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English Anti-Suit Injunctions in Support of Arbitration

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> 'Where parties agree to arbitrate, it is the policy of the law that they should be held to their bargain.' (Males J in *Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp*1 ('*Nori*')

Introduction

This article considers the approach adopted by English courts in restraining legal proceedings brought in breach of valid arbitration agreements, focusing in particular on instances where proceedings are issued in foreign jurisdictions.

Where domestic legal proceedings are brought, the matter is relatively simple. Under section 9(1) of the Arbitration Act 1996, a party to an arbitration agreement against whom legal proceedings are brought may to apply to the court to stay proceedings, insofar as they concern matters which, under the agreement, should have been referred to arbitration. Under section 9(4), the court may not refuse such an application, unless it is satisfied that the arbitration agreement is void, inoperative, or incapable of being performed.

Where, however, proceedings are initiated in foreign courts, the cross-border nature of the facts raises complex questions of jurisdiction and international law. The nature of the restraint by an English court is a substantive, as opposed to procedural, remedy. Although such a remedy restrains the foreign proceedings to a similar effect as a procedural stay, the principles applicable to the grant of a so-called 'anti-suit injunction'

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1 [2018] EWHC 1343 (Comm), [66].

differ significantly from the simple statutory scheme which applies to domestic proceedings. Further considerations arise, depending on whether the foreign proceedings were initiated in a European Union Member State or in a non-EU jurisdiction.

Part 2 of this article, therefore, examines the nature of English anti-suit injunctions, both generally and in the context of arbitration agreements. Part 3 then comprises three recent cases studies to explore some of the related contemporary legal issues in arbitration, commercial, and international law. Part 4 offers some concluding thoughts.

Anti-suit injunctions and how to obtain one before the English courts

The nature of an anti-suit injunction

As noted in the introduction, the power of the English courts to injunct foreign proceedings operates as a substantive remedy, not a procedural stay. The conceptual basis of this power was outlined by Lord Goff in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak*[2] ('*Société Nationale*') who clarified that anti-suit injunctions are not directed against the foreign court itself, but against the parties proceeding or threatening to proceed in that forum. It followed, therefore, that anti-suit injunctions can only be issued against persons amenable to the jurisdiction of the English courts and, therefore, against whom an English injunction would be an effective remedy.[3] Notwithstanding this clear statement of jurisdiction and principle, Lord Goff also recognised that such injunctions may have 'indirect effects' on foreign courts and, therefore, that a cautious approach was required.

There has been a departure in more recent times from this attitude of caution. In *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*[4] (*AES*), the Supreme Court approved the statement of the lower courts that 'the time had come […] to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution,' and that anti-suit injunctions should be granted on the 'simple and clear ground that the defendant has promised not to bring them.'[5] This approach emphasises the contractual nature of the arbitration agreements and characterises the anti-suit injunction as a remedy for a breach of contract for which damages would 'manifestly' be

2 [1987] AC 871 (PC).

3 *Ibid*, 892 (Lord Goff).

4 [2013] UKSC 35; [2013] 1 WLR 1889.

5 *AES*, [25] (Lord Mance, citing and approving Millett LJ in *Aggeliki Charis Cia Maritime SA v Pagnan SpA (The 'Angelic Grace')* [1995] 1 Lloyd's Rep 87).

inadequate.[6] The courts, however, require a high degree of probability that there is an arbitration agreement which governs the dispute in question[7] to which the defendant is party.[8]

As a remedy developed by the ancient courts of equity, injunctions in general remain subject to the court's discretion and are unavailable 'as of right'. In contemporary practice, the equitable jurisdiction and discretionary nature of the remedy is placed on a statutory footing by section 37(1) of the Senior Courts Act 1981, which confers a discretion on court to grant injunctions 'in all cases in which it appears to the court to be just and convenient to do so'. The power is a general one and so, as with most other specific types of injunctions, anti-suit injunctions have developed an additional body of specifically applicable legal principles.

