**Anti-suit injunctions**

This element introduces the concept of anti-suit injunctions and outlines circumstances in which such injunctions are likely to be granted or refused.

**Introduction**

Let us suppose a claimant commences proceedings in a foreign court (ie not England and Wales) against a defendant who considers the claim should be brought in the courts of England and Wales. Such a defendant has a range of options open to it:

- Submitting to the foreign court’s jurisdiction and seeing the case through to trial there.

- Submitting to the foreign court’s jurisdiction but contesting any subsequent enforcement of the judgment (a risky proposition given that it might then be too late to raise any substantive issues about jurisdiction).

- Challenging the jurisdiction of the foreign court in which the claimant has commenced proceedings.

- Commencing its own ‘parallel’ proceedings in the courts of England and Wales: for example, for a ‘negative declaration’ (a declaration that the defendant is not liable to the claimant), or if it has its own claim / counterclaim against the claimant.

- Applying for an ‘anti-suit injunction’ – ie an order from the courts of England and Wales preventing a party from commencing or continuing foreign proceedings.

**Questions to consider**

An anti-suit injunction is an order preventing a party from commencing or continuing foreign proceedings.

Read the extracts from *Donohue v Armco Inc and Others* [2001] UKHL 64 (*'Armco*') set out on the following pages, and ask yourself the following questions:

Against whom does the injunction operate – the foreign court, or the claimant?

What needs to be established before an injunction will be granted?

When will a court grant an anti-suit injunction in support of an exclusive jurisdiction clause?

When will a court grant an anti-suit injunction in the absence of an exclusive jurisdiction clause?

Donohue v Armco Inc and Others [2001] UKHL 64

House of Lords

Extracts

LORD BINGHAM OF CORNHILL

[…]

19.. The jurisdiction of the English court to grant injunctions, both generally and in relation to the conduct of foreign proceedings, has been the subject of consideration by the House of Lords and the Privy Council in a series of decisions in recent years which include Siskina (Owners of cargo lately laden on board) and others v Distos Compania Naviera SA [1979] AC 210 ; Castanho v Brown & Root (UK) Ltd [1981] AC 557 ; British Airways Board v Laker Airways Ltd [1985] AC 58 ; South Carolina Insurance Co v Assurantie Maatschappij “De Zeven Provincien” NV [1987] AC 24 ; Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] AC 871 ; and Airbus Industrie GIE v Patel [1999] 1 AC 119 . Those decisions reveal some development of principle and there has in other decisions (for example, Mercedes Benz AG v Leiduck [1996] AC 284 ) been some divergence of opinion. But certain principles governing the grant of an injunction to restrain a party from commencing or pursuing legal proceedings in a foreign jurisdiction, in cases such as the present, as between the Armco companies and these PCCs, are now beyond dispute. They were identified by Lord Goff of Chieveley giving the opinion of the Judicial Committee of the Privy Council in Aérospatiale (at p 892):

(1) The jurisdiction is to be exercised when the ends of justice require it.

(2) Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.

(3) An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy.

(4) Since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution.

In Aérospatiale the issue was whether proceedings in Texas should be restrained in favour of Brunei, and (at p 896) Lord Goff summarised the guiding principles:

“In the opinion of their Lordships, in a case such as the present where a remedy for a particular wrong is available both in the English (or, as here, the Brunei) court and in a foreign court, the English or Brunei court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive. This presupposes that, as a general rule, the English or Brunei court must conclude that it provides the natural forum for the trial of the action; and further, since the court is concerned with the ends of justice, that account must be taken not only of injustice to the defendant if the plaintiff is allowed to pursue the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the court will not grant an injunction if, by doing so, it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. Fortunately, however, as the present case shows, that problem can often be overcome by appropriate undertakings given by the defendant, or by granting an injunction upon appropriate terms; just as, in cases of stay of proceedings, the parallel problem of advantages to the plaintiff in the domestic forum which is, prima facie, inappropriate, can likewise often be solved by granting a stay upon terms.”

