

ANTI-SUIT INJUNCTIONS IN CARGO CLAIMS: OVERVIEW

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Legal 500 UK Awards 2023



Outline of the Law

- » ASI is granted to restrain a D - which is subject to the English court's jurisdiction - from pursuing proceedings which D has wrongfully started/threatened to start in a foreign court or arbitration.
- » ASI attaches to the D; not an interference with the foreign court.
- » S.37(1) Senior Courts Act 1981 provides the jurisdiction for the Court to make an ASI, including to protect arbitration agreements - **AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC** [2013] 1 WLR 1889.
- » Post-Brexit, ASIs now available to restrain proceedings in EU Member States.

- » Two types:
 - » ASI to restrain breach of jurisdiction/arbitration clause;
 - » ASI to restrain vexatious or oppressive conduct.

Contractual ASIs

- » An injunction will ordinarily be granted to restrain the D unless there are strong reasons not to do so - **The Angelic Grace** [1995] 1 Lloyd's Rep.425.
- » The burden is on the party in breach to establish that there are strong reasons not to do so - **Donohue v Armco** [2002] 1 All E.R. 749

- » **The Angelic Grace** - Need to establish:
 - » English Jurisdiction or London Arbitration Clause.
 - » Breach of that clause.
 - » No strong reasons not to grant ASI.
 - » Application for ASI brought promptly and before foreign proceedings too far advanced.
 - »

(1) Jurisdiction/Arbitration Clause?

- » Burden of proof:
 - » Interim ASI: "High degree of probability" - **Transfield Shipping Inc v Chipping Xinfa Huayu Alumina Co Ltd** [2009] EWHC 3629 (Comm) at [52].
 - » Final ASI: balance of probabilities.

- » Is there a Jurisdiction/Arbitration Clause which binds carrier?
 - » Typically b/l will incorporate by reference a c/p - see e.g. CONGENBILL form.
 - » Where words of incorporation in a b/l include a clear reference to the law and arbitration clause of a c/p that clause will be incorporated into the contract contained in and evidenced by the Bill - **The Rena K** [1978] 1 Lloyd's Rep 545 at p.551.
 - » NB: Establish which c/p is incorporated if the b/l is ambiguous.

- » Is the cargo receiver a party to the b/l contract?
 - » Cargo receivers typically bound by b/l and become subject to its terms by s.2(1) and s.3(1) COGSA 1992 when they become lawful holder and take delivery of the cargo and claim in respect of it.
 - » Liability upon lawful holders includes obligation to resolve any claim under the b/l in accordance with its terms - **The Kishore** [2016] 1 Lloyd's Rep. 427 at [31].
- » Potential wrinkle: which law governs the question of the proper law of the b/l where a b/l incorporates a c/p? English law or the law of the place of the habitual residence of the cargo receiver? Can Article 10(2) of the Rome I Regulation apply?
 - » Answer: No. See: **The Joker** [2021] 1 Lloyd's Rep. 169 at [12]-[18]; **Ulusoy Denizilik A.S. v Cofco Global Harvest (Zhangjiagang) Trading Co. Ltd** [2021] 1 Lloyd's Rep. 177 at [27]-[31]; [38].

(2) Breach of Jurisdiction/Arbitration Clause?

- » Demonstrate that foreign proceedings contain a claim which is a claim arising out of the carriage of the cargo and therefore falls within the b/l.

(3) Strong Reasons Not To Grant ASI?

- » Not closed categories.
- » Common reasons relied upon include:
 - a. **Delay**
 - » **Ecobank Transnational v Tanoh** [2016] 1 WLR 2231: Failure to seek relief before foreign proceedings are too advanced offends against comity (the courtesy which should be shown to a foreign court).
 - » **The Kishore** [2016] 1 Lloyd's Rep 427: High water mark for 'delay' as a ground for refusing relief. Relevant even if foreign proceedings not significantly progressed. Application must be made promptly in any event.
 - » Recent cases indicate move away from **The Kishore**. See:
 - » **VTB v Mejlumjan** [2021] EWHC 1386 (no significant progress in foreign proceedings);
 - » **AON UK Ltd v Lamia** [2022] EWHC 3323 (unjustified delay of 4 months);
 - » **Africa Finance Corp v Aiteo** [2022] EWHC 769 (delay for commercial negotiation).
 - b. **Submission**
 - » Closely connected to delay.
 - » Submission to the foreign jurisdiction weighs heavily against the granting of an ASI – can be fatal.
 - » Submission must be truly voluntary. Tested by English law conflict rules.