The 'strong reasons' test

In *Donohue v Armco Inc*[9] ('*Donohue*'), a case which concerned an exclusive jurisdiction clause, Lord Bingham approved *Société Nationale* and further developed the principles therein stated to formulate what is now known as the 'strong reasons' test for the grant of an anti-suit injunction:

> '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 […]. 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.'[10]

Practical points to note include that: (1) it is for the party suing in the other forum to show that there are strong reasons for doing so; and (2) what constitutes 'strong reasons' will depend on all the facts and circumstances of the case.

Lord Bingham's speech was approved by the Supreme Court in the *AES* case, which confirmed that the 'strong reasons' test is equally applicable

6 *Ibid.*

7 *Ecobank Transational Inc v Tanoh* [2015] EWCA Civ 1309, [89].

8 For recent applications of this principle, see *Michael Wilson & Partners Ltd v Emmott* [2018] EWCA Civ 51 and, in the context of an anti-arbitration injunction, *Sabbagh v Khoury* [2018] EWHC 1330 (Comm).

9 [2001] UKHL 64.

10 *Donohue*, [24] (Lord Bingham).

to applications for anti-suit injunctions made to enforce an arbitration agreement. In this context, recent cases confirm that the English courts are generally slow to refuse the grant of an anti-suit injunction where there is a valid arbitration agreement; injunctions were granted, at least in part, in all applications made within the past eighteen months. However, the cases also give some indication of what the courts may consider a 'strong reason' for refusal:

(i) In *Donohue* itself, the application was refused on the grounds that 'the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured'. The authorities showed that the English court may well decline to grant an injunction or a stay where there is a risk of parallel proceedings and inconsistent decisions.[11]

(ii) In the same case, the court also noted that the interests of parties other than the parties bound by the exclusive jurisdiction clause are involved are often a relevant factor.[12]

(iii) More recently, *The Sam Purpose*[13] continues a line of authority[14] which holds that English courts will not injunct foreign legal proceedings brought in breach of an arbitration agreement where the purpose of those proceedings is arrest of a vessel as security for the arbitration claim. In *The Sam Purpose*, thus, an injunction was granted in part to secure such an arrest.

(iv) Although injunctions were granted in *Dana Gas PJSC v Dana Gas Sukuk Ltd*[15] and '*The Jaf Laadki*',[16] both cases suggest that material differences in law or public policy between England and Wales, and the foreign jurisdiction in which proceedings were initiated, may, in some circumstances, constitute a strong reason to allow proceedings to continue in the foreign jurisdiction. In *Dana Gas*, the court recognised that 'all things being equal' it was 'usually preferable' for national courts to determine questions concerning law of their country.[17]

Finally, it is worth noting that equitable principles continue to govern the modern exercise of discretion under the statutory jurisdiction to grant an anti-suit injunction. In *Donohue,* Lord Bingham qualified the authoritative

11 *Donohue*, [27] *et seq.*

12 *Ibid.*

13 *Sam Purpose AS v Transnav Purpose Navigation Ltd* (*The Sam Purpose)* [2017] EWHC 719 (Comm).

14 *The Sam Purpose*, [24].

15 [2018] EWHC 277 (Comm).

16 [2018] EWHC 389 (Admlty).

17 *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2018] EWHC 277 (Comm), [18].

principles stated therein with the caveat 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'.[18]

Dilatoriness tends to be the most commonly raised objection in practice, with a clear line of authority which holds that delay may be fatal to an application for an anti-suit injunction.[19] As cautioned by Lord Bingham, the discretionary nature of the remedy renders it unwise, if not impossible, to extrapolate a general rule from the decided cases. However, it is worth noting that applications made roughly within five months of the applicant becoming aware of the foreign proceedings have recently been successful before the English courts.[20] Other factors which have been held relevant to the exercise of the discretion in recent cases include the extents to which: (1) the relevant parties participated in the foreign proceedings and the application for the English stay;[21] (2) the applicant acted promptly to initiate arbitration proceedings;[22] and (3) the defendant may suffer irreversible prejudice.[23]