[…]

21.. […] In stating the third of his basic principles in Aerospatiale , above, Lord Goff made reference to “a party who is amenable to the jurisdiction of the court”. This echoed the language of Lord Diplock in his important statement of principle in The Siskina , above, at p 256, which has been understood to mean that the court may only grant an injunction where it has personal jurisdiction over the defendant in the sense that he could be served personally or under RSC Order 11 (other than sub-rule (i)): see Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 at 342, per Lord Browne-Wilkinson.

[…]

24.. If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word “ordinarily” to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party’s prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in The Eleftheria [1970] P 94 , 99–100, Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see Aérospatiale at p 896. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case).

25.. Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A’s claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause. That was the result in Mackender v Feldia AG [1967] 2 QB 590 ; Unterweser Reederei GmbH v Zapata Off-Shore Co (The Chaparral) [1968] 2 Lloyd’s Rep 158 ; The Eleftheria [1970] P 94 ; DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar and 13 Other Ships (The Sennar (No 2)) [1985] 1 WLR 490 ; British Aerospace Plc v Dee Howard Co [1993] 1 Lloyd’s Rep 368 ; Continental Bank NA v Aeakos Compania Naviera SA and Others [1994] 1 WLR 588 ; Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd’s Rep 87 ; and Akai Pty Ltd v People’s Insurance Co Ltd [1998] 1 Lloyd’s Rep 90 . A similar approach has been followed by courts in the United States, Canada, Australia and New Zealand: see, for example, M/S Bremen v Zapata Off-Shore Co (1972) 407 US 1 ; Volkswagen Canada Inc v Auto Haus Frohlich Ltd [1986] 1 WWR 380 ; FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association (1997) 41 NSWLR 559 ; and Kidd v van Heeren [1998] 1 NZLR 324 .

[…]

29.. In seeking to apply this body of authority to the present case the first point to be made is that Mr Donohue has as against the first three Armco appellants a strong prima facie right not to be the subject elsewhere than in England of claims by those companies falling within the scope of the clause. Some of the claims made against him by those companies in New York do fall within the clause. This is an important and substantial, and not a formal or technical, right. At an earlier stage of this English litigation Armco sought to impeach the exclusive jurisdiction clauses on the ground that they had been induced by the fraud of the four conspirators. The judge not only rejected the contention that Armco executives had been misled but also found that Armco’s English and US lawyers had known all about the clauses and their consequences and that Armco had had its own good reasons for inserting English law and jurisdiction clauses in the contracts ( [1999] 2 Lloyd’s Rep 649 at pp 657–659, paras 35–40). There was no appeal against these conclusions. Thus Armco, having agreed to these clauses to serve their own ends, are now seeking to be released from their bargain. To permit them to do so exposes Mr Donohue to an obvious risk of injustice. This risk does not derive from the venue alone: Mr Donohue might, as a United Kingdom citizen, prefer to be sued in London rather than New York if he has to be sued anywhere, but to him, as a resident of Singapore, New York is not in itself an obviously more inconvenient forum than London. A more substantial objection may be founded on the perceived procedural disadvantages to him of being sued in New York: as the evidence suggests, the cost would be greater, trial would be by jury and costs would be very largely irrecoverable even if he were to succeed. But there are always points of this kind to be made when comparing one forum with another, and the standing, authority and expertise of the forum in which the New York proceedings are being pursued cannot be questioned. Much more significant, from Mr Donohue’s viewpoint, are the RICO claims made against him. They could not be pursued against him in England. They could, if established in New York, lead to the award of swingeing damages against him. On agreement of the exclusive jurisdiction clause he could reasonably have felt confident that no RICO claim arising out of or in connection with the agreements could be pursued against him and it would represent an obvious injustice if he were now to be exposed to those claims.

