Anti-Suit Injunctions and Insurance Coverage

By Peter A. Halprin

I. Introduction

Anti-suit injunctions play an important, and perhaps increasing, role in determining the forum for dispute resolution in cases involving international parties. Such injunctive relief is prevalent in insurance coverage litigation as insurance companies, often based in the United Kingdom, insure corporations and risks throughout the globe. This article examines the interplay between anti-suit injunctions and insurance coverage with a focus on the decision in *Sul America Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.* ("*Enesa*"), a recent ruling on this issue by the Court of Appeal in England.

II. Anti-Suit Injunctions

A. What Is an Anti-Suit Injunction?

Anti-suit injunctions are a device issued by courts to protect jurisdiction by ordering a party to refrain from bringing a claim before the courts of another State or before an arbitral tribunal or, if the party has already brought such a claim, ordering that party to withdraw from or suspend the proceeding.[1] Thus, they are issued where concurrent jurisdiction exists and one or both courts decide to assert jurisdiction instead of allowing the parallel litigation to proceed.[2]

"[P]olicyholders facing arbitration clauses providing for London arbitration could be exposed to litigation in the United Kingdom to enjoin coverage litigation in a policyholder's home country or the country where the risk is located. In addition, questions as to the validity of an arbitration clause, or the enforceability of an award, will be decided under English law."

B. History and Origins

Anti-suit injunctions have their roots in English law and are traceable to 15th Century England.[3] Common law courts originally used anti-suit injunctions as a writ of prohibition against the assertion of jurisdiction by ecclesiastical courts.[4] Later, the Court of Chancery, a court of general equity jurisdiction, used such injunctions to prevent parties from bringing suits in common law courts.[5] Over time, this evolved into the present practice whereby anti-suit injunctions were eventually extended to foreign or international proceedings.[6] In the United States, it was not until fairly recently that the power to issue such orders was used to restrain proceedings in foreign courts.[7]

III. Anti-Suit Injunctions in Practice

A. Anti-Suit Injunctions in The United Kingdom

In the United Kingdom, there is a statutory basis for anti-suit injunctions. Indeed, the Supreme Court Act of 1981, § 37(1) provides that, "The High Court may by order 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." Further, the Arbitration Act of 1996[8] § 44 confirms the judicial power to grant an interim injunction in connection with arbitration proceedings. In a 2008 decision, the High Court examined the interplay between two provisions and held that although the power under the Arbitration Act is more limited than that in the Supreme Court Act, the High Court retains the right to issue an injunction against foreign litigation in order to preserve the contractual property right to submit a dispute to arbitration.[9] Given this statutory basis, it is no surprise that English courts are perceived as favorable to anti-suit injunctions.[10]

English courts will generally grant an anti-suit injunction if two requirements are satisfied: (1) the court must be in a position to assert jurisdiction over the claimant to the foreign litigation proceeding, and (2) the court must be persuaded that it should grant such a remedy.[11]

The first requirement, jurisdiction, will be satisfied if the defendant has a physical presence in England or has submitted to the jurisdiction of the English courts by its actions.[12] The second requirement can be met by the existence of an agreement to arbitrate in England.[13]

Assuming that jurisdiction is found, however, this second requirement of the anti-suit injunction test can be more difficult for a claimant to satisfy. Indeed, there is no bright line rule for determining whether the court will deem an anti-suit injunction to be the appropriate remedy in a given case. The inquiry is, in fact, very fact specific and includes a number of factors including: whether the cases involve the same or similar issues, the existence of an arbitration clause, whether exceptional circumstances exist which militate against granting relief, and the stage reached by the foreign proceeding. The inconvenience of a foreign proceeding, however, is unlikely to result in the issuance of an anti-suit injunction.

IV. Insurance Coverage Jurisprudence Involving Anti-Suits in the United Kingdom

In recent years, a line of cases has developed in English jurisprudence which would suggest that policyholders facing arbitration clauses providing for London arbitration could be exposed to litigation in the United Kingdom to enjoin coverage litigation in a policyholder's home country or the country where the risk is located. In addition, questions as to the validity of an arbitration

clause, or the enforceability of an award, will be decided under English law.