Summary

Drawing these principles together, an application checklist for an anti-suit injunction should consider at least the following questions:

1. Do the foreign legal proceedings fall within the scope of a valid arbitration agreement which is not void, inoperative, or incapable of being performed?
2. Is the respondent (i) party to the arbitration agreement; and (ii) amenable to the jurisdiction of the English court?
3. Is the court's discretion under section 37 of the Senior Courts Act 1981 to grant an injunction where it is 'just and convenient' to do so engaged?

18 *Donohue*, [24].

19 See *Aggeliki Charis Cia Maritime SA v Pagnan SpA (The 'Angelic Grace')* [1995] 1 Lloyd's Rep 87; *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309; *Donohue v Armco Inc* [2001] UKHL 64.

20 See *Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm) and *Mobile Telecommunications Co Ltd v Al Saud (t/a Saudi Plastic Factory)* [2018] EWHC 1469 (Comm).

21 *Dana Gas PJSC v Dana Gas Sukuk Ltd* [2018] EWHC 277 (Comm), [25]; [30].

22 *Mobile Telecommunications Co Ltd v Al Saud (t/a Saudi Plastic Factory)* [2018] EWHC 1469 (Comm), [14].

23 *Amelie Navigation Corp v Ugo Hannah Energy Ltd* Queen's Bench Division (QBD) (Commercial Court) unreported, 1 December 2017.

4. Is it likely that the respondent will be able discharge the burden of proving 'strong reasons' for pursuing foreign proceedings within the meaning of *Donohue* and associated case law?
5. Has the applicant lost the claim to equitable relief through delay or other unconscionable conduct?
6. Are there any other facts particular to the case which should be taken into account?

Anti-suit injunctions in action: three recent case studies

In practice, applications for anti-suit injunctions in support of arbitration are made in a wide variety of contexts. For this reason, cases involving anti-suit injunctions also shed light on a vast range of contemporary legal issues, ranging from arbitration, injunctions, supranational and EU law, and commercial disputes in general. Part 3, therefore, will examine three recent cases to explore the nuanced approach English courts take when the jurisdiction to grant anti-suit injunctions under the Senior Courts Act 1981 intersects with: (1) the supervisory jurisdiction over arbitration conducted within the UK conferred by the Arbitration Act 1996; and (2) EU law.

Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp[24]

The claimants were Cypriot companies who had entered into a short-term secured loan agreement with the defendant Russian bank. Pursuant to this agreement, shares in the claimant companies were pledged as the security for the loan under a separate pledge agreement. Subsequently, and during the term of the loan, the parties agreed to terminate both original agreements and entered, instead, into a long-term unsecured loan agreement. Both the original pledge and termination agreements were governed by Cypriot law, and both included the same arbitration clause nominating a London seat and the London Court of International Arbitration (LCIA) Rules.

With their shares thus unencumbered by security, the claimant companies then pledged their shares to another bank in a separate transaction. However, when the defendant bank entered into temporary Russian administration proceedings, the bank initiated proceedings in Russia seeking to recover security over the shares, claiming that the termination agreement was invalid under Russian insolvency law owing to the presence of fraud. Proceedings were also brought in Cyprus to invalidate the termination agreement and recover security over the shares.

24 [2018] EWHC 1343 (Comm); [2018] 2 All ER (Comm) 1009.

The claimant companies denied fraud and alleged that the renegotiation had occurred at arms' length at the request of the defendant bank for restructuring and liquidity purposes. The companies therefore initiated: (1) arbitration in London under the arbitration clause, seeking a declaration that the termination agreement was valid; (2) legal proceedings in Cyprus, seeking to restrain the bank from taking any steps in Cyprus to register security over the shares; and (3) an application to the English High Court for anti-suit injunctions restraining the defendant bank from continuing its Russian and Cypriot claims, in recognition and enforcement of the agreement to arbitration in London.

