International Law Office

September 15 2022

High Court grants "quasi-contractual" anti-suit injunction in support of arbitration agreement

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Introduction

In *QBE Europe SA/NV v Generali Espana de Seguros Y Reaseguros*,[(1)] the High Court granted an anti-suit injunction in support of a London arbitration agreement in an insurance policy to restrain claims brought in Spain. The anti-suit injunction was "quasi-contractual" in nature, as the respondent insurer was not actually a party to the underlying policy that contained the arbitration agreement. However, in pursuing a claim in the Spanish courts pursuant to local insurance legislation, the respondent sought to enforce rights derived from the policy. In those circumstances, the respondent was unable to obtain the benefit of the derived right without complying with the obligation to submit disputes to arbitration. While one of the successful applicants denied that they were a party to the policy containing the arbitration agreement, they were granted an anti-suit injunction on the basis that there was a real risk that the insurer would seek to join them to the Spanish proceedings without notice.

Background

Wholly-contractual anti-suit injunctions

The English courts may grant an anti-suit injunction restraining a respondent from pursuing foreign proceedings brought in breach of an arbitration or jurisdiction agreement between the respondent and the applicant. A court must first be satisfied that:

- there is a "high degree of probability" that an agreement exists which governs the dispute;
- the proceedings brought by the respondent are in breach of the agreement; and
- it is "just and convenient" to grant the injunction.

Where a court is satisfied that the criteria have been met, it is likely to exercise its discretionary power and grant an anti-suit injunction unless the respondent can establish a "strong reason" for not doing so. Such an anti-suit injunction can be characterised as "wholly-contractual" due to the contractual relationship between applicant and respondent.[(2)]

"Quasi-contractual" anti-suit injunctions

The English courts may also grant an anti-suit injunction even if an applicant:

- denies that it is party to the relevant arbitration or jurisdiction agreement; and/or
- does not assert, or denies, that the respondent is a party to that agreement.

While the respondent may not be party to the contract containing the jurisdiction or arbitration agreement, the rights it purports to assert in the non-contractual forum nevertheless may arise from that contract. As such, the obligation sued upon is deemed to be "conditioned" by the arbitration or jurisdiction agreement.

Where the respondent's claim is regarded by an English court as contractual, the court will regard the arbitration or jurisdiction agreement that "conditions" the claim as a "highly significant factor" in determining the injunction application. An anti-suit injunction granted in these circumstances may be characterised as "quasi-contractual".

It may be that the respondent seeks to assert a right derived from a contracting party. The granting of an anti-suit injunction in these circumstances is justified on the basis that a respondent should not enjoy the "benefit" of the derived right without complying with the obligation to bring a claim in the contractual forum. In this context, an application for anti-suit relief will be determined in accordance with the same principles that apply in the "wholly-contractual" scenario outlined above.

Where specifically the applicant denies that they are a party to the contract which they claim the respondent seeks to assert in the non-contractual forum – and which is subject to the arbitration or jurisdiction agreement – the court may grant an anti-suit injunction that is sometimes referred to as a "non-contractual claimant" injunction.[(3)]

Facts

The case related to an incident in 2016 in which it was alleged that a yacht had damaged an undersea power cable owned by Red Eléctrica de España (REE). REE was insured by Generali España de Seguros Y Reaseguros (the insurer) and received an indemnity in respect of the loss of approximately €7.7 million.

QBE (UK) Limited (QBE UK) had issued an insurance policy in favour of the yacht's owner (the policy), which provided for the resolution of any disputes through arbitration seated in London. In November 2020, QBE Europe SA/NV (QBE Europe) took over QBE UK's rights and obligations under the policy.

In February 2022, the insurer initiated proceedings in the Spanish courts seeking to recover from QBE UK the sum it had paid to REE.

In the Spanish proceedings, the insurer asserted that:

- REE had a direct claim against QBE UK pursuant to article 465 of the Spanish Maritime Navigation Act (the MNA 2014); and
- the insurer was subrogated to REE's rights against QBE UK pursuant to section 43 of the Spanish Insurance Contracts Act 1980 (the ICA 1980). The insurer argued that the arbitration agreement in the policy did not apply as its claim against QBE UK was tortious in nature under Spanish law.

QBE UK and QBE Europe (together, QBE) applied to the High Court in England for an anti-suit injunction to restrain the Spanish proceedings.

Decision

In his judgment dated 1 August 2022, Foxton J granted QBE an anti-suit injunction. In doing so, the judge considered two primary issues:

- whether the direct right of action asserted by the insurer under Spanish law was independent of the underlying policy (as asserted by the insurer) or an attempt to enforce a contractual right contained in the policy and therefore subject to the arbitration agreement (as asserted by QBE); and
- if the right that the insurer sought to enforce could be characterised as contractual, whether there were any strong reasons not to grant the quasi-contractual anti-suit injunction.

