**Anti – Suit Injunctions in the context of shipbuilding contracts by Mark Davis**

**Introduction**

Most shipbuilding contracts are subject to English law and provide for disputes to be resolved by London arbitration or the English courts.

Disputes sometimes arise as to whether the buyer has a contractual right to terminate the shipbuilding contract, and consequently to claim back the advance payments which are typically paid in stages as the construction progresses. In the event that the shipyard does not refund them, a similar issue arises as to whether the buyer is entitled to make demand under the refund guarantees which are procured by the seller in favour of the buyer, as a cornerstone of the shipbuilding project, and which typically also are subject to English law and London arbitration/English court jurisdiction.

Notwithstanding the parties’ express choice of English law and jurisdiction, there have been a number of instances over the years, where the relevant shipyard seeks to invoke the assistance of local courts in an effort to obtain a more favourable outcome than may be available to it in London. In such cases proceedings have been issued in the local courts against the buyers, the refund guarantors and sometimes others.

Against this background it is relevant to consider in what circumstances an English court (or arbitration tribunal) will grant an anti-suit injunction to restrain the shipyard from commencing or continuing proceedings in breach of the exclusive jurisdiction or arbitration agreement, and to examine the principles that can be derived from a number of recent reported decisions in this area.

**The court’s Jurisdiction to grant an anti-suit injunction**

The court has a broad discretion under Section 37 of the Senior Courts Act 1981 to grant an injunction in all cases in which it appears to the court to be just and convenient to do so. That discretion is to be exercised, however, in accordance with the principles to be derived from a long line of authority referred to by Lord Bingham in *Donohue V Armco Inc*[[1]](#footnote-1).

As Lord Bingham explained:

1. The starting point is that where the parties have agreed that disputes should be resolved in a particular forum[[2]](#footnote-2), effect should *ordinarily* be given to that agreement in the absence of “*strong reasons*” for departing from it.
2. An anti-suit injunction is a form of equitable relief, and thus there can be no absolute or inflexible rule to govern the exercise of the discretion.
3. A party may lose his claim to equitable relief by dilatoriness of other unconscionable conduct.
4. Considerations of comity also arise. In *the Angelic Grace[[3]](#footnote-3)* the Court of Appeal rejected the suggestion that the proper approach for the English court was to allow the foreign court to decide whether it should decline jurisdiction or not.

In that case Leggatt LJ (with whom both Neill and Millett LJJ agreed) said: “*I can think of nothing more patronising that for the English Court to adopt the attitude that if the Italian Court declines jurisdiction, that would meet with the approval of the English Court, whereas if the Italian Court assumed jurisdiction, the English Court would then consider whether at that stage to intervene by injunction. That would not only be invidious but the reverse of comity*.”

Millet LJ went on to explain that: “*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 it is sought promptly and before the foreign proceedings are too far advanced*.”

**Issues to consider**

One of the questions that therefore arise in the context of anti-suit injunctions is what “*strong reasons*” may exist to cause the Court to depart from the ordinary position that it will give effect to the parties’ autonomous choice of English court jurisdiction or London arbitration to resolve their disputes.

There have been a number of recent cases in which the Court has considered applications for the grant of anti-suit relief. It is instructive to look at some of the principles to be derived from these cases, which I shall consider firstly in relation to delay, secondly in relation to other *“strong reasons”*, and lastly to consider the rare application of the jurisdiction exercised duty by the Court of Appeal in *Petrosaudi Oil Services (Venezuela) Ltd v Novo Banco S.A and others*[[4]](#footnote-4) to make consequential orders to achieve the restitution which the result of the court’s jurisdiction requires.

Delay

The issue of delay in the context of anti-suit injunctions has been considered by the Commercial Court in three recent decisions:

1. In *Essar Shipping Ltd v Bank of China Ltd*[[5]](#footnote-5) Walker J emphasised that the need to apply for an injunction (a) promptly and (b) before the foreign proceedings are too far advanced, are separate and cumulative principles.

In that case the Claimant sought an anti-suit injunction against the Defendant, restraining it from commencing or continuing proceedings in breach of a London arbitration agreement incorporated into a bill of lading contract.

Walker J identified that the only question which he needed to determine in relation to the proposed injunction was whether there had been delay which, on the particular facts of the case, had the consequence that the proposed injunction would be neither just nor convenient and ought to be refused.

After examining the parties’ contentions as to whether the Claimant’s application for an injunction had been made promptly, he held that it had not, consequently refusing the application.

Walker J accepted that the issue as to promptness is fact sensitive, but rejected the submission that assistance was to be derived from the analyses of the facts carried out by the court in previous decisions.

He therefore declined even to embark upon the exercise of considering earlier first instance decisions to see on what basis the cases were held to fall on one side of the line or another[[6]](#footnote-6).

1. In *Magellan Spirit[[7]](#footnote-7)* a similar approach was followed. In that case the Claimant applied for an anti-suit injunction to restrain the Defendant from suing the Claimant in Nigeria on the ground that the parties had agreed to refer the dispute to the jurisdiction of the High Court in London.