The English High Court's decision to grant an injunction in respect of the Russian proceedings, but to refuse in respect to those in Cyprus, is particularly noteworthy for two main reasons.

With respect to the Russian proceedings, the grant of an anti-suit injunction demonstrates the wide concept of arbitrability that the English courts adopt when construing arbitration clauses. The defendant bank had made submissions, among others, that because the relevant Russian insolvency provisions were designed to confer benefits on the creditors, the dispute was either beyond the scope of the arbitration agreement and/or not arbitrable at all.[25] This was rejected by the English High Court, which construed the arbitration clause in accordance with its wide and general terms, which covered 'any dispute or disagreement arising under, or in connection with [the pledge and termination] agreements'. Given the absence of any express exclusions for particular kinds of dispute, the High Court saw no reason to exclude the Russian proceedings from the scope of the clause.[26]

Drawing upon *Fulham Football Club (1987) Ltd v Richards*,[27] the court reasoned that, although there may be cases where an arbitral tribunal has no power to order the statutory remedy sought – such as the winding up of a company following the finding of unfair prejudice under the Companies Acts – what mattered for the concept of arbitrability was the substance, not form, of the dispute. The instant case was a straightforward factual dispute as to whether the renegotiation of the loan constituted a fraud, which the arbitral tribunal could determine for itself. If it made a finding of fraud, the Russian Arbitrazh Court could proceed to avoid the transactions and require the claimant companies to reinstate the pledge agreement. In this case, the case for finding the dispute arbitrable was even stronger, because

25 *Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm), [45]–[46].

26 *Ibid*, [60].

27 [2011] EWHC Civ 855.

the ultimate remedy sought by the bank, that is, reinstating its security over the shares, was something the arbitral tribunal itself had the power to order the claimant companies to do.[28] Hence, the injunction was granted.

The contrary decision with respect to the Cypriot proceedings, on the other hand, is noteworthy as the most recent English judicial statement on the long-standing controversy which surrounds the EU case of *Allianz SpA v West Tankers Inc*[29] ('*West Tankers*'). Given the ground-breaking ruling of the Court of Justice of the EU (CJEU) that anti-suit injunctions are contrary to EU law, it is worth revisiting the case.

As recounted in *Nori*, the CJEU in *West Tankers* gave three reasons for the ruling:

The first, at [29], was that an anti-suit injunction was contrary to 'the general principle which emerges from the case law of the Court of Justice on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it'. Second, at [30], 'an anti-suit injunction also runs counter to the trust which the member states accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based'. Third, at [31], an anti-suit injunction would deprive the party enjoined of its right of access to a court having jurisdiction under the Regulation in order to argue that the arbitration agreement was void, inoperative or incapable of being performed, which was a matter for that court to determine in accordance with the New York Convention.[30]

West Tankers was met with considerable controversy, leading to proposals to redefine or clarify the 'arbitration exception' which has excluded arbitration from the scope of all iterations of the Brussels regime for judicial cooperation with respect to jurisdiction and judgments within the EU.[31] The subsequent inclusion of Recital 12 in the latest iteration, the recast Brussels Regulation (No 1215/2012),[32] had given rise to uncertainty as to whether – and certainly some hope that – *West Tankers* had effectively been reversed. Support for this proposition was given in the reasoning of AG Wathelet in *Proceedings concerning Gazprom OAO*[33] ('Gazprom').

In *Nori,* the claimant companies relied on AG Wathelet's reasoning in *Gazprom* as to the effect of Recital 12 of Brussels Recast in their submission

28 *Ibid*, [63]–[64].

29 (Case C-185/07).

30 *Ibid*, [75].

