37 of

10 See above, no. 1.

11 Section 44 of the Arbitration Act 1996 grants the English court certain powers exercisable in support of arbitral proceedings. These include the power to grant an interim injunction. If the case is not one of urgency, the court shall only act on the application of a party to the arbitral proceedings made with the permission of the tribunal or the agreement in writing of the other parties. The application must also be made on notice to the other parties and to the Tribunal.

12 *Ibid*, at 23.

13 *Ibid*, at 56.

14 *Ibid*, at 55 – 59.

the Senior Courts Act 1981 is equally applicable to that cause of action. It would follow that the remedial power to grant an anti-suit injunction, whether to effect contractual rights and obligations or to prevent vexatious and oppressive litigation, can be found in section 37 of the Senior Courts Act 1981 and, where arbitration is on foot or in prospect, in section 44 of the Arbitration Act 1996.

(b) Ingosstrakh-Investments v BNP Paribas SA

The scope of the jurisdiction to grant anti-suit injunctions against vexatious and oppressive proceedings was considered by the Court of Appeal in *Ingosstrakh-Investments v BNP Paribas SA*.[15]

The facts

The case concerned an application by a bank, BNP Paribas, to restrain a Russian company, Ingosstrakh-Investments, from pursuing proceedings in Russia concerning the validity of a guarantee entered into by a second Russian company, Russian Machines. Ingosstrakh was the trust manager of a small (0.14 per cent) shareholding in Russian Machines. The guarantee in question had been given by Russian Machines in favour of the bank to secure the liabilities of its subsidiary, Veleron Holding BV, arising under a loan. The guarantee was governed by English law and contained a dispute resolution clause providing for LCIA arbitration in London or, at the bank's option, proceedings before the English court.

In August 2010, the bank commenced an arbitration against Russian Machines to enforce the guarantee. In its defence, the latter disputed the validity of the guarantee on the grounds that there had been no consideration and that it had been entered into without the approval of the company's board. In December 2010, Ingosstrakh commenced the Russian proceedings referred to above. It also argued that the guarantee was invalid, and did so on grounds that overlapped those advanced by Russian Machines in the arbitration. Russian Machines was named as a defendant in the Russian proceedings, where it also maintained that the guarantee was invalid.

In April 2011, the bank did two things. Citing the arbitration, it issued a motion in the Russian court disputing jurisdiction. In the arbitration itself, it sought the tribunal's permission to commence anti-suit proceedings in the English court, in accordance with section 44 of the Arbitration Act 1996. Having obtained the tribunal's consent, the bank duly applied to the English court for an order restraining Ingosstrakh from taking any further part in the Russian proceedings.

15 [2012] EWCA Civ 644.

In November 2011, in addition to dealing with certain jurisdictional and service issues, Blair J granted the bank's application for an anti-suit injunction. Ingosstrakh appealed that decision. The appeal was heard by the Court of Appeal the following April. Stanley Burnton LJ gave the leading judgment, with which Sir Mark Potter and Lloyd LJ agreed.

The issues

Burnton LJ summarised the bank's cause of action as follows:

> '[t]he right to be protected from vexatious foreign proceedings by a party seeking to affect or to deprive the Bank of the benefit of a consensual arbitration agreement providing for the resolution of disputes by arbitration in this country'.[16]

He then went on to acknowledge that, as against a party to an arbitration agreement, there is no doubt that such a cause of action can exist, and that anti-suit relief can be granted.

At first instance, the bank had argued that Ingosstrakh was directly bound by the arbitration agreement by analogy to cases where an insurer that acquires contractual rights by subrogation has been held to be subject to an arbitration agreement that is related to such rights.[17] The bank argued that any substantive right that Ingosstrakh might have in the Russian proceedings would have attached to it the restrictions on disputes in the contract to which such substantive rights related.[18] Although the bank abandoned this line of argument in the Court of Appeal, it is conceivable that similar arguments might successfully be made in the future to expand the contractual ambit of an arbitration agreement to persons not directly party to it.

In addition, though the bank alleged collusion between Ingosstrakh and Russian Machines, it did not argue that Ingosstrakh was the alter ego of Russian Machines.[19] Therefore, the point in issue in the Court of Appeal was

16 At paragraph 46.

17 [2011] EWHC 308, at 67.

18 *Ibid.*

19 Paragraph 51. English law on piercing the corporate veil has benefitted from two important decisions of the Supreme Court since this case was decided. In *VTB Capital Plc v Nutritek International Corp & Ors (Rev 1)* [2013] UKSC 5, paragraphs 118 to 130, Lord Neuberger acknowledged that it was open to debate whether there are any circumstances in which the court might pierce the corporate veil or, put another way, determine that one legal person was the *alter ego* of another. However in the subsequent case of *Prest v Petrodel Resources Ltd & Ors* [2013] UKSC 34, after an extensive survey of the relevant case law, Lord Sumption determined that in certain, very limited, circumstances, English law would indeed allow for the veil to be pierced: 'I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality' (paragraph 25).

whether the same cause of action and injunctive relief could be available in an action against someone not party to the arbitration clause.