30.. There is, as always, another side to the coin. All five Armco appellants have a clear prima facie right to pursue against Messrs Rossi, and Stinson and their respective companies any claim they choose in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. There is, as I have already concluded, no ground upon which this court could properly seek to restrain those proceedings. It would not be appropriate for the English courts to form any judgment, however tentative, on the merits of the Armco companies’ claims, beyond noting that lack of merit was not one of the grounds on which the PCCs invited Judge Schwartz to dismiss the proceedings in New York. It must be assumed that the claims made by the Armco companies against their former employees Messrs Rossi and Stinson, including the RICO claims, are serious and substantial claims. There is nothing whatever to suggest that these claims will not proceed in New York whether or not an injunction is granted to Mr Donohue.

31.. It must further be noted that APL and NNIC have a clear prima facie right to pursue against Mr Donohue, Wingfield and CISHL also any claim they choose in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. I have already recorded that service of the English proceedings on APL and NNIC has been set aside. There is no ground upon which the English court could properly restrain their proceedings in New York. It appears, as Stuart-Smith LJ held ( [2000] 1 Lloyd’s Rep 579 at 593, para 54(3) that the claims of APL and NNIC relate to the collection agreement and the trust fund withdrawals rather than the allegedly fraudulent management buy-out, but these claims also cannot be treated as lacking merit. They are proceeding in New York, and everything suggests that they will continue in New York whether or not the English court grants an injunction to Mr Donohue.

32.. Similarly, the first three Armco appellants have a clear prima facie right to pursue against Mr Donohue, Wingfield and CISHL any claim not covered by the exclusive jurisdiction clauses in any convenient forum where they can found jurisdiction. They have successfully founded jurisdiction in New York. To the extent that the claims of these Armco companies do not arise out of or in connection with the transfer agreements and the sale and purchase agreement, they fall outside the exclusive jurisdiction clauses, and there is no ground upon which the English court could properly restrain these proceedings. Everything suggests that they will continue in New York whether or not the English court grants an injunction to Mr Donohue.

33.. Thus Mr Donohue’s strong prima facie right to be sued here on claims made by the other parties to the exclusive jurisdiction clause so far as the claims made fall within that clause is matched by the clear prima facie right of the Armco companies to pursue in New York the claims mentioned in the last three paragraphs. The crucial question is whether, on the fact of this case, the Armco companies can show strong reasons why the court should displace Mr Donohue’s clear prima facie entitlement. If strong reasons are to be found (and the need for strong reasons is underlined in this case by the potential injustice to Mr Donohue, already noted, if effect is not given to the exclusive jurisdiction clauses) they must lie in the prospect, if an injunction is granted, of litigation between the Armco companies on one side and Mr Donohue and the PCCs on the other continuing partly in England and partly in New York. What weight should be given to that consideration in the circumstances of this case?

34.. I am driven to conclude that great weight should be given to it. The Armco companies contend that they were the victims of a fraudulent conspiracy perpetrated by Messrs Donohue, Atkins, Rossi and Stinson. Determination of the truth or falsity of that allegation lies at the heart of the dispute concerning the transfer agreements and the sale and purchase agreement. It will of course be necessary for any court making that determination to consider any contemporary documentation and any undisputed evidence of what was said, done or known. But also, and crucially, it will be necessary for any such court to form a judgment on the honesty and motives of the four alleged conspirators. It would not seem conceivable, on the Armco case, that some of the four were guilty of the nefarious conduct alleged against them and others not. It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.

[…]

LORD SCOTT OF FOSCOTE

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53.. The principles to be applied in order to decide on the one hand whether an exclusive jurisdiction clause should be enforced by an injunction and on the other hand whether the commencement or continuation of foreign proceedings which are not caught by an exclusive jurisdiction clause should be barred by an injunction seem now well settled and have not been the subject of any real disagreement before your Lordships. It is accepted that a contractual exclusive jurisdiction clause ought to be enforced as between the parties to the contract unless there are strong reasons not to do so. Prima facie parties should be held to their contractual bargain: see The Fehmarn [1958] 1 WLR 159 ; The Chaparral [1968] 2 Lloyd’s Rep 158 ; The El Amria [1981] 2 Lloyd’s Rep 119 ; The Sennar (No 2) [1985] 1 WLR 490 ; The Angelic Grace [1995] 1 Lloyd’s Rep 87 . If, on the other hand, there is no contractual bargain standing in the way of the foreign proceedings, “the … court will, generally speaking, only restrain the plaintiff from pursuing proceedings in the foreign court if such pursuit would be vexatious or oppressive”: per Lord Goff of Chieveley in Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987] AC 871 , 896.

