

ANTI-SUIT INJUNCTIONS AND THIRD PARTIES

In two recent decisions, the English courts have considered the availability of anti-suit relief to restrain defendants from pursuing foreign proceedings against third parties.

Under English law, a contract, including an arbitration clause or other dispute resolution agreement, can typically only bind or be relied upon by the persons who are party to that agreement. However, there are limited circumstances where third parties may be bound by or be able to enforce rights conferred by a dispute resolution agreement or other contract terms. At the same time, the English courts may exercise their discretion to award anti-suit relief against parties who breach their dispute resolution agreements on the expectation that parties should adhere to their contractual bargains. In two separate decisions, the English courts have considered the extent to which anti-suit relief is available to restrain defendants from pursuing foreign proceedings against third parties in breach of their dispute resolution agreements.

In *Renaissance Securities v Chlodwig Enterprises*, the Court of Appeal refused to grant anti-suit injunctions in relation to foreign court proceedings brought by Russian companies against affiliates of its counterparty in an apparent attempt to circumvent arbitration agreements between the contracting parties.

In the unusual case of *Manta Penyez Shipping and Uraz Shipping v Zuhoor Alsaed Foodstuff Company*, the High Court granted anti-suit injunctions to third parties under the *Contracts (Rights of Third Parties) Act 1999* against a party in breach of its contractual obligations not to sue.

Renaissance Securities v Chlodwig Enterprises

The claimant, Renaissance, entered investment service agreements with the Russian defendant companies. Each of the agreements were governed by English law and contained

London-seated and English-law governed LCIA arbitration clauses. After a dispute arose between the parties, Renaissance refused to return assets to the defendants contending that doing so would breach sanctions. The defendants commenced Russian court proceedings against Renaissance and two of the defendants later issued Russian proceedings against three Russian companies alleged to be affiliates of Renaissance asserting delictual claims connected to the underlying contractual dispute.

The English High Court granted interim anti-suit injunctions restraining the defendants from continuing the Russian proceedings against Renaissance in breach of the parties' arbitration agreements. Renaissance applied to extend the anti-suit injunctions to the Russian proceedings against its affiliates. The High Court refused to vary the injunctions because it considered that, properly construed, the agreements did not apply to claims brought by or against the parties by Renaissance's non-party affiliates. Renaissance appealed to the Court of Appeal.

The Court of Appeal decision

The Court of Appeal unanimously dismissed Renaissance's appeal and refused to extend the anti-suit injunction to the proceedings against Renaissance's affiliates.

Non-contractual basis: where foreign proceedings are vexatious or oppressive - the need for full disclosure

The Court of Appeal acknowledged that there was a plausible argument that the Russian proceedings against the affiliates were vexatious as they appeared to be aimed at circumventing the 'spirit' of the arbitration agreements and potential sanctions. Singh LJ who gave the leading judgment held this was a single forum case (as there was no alternative forum to bring claims against the affiliates other than the Russian courts) and there was no threshold forum requirement for granting an anti-suit injunction in these circumstances. However, the absence of an alternative

forum to bring the claims would not in itself prevent the English courts from granting the relief sought. In Singh LJ's view, there appeared to be three reasons in principle why the Court might contemplate granting an anti-suit injunction in this case: (a) to protect the integrity of the arbitral process, (b) to protect the integrity of the High Court's earlier orders in the case, including anti-suit injunctions previously granted, and (c) to protect UK public policy in terms of its sanctions regime.

Ultimately, however, the Court of Appeal unanimously refused to grant the anti-suit relief sought. Renaissance had not provided the Court with sufficient information about its corporate relationship with the affiliates and therefore the Court did not have "the fullest possible knowledge and understanding of all the circumstances relevant to the litigation and the parties to it". Whilst Males LJ acknowledged there appeared at first sight to be a "powerful" case that the proceedings against the affiliates were vexatious and oppressive, the Court of Appeal left open the point and therefore whether it would have granted anti-suit injunctions had full disclosure been provided.

Contractual basis: where foreign proceedings are in breach of contract

Singh LJ found that the arbitration agreements did not extend to the affiliates and applied only to disputes between the contracting parties. In his view, properly construed, the arbitration agreements did not imply a negative obligation not to bring related claims elsewhere outside the arbitration. The other Lord Justices declined to determine the issue, although Males LJ considered that it was at least arguable that in the "distinctive circumstances" of the case, it was necessary for business efficacy to imply a term that the arbitration agreements not be circumvented in this way by "artificial" claims brought against the affiliates. In Males LJ's view, the issue was not whether the arbitration clauses applied to claims against either party by a non-party, but whether the clauses applied to artificial claims against one party's affiliate by the other party, whose only purpose was to circumvent the obligation to arbitrate.