As Burnton LJ put it:

> 'What is unusual in this case is that an injunction has been granted not only against a party to the arbitration agreement, but also against a non-party. By definition, a non-party has not agreed to submit his claim to arbitration, and in the absence of a good collateral ground for restraint, an anti-suit injunction should not be granted against it solely on the basis that the issue in the proposed suit is already the subject of arbitration proceedings involving an associated company.'[20]

In addressing that issue, he placed key importance on the allegation of collusion. Provided the bank could demonstrate that the actions of Ingosstrakh (in the Russian proceedings) and Russian Machines (in the arbitration) were in fact co-ordinated decisions made by the same person or persons, Burnton LJ considered that the allegation of collusion would be made out and that it was therefore 'unconscionable' for Ingosstrakh to have disputed the validity of the guarantee in the Russian proceedings in order to obtain a more favourable decision on that issue than might be forthcoming in the arbitration, to which Russian Machines had agreed to submit the same question. He accepted that such behaviour was not only unconscionable but also vexatious, because it forced the bank to choose between the risk of an unfavourable decision in the Russian proceedings, or otherwise engage in the cost and risks attendant on participation in those proceedings, in addition to the arbitration.

What then amounts to collusion? Is it sufficient that the parties in question form part of the same group? As noted above, Burnton LJ determined that it is not enough simply to show that the company which commences the parallel court proceedings is merely 'associated' with the respondent in the arbitration.

This would tend to suggest that it is insufficient only to demonstrate the common control of both parties in the ordinary course of their affairs. Rather, the actions of each party in the arbitration and in the parallel proceedings must be examined in detail. In conducting this exercise, Burnton LJ considered a variety of factors which, in the bank's submission, demonstrated collusion on the part of Ingosstrakh and Russian Machines. He concluded as follows:

> '… the common control of [Russian Machines] and the [Ingosstrakh], the importance of the transactions, the arbitration and the Russian Proceedings, the timing of the [Ingosstrakh's] action in commencing

20 Paragraph 49.

> those proceedings, and the improbability of the [Ingosstrakh] acting alone, are in my judgment sufficient to give rise to a serious issue to be tried as to whether or not the proceedings are collusive, so that in fact the [Ingosstrakh] is the stalking horse for [Russian Machines].'[21]

It follows that common control can be a relevant factor in determining that two parties have acted in collusion, but does not alone provide sufficient basis for such a finding. In this case, as noted above, the court focused on the timing of the parties' actions in each set of proceedings and their apparent motivation. However, and notably, Burnton LJ was not persuaded to place any reliance upon the actions taken by Russian Machines in its capacity as defendant in the Russian proceedings commenced by Ingosstrakh. Russian Machines effectively acquiesced in those proceedings and accepted, as alleged by Ingosstrakh, that the guarantee was invalid. But Burnton LJ considered this to be evidence only of Russian Machines acting in its own interests and not necessarily indicative of collusion.[22] The line between collusive and merely self-interested behaviour may therefore be a narrow one.

In summary, this decision is notable for the manner in which the English court recognised the applicability of a well-established cause of action, the right to protection from vexatious and oppressive proceedings, in support of the arbitral process. In doing so, it has confirmed that the class of persons potentially subject to an anti-suit injunction in support of arbitration extends beyond those who are parties to an arbitration agreement and includes those who, though not a party, pursue vexatious foreign proceedings which undermine an arbitration.

Conclusion

Both of the judgments summarised above evidence the continued development of the English court's jurisdiction to grant anti-suit injunctions in support of arbitration. *Hydropower Plant* establishes that the court's jurisdiction in this regard is not limited to the relevant provisions of the Arbitration Act 1996 but may also be founded on its general power to grant injunctive relief. Although not, perhaps, a controversial decision, it is a welcome acknowledgment that legislation enacted to protect the arbitral process should not be used as a bar to such protection. Furthermore, in *Ingosstrakh-Investments v BNP Paribas SA*, the English court has given support

21 Paragraph 57. In an application for interim injunctive relief, the applicant need only show that its cause of action raises a 'serious issue to be tried'. This is a lower threshold than that applicable at trial, where the applicant must go on to prove its case on a balance of probabilities.

22 *Ibid.*

to parties to arbitration agreements who fall victim to parallel foreign proceedings pursued by a person who, though not themselves party to the clause, act in collusion with another who is so bound for the purposes of undermining the arbitral process. Although the precise parameters of the court's approach in cases of this kind will doubtless be developed further in future decisions, this decision puts down an important marker when it comes to restraining the conduct of third parties designed to derail or render futile the proper conduct of an arbitration.

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