31 Art 1(2)(d) of the Brussels Regulation 2001, the Lugano Convention 2007 and the recast Brussels Regulation.

32 Regulation of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

33 (Case C-536/13), [2015] 1 WLR 4937.

that *West Tankers* was no longer good law and, therefore, that an injunction should be granted with respect to the proceedings in Cyprus. This was rejected on the grounds that AG Wathelet's reasoning was fundamentally flawed and that *West Tankers* remained good law. It was also held significant that AG Wathelet's Opinion was not adopted by the CJEU itself in its determination of the *Gazprom* case.

The *Nori* decision highlights the inherent potential for conceptual tension where arbitration agreements, anti-suit injunctions and international law intersect. It was noted in the introduction to this article above that anti-suit injunctions, under English law, are directed at the party in breach of the arbitration agreement, not the foreign court itself. Although there had historically been a 'cautious' approach to such injunctions owing to the 'indirect effects' on foreign courts, the English courts have more recently shed this approach; emphasising the contractual nature of an arbitration agreement by characterising anti-suit injunctions as an equitable remedy for breach of contract.[34] The EU position, however, continues to emphasise the 'indirect effects' aspect; holding that such injunctions 'prevent' the courts of other Member States from exercising jurisdiction under the Brussels regime. Hence, a tension exists between the fundamental conceptual positions adopted between the common law and EU regimes.

On a theoretical level, the EU position may be the less convincing. Vis-à-vis the foreign member state court where proceedings are effectively restrained, thereby 'preventing' it from exercising its jurisdiction under the Brussels regime, it is not accurate to state that the restraint occurs at the instigation of the court granting the anti-suit injunction. Rather, the party bringing proceedings in the foreign Member State court simply discontinues its claim in that forum, albeit, by order of an anti-suit injunction. The distinction is a fine one. However, it may be made clearer by considering the case where the foreign Member State court is not yet seised and an injunction is granted against a defendant who has not yet begun proceedings in that court. In such a case, the foreign Member State court could not reasonably be said to have been 'prevented' from exercising jurisdiction, unless the jurisdiction were applicable to any and all *potential* claims in addition to those currently pending before the court. If, nevertheless, the grant of an injunction in such a case were also considered contrary to the Brussels regime, in many ways, it would seem absurd that (1) a party, having initiated legal proceedings, should not be free to discontinue his claim; and (2) a national court's right to exercise jurisdiction should take precedence over a

34 *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35), [25] (Lord Mance, citing and approving Millett LJ in *Aggeliki Charis Cia Maritime SA v Pagnan SpA (The 'Angelic Grace')* [1995] 1 Lloyd's Rep 87).

claimant's decision whether or not to bring a claim at all. The propositions are at stark contrast with the principles enunciated by the English civil rules of procedure that a claimant has, broadly speaking, a right to discontinue a claim at any time[35] and that a reluctant party to litigation when entitled to pursue a claim cannot be compelled to do so as a claimant.[36]

By contrast, following the reasoning of the CJEU in *West Tankers,* it appears that, under EU law, the fact that the defendant has not yet begun foreign legal proceedings is irrelevant to the broader proposition that anti-suit injunctions are contrary to EU law. As noted above, one of the three reasons given for the ruling was that anti-suit injunctions 'deprive the party [the defendant] enjoined of its right of access to a court having jurisdiction under the Regulation for the determination of the question as to whether the arbitration agreement was void, inoperative or incapable of being performed.'[37] It would seem, therefore, that the defendant's right to access the courts is a further factor, alongside the rights of EU Member State courts to determine jurisdiction under the Brussels regime, which are to be balanced against the claimant's contractual entitlement to arbitration.

