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Insights

Litigation & Arbitration Group

Arbitration Update: Anti-suit Injunctions and the Relationship with the Seat of Arbitration

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Contact

Tom Canning, Partner
+44 20.7615.3047
tcanning@milbank.com

Peter Edworthy, Senior Associate
+44 20.7615.3070
pedworthy@milbank.com

Vasiliki Katsarou, Associate
+44 20.7615.3282
vkatsarou@milbank.com

In a judgment issued last week in the anonymised case of SQD v QYP [2023] EWHC 2145, the Commercial Court provided some helpful guidance on the relevant considerations under English law for seeking an anti-suit injunction to restrain proceedings that are commenced in breach of an arbitration agreement. The judgment highlighted in particular the important relationship between the seat of arbitration and the national courts' ability to grant anti-suit injunctions and emphasises a major difference between the respective French and English law approaches that may have a material impact on the decision for parties as to the most appropriate seat to include in their arbitration agreements.

Facts

SQD and QYP were parties to an arbitration agreement contained in an English-law project agreement which provided for arbitration seated in Paris pursuant to the ICC Rules. Work on the project had ceased and QYP sought payments from SQD, which SQD claimed it was unable to pay due to certain sanctions that were in place. QYP therefore commenced proceedings in its own national courts but did not deny the existence of the arbitration agreement – instead, QYP argued in those court proceedings that the arbitration agreement was unenforceable because, amongst other things, it would not be able to participate in a Paris seated arbitration due to difficulties with appearing and/or being legally represented. SQD sought an anti-suit injunction from the English Commercial Court to restrain QYP from continuing the court proceedings.

The English courts' ability to grant anti-suit injunctions

Anti-suit injunctions are regarded in the arbitration community as an important tool to protect and enforce the agreement between parties to refer their disputes to arbitration rather than the national courts. In that regard, the judge in SQD v QYP acknowledged that English courts have historically been robust in restraining breaches of arbitration agreements by granting anti-suit injunctions – "*an anti-suit injunction will readily be granted if: (a) the claimant can demonstrate with a high degree of probability the existence of an arbitration clause to which the defendant is a party and which covers the dispute; and (b) there are no exceptional circumstances which militate against the grant of relief*".[1]

However, the judge recognised that there had been some uncertainty as to the source of the English courts' power to grant anti-suit injunctions: s.44 of the Arbitration Act 1996 provides the English courts with the same power to grant interim injunctions "*for the purposes of and in relation to arbitral proceedings*" as it has in relation to court proceedings; whilst s. 37(1) of the Senior Courts Act 1981 provides that the court may

[1] See paragraph 32 in SQD v QYP, where the judge noted that the English law position is fairly summarised by Professor Merkin in 'Arbitration Law' at paragraph 8.94 from which the quote above was extracted.

"*by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so*". Whilst a number of previous authorities appeared to consider that the power arose from both provisions (and so any limitations that attached to the exercise of the power under either provision would be relevant), the judge in SQD v QYP confirmed that the power **only** arises under s.37(1) of the Senior Courts Act 1981.[2]

Consequently, the relevant criteria for the English courts to consider are whether it would be "*just and convenient*" to grant the proposed anti-suit injunction, and (as noted above), whether there is a high probability that an arbitration agreement exists and there are no "*exceptional circumstances*" that mean that the anti-suit injunction should not be granted.[3]

In SQD v QYP, there was no dispute that an arbitration agreement existed and that it was governed by English law (as the governing law of the underlying project contract was English law and, following the decision in Enka v Chubb,[4] this meant that English law also applied to the arbitration agreement). Therefore, the focus of the application was on whether any "*exceptional circumstances*" existed such that the court should refuse to grant the anti-suit injunction.

Anti-suit injunctions in aid of foreign-seated arbitrations

An unusual feature of SQD v QYP was that the claimant sought an anti-suit injunction from the English courts in support of an arbitration seated in Paris rather than in England & Wales.[5] This was significant: the fact that the seat of arbitration was outside of the jurisdiction was, in the judge's view, not an absolute bar to granting an anti-suit injunction,[6] but was nevertheless capable of giving rise to an "*exceptional circumstance*" that militates against granting one.[7]

In particular, the judge referred to the warnings set out in earlier authorities to the effect that the court's discretion to grant anti-suit injunctions in aid of foreign arbitrations should be exercised "*with the utmost caution*" and "*only when the balance of advantage plainly favours the grant of relief*".[8] He also relied on guidance published in the Departmental Advisory Report (and Supplemental Departmental Advisory Report), which concerned the draft bill from which the Arbitration Act 1996 emerged, as that report advised that it would **not** be appropriate for the English courts to grant relief in aid of foreign arbitrations if to do so might give rise to a conflict or a clash.[9]

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[2] See paragraph 34 in SQD v QYP, relying on the Supreme Court's decision in Ust-Kamenogorsk Hydropower Plant JSC v. AES Ust-Kamenogorsk Hydropower Plant LLP [2013] UKSC 35.

