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Anti-Suit Injunctions from the English Courts

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There can be significant tactical advantages in ensuring that cross-border litigation takes place in the country of your choice. Many litigants feel that they can obtain an advantage (be it legal, linguistic or even political) by bringing proceedings in their home country.

Anti-suit injunctions restrain a person or company from starting or pursuing proceedings outside of England[1] . The injunction is directed against the person or company (rather than the foreign court) and a breach of an anti-suit injunction amounts to a contempt of court and could lead to a fine or even the arrest of an individual. The English courts can also refuse to recognise or enforce a judgment obtained in breach of an injunction on public policy grounds. Injunctions can be granted on either an interlocutory or final basis.

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Legal 500, 2009

This is a discretionary remedy (which is exercised with great caution by the English courts, for reasons of international comity) and will only be granted if the English court already has personal jurisdiction over the respondent. The remedy is not available where the dispute concerns which of two foreign courts should hear the case (even if one of the parties is in England).

Position under Common Law

An anti-suit injunction will only be granted if it can be shown that the ends of justice require it. This will usually occur where:

- the foreign proceedings are **vexatious or oppressive** and England is the natural forum. In assessing whether the foreign proceedings are vexatious or oppressive, the court will weigh up all the circumstances, including the potential injustice to each party, bad faith in the institution of proceedings and whether the foreign proceedings interfere with the due process of the court – for example, they are intended to procure an advantage over other claimants in an English arbitration or winding up. When deciding whether England is the natural forum, the court will again weigh up various factors, including the location of witnesses, applicable law, language, place of relevant events and so on; or

- the commencement of foreign proceedings would **breach a binding contract** between the parties. A valid exclusive jurisdiction clause or arbitration clause will normally be enforced by the English courts unless there is a strong reason not to do so, for example if there is a risk of parallel proceedings taking place anyway. However, where the jurisdiction clause is non-exclusive, there is no presumption that the foreign proceedings are vexatious or oppressive.

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[1] All references here to England should be read as referring to both England and Wales

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European Position

If the respondent wishes to bring a claim in a European Union member state, or Iceland, Norway or Switzerland (or has already done so), the position is governed by Council Regulation (EC) 44/2001 or the (new or old) Lugano Conventions. These, broadly, provide that a defendant should be sued in the country where he is domiciled. However, where proceedings between the same parties in respect of the same cause or matter are commenced in two EU/EFTA countries, the court "first seised" shall determine if it has jurisdiction and any proceedings commenced later in time must be stayed until the first seised court has made that decision. Similar provisions apply where there are "related" proceedings.

Following the ECJ decisions in *Erich Gasser GmbH v Misat Srl* and *Turner v Grovit*, English courts are precluded from granting anti-suit injunctions where the court of a contracting state is first seised (even in breach of an exclusive jurisdiction clause) and the English proceedings must be stayed. This is the case even if the foreign proceedings have been commenced in bad faith and with the sole purpose of preventing "legitimate" proceedings being brought pursuant to the jurisdiction clause.

Neither the Regulation nor the Convention(s) apply to "arbitration". Up until recently, the English courts still granted injunctions in support of an arbitration agreement. However the ECJ recently ruled in the case of *Allianz SpA v West Tankers Inc* that this is not permissible. Accordingly, it is for the court first seised in breach of an arbitration agreement to determine whether it has jurisdiction.

Since it cannot be assumed that a foreign court will always uphold an arbitration agreement, in a European context, the focus of the English courts turned to whether they should refuse to enforce a judgment obtained in breach of an arbitration agreement. In *DHL GBS v Fallimanto Finmatica* it was doubted whether an English court could refuse to recognise the judgment. At first instance in *National Navigation Co v Endesa Generacion SA*, a different High Court judge concluded, with some hesitation, that recognition of a judgment obtained in breach or an arbitration agreement governed by English law would be contrary to public policy. However, an appeal from that decision was allowed. The Court of Appeal has now held that the English court was bound to recognise the decision of another European court and there was no room for public policy arguments, unless the foreign judgment could be show to be inconsistent with a "fundamental principle of the legal order" of England. That will obviously be a very high threshold to surmount.

Some Practical Tips

An application for an anti-suit injunction must be made promptly. Any delay in bringing an application reduces the prospects of obtaining an anti-suit injunction.

If proceedings have already commenced in another jurisdiction, take care not to submit to the jurisdiction of the foreign court (there is no need to ask the foreign court not to exercise its jurisdiction before applying for an anti-suit injunction in England).

Care should be taken when drafting the terms of the injunction which you are seeking. The wider the relief that is being sought, the more difficult it is to get the court to grant it.

Further information

If you would like further information on any issue raised in this update please contact:

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