54.. There has been some debate before your Lordships as to the order in which the two issues referred to above should be considered but it seems to me convenient to start with the exclusive jurisdiction clauses and to try and decide what part, if any, of the New York proceedings the clauses cover, who is and who is not entitled to their benefit and who is and who is not bound by them.

[…]

**Power of the court to grant an anti-suit injunction**

The power of the courts of England and Wales to grant injunctions (including anti-suit injunctions) comes from s37(1) Senior Courts Act 1981. Injunctions are an equitable remedy and therefore are awarded at the discretion of the court.

**Against whom does the injunction operate – the foreign court, or the claimant?**

The injunction operates against the claimant, not the foreign court.

The injunction is not determining whether or not the foreign court has jurisdiction. It is, effectively, a determination as to whether it is right for the claimant to make use of whatever jurisdiction a foreign court might have.

See paragraph 19 of *Armco*:

*Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.*

However, the court will exercise its power to grant an anti-suit injunction with caution because it indirectly interferes with the process of a foreign court.

**What needs to be established before an injunction will be granted?**

The applicant for the injunction needs to establish that the courts of England and Wales have jurisdiction over the respondent. The court has jurisdiction if a respondent can be served with proceedings. If the respondent is out of the jurisdiction, as is likely if an anti-suit injunction is being considered, then the applicant will need to either:

serve the application for an injunction out of the jurisdiction without the court's permission, if there is a provision on which the applicant can rely which permits this. In this regard, note CPR 6.33(2B) which permits this where the contract contains a jurisdiction clause in favour of the courts of England and Wales;

Apply for permission to serve the proceedings out of the jurisdiction pursuant to CPR 6.36 and CPR 6.37. Relevant jurisdictional gateways under 6B PD 3.1 could include that the contract was governed by English law, or a claim is made in respect of a contract which was made within the jurisdiction.

See paragraph 21 of *Armco*:

*…the court may only grant an injunction where it has personal jurisdiction over the defendant in the sense that he could be served personally or under RSC Order 11* [RSC Order 11 is a predecessor of the current rules permitting service out of the jurisdiction]

**When will a court grant an anti-suit injunction in support of an exclusive jurisdiction clause?**

If the parties have agreed that the courts of England and Wales shall have exclusive jurisdiction to determine a dispute and, contrary to that agreement, a party seeks to pursue a claim in a foreign jurisdiction, the court will ordinarily grant an anti-suit jurisdiction to prevent this.

See para 24 of *Armco*:

*If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion […]to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum*

However, even in these circumstances the court might not grant an anti-suit injunction, for example, if the applicant does not seek the injunction sufficiently promptly, is guilty of unconscionable conduct, or there are inevitably going to be proceedings in the foreign jurisdiction anyway in relation to closely connected matters involving the applicant which do not fall within the exclusive jurisdiction clause.

**When will a court grant an anti-suit injunction in the absence of an exclusive jurisdiction clause?**

In the absence of an exclusive jurisdiction clause (and putting aside agreements to arbitrate, addressed later in this element), it will generally be much harder to obtain an anti-suit injunction. An anti-suit injunction is only likely to be granted if:

a. Pursuing the claim in the foreign court would be vexatious or oppressive;

b. The courts of England and Wales are the natural forum for the trial; and

c. Granting an injunction will not deprive the claimant of advantages in the foreign forum of which it would be unfair to deprive him.