Leggatt J held that the court had no jurisdiction to try the Defendant’s claim and that the Claimant had no contractual right not to be sued on that claim in the courts in Nigeria.

He went on to hold that even if on the material available he had reached the conclusion that the court had jurisdiction to try the Claimant’s claim and that the claim was well founded, he would still have refused the Claimant’s application for an injunction. That was because there had, in his view, been fatal delay in making the application, which was of itself a sufficient reason to refuse injunctive relief. In addition, he considered that the Claimant had allowed the Nigerian court to become seised of the matter to an extent which would make in inappropriate for the English court to intervene at that stage.

1. In *ADM Asia-Pacific Trading Pte. Ltd v PT Budi Semesta Satria*[[8]](#footnote-8)the Claimant sought a final anti-suit injunction to restrain the Defendant from continuing proceedings against the Claimant in Indonesia on the grounds that those proceedings were in breach of a FOSFA arbitration agreement between the parties. A few days after the conclucion of the trial, the Court of Appeal confirmed in *Ecobank Transnational Incorporated v Tanoh[[9]](#footnote-9)* the existence of a general discretion to refuse an anti-suit injunction on the grounds of delay in making the application, a discretion which Phillips J duly exercised.

In that case the Claimant argued that mere delay was not in itself a “*strong reason*” for refusing to enforce an arbitration clause. In support of its argument Counsel for the Claimant submitted that:

1. Waiting for the foreign court to determine a challenge to its jurisdiction should not be regarded as unconscionable delay: the applicant should not be obliged to seek relief in two jurisdictions simultaneously;
2. In the absence of evidence that the respondent would have complied with an anti-suit injunction, had it been obtained sooner, by discontinuing the foreign proceedings the respondent could not show detrimental reliance or prejudice;
3. Comity has no role to play where the applicant is seeking to enforce a contractual right not to be sued in the foreign jurisdiction.

Phillips J had no hesitation in rejecting each of these submissions, stating that in a series of cases the Commercial Court had rejected each of them, and therefore exercised his discretion to refuse the grant of the injunction sought.

The Claimant invited the court to look at periods of delay and attribute blame for them in support of a submission that periods of delay for which the Claimant was responsible should not be taken into account in considering whether there had been a delay in making the application.

Phillips J rejected this approach, holding that the task of the court instead was to consider whether the application was made promptly and how far and with what consequences the foreign proceedings had progressed.

Conclusions on delay

It can be seen from these cases that it is no answer to an objection to the granting of an anti-suit injunction on the grounds of delay, that the delay was caused by steps taken in the foreign proceedings to challenge the court’s jurisdiction, or that the respondent cannot show prejudice. Nor will it assist to draw comparisons with cases which have in the past fallen on one side of the line or the other.

As is apparent, the sole issues for the court to consider in the context of an objection to the grant of an anti-suit injunction on the grounds of delay are (1) was the application made promptly, and (2) are the foreign proceedings too far advanced. If the answer to (1) is no or the answer to (2) is yes, an injunction will be refused.

Other “*strong reasons*”

In *Crescendo Maritime Co and another v Bank of Communications Company Limited and others[[10]](#footnote-10),* the Commercial Court was asked to consider three other potentially “*strong reasons*” to deny the grant of an anti-suit injunction.

In that case, Teare J was asked to grant an anti-suit injunction to restrain the Chinese bank issuer of refund guarantees from pursuing proceedings in China. Those proceedings had been brought by the Chinese bank against the buyer (in breach of the London arbitration clause in the refund guarantees), the buyer’s bank and the seller. The buyer’s bank and the seller were not of course party to the arbitration agreement in the refund guarantees.

The Chinese bank alleged that the Defendants in the Chinese proceedings had been party to fraudulent conduct (in which they agreed to backdate the date of the shipbuilding contract to avoid the need to comply with new SOLAS requirements) which had induced the Chinese bank to issue the refund guarantees.

In that case counsel for the Chinese bank relied upon three matters to establish the necessary strong reason for not issuing the anti-suit injunction, namely:

1. That the claim in China was different to that advanced by the Chinese bank in the London arbitration;
2. That the natural forum for the resolution of the fraud claim was the Chinese court; and
3. That the Chinese proceedings were also brought against the buyer’s bank and others who were not party to the arbitration clause and therefore the claim against them could not be brought in China.

As to (1) Teare J held that such differences as there were could not amount to a strong reason not to enforce the arbitration clause.

As to (2), Teare J accepted that the natural forum for determination of the allegation of fraud was China, but quoting from the judgment of Lloyd J (as he then was) in *Akai Pty Ltd v People’s Insurance Co Ltd*[[11]](#footnote-11), held that “*Where the parties have chosen a neutral forum connected with neither party, factors relating to the convenience of the parties or the location of witnesses are of little relevance*.”

As to (3), Teare J accepted that the existence of claims against multiple parties, with the consequent risk of inconsistent findings, can amount to a strong reason not to issue an anti-suit injunction. However, on the facts of this case, Teare J held that it was clear that the proceedings in China against the buyer were vexatious and oppressive, and that there was strong reason to grant the anti-suit injunction. In particular, he regarded it as inappropriate and unjust for the Chinese bank to rely upon a risk of inconsistent decisions when that risk arose from the bank’s own decision to allege fraud inn both sets of proceedings.