A. Owens Corning

In *XL Insurance Ltd. v. Owens Corning*,[14] the insurance policy at issue, as is common in many London–arbitration clauses,[15] identified New York state law as the law governing the substantive contract and incorporated the Federal Arbitration Act by reference, but provided for London arbitration under the provisions of the Arbitration Act. The policyholder sought a declaratory judgment in Delaware that, under the insurance it purchased, the policyholder was entitled to indemnification for certain Y2K costs. The insurance company sought an anti-suit injunction in London to enjoin the policyholder from pursuing the Delaware action. The policyholder, in turn, opposed the injunction on the grounds that the arbitration agreement was invalid under New York law. The Queen's Bench granted the injunction and held that by selecting London as the seat of arbitration, and in referencing the Arbitration Act, the parties had chosen English law to govern matters failing within the scope of the Act, including the validity of the arbitration agreement.

Owens Corning is notable for a number of reasons. First, the Queen's Bench rejected Owens Corning's assertion that it was inconvenienced by not being able to sue all of its insurance companies in one jurisdiction, holding that this was not an adequate reason to deprive XL of its contractual rights under the arbitration clause. Second, the court considered the policyholder's argument that a Delaware Court would be forced under the Federal Arbitration Act to apply New York law and thus subject XL to jurisdiction. Rejecting this argument, the court opined that, "The grant of an anti-suit injunction involves by definition a degree of interference with foreign court procedures, because that is its object. But if the English court is satisfied that litigation in another country would be a breach of contract to arbitrate the dispute in London, the grant of an injunction involves no disrespect or unfriendliness towards the foreign court, but merely an insistence on parties respecting their own contractual obligations."

B. *C&D*

In *C v. D*,[16] the policy at issue was governed by New York law but contained an arbitration provision that provided for London arbitration "under the provisions of the Arbitration Act of 1950 as amended." The policyholder initiated arbitration in London and prevailed in arbitration. The insurance company then asked the tribunal to re-consider the award on the grounds that the rationale supporting the award constituted a manifest disregard of New York law. The insurance company also indicated that it would seek to vacate the award on the grounds of manifest disregard of the law in the United States. The policyholder then sought to enjoin the insurance company from initiating a challenge to the award in New York or otherwise relying on New York law to oppose enforcement of the award. The court granted the injunction and held that the choice of London as the seat of arbitration "necessarily imports that... challenges to any award are governed by the relevant sections of the [Arbitration Act]" and thus the only permissible challenges are those provided for by the Arbitration Act.[17] On appeal, the Court of Appeal affirmed the decision of the trial court and held that "the choice of the seat of arbitration was also a choice of forum for remedies to challenge any award."[18]

C v. D is notable for at least two additional reasons. First, *C v. D* seems to be one of those rare situations in which a policyholder prevailed in London arbitration, and benefited from an anti-suit injunction in favor of London arbitration—a reminder that anti-suit injunctions are a double-edged sword. Second, the anti-suit injunction was sought after an award was issued by the tribunal. Generally, such injunctive relief is sought prior to the initiation of proceedings, or directly after proceedings are brought, in favor of some other forum or dispute resolution mechanism. Indeed, "Time and again the English courts have granted an injunction to restrain a clear breach of an exclusive jurisdiction agreement or a breach of an arbitration agreement where the rights of the parties are clear. [In the court's judgment] the position is even stronger where an award *has already been* issued and the breach of the agreement to London arbitration consists of an unlawful attempt to *invalidate* the award."[19]

C. *Sul America Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.*

The latest chapter in the intersection between insurance coverage litigation and anti-suit injunctions is the *Enesa* case,[20] decided in June in the England and Wales High Court, Commercial Court.

The policyholders, a group of affiliated Brazilian companies, sought to pursue an action against the insurance companies in Brazil in connection with a claim related to the construction of a hydroelectric plant in Brazil. The policy at issue contained a London arbitration clause and an express choice of Brazilian law as the law governing the contract and an exclusive jurisdiction clause in favor of Brazilian courts. While the Brazilian coverage action was pending, the insurance companies sought an anti-suit injunction in London enjoining the policyholders from pursuing the coverage action against the insurance companies in Brazil. The trial court granted the injunction and the policyholders appealed.

