

## AN APPRAISAL OF THE CONCEPT OF ANTI-SUIT INJUNCTION IN INTERNATIONAL ARBITRATION

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### ABSTRACT

*The fundamental effect of a valid arbitration agreement is to confer jurisdiction on the arbitration tribunal to decide the dispute between the parties. Consequently, a positive obligation is imposed on the parties to submit their dispute to arbitration pursuant to the arbitration agreement and participate in good faith in the resolution of their disputes by arbitration. Thus, there may be cases where a party may require an injunction restraining the other party from instituting an action in violation of an arbitration agreement or continuing one already instituted. While anti-suit injunctions may not engender controversies in domestic arbitrations where a party institutes or intends to institute an action in national courts, the situation is different in international arbitration since such an injunction may be considered as an interference with the judicial process of a foreign sovereign state. This paper examines the grant of anti-suit injunctions in common law jurisdictions and international law concerns of comity affecting the grant of anti-suit injunctions. The paper considers the recent decision of the English Commercial Court in *Specialised Vessel Services Ltd v Mop Marine Nigeria Limited*. It concludes that anti-suit injunctions are desirable to protect arbitration agreements in both international and domestic arbitrations.*

**Keywords:** *Anti-suit injunction, Arbitration, Courts, Arbitration agreements, Common law.*

### INTRODUCTION

The existence of a valid arbitration agreement prevents courts from assuming jurisdiction over disputes subject to the arbitration agreement. Therefore, unless the arbitration agreement is null and void, inoperative or incapable of being performed, the court has a duty to refer the parties to arbitration.<sup>1</sup> Although a party may obtain a stay of proceedings where the other party proceeds to court in defiance of an arbitration agreement, a stay of proceedings may not invariably be sufficient to compel a party not to litigate in national courts or to submit to arbitration as agreed. This is because, since a stay only precludes the party from proceeding with the suit already instituted, the party may proceed to institute another action in a separate court. Accordingly, some states may offer additional remedies to enforce the obligation to refrain from litigating disputes subject to arbitration. These remedies are usually available in common law jurisdictions where national courts may be willing to issue "anti-suit injunctions" to prohibit the filing or prosecution of litigation in a foreign forum.<sup>2</sup>

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1. See New York Convention 1958, art II(3); UNCITRAL Model Law on International Commercial Arbitration, art 8.
2. See Gary B Born, *International Commercial Arbitration* (2<sup>nd</sup> edn, Wolters Kluwer 2014) vol 1 1291.



Anti-suit injunctions are orders of national courts usually granted in common law jurisdictions, restraining a party from commencing an action in relation to a dispute subject to an arbitration agreement or continuing one already commenced in defiance of an arbitration agreement.<sup>3</sup>

Recently, the use of anti-suit injunctions in the context of international arbitration has increased. The courts of many common law countries frequently resort to this device at a party's request to prevent the other party from instituting proceedings in breach of the arbitration agreement.

Whilst proceeding to court on the ground that the arbitration agreement is null and void or inoperative may be legitimate, however, in practice, a party may initiate parallel court proceedings in an attempt to avoid arbitration proceedings which it had initially agreed to because it considers court proceedings to be more convenient. In such a case, there may be the need to obtain an anti-suit injunction to protect the arbitration agreement.

This paper reviews Anti-suit injunctions in some common law jurisdictions, the decision of the English Commercial Court in *Specialised Vessel Services Ltd v Mop Marine Nigeria Limited*<sup>4</sup>, and Nigerian courts' stance. The paper further argues that an anti-suit injunction in international arbitration should not be considered as an interference with the judicial process of a foreign sovereign state since such injunctions are made in personam i.e against the parties to foreign litigation and not the foreign court itself, even though they are intended to have the effect of precluding the litigation from proceeding in the foreign court.

## ANTI-SUIT INJUNCTIONS UNDER ENGLISH LAW AND OTHER COMMON LAW JURISDICTIONS

English courts and indeed courts in many common law jurisdictions like Hong Kong, Singapore, Canada and Australia have long exercised the power to grant anti-suit injunctions enjoining foreign litigation instituted in violation of an arbitration agreement. Under English law, an anti-suit injunction would be granted against the prosecution of a foreign suit if it is established that (a) the English forum has a sufficient interest in, or connection to with, the matter in question; (b) the foreign proceeding causes sufficient prejudice to the applicant; and (c) the anti-suit injunction would not unjustly deprive the claimant in the foreign court of a legitimate advantage.<sup>5</sup>

In *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*<sup>6</sup> the English Supreme Court held that English courts have the power under section 37 of the Senior Courts Act to issue an injunction restraining a party from pursuing proceedings in apparent breach of an arbitration clause. In that case, AES Ust-Kamenogorsk Hydropower Plant LLP ("AES UK") leased a concession to operate a hydroelectric plant in Kazakhstan. Ust-Kamenogorsk Hydropower Plant JSC ("JSC") was the owner of the concession. The Concession Agreement between the two parties was governed by Kazakh law but contained an arbitration clause under the ICC Rules with a London seat. The relationship between the two parties deteriorated and JSC commenced several court proceedings in Kazakh courts against AES UK (the "Kazakh court proceedings").