Characterisation of insurer's claim

In his analysis of whether the insurer's claim was, in substance, contractual in nature, the judge identified the applicable English conflicts of law principles. He noted the decision of the Court of Appeal in *The Yusuf Cepnioglu* that the question for the Court to ask was:

> *whether the intention and effect of the foreign statute is to enable the victim to enforce against the insurer essentially the same obligations as those that could have been enforced by the insured or whether the statute has created a new and independent right which is not intended to mirror the insurer's liability under the contract of insurance.*[(4)]

Both sides had presented extensive expert evidence on the interpretation and effect of the MNA 2014, which superseded article 76 of the ICA 1980. The High Court and the Court of Appeal had previously considered the effect of article 76 of the ICA 1980 in *The Prestige (No. 2)*,[(5)] finding that it created a direct right to enforce contractual rights arising under an insurance policy. While the insurer's experts argued that the MNA 2014 had departed significantly from article 76 of the ICA 1980, the judge ultimately found that QBE had made out to a "very high level of probability" that the effect of the MNA 2014 was to provide the insurer with a right to enforce the contractual obligation to indemnify under the policy.[(6)]

In reaching his conclusion, the judge was not swayed by the insurer's argument that the MNA 2014 changed the essential nature of the insurer's right such that it was no longer a contractual right, by precluding QBE from raising certain defences that it otherwise could in a claim by the insured party.[(7)] Accordingly, the judge concluded that the insurer's claims were, in substance, contractual in nature and conditioned by the arbitration agreement in the policy. This meant that it was appropriate to grant a "quasi-contractual" anti-suit injunction in favour of QBE, including QBE UK in its status as a "non-contractual claimant".

No strong reasons to refuse anti-suit relief

The judge rejected a number of grounds advanced by the insurer as to why anti-suit relief should be denied, including that the policy expressly excluded the operation of the Contracts (Rights of Third Parties) Act 1999 and that the wording in the arbitration agreement was insufficiently broad. The judge dismissed the insurer's submission that the formulation "any dispute or difference arising between the insurer and the assured under this policy" did not, as a matter of construction, extend to claims brought by a non-party, even if that non-party was exercising a right of the "assured" on a derivative basis, concluding that:

> *Language which would prevent the arbitration agreement extending to those exercising the rights of parties in a derivative manner would have to be extremely clear (not least because there is no obvious reason why the parties should contract on a basis which would allow one party to circumvent a mandatory arbitration agreement by assigning the right it wished to enforce to someone else).*[(8)]

Next, the judge considered the insurer's argument that there should be respect for comity, which he swiftly rejected as "a factor which is of little or no weight",[(9)] citing *Angelic Grace*[(10)] and *Yusuf Cepnioglu*.[(11)] The judge rejected a submission that Spanish public policy underpinning the MNA 2014 required a different conclusion, given the "obvious English public policy in upholding the obligation to arbitrate".[(12)]

Finally, the insurer had submitted that it was premature to grant an anti-suit injunction in favour of QBE Europe given that it had no intention to join this entity to the Spanish proceedings until such time it was comfortable that there had been a transfer of liabilities from QBE UK. However, in the absence of an undertaking from the insurer not to commence proceedings against QBE Europe, the judge was satisfied that the Court had the jurisdiction to grant relief on a *quia timet* basis to avoid the risk of the insurer seeking to join QBE Europe to the Spanish proceedings without notice.[(13)]

Comment

The judgment illustrates the robust approach that the English courts will take to give deference to an arbitration agreement. It helpfully sets out the principles and considerations that the courts will apply when determining an application for an anti-suit injunction against a respondent that pursues claims derived from an agreement providing for arbitration, even if the respondent is not a party to that agreement.

The case also illustrates the power of the English courts post-Brexit to grant anti-suit injunctions in respect of proceedings in the courts of EU member states. Parties will welcome the judge's restatement of the "obvious" English public policy in upholding an obligation to arbitrate.

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Endnotes

(1) [2022] EWHC 2062 (Comm).

(2) Paras 9-11.

(3) Paras 12-17.

(4) *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS* [2016] EWCA Civ 386 (*The Yusuf Cepnioglu*) at para 1 (Longmore LJ).

(5) *The London Steamship Owners' Mutual Insurance Association Ltd v The Kingdom of Spain, The French State* [2015] EWCA Civ 333.

(6) *QBE*, at para 64.

(7) Para 65.

(8) Paras 30, 67-68.

(9) Para 69.

(10) *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87 at para 11.

(11) *The Yusuf Cepnioglu*, at paras 34 and 58.

(12) Para 69.

(13) Para 71.