On appeal, the Court of Appeal Civil Division affirmed the injunction and held that while Brazilian law applied to certain parts of the insurance policy (including a mediation clause), the choice of London as the seat of arbitration meant that the parties accepted that English law would apply to the proceedings.[21] The decision of the

Court of Appeal was premised upon a determination of what system of law (Brazilian or English) has the closest and most real connection to the agreement. To that end, the court held that "an agreement to resolve disputes by arbitration in London, and therefore in accordance with English arbitral law, does not have a close juridical connection with the system of law governing the policy of insurance, whose purpose is unrelated to that of dispute resolution; rather, it has its closest and most real connection with the law of the place where the arbitration is to be held and which will exercise the supporting and supervisory jurisdiction necessary to ensure that the procedure is effective."[22]

V. Conclusion

Litigators, arbitration practitioners, and coverage counsel need to pay particular attention to arbitration clauses, and should consider the potential for an anti-suit injunction when seeking relief outside of an arbitration or dispute resolution clause in a policy. Where a clause makes reference to English law, in particular, parties should expect that English courts, more likely than not, will enforce London-arbitration clauses and will look to English law when deciding the validity of an arbitration clause or enforceability of an award.

Endnotes

1. IAI Series on International Arbitration No. 2, Anti-Suit Injunctions in International Arbitration 1 (E. Gaillard ed., 2005).
2. Michael David Schimek, *Anti-Suit and Anti-Anti-Suit Injunctions: A Proposed Texas Approach*, 45 Baylor L. Rev. 499, 499-500 (1993).
3. George Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 Colum. J. Transnat'l L. 589, 593 (1990).
4. *Id.*
5. *Id.* at 593-94.
6. *Id.* at 594; Arif Ali, Katherine Nesbitt and Jane Wessel, *Anti-Suit Injunctions in Support of International Arbitration in the United States and the United Kingdom*, Int. A.L.R. 2008, 11(1), 12, 16. The authority for anti-suit injunctions in the United States comes from 28 U.S.C § 2283 (2000) which provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C § 2283.
7. Bermann, *supra* note 3.
8. Referred to herein as the "Arbitration Act."
9. *See Starlight Shipping Co. v. Tai Ping Ins. Co. Ltd. (Hubei Branch)*, [2007] EWHC 1893 (QBD Comm.).
10. This is the cause of much tension between the European Union and England. *See* Martin Illmer and Ingrid Naumann, *Yet Another Blow: Anti-Suit Injunctions in Support of Arbitration Agreements within the European Union*, Int. A.L.R. 2007, 10(5), 147,158-9; *see Turner v. Grovit* , C-159/02 [2004] E.C.R. I-3565.
11. *See Navigation Maritime Bulgare v. Rustal Trading Ltd.* [2002] Lloyd's Rep. 106.
12. Ali, *supra* note 6, at 17.
13. *Id.* This contractual obligation alone frequently provides the basis for jurisdiction.
14. *XL Ins. Ltd. V. Owens Corning* (*XL*) [2000] 2 Lloyd's Rep. 500 (QBD (Comm.)).
15. *See* Richard Jacobs et al., Liability Insurance in International Arbitration: The Bermuda Form 1.25-1.26 (Hart Publishing 2004).
16. *C v. D*, [2007] 2 Lloyd's Rep. 367 (QBD (Comm.)) .
17. *Id.* at para. 27.
18. *C v. D*, [2008] 1 Lloyd's Rep. 239 (Ct. App. Civil Div.).
19. *C v. D*, [2007] 2 Lloyd's Rep. 367 (para. 55) (emphasis added).
20. *Sul America Cia Nacional de Seguros S.A. v. Enesa Engenharia S.A.*, [2012] EWCA Civ 638 (C.A. C.D.).
21. *Id.* at para. 29.
22. *Id.* at 32.

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