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## Protecting the right to arbitrate - Restraining proceedings

Michael Nolan

### A. PROCEEDINGS WITHIN THE JURISDICTION – STAY

#### 1. Arbitration Act 1996

##### 9. *Stay of legal proceedings*

(1) *A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*

(2) *An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.*

(3) *An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.*

(4) *On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.*

(5) *If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.*

2. Seeking an extension of time to serve a Defence was not a “step in those proceedings” for the purposes of section 9(3): Bilta (UK) Ltd (In Liquidation) V Muhammad Nazir & 8 Ors [2010] EWHC 1086 (Ch) distinguishing Ford’s Hotel Co Ltd v Bartlett [1896] AC 1.

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## B. PROCEEDINGS ABROAD OTHER THAN IN EU – ANTI – SUIT INJUNCTION

### 1. General principle - injunction to restrain unless good reason not.

- Angelic Grace [1995] 1 Ll. Rep. 87

*“In my judgment, where an injunction is sought to restrain a party from proceeding in a foreign Court in breach of an arbitration agreement governed by English law, the English Court need feel no diffidence in granting the injunction, provided that it is sought promptly and before the foreign proceedings are too far advanced. I see no difference in principle between an injunction to restrain proceedings in breach of an arbitration clause and one to restrain proceedings in breach of an exclusive jurisdiction clause as in Continental Bank N.A. v. Aeakos Compania Naviera S.A. [1994] 1 W.L.R. 588. The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case”*: Per Millett LJ at 96.

### 2. Requirements

- (a) “A high degree of probability” that there is an arbitration agreement.
- American v Abbott [2003] 1 Ll. Rep. 267
  - Sheffield United v West Ham [2009] 1 Ll. Rep 167
  - Midgulf International Ltd v Groupe Chimique Tunisien [2009] 2 Lloyd's Rep 411
  - Transfield Shipping Inc v Chipping Xinfa Huayu Alumina Co Ltd [2009] EWHC 3629 (QB) at [55]
  - But cf CPT Empresas Maritimas SA v Tryggingarfelagio Foroyar [2009] EWHC 3030
- (b) Promptness
- Angelic Grace [1995] 1 Ll. Rep. 87.
  - Verity Shipping SA v NV Norexa (The Skier Star) [2008] 1 Lloyd's Rep 652.
- (c) No submission to jurisdiction of the foreign court.
- (d) That is it necessary in the interests of justice to restrain the defendant from instituting or commencing proceedings abroad.
- Deutsche Bank AG and another v Highland Crusader Offshore Partners LP (CA) [2010] 1 W.L.R. 1023

*"I would summarise the relevant key principles as follows.*

(1) *Under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court when it is necessary in the interests of justice to do.*

(2) *It is too narrow to say that such an injunction may be granted only on grounds of vexation or oppression, but, where a matter is justiciable in an English and a foreign court, the party seeking an anti-suit injunction must generally show that proceeding before the foreign court is or would be vexatious or oppressive.*

(3) *The courts have refrained from attempting a comprehensive definition of vexation or oppression, but in order to establish that proceeding in a foreign court is or would be vexatious or oppressive on grounds of forum non conveniens, it is generally necessary to show that (a) England is clearly the more appropriate forum ("the natural forum"), and (b) justice requires that the claimant in the foreign court should be restrained from proceeding there.*

(4) *If the English court considers England to be the natural forum and can see no legitimate personal or juridical advantage in the claimant in the foreign proceedings being allowed to pursue them, it does not automatically follow that an anti-suit injunction should be granted. For that would be to overlook the important restraining influence of considerations of comity.*

(5) *An anti-suit injunction always requires caution because by definition it involves interference with the process or potential process of a foreign court...*

(6) *The prosecution of parallel proceedings in different jurisdictions is undesirable but not necessarily vexatious or oppressive....*

(8) *The decision whether or not to grant an anti-suit injunction involves an exercise of discretion and the principles governing it contain an element of flexibility." Per Toulson LJ at [50].*

[The key principles omitted relate specifically to anti-suit injunctions on grounds of *forum non conveniens*].

### **C. APPOINTMENT OF ARBITRATOR WHERE THERE IS A DISPUTE AS TO EXISTENCE OF ARBITRATION AGREEMENT**

1. Arbitration Act 1996

18. *Failure of appointment procedure*

(1) *The parties are free to agree what is to happen in the event of a failure of the procedure for the appointment of the arbitral tribunal.*

*There is no failure if an appointment is duly made under section 17 (power in case of default to appoint sole arbitrator), unless that appointment is set aside.*

(2) *If or to the extent that there is no such agreement any party to the arbitration agreement may (upon notice to the other parties) apply to the court to exercise its powers under this section.*

(3) *Those powers are—*

(a) *to give directions as to the making of any necessary appointments;*

(b) *to direct that the tribunal shall be constituted by such appointments (or any one or more of them) as have been made;*

(c) *to revoke any appointments already made;*

(d) *to make any necessary appointments itself.*

(4) *An appointment made by the court under this section has effect as if made with the agreement of the parties.*

(5) *The leave of the court is required for any appeal from a decision of the court under this section.*

31 ***Objection to substantive jurisdiction of tribunal***

(1) *An objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.*

2. Should the court appoint an arbitrator if it is persuaded that there is a prima facie case that an arbitration agreement was made and leave him/her to decide whether there was an arbitration agreement as argued by Midgulf in its skeleton argument for the Court of Appeal in Midgulf v GCT [2010] EWCA Civ 66?