3. The phrase 'Anti-suit injunction' may also be used to refer to court orders enjoining the parties from initiating or continuing with the arbitration, and/or invalidating the arbitral process. However, this category of injunction is more properly referred to as Anti-arbitration injunction.

4. [2021] EWHC 333 (Comm).

5. See *Airbus Indus. GIE v Patel* [1998] 1 Lloyd's Rep.631 (House of Lords); Gary B Born (n 2).

6. [2013] UKSC 35.



AES UK obtained an interim anti-suit injunction against the Kazakh court proceedings from the English court. On 16 April 2010, the English court issued a final anti-suit injunction restraining JSC from bringing any claim arising out of or in connection with the Concession Agreement "otherwise than by commencing arbitration proceedings in the International Chamber of Commerce in London and pursuant to its Rules". JSC appealed the decision to the Court of Appeal and subsequently to the Supreme Court. Both Appellate courts upheld the English court's order.

Similarly, in *Midgulf International Ltd v Groupe Chimiche Tunisien*<sup>7</sup> the English Court of Appeal granted an anti-suit injunction against proceedings in Tunisia, and recently, the English Commercial Court in *Riverrock Securities Ltd v International Bank of St. Petersburg*<sup>8</sup> granted an anti-suit injunction restraining Russian proceedings brought by the liquidator of an insolvent company in breach of an LCIA arbitration agreement.

The more recent case of *UAU v HVB*<sup>9</sup> shows that in certain circumstances, the English Courts may be willing to grant anti-suit injunctions enjoining foreign litigation instituted in violation of an arbitration agreement regardless of how far the foreign proceedings might have proceeded and the delay by the applying party in bringing the application. This underscores the commitment of English Courts to protect valid arbitration agreements. In that case, UAU and HVB entered into a farm-out agreement in relation to their participation in an oil and gas block, offshore of Equatorial Guinea. The agreement contained an arbitration clause by which the parties agreed to submit any dispute arising out of or in connection with the agreement to arbitration under the London Court of International Arbitration rules. The seat of the arbitration was London.

A dispute arose and HVB, contrary to the arbitration clause commenced proceedings in Equatorial Guinea's Court of First Instance on 18 November 2020. On 26 November 2020 the Court of First Instance made an *ex parte* order against UAU. UAU filed an appeal at the Provincial Court against the order on the basis that the Court of First Instance had no jurisdiction to determine the dispute, given the terms of the arbitration agreement. UAU's appeal was dismissed by the Provincial Court and it appealed to the Supreme Court. UAU's appeal to the Supreme Court was still pending when it applied to the English Commercial Court for an anti-suit injunction in April 2021. The English Court granted the anti-suit injunction and on the issue of delay raised by HVB, the court held that it was reasonable for UAU to delay English anti-suit proceedings (which might otherwise have proved a waste of time and money) in circumstances where the jurisdiction challenge before the Equatorial Guinea court was still pending. According to the Court:

given the advice of its lawyers in Equatorial Guinea, the Claimant [UAU] reasonably believed that the jurisdiction issue could be dealt with effectively in Equatorial Guinea and that its appeal to the Provincial Court had good prospects of success...there are good reasons for the time taken by the Claimant [UAU], in my judgment and no prejudice has been suffered by the Defendant [HVB].

7. [2010] EWCA Civ 66. See also *Starlight Shipping Co. v Tai Ping Ins. Co* [2007] EWHC 1893 (QB), *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571.

8. [2020] EWHC 2483 (Comm).

9. [2021] EWHC 1548 (Comm).



The practice of granting anti-suit injunctions enjoining foreign proceedings brought in violation of an arbitration agreement is also well recognised in many other common law jurisdictions. In *Giorgio Armani SPA v Elan Clothes Co Ltd*,<sup>10</sup> a court in Hong Kong granted an anti-suit injunction restraining Elan Clothes Co. Ltd ("Elan") from taking any further steps in a Shandong court proceeding that Elan had instituted in violation of an arbitration agreement between it and Giorgio Armani SPA.