This reference to the defendant's rights, however, misses the point that these form a key part of the English test for restraining legal proceedings in support of arbitration. As noted in the introduction above, a procedural stay under the Arbitration Act 1996 must be granted, unless the English court is satisfied that the arbitration agreement is void, inoperative, or incapable of being performed. Although not expressly part of the 'strong reasons test' for the 'complementary' power under the Senior Courts Act 1981 to grant an anti-suit injunction with respect to foreign proceedings, it was noted in the introduction above that the case law establishes that, as a very minimum, there must be a strong probability that a valid arbitration agreement exists to which the defendant is a party. Further, given that the power to grant a stay under the Arbitration Act 1996 and the power to grant an anti-suit injunction under the Senior Courts Act 1981 have been recognised as 'opposite and complementary sides of a coin',[38] it is highly unlikely that a void or inoperative arbitration clause, or one incapable of being performed, would not constitute a 'strong reason' to refuse an anti-suit injunction.

It is, therefore, not accurate to say that a defendant allegedly in breach of an arbitration agreement would not 'have access to a court with

35 CPR r 38.2.

36 Albeit that, where a claimant claims a remedy to which the reluctant party is jointly entitled, the reluctant party must be joined as a defendant, unless the court orders otherwise: CPR r 19.3(2).

37 *Allianz SpA v West Tankers Inc* (Case C-185/07), [31].

38 *AES*, [60] (Lord Mance).

jurisdiction under the Regulation for the determination of the question as to whether the arbitration agreement was void, inoperative, or incapable of being performed.' It could be further argued that a refusal to allow the issue to be determined in the context of an application for an anti-suit injunction in one Member State undermines the trust between the EU Member State courts upon which the Brussels regime is based just as much as it does when, according to *West Tankers*, anti-suit injunctions are granted.

Finally, the issue of access to the courts highlights a further difference in the conceptual understanding of arbitration adopted by the two legal systems. In *Nori* itself, the court clearly opined that views of arbitration as depriving parties of their 'inalienable' rights of access to the courts is 'outmoded'. It then stated the modern view in English law, as espoused in the Arbitration Act 1996 as being that:

> '…commercial parties who agree to arbitrate do not deprive themselves of fundamental rights. They merely choose an alternative method of resolving disputes between them. The law does not regard arbitration as intrinsically better or worse than litigation. It is just different, having both advantages and disadvantages. Where parties agree to arbitrate, it is the policy of the law that they should be held to their bargain.'[39]

At time of writing, there is, of course, considerable uncertainty created by the UK's pending withdrawal from the EU. But in the present context, withdrawal from the jurisdiction of the CJEU may mean the English courts no longer feel constrained to adopt the approach in *West Tankers* in respect of applications for anti-suit injunctions enjoining parties from commencing or continuing proceedings in EU jurisdictions. Indeed, given the longstanding policy in favour of giving effect to parties' arbitration agreements – and promoting London as a hub for international arbitration – this approach may well be the most likely scenario, absent any contrary agreement. Brexit, therefore, is unlikely to have a negative impact on parties' ability to obtain anti-suit injunctions in England and Wales, and this jurisdiction remains highly attractive for parties who wish to ensure that their disputes are settled by means of arbitration.

Atlas Power Ltd v National Transmission and Despatch Co Ltd[40] *('Atlas Power')*

The claimants were Pakistani power producing companies supplying power to the defendant Pakistani national grid company pursuant to

39 *Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm), [66].

40 [2018] EWHC 1052 (Comm); [2019] 1 All ER (Comm) 931.

a power purchasing agreement governed by Pakistani law. The dispute resolution clause contained therein was in the following terms:

> 'Any Dispute arising out of or in connection with this Agreement that has not been resolved [by mutual discussion or expert determination] shall be settled by arbitration in accordance with the London Court of International Arbitration […].
>
> […] The arbitration shall be conducted in Lahore, Pakistan; provided, however, that if [the dispute is of a certain nature] […] then either Party may, unless otherwise agreed by the Parties, require that the arbitration be conducted in London, in which case the arbitration shall be conducted in London.'[41]

Following a dispute, the claimants filed a request for arbitration with the LCIA, proceedings to be suspended pending an attempt to resolve the dispute by way of expert determination, in accordance with the dispute resolution clause. In its response, the defendant disputed the claimants' entitlement to select a London seat, on the ground that the dispute resolution clause referred only to the venue of the arbitration. According to the defendant, the juridical seat of the arbitration, whether conducted physically in Lahore or London, was Lahore.[42] The defendant further initiated proceedings in Pakistan to restrain the claimants from taking any step to enforce the outcomes of the expert determination and from taking any further steps in the arbitration.