Proceedings in a foreign court might be vexatious or oppressive if, for example, the claimant has commenced proceedings without basis in a foreign jurisdiction as well as commencing proceedings in England and Wales. Proceedings in the foreign court will not be vexatious or oppressive simply because it would be more convenient for them to be pursued in England and Wales.

See para 19 of *Armco* and in particular the passage from *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871 set out there.

**The timing of an application**

In *The Angelic Grace* [1995] 1 Lloyd’s Rep 87, the court stated that there is no general requirement that the applicant must apply to the foreign court for a stay of the proceedings before it applies for an English anti-suit injunction. If such an application for a stay has been made and rejected by the foreign court, this could, however, impact upon the English court’s discretion; the English court might refuse to grant the injunction in such circumstances since it would be more likely to be encroaching upon the foreign court’s jurisdiction.

Given the above, an applicant should consider applying for the injunction as soon as possible. It should certainly be applied for before the foreign proceedings are too far advanced.

**Pre-Brexit position: non-application in Brussels Regulation cases**

The EU rules on jurisdiction and recognition and enforcement of judgments in civil and commercial matters are contained in the ‘Brussels Regulation’ - Regulation 1215/2012.

Within EU member states, the ECJ has determined that it would be contrary to the Brussels Convention, now superseded by the Brussels Regulation (to which the same reasoning and approach would apply) to grant an anti-suit injunction restraining a respondent from bringing proceedings in a civil or commercial matter falling within the scope of the Brussels Regulation before the courts of another Regulation member state. The logic of this is that, under the terms of the Brussels Regulation, a foreign court will decline jurisdiction if it should not have jurisdiction, so there is no need for anti-suit injunction in such cases.

As the UK is no longer in the EU, the ECJ's decision on this point is no longer applicable to the courts of England and Wales and anti-suit injunctions can now be awarded in relation to cases in EU member states. However, should the UK enter a new reciprocal jurisdiction arrangement with member states, such as via admission to the Lugano Convention, it may be that a similar position is again reached. It is also arguable that a similar approach could be taken by a court faced with an application for an anti-suit injunction in support of an exclusive jurisdiction clause falling within the Hague Convention 2005.

**Arbitration agreements**

The principles set out above relate to an applicant objecting to proceedings in a foreign jurisdiction because the applicant considers that the dispute should be determined in the courts of England and Wales.

An anti-suit injunction is also the mechanism used to prevent a party pursuing proceedings in the courts of a foreign jurisdiction where there is a binding agreement to submit a particular claim to English-seated arbitration instead. Broadly speaking, the principles governing such an application are the same as those set out above in relation to seeking an anti-suit injunction in support of an exclusive jurisdiction clause. In particular, once it is established that the pursuit of proceedings in a foreign jurisdiction would amount to a breach of an arbitration agreement, an injunction will ordinarily be granted.

In terms of establishing that the court has personal jurisdiction over the respondent when an injunction is sought in this situation, note that an application for an anti-suit injunction in these circumstances may be served out of the jurisdiction without permission if (i) the seat of arbitration is or will be England and Wales and (ii) the respondent is party to the arbitration agreement in question (CPR 62.5(2A)).

**Summary**

- An anti-suit injunction is an order preventing a party from commencing or continuing foreign proceedings.

- Key principles are summarised in the case of *Donohue v Armco Inc and Others* [2001] UKHL 64.

- In order to obtain an anti-suit injunction from the courts of England and Wales, it is necessary to be able to serve proceedings on the respondent in or out of the jurisdiction in accordance with the court and common law rules.

- The court can grant an anti-suit injunction in support of an exclusive jurisdiction clause or an arbitration agreement. The court has a discretion whether or not to do so, but will ordinarily do so.

- More broadly, the court can grant an anti-suit injunction to restrain the pursuit of proceedings in a foreign jurisdiction which would be vexatious or oppressive.

- An applicant should consider applying for the injunction as soon as possible and before the foreign proceedings are too far advanced.