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An English/Bermuda Law Guide to Anti-Suit Injunctions

Insurers and reinsurers take great care in selecting the forum for the resolution of disputes with their (re)insureds. The Bermuda Policy Form is a classic example of this, requiring disputes to be arbitrated in either London or Bermuda.

An anti-suit injunction is an order restraining a litigant from commencing or pursuing proceedings in another forum. As such, anti-suit injunctions are a key part of an insurer's armoury to protect and enforce contractual agreements to arbitrate. They also operate in relation to agreements as to jurisdiction.

This summary provides an overview of the English and Bermuda courts' approach to anti-suit injunctions.

Exclusive Jurisdiction Clauses

Where there is an exclusive jurisdiction agreement in favour of England or Bermuda, the respective courts will generally grant an anti-suit injunction. An exclusive jurisdiction agreement is "*near-conclusive*" evidence upon which to grant an injunction[1] and the court will "*ordinarily*" exercise its discretion to do so.[2]

There is, however, still an element of discretion.[3] Also, an injunction is an equitable remedy, the right to which might be lost, for example, by delay.

The courts may also grant an anti-suit injunction in the case of a non-exclusive jurisdiction clause, but only if the foreign proceedings would be vexatious or oppressive for reasons independent of the jurisdiction clause.[4]

Arbitration Clauses

The principles applicable to exclusive jurisdiction clauses are equally applicable where there is an agreement to arbitrate.[5] In the case of an English or Bermuda arbitration, the relevant local court will be willing to grant an anti-suit injunction, rather than require that party to apply for a stay in the foreign court as required by the New York Convention.[6] The Bermuda court has, in particular, indicated that: "*When it comes to enforcing an arbitration clause by anti-suit injunction the courts will act robustly*" and that there are "*strong policy reasons for ensuring that Bermuda arbitration clauses are respected*".[7]

Where the parties are both from member states of the European Union, however, the English courts will not grant an anti-suit injunction, for reasons of comity under European law.[8]

Vexatious or Oppressive Foreign Proceedings

- Generally, there is no right to be sued in a particular forum. However, such a right can be demonstrated by reference to clearly unconscionable conduct[9] (or by a contractual provision, as above).
- The foreign proceedings will be viewed as unconscionable where they are vexatious or oppressive or interfere with the due process of the English/Bermuda court.
- Concurrent proceedings do not of themselves amount to unconscionable conduct.
- Unconscionable conduct may be found where England or Bermuda is the natural forum and there is no advantage to the party seeking to run the dispute in some foreign forum.
- By way of example, issuing proceedings in a foreign forum with the intention of persuading that foreign court to reach a different conclusion from that already reached by the English court in relation to an agreement governed by English law would be viewed as vexatious.[10]
- The English and Bermuda courts must have regard to comity; anti-suit injunctions involve a jurisdiction that must be exercised "*with caution*".[11]
- In the interests of comity, injunctions must be necessary to protect the applicant's legitimate interest in English/Bermuda proceedings. The applicant must be a party to litigation in England or Bermuda to which the unconscionable conduct of the party to be restrained is directed. This requirement is satisfied by proceedings to enforce the jurisdiction provision in the contract; alternatively, proceedings in relation to the substantive claim.

Specific Examples

- A US insurer brought proceedings in a US federal court against its insured seeking declaratory judgment on its policy. With a view to binding them, the US insurer also joined all its co-insurers, including a Bermuda insurer, to those US proceedings. This potentially circumvented the Bermuda arbitration clause in the Bermuda insurer's policy. On an ex-parte basis, the Bermuda court granted an anti-suit injunction to restrain the US insurer from pursuing its US proceedings against the Bermuda carrier. The Bermuda court was satisfied that it would be unconscionable for the Bermuda insurer to be brought into the US action, so the US insurer was not permitted to interfere with the Bermuda insurer's contractual relations with its insured in this manner.[12]

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An English/Bermuda Law Guide continued

- A non-party to a policy brought an action against the insurer under a local law that permitted a direct cause of action against that insurer. As there was no contractual agreement as between those parties, although the policy contained an arbitration clause, the court looked at the matter in terms of unconscionable conduct. The court took into account the delay on the part of the insurer seeking the injunction and found no evidence of unconscionable behaviour. An anti-suit injunction was refused. But the court indicated it could grant the insurer an alternative remedy: a declaration that, while not in breach of the arbitration clause, the "non-party" was nevertheless bound by the arbitration clause. The effect of such a ruling being that the non-party, while entitled to continue its action in the foreign forum, would not be able to enforce any judgment that it might obtain in England or Bermuda.[13]

- Injunctions have also been obtained to restrain proceedings to challenge an arbitration award. If there is an agreement to arbitrate with London or Bermuda as the seat of that arbitration and so subject to the supervisory jurisdiction of the English or Bermuda court, an injunction will be granted even if both parties are US corporations. The court will not permit a party to challenge an award made in such an arbitration in a foreign forum.[14] Foreign proceedings would negate the whole framework in which the arbitration took place. This would be vexatious and oppressive conduct, amounting to a direct attack on the award and accordingly unconscionable.