In the claimants' application to the English courts for an anti-suit injunction with respect to these proceedings, the main issue was whether the Pakistani courts had supervisory jurisdiction over the arbitration. The claimants contended that, even if there were some doubt as to the seat in the dispute resolution clause, the LCIA had validly chosen London as the seat in accordance with its rules in the absence of a clear choice by the parties.[43] Hence, London was the arbitral seat and, therefore, the courts of England and Wales had exclusive supervisory jurisdiction.

Before the English court, the defendants conceded that London was the seat of the arbitration, but contended that the choice gave rise only to the presumption that the parties intended any challenges on the award to be permitted solely by English law. Under Pakistani law, which the parties had expressly chosen as governing law of the agreement and its arbitration clause, the parties could not exclude the supervisory jurisdiction of the Pakistani courts.[44] Hence, the defendant submitted

41 *Atlas Power Ltd v National Transmission and Despatch Co Ltd* [2018] EWHC 1052 (Comm), [5].
42 *Ibid*, [12].
43 *Ibid*, [13]; [32(i)].
44 *Ibid*, [13]; [32(iii)].

that Pakistani courts had at least concurrent supervisory jurisdiction over the arbitration. In the alternative, the defendant submitted that if a London seat cannot give rise to concurrent supervisory jurisdictions, then the choice was invalid as contrary to public policy of Pakistani law.[45] The seat, therefore, must be Lahore.

The court rejected the defendant's submissions on the ground that, as a matter of English law, a choice of seat *necessarily* gave rise to an exclusive supervisory jurisdiction, not mere presumptions as to one.[46] The court further drew attention to the 'numerous' authorities[47] which establish that the English courts regard the choice of the seat of an arbitration (whether in England and Wales or elsewhere) as akin to an exclusive jurisdiction clause. An anti-suit injunction was, therefore, granted.

The approach of the English courts in firmly, perhaps even jealously, guarding their position as the sole authorities entitled to supervise arbitrations seated in the jurisdiction gives parties the benefit of legal certainty. Having chosen the seat of an arbitration to be England and Wales, a party can be certain that any challenges to an award made by the tribunal can be only those permitted by the Arbitration Act 1996 and that the English courts will act so as to prevent another party from seeking to usurp this jurisdiction by commencing proceedings in a different forum.

Perkins Engines Co Ltd v Ghaddar[48] *('Perkins Engines')*

The claimant was a UK company which had entered into a distribution agreement with the defendant Lebanese company. The distribution agreement was governed by English law with a dispute resolution clause in the following terms:

> 'To the extent there is no reciprocal enforcement procedures between the United Kingdom and the country in which the Distributor Agreement is located, the Parties agree to submit any dispute arising between them that cannot amicably be settled to arbitration. The arbitration shall be held in London, England […].'[49]

A dispute subsequently arose between the parties which, according to the claimant, constituted a repudiatory breach entitling them to terminate the agreement. The defendant, having denied that the termination was lawful, sought damages before the Lebanese courts pursuant to a mandatory

45 *Ibid*, [33].
46 *Ibid*, [38].
47 *Ibid*, [37].
48 [2018] EWHC 1500 (Comm); [2019] 1 All ER (Comm) 371.
49 *Perkins Engines*, [16].

provision of Lebanese law containing mandatory rules of Lebanese public policy, which was in force at the time when the agreement was concluded.