Cf The position in Hong Kong applying the UNCITRAL model law

- Pacific International Lines v Tenlien Metals & Minerals 1992 MP 1343
  - Private Company Triple v Star Universal Co [1995] 3 HKC 129.
3. For the position in this jurisdiction see:
- Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping [2000] 2 Ll. Rep. 1 at [57] per Thomas J in the context of an application to set aside an arbitration claim form seeking a declaration that the Defendants were party to a COA containing an arbitration clause considered but declined to deal with the point. "However I do see the force of the argument..."
4. But costly and time consuming. Cf Azov Shipping Co v Baltic Shipping Co [1999] 1 Lloyd's Rep 68 where, in the context of a section 67 challenge, Rix J said:
- "This was perhaps a case where the parties might well have come to Court, either by agreement or upon an application from the one side or the other for the Court to determine the issues of jurisdiction, on the ground that it was likely to produce substantial savings in cost and that there was good reason why the matter should be decided by the Court. With hindsight it seems to me that even if the parties could not agree upon that course, the Court would be persuaded to allow such a determination if, of course, the tribunal had given its own permission, which is a sine qua non in the absence of the agreement of the parties. It might be assumed that the arbitrator may have been the more willing to give his agreement inasmuch as the question of jurisdiction in this case involved the prior question of whether Azov had ever become a party to the agreement as a whole."*
5. Solution in context of stay application where there is a dispute as to the existence of an arbitration agreement: Ahmad Al-Naimi (T/A Buildmaster Construction Services) V Islamic Press Agency Inc. (CA) [2000] 1 Ll. Rep. 522. 4 possible courses.
- (1) Decide on basis of written evidence that an arbitration agreement was made.
  - (2) Stay the proceedings on the basis that the arbitrator should decide his own jurisdiction.
  - (3) Order a trial of the issue whether there was an arbitration agreement.
  - (4) Decide there was no agreement and dismiss the application for a stay.

**D. ANTI-SUIT INJUNCTIONS IN RELATION TO PROCEEDINGS IN NON-EU STATES SINCE THE FRONT COMOR**

1. Article II.1 of the New York Convention 1958 provides that each contracting state shall recognise arbitration agreements.

2. Article II.3 provides:

*“The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”*

3. In the Angelic Grace [1995] 1 Ll. Rep. 86 at 94, the Court of Appeal held:

- (1) that the provision does not confer an exclusive jurisdiction on the Court of the Contracting State concerned;
- (2) The terms of the Convention were no bar to the court granting an anti-suit injunction to restrain court proceedings brought in breach of an arbitration agreement in a country that was party to the New York convention.

4. However that decision was doubted in Toepfer v Societe Cargill [1998] 1 Lloyd's Rep 379. At page 386 LHC, Phillips LJ said:

*“The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards article II.3 requires the court of a Contracting State to refer the parties to arbitration when an action is commenced in disregard of a binding arbitration clause. It might be thought that there would be much to be said, both as a matter of comity and in the interests of procedural simplicity, if a defendant who was improperly sued in disregard of an arbitration agreement in the court of a country subject to the New York Convention were left to seek a stay of the proceedings in the court in question. It seems, however, that litigants in cases governed by English arbitration clauses are not prepared to trust foreign courts to stay proceedings in accordance with the New York Convention, for it has become the habit to seek anti-suit injunctions such as that sought in the present case. In The Angelic Grace [1995] 1 Lloyd's Rep 87 the Court of Appeal gave its approval to this practice...*

*While we would not wish it to be thought that we have independently endorsed these sentiments, in view of this decision we feel obliged to hold that Mr Justice Colman did not err in principle in the exercise of his discretion when granting an injunction in this case. The point will be open to argument in a higher tribunal.”*

5. In West Tankers Inc v Ras Riunione Adriatica di Sicurta (“the Front Comor”) [2005] EWHC 454 (Comm), [2005] 2 Lloyd's Rep. 257, at first instance, Colman J referred to these passages and held that they had not been displaced by the decision in Turner v Grovit. He also held that Article II.3 said nothing which vested in the court in which proceedings in breach of the arbitration were brought, exclusive jurisdiction to enforce the arbitration agreement.
6. His decision was approved, without any discussion, by the House of Lords [2007] UKHL 4.
7. However in the opinion of Advocate General Kokott in the Front Comor, it was said that every court seised was entitled, under the New York Convention, before referring the parties to arbitration to examine (amongst other things) whether there was an arbitration agreement: para 56 [2009] 1 AC 1138 at 1150.
8. That approach was endorsed by the European Court of Justice which, having held that an anti-suit injunction was not compatible with Regulation (EC) No 44/2001, went on to say that that finding was supported by Article II.3 of the New York Convention, according to which it is the court of the contracting state, when seised of an action in a matter in respect of which the parties have made an arbitration agreement, that would refer the parties to arbitration unless it finds the agreement null and void, inoperative or incapable of being performed [2009] 1 AC 1138 at 1158 para 33.
9. However the practice of granting anti-suit injunctions in respect of proceedings in New York Convention non-EU countries has subsequently been reaffirmed. See
  - Shashoua v Sharma [2009] 2 Ll. Rep. 376.
  - Midgulf v GCT [2010] EWCA Civ 66.
10. An application for permission to appeal is before the Supreme Court at the moment.