[3] Following the comments of Millett LJ in Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep. 87), as noted by the judge in SQD v QYP at paragraph 31, it is also relevant to consider whether the application for the anti-suit injunction has been made "*promptly and before the foreign proceedings are too far advanced*".

[4] Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb [2020] UKSC 38. See our earlier briefing on this decision here.

[5] In fact, the judge in SQD v QYP noted that, in his (and counsel for the claimant's) experience, anti-suit injunctions had only ever been granted by the English courts in the context of arbitration where the seat was or would be in England & Wales (see paragraphs 35 and 46).

[6] The judge acknowledged that previous case law, and various advisory reports relating to the development of the Arbitration Act, have all noted that the courts are, in principle, entitled to grant interim relief in support of foreign arbitrations.

[7] Paragraph 36 in SQD v QYP.

[8] Paragraph 40 in SQD v QYP, quoting from Lord Mustill in Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334.

[9] Paragraph 45 in SQD v QYP. Whilst the report concerned the exercise of powers under the Arbitration Act 1996, rather than s.37(1) of the Senior Courts Act 1981, the judge in SQD v QYP nevertheless considered it to be relevant background.

Accordingly, the judge considered that, whilst it was open to him in principle to grant an anti-suit injunction in support of the Paris-seated arbitration, he should not do so if it would give rise to a conflict or clash with the French courts.

Decision

The judge held, having considered the claimant's evidence on French law, that there was a fundamentally different approach taken by the French and English courts to anti-suit injunctions, and that this meant that he should not grant an anti-suit injunction in this case.

Importantly (and which will likely be relevant to any party considering whether to designate Paris as the seat of arbitration), the evidence before the judge indicated that it was impossible to obtain an anti-suit injunction in France because "*French law has a philosophical objection*" to that form of relief and because anti-suit injunctions "*contradict the fundamental principle of freedom of legal action*".[10] Instead, the French courts have been willing to grant 'anti-anti-suit injunctions' in order to restrain parties from trying to obtain anti-suit injunctions (albeit the French courts may recognise an anti-suit injunction properly granted by a foreign court in accordance with that foreign court's procedural laws).[11] Accordingly, the judge considered that it would be inappropriate for the English courts to grant relief that would directly contradict the approach taken by the courts in the seat of the arbitration.

The judge noted that the parties had made the deliberate choice to designate Paris as the seat of arbitration, and they must therefore be taken to have done so knowing that the French courts would not grant anti-suit injunctions. He therefore considered it appropriate to give effect to the parties' objective intention in that anti-suit injunctions would not be available to them.

Comments

This case is a warning to parties negotiating arbitration agreements to ensure that they are aware of the full implications of their choice of seat. In the context of anti-suit injunctions in support of arbitration, it is clear that the English courts will take into account the law of the seat which may, where the seat of arbitration is outside of England & Wales (as in this case), result in a party being unable to restrain proceedings that are commenced by the other party in breach of the arbitration agreement. In contrast, where the seat is England & Wales, the English courts are likely to more readily grant anti-suit injunctions (using their powers under s.37(1) of the Senior Courts Act) in order to protect and enforce agreements to arbitrate.

It is also worth noting, for completeness, that EU Member States are not permitted under the Recast Brussels Regulation to issue anti-suit injunctions to restrain proceedings in another Member State's courts if those courts were first seised of the dispute (see our earlier briefing here). However, since the UK left the EU at the end of 2020, the English courts should no longer be restricted by EU law from granting anti-suit injunctions restraining proceedings in EU Member States that are commenced in breach of an arbitration agreement.[12] This may be a further consideration for parties when choosing their seat of arbitration.

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10 Paragraphs 82-83 of SQD v QYP.

11 Paragraph 85 of SQD v QYP.

12 See, for example, the Commercial Court's order for an anti-suit injunction restraining proceedings in the Spanish courts in breach of an arbitration agreement (QBE Europe SA/NV v Generali España de Seguros Y Reaseguros [2022] EWHC 2062 (Comm)). That decision was subsequently relied upon in Ebury Partners Belgium SA/NV v Technical Touch BV & Anor [2022] EWHC 2927 (Comm), albeit in support of an exclusive jurisdiction clause.

Litigation & Arbitration Contacts

London	100 Liverpool Street, London EC2M 2AT	
Tom Canning	tcanning@milbank.com	+44 20.7615.3047
Peter Edworthy	pedworthy@milbank.com	+44 20.7615.3070
Vasiliki Katsarou	vkatsarou@milbank.com	+44 20.7615.3282

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