In *Crescendo*, the buyer also sought an injunction restraining the Chinese bank from suing the buyer’s bank in China, on the basis that the proceedings against the buyer’s bank in China were a collateral attack upon the arbitration agreement and the subsequent arbitration award in the buyer’s favour.

Teare J accepted that the judgment of Toulson LJ (as he then was) in *Noble Assurance v Gerling- Konzern General Insurance*[[12]](#footnote-12) was authority for the proposition that where proceedings abroad amount to a collateral attack on an arbitration decision the court has jurisdiction to grant an anti-suit injunction restraining the pursuit of those proceedings also against a non-party to the arbitration agreement.

However, Teare J held that since the buyer’s bank would only be exposed to damages in the Chinese proceedings if the Chinese bank was held in the Chinese proceedings to be liable under the refund guarantees, as the London arbitration tribunal had found, he was not persuaded that the Chinese proceedings could be regarded as a collateral attack, or that it was appropriate therefore to grant an injunction restraining suit against the buyer’s bank.

This case serves as a useful illustration therefore of other factors that may be considered to be “*strong reasons*” to decline the grant of an anti-suit injunction, and a reminder of the potential breadth of the court’s discretion to grant an anti-suit injunction, which can extend in appropriate circumstances to parties who are not privy to the exclusive jurisdiction or arbitration agreement.

The Court’s jurisdiction to make consequential orders as nearly as possible to achieve the restitution which the result requires.

Another illustration of the breadth of the court’s discretion to grant anti-suit injunctions can be found in the very recent judgments handed down by the Court of Appeal in *Petrosaudi Oil Services (Venuzuela) Ltd*.

In that case the Court of Appeal overturned the decision of His Honour Judge Waksman QC, sitting as a judge of the Commercial Court, in which he had held that the Claimant was not entitled to call for payment of some US$129 million under a standby letter of credit.

The effect of the order of the Court of Appeal was that the Claimant was entitled to make demand and collect the US$129 million, but some complications arose as to the form of the order to be made, since in compliance with Judge Wakman’s earlier order the Claimant had irrevocably withdrawn its demands and acknowledged that the bank was no longer under any obligation to make any payments to it.

In order to address this issue, the Court of Appeal ordered inter alia that the notice of withdrawal was to be treated as always having been null, void and of no effect, relying upon “*the power and practice of the court to make consequential orders as nearly as possible to achieve the restitution which the result requires.”*[[13]](#footnote-13)

After the initial judgment had been circulated in draft, the Court of Appeal received further submissions as to the form of the order that should be made. In a supplementary judgment, Christopher Clarke LJ (with whom Lewison LJ agreed), exercising the powers and practice of the Court referred to above, indicated that they would in what they regarded *as exceptional circumstances* grant injunctive relief. The form of the injunctive relief was to restrain the Defendant from pursuing or maintaining any applications to the arbitration tribunal (which was seised of the disputes under the underlying drilling contract), or to the French courts, which would restrain the Claimant from receiving payment or taking steps to enforce its rights as declared in the Court of Appeal’s judgment.

The Court of Appeal was willing to make this order notwithstanding the fact that the suggestion that the Defendant should be the subject of an injunction had not been argued before them.

It should be noted, however, from the judgment of Lord Nicholls in *Nykredit* that this power only extends to a court possessed of appellate functions. In deciding *Nykredit* in 1997, Lord Nicholls expressed surprise that the existence of this power had not previously arisen for decision, and it remains to be seen whether it will now feature more frequently in the years ahead.

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1. [2001] UKHL 64,[2002] 1 All ER 749 [↑](#footnote-ref-1)
2. Including arbitration, *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust- Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35, [2013] 1 WLR 1889 [↑](#footnote-ref-2)
3. *Aggeliki Charis Cia Maritima SA v Pagnan SpA* [1995] 1 Lloyd’s Rep 87 [↑](#footnote-ref-3)
4. [2017] EWCA Civ 9 and [2017] EWCA Civ 32 [↑](#footnote-ref-4)
5. [2015] EWHC 3266 [↑](#footnote-ref-5)
6. In the instant case Walker J held that given that there was a potential time bar expiring in January an application for an anti-suit injunction should have been made, in the absence of a good reason to the contrary, by the end of the previous November. [↑](#footnote-ref-6)
7. *Magellan Spirit ApS v Vitol SA* [2016] EWHC 454 [↑](#footnote-ref-7)
8. [2016] EWHC 1427 [↑](#footnote-ref-8)
9. [2015] EWCA Civ 1309 [↑](#footnote-ref-9)
10. [2015] EWHC 3364 [↑](#footnote-ref-10)
11. [1998] 1 Lloyd’s Rep 90 at 105 [↑](#footnote-ref-11)
12. [2007] EWHC 253 [↑](#footnote-ref-12)
13. Per Lord Nicholls in *Nykredit Mortgage Bank Plc v Edward Erdman Group Ltd* [1997] 1 WLR 1627, 1637. [↑](#footnote-ref-13)