- » **Advent Capital v Ellinas Imports** [2005] 2 Lloyd's Rep 607: Has party taken a step in proceedings which is only necessary or useful if objection to jurisdiction has been waived?
- » Can challenge jurisdiction in foreign court and, if required to do so, plead to merits.
- » Can seek to strike out foreign proceedings, if strike out application is made by reference to jurisdiction clause: **Africa Finance Corp v Aiteo** [2022] EWHC 768.
- » Can issue security which answers to local court.
- » The cases use the language of there being an "objective justification" for the approach taken.
- » In practical terms, foreign law advice should be sought before steps are taken in the foreign jurisdiction and such foreign law advice should be put in evidence in the ASI application.

c. Comity – the courtesy or respect which should be shown to the foreign court

- » Not a "strong reason" but still something to consider.
- » **Daiichi Chuo Kisen Kaisha v Chubb Seguros Brasil S.A. (formerly Ace Seguradora S.A.)** [2020] EWHC 1223 (Comm) Applications for ASIs should be made promptly both in fairness to the other side and comity towards the foreign court.
- » **Essar Shipping Ltd v Bank of China Ltd** [2015] EWHC 3266 (Comm) – the longer the case goes on in the foreign court, the greater the force of comity considerations.
- » **AON UK Ltd v Lamia** [2022] EWHC 3323 – bullish approach – an injunction to enforce an exclusive jurisdiction clause governed by English law is not regarded as a breach of comity, merely requiring a party to honour his contract.
- » Following 3 cases – important factor that foreign proceedings had not progressed very far and had only dealt with matters of jurisdiction and procedure was an important factor in finding that no issues of comity raised at all.
 - » **Ecobank Transnational Inc v Tanoh** [2015] EWCA Civ 1309
 - » **Team Y&R Holdings Hong Kong Ltd v Ghossoub** [2017] EWHC 2401 (Comm)
 - » **The Skier Star** [2008] 1 Lloyd's Rep. 652

d. Security

- » Proceedings to obtain security are not subject to ASIs; arrest proceedings are permitted.
- » But relief can be granted if purpose of proceedings is to outflank the arbitration / jurisdiction agreement: **Aquavita v Indagro** [2022] EWHC 892.
- » **The Kallang No.2** [2007] 1 Lloyd's Rep 160: anti-suit against arrest proceedings where security required for release answered exclusively to local judgment.
- » Options:
 - » Offer security which complies with terms of arbitration agreement and, if refused, seek ASI relief
 - » Offer security which answers to both local and contractual jurisdiction and seek ASI relief after vessel is released.

e. **Foreign Court Already Taken Jurisdiction**

- » In some cases, the carrier has already challenged the jurisdiction of the foreign court and lost. The foreign court has ruled that it **does** have jurisdiction.
- » **A v B (“The Star Moira”)** [2021] 2 C.L.C. 47 - Consider: are the foreign proceedings now too far advanced and was the ASI application made promptly?

f. **Foreign Domestic Statute Gives Foreign Court Jurisdiction**

- » **OT Africa Line v Magic Sportswear** [2006] 1 All ER (Comm) 32.
- » **Aline Tramp SA v Jordan International Insurance Co** [2017] 1 Lloyd’s Rep. 467

Anti-Anti- Suit Injunctions

- » Arise when one party obtains (normally *ex parte*) an injunction in the foreign court preventing the claimant from bringing a claim pursuant to the jurisdiction agreement.
- » There are very few English cases on anti-anti-suit injunctions, but those cases are analysed under the same principles as general anti-suit injunctions.
- » Examples of anti-anti-suit injunctions – court held that breach so egregious that any issues of comity fall away:
 - » **Ecom Agroindustrial Corp Ltd v Mosharaf Composite Textile Mill Ltd** [2013] EWHC 1276
 - » **Specialised Vessel Services Ltd v Mop Marine Nigeria Ltd** [2020] EWHC 3657 (Comm)

Quasi-Contractual Situation

- » Two principal types of quasi-contractual cases:
 - » Inconsistent contractual claims - (**Dell Emerging Markets (EMEA) Ltd & Anor v IB Maroc.com SA** [2017] 2 CLC 417).
 - » “Quasi-contractual/derived rights” cases – where the existence of the contract is not in doubt, but the person who has brought proceedings which are sought to be precluded is not a direct party to that contract.
 - » A third category was identified by Cockerill J in **Times Trading Corporation v National Bank of Fujairah (Dubai Branch)** [2020] 2 Lloyd’s Rep 317, but the same principles were held to apply.
- » Even though it cannot be shown that there is a contract between the parties, the “contractual” *Angelic Grace* principles are applied.
- » In the direct action type case, first the court will “characterise” the right being enforced **The Prestige (No.2)** [2014] 1 Lloyd’s Rep 309; and in the CoA ([2015] 2 Lloyd’s Rep 33) and if it is found to be contractual, will apply the **Angelic Grace** principles.
- » **QBE Europe SA/NV v Generali Espana de Seguros Y Reaseguros** [2022] EWHC 2062 (Comm) – example of where court granted an ASI on the quasi-contractual basis (a direct action case)



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