In the claimant's application for an anti-suit injunction before the English courts, the main legal question was the meaning of 'reciprocal enforcement procedures' for the purpose of determining whether the arbitration provision had been engaged. The claimant contended that 'reciprocal enforcement procedures' could only mean a binding bilateral or multilateral treaty between Lebanon and the UK providing for the rules or procedures according to which judgments of one state will be enforced in the other.[50] The defendant argued for a less formalistic definition based simply on 'substantial reciprocity' between Lebanon and UK in terms of substantially or functionally equivalent domestic laws.[51]

The issue was, therefore, ultimately a case of contractual construction. Having considered the authoritative summaries of the Supreme Court in *Arnold v Britton*[52] and *Wood v Capita Insurance Services Ltd*,[53] the court proceeded on the basis that the arbitration clause should be construed in accordance with the principles identified by Lord Hoffmann in *Fiona Trust & Holding Corp v Privalov*[54] in the context of dispute resolution clauses in commercial contracts. This ultimately seeks the 'fair construction' of the contract to give effect to commercial purpose by ascertaining the 'rational commercial purpose' or 'reasonable commercial expectations' of 'rational businessmen', with awareness that the commercial purpose of the wording may be affected by the 'commercial background'. Further, following *Wood v Capita,* where there are rival meanings, the court should prefer the construction which is more consistent with business common sense.

In this case, the fair construction of the arbitration clause clearly favoured the claimant and an injunction was granted.

Bryan J held that the claimant's interpretation was the 'ordinary and natural meaning of the words used' and gave meaning and effect to each of the words used.[55] Further, the claimant's construction was the only one that was 'consistent with business common-sense and reasonableness'.[56] This was the case as the claimant's interpretation produced a scheme whereby, if there was no specific treaty between Lebanon and the UK regarding enforcement of judgments, the parties were bound to arbitrate in London, which would result in an 'award which can then be enforced

50 *Ibid*, [18].
51 *Ibid*, [20].
52 [2015] UKSC 36; [2015] AC 1619.
53 [2017] UKSC 24; [2017] AC 1173.
54 [2007] UKHL 40; [2007] 4 All ER 951.
55 *Perkins Engines*, [87]ff.
56 *Ibid*, [100].

in many jurisdictions of the world'.[57] The judge also emphasised the need for 'certainty, speed and simplicity', especially in cases where 'urgent interim relief is needed or a limitation period is soon to expire'[58] and held that the claimant's interpretation provided such certainty, while the defendant's did not.

The decision is an excellent illustration of the manner in which the English courts' pragmatic and commercially sensible approach applies to matters of jurisdiction in international arbitration. Defendants to an application for an anti-suit injunction are unlikely to find sympathy by contending for a commercially unreasonable interpretation of the arbitration agreement.

Conclusions

The anti-suit injunction is a vital tool for a party facing a recalcitrant defendant who might seek to derail an arbitration and/or apply commercial pressure by launching proceedings in other jurisdictions in breach of the parties' agreement to arbitrate. As noted in the introduction to this artice above, while this remedy is not available as of right, in recent times, underpinned by a coherent conceptual basis, the English courts have become increasingly willing to grant anti-suit injunctions in appropriate cases. The Supreme Court confirmed in *AES* that, provided there is a valid arbitration agreement, the party suing in another's jurisdiction must show strong reasons to successfully resist the application.

Parties may, quite understandably, have some hesitance to choose England and Wales as a jurisdiction for dispute resolution before the outcome of the UK's withdrawal from the EU is fully known. However, as shown in the introduction to this article above, if anything, Brexit is likely to increase the availability of anti-suit injunctions in England and Wales, as the courts may well hold that such injunctions are now available against parties commencing litigation in EU Member States. Further, the English courts' commercial mindedness and adherence to a strongly pro-arbitration policy mean that parties can continue to have legal certainty over the binding nature of arbitration agreements that provide for English seated arbitrations.

57 *Ibid*, [101].
58 *Ibid*, [106].