Manta Penyez Shipping and Uraz Shipping v Zuhoor Alsaeed Foodstuff

In a factually complex case, claimants Penyez and Uraz were SPV owners of two vessels chartered by the seller to transport cargo from Russia to the defendant Zuhoor in Yemen. After the defendant allegedly failed to make payment, the seller instructed Penyez to deliver the cargo to Djibouti and issued a letter of indemnity in favour of Penyez. Zuhoor commenced court proceedings in Djibouti and Yemen including to arrest the vessels. In the Djibouti proceedings, Zuhoor was ordered to resolve the claims and release one of the vessels subject to the provision of a bank guarantee in Zuhoor's favour. The claimants therefore understood that the Djibouti proceedings had been resolved,

but Zuhoor appealed the decision without the claimants' knowledge.

The claimants obtained injunctions from the English courts including an interim anti-suit injunction requiring Zuhoor to discontinue the proceedings in Yemen. After becoming aware of the Djibouti appeal, the claimants sought to extend the anti-suit injunction to expressly include the Djibouti proceedings and to make interim anti-suit relief previously awarded final.

The claimants relied on the Guarantee, which included an express contractual covenant not to sue, and, in the alternative, on the Charterparty, which contained a London-seated London Maritime Arbitrators Association (LMAA) arbitration clause. However, the claimants were not parties to the Guarantee and Uraz was not a party to the Charterparty.

Guarantee

The Guarantee provided that:

"In consideration of Zuhoor (i) immediately procuring the release of the Vessel and Zuhoor and/or assignees and/or associates and/or subrogees refraining from re-arresting or otherwise detaining the Vessel or any other vessel in the same or associated ownership, beneficial ownership, management, and (ii) immediately withdrawing or procuring the setting aside of all legal proceedings, actions, judgments and/or orders in Yemen in relation to or against the Vessel or Owners or the Charterparty..."

The **High Court held** that as a matter of construction and/or implication, the Guarantee precluded Zuhoor from initiating fresh proceedings. It would be nonsensical for the Guarantee to require Zuhoor to withdraw proceedings but to permit Zuhoor to immediately recommence them.

In addition, the High Court found that the claimants as non-parties to the Guarantee could rely on the **Contracts (Rights of Third Parties) Act 1999** (CRTPA). Where it applies, CRTPA enables third parties to enforce a contract term, including obtaining remedies that would be available to a contracting party for breach of contract, such as an injunction. Unusually, CRTPA had not been expressly excluded in the Guarantee and the High Court found that the claimants satisfied the other necessary requirements for CRTPA to apply:

- Third party benefit (s1(1)(b)): The Guarantee 'self-evidently' had the purpose of benefitting Penyez (and any related party that might be sued by Zuhoor, such as Uraz) by protecting them against suit in Yemen.
- Parties expressly identified (s1(3)): Penyez was expressly named in the Preamble to the Guarantee and referred to in the Guarantee. Uraz was a member of a class of parties named in the Guarantee ("in relation

to...Owners”) and had been named by Zuhoor in proceedings as ‘affiliated’ to Penyez. Further or alternatively, the Guarantee prohibited Zuhoor from arresting “any other vessel...” which benefited owners of any such “other vessel” including Uraz.

As a result, the High Court held that there was a “strong presumption” that the Guarantee’s terms were enforceable by the claimants. There was no express contract term to rebut that presumption and there was nothing in the Guarantee to suggest that the parties did not intend for the Guarantee to be enforceable by the claimants.

Applying the standard principles for awarding anti-suit relief (*Angelic Grace*), the High Court found that Zuhoor had breached the Guarantee and as there were no strong reasons mitigating against granting relief, it awarded the relief sought.

Charterparty

In the alternative, the High Court found (obiter) that the claimants would have been able to rely on the LMAA arbitration clause in the Charterparty in relation to both the Yemeni and the Djibouti proceedings. Zuhoor’s conduct in going behind the arbitration agreement by commencing foreign court proceedings rendered those proceedings

vexatious or oppressive, and therefore provided a feasible alternative basis for the grant of final injunctive relief.

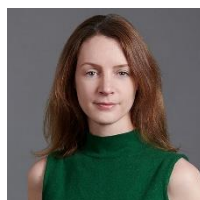
Takeaways

It is important to consider at the transaction stage the potential for non-parties who may wish to rely on contract terms and the desirability of this from the transacting parties’ perspective. The English courts are generally unwilling to extend the scope of an arbitration agreement or other contractual right to third parties unless there is a clear and express contractual agreement to this effect. The case of *Manta Penyez* was unusual as many contracts expressly exclude the operation of CRTPA. However, the judgment helpfully provides clear guidance on when a third party can use CRTPA to enforce contractual rights, including to obtain a final anti-suit injunction to restrain a party from breaching its contractual commitments. Both cases illustrate the English courts’ willingness to exercise their discretion to grant anti-suit relief in support of parties’ dispute resolution agreements, including where third parties are affected. However, as *Renaissance* illustrates, the English courts will only be willing to do so where they consider parties are acting transparently and the courts are furnished with sufficient information to exercise their discretion.

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