- There have been several rulings directly on the Bermuda Policy Form. The English court has ruled that, by stipulating for arbitration in London under the provisions of the Arbitration Act 1996, the parties chose English law to govern the matters that fell within those provisions, including the validity of the arbitration clause and the jurisdiction of the arbitral tribunal. Also, by implication, the parties chose English law as the proper law of the arbitration clause. Prosecuting litigation against an insurer in the face of a Bermuda Form arbitration clause is a clear breach of agreement and an anti-suit injunction will be granted.[15] The Bermuda court adopts the same approach. An agreement to arbitrate a dispute in Bermuda implies agreement to Bermuda procedural law applying to the arbitration. Where one is dealing with a Bermuda arbitration, the procedural law of which is Bermudian and hence, in relation to which the parties have submitted themselves to the supervisory jurisdiction of the Bermuda court, then it is: "*clearly unconscionable for a defendant to take proceedings in a foreign court which are in breach of the arbitration clause*".[16]

(Endnotes)

[1] *Bouygues v Caspian* [1998] 2 Lloyd's Rep. 461

[2] *Donohue v Armco Inc. and Others* [2002] 1 All ER 749

[3] *Donohue* is an example of the English court refusing to grant an anti-suit injunction. The court concluded that the claims in the non-contractual forum (New York), which involved other defendants not bound by the arbitration clause, would continue. On the facts, there was overwhelming sense in all these claims, which were related, being decided by one court in one forum.

[4] See e.g. *Highland Crusader v Deutsche Bank*, [2009] 2 Lloyd's Rep 617 (CA).

[5] *Aggeliki Charis, Compania Maritima SA v. Pagnan SpA.* "*The Angelic Grace*" [1995] 1 Lloyd's Rep 87

[6] The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

[7] *ACE Bermuda Insurance Ltd v Continental Casualty Company and Another* [2007] Bda L.R. 8 citing *The Angelic Grace*; *IPOC International Growth Fund Ltd v OAO* "*CT-Mobile*" [2007] Bda L.R. 43

[8] *Allianz SpA v West Tankers Inc (The Front Comor)*, [2009] 1 Lloyd's Rep 413 (ECJ)

[9] *Turner v Grovit* [2002] 1 WLR 107

[10] *Trafigura Beheer BV v Kookmin Bank Co* [2006] All ER 418

[11] *Airbus Industrie v Patel* [1998] 1 Lloyd's Rep 631and on appeal at [1999] 1 AC 119

[12] *ACE Bermuda Insurance Ltd v Continental Casualty Co. and Another* [2007] Bda L.R. 8, Ground LJ. The decision was subsequently upheld on an inter partes hearing [2007] Bda L.R. 38 Bell J

[13] *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67; *Markel International Co Ltd v. Craft* [2006] EWHC 3150 (Comm)

[14] *C v D* [2007] EWHC 1541 (Comm). Decision upheld by the Court of Appeal [2007] EWCA Civ 1282

[15] *XL Insurance Ltd v. Owens Corning* [2000] 2 Lloyd's Rep 500

[16] *Starr Excess Liability Insurance Co. v General Reinsurance Corporation* [2007] Bda L.R. 34

Contact Us

Sedgwick Bermuda
Mark Chudleigh
mark.chudleigh@sedgwick-chudleigh.com
E.W. Pearman Building, 20 Brunswick Street
Hamilton HM 10, Bermuda
Tel: 441.296.9276

Sedgwick UK
Sarah Hills
sarah.hills@sdma.com
Fitzwilliam House, 10 St Mary Axe
London EC3A 8BF, England
Tel: 44.20.7929.1829

Sedgwick US
Eric Scheiner
eric.scheiner@sdma.com
One North Wacker Drive, Suite 4200
Chicago, Illinois 60606
Tel: 312.641.9050