In *WSG Nimbus Pte Ltd v Bd of Control for Cricket in Sri Lanka*,<sup>11</sup> the Singapore High Court granted an anti-suit injunction enjoining proceedings in Sri Lanka in breach of an arbitration agreement between the parties. Similarly, in *Travelport Global Distribution Systems BV v Bellview Airlines Ltd*,<sup>12</sup> the District Court in New York granted an anti-suit injunction enjoining Bellview Airlines Ltd from further pursuing court proceedings in Nigeria in breach of the arbitration agreement between the parties.

There appears to be no known case where a court in Nigeria granted an anti-suit injunction, although it can be said that being a common law jurisdiction, the courts in Nigeria should be willing to grant such an injunction when called upon to do so.

#### ANTI-SUIT INJUNCTIONS AND PUBLIC INTERNATIONAL LAW CONCERNS

Anti-suit injunctions, particularly in the context of international arbitration, have for long engendered controversies, particularly in civil law jurisdictions on the grounds that it violates the principles of international comity as it interferes with the judicial process of a foreign court. Consequently, civil law courts have shown their aversion for anti-suit injunctions which aversion is well expressed in their unwillingness to grant anti-suit injunctions accompanied by a marked reluctance on their part to recognise or give effect to the grant of such injunctions by Common Law courts. In 1996 a German Regional Court of Appeal in *Re the Enforcement of An English Anti-Suit Injunction*<sup>13</sup> held that anti-suit injunctions constitute an infringement on the jurisdiction of Germany and thus of its sovereignty. In that case, the Petitioner had obtained an injunction from the High Court in England ordering a German resident not to proceed against the Petitioner, in relation to a contractual dispute that had arisen between them, in any court other than the London Court of International Arbitration which was the contractually agreed forum. The German Court opined as follows:

Such injunctions constitute an infringement of the jurisdiction of Germany because the German courts alone decide, in accordance with procedural laws governing them and in accordance with existing international agreements, whether they are competent to adjudicate on a matter or whether they must respect the jurisdiction of another domestic or a foreign court (including arbitration courts)... These rights are safeguarded by the Germany procedural codes, and in many respects, by the German constitution. The courts must give effect to these rights. Instructions from foreign courts to the parties concerning the manner in which the proceedings are to be conducted and their subject-matter are likely to impede the German courts in fulfilling this task.

10. [2019] HKCFI 530.
11. [2002] 3 3LR 603.
12. [2012] WL 39258556 (SDNY Sept 2012).
13. 3 VA 11/95 [1997] I.L.Pr. 320.



In Europe, the EC Regulation 44/2001 (the "EC Regulation"), which amended the Brussels Convention, has been held to forbid Member states from granting anti-suit injunctions against proceedings brought in another European Union Member State in violation of a valid arbitration clause.<sup>14</sup> This is based on the principle of mutual trust that the European Court of Justice has strictly applied (now the Court of Justice of the European Union) (the "CJEU").<sup>15</sup> By and large, the EC Regulation only forbids member states from granting an injunction enjoining a party from pursuing litigation in the Court of another Member State even when litigation is in breach of an exclusive forum selection clause. The CJEU authority which was binding on national courts within the EU was *Gregory Paul Turner v Felix Freed Ismail Grovit*.<sup>16</sup> In that case, the CJEU held that any injunction from a contracting state prohibiting a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another contracting state constitutes interference with the foreign court's jurisdiction. But this authority was restricted and applied only to litigation and not arbitration.

Interestingly, the EC Regulation contains an exception that excludes measures taken to enforce arbitration agreements from the scope of the Regulation. Unfortunately, the CJEU decision in *Allianz SPA v West Tankers Inc* has rendered the exception inapplicable.<sup>17</sup> In that case, the English Court relying on the arbitration exception in the EC Regulation, had initially granted an anti-suit injunction against an insurer that had initiated litigation in Italy in violation of a charterparty arbitration agreement. However, on appeal, the House of Lords requested a preliminary ruling from the CJEU on whether it is inconsistent with the EC Regulation for the court of a member state to prohibit a party from commencing or continuing proceedings in the court of another member state on the basis of an arbitration agreement.

The CJEU Ruled that it would be incompatible with the EC Regulation for the court of a member state to grant an order enjoining a party from commencing proceedings before courts of another member state even though the proceedings would be in violation of a valid arbitration agreement since, at any rate, such an injunction bars the parties' access to an EU Member Court. According to the CJEU, a court order which undermines the effectiveness of the EC Regulation by preventing a court in another member state from deciding for itself whether it had or should exercise jurisdiction under the EC Regulation is incompatible with the regulation regardless of whether the proceedings in which the order was made are themselves within the scope of the EC Regulation.

The EC Regulation was later repealed by the EU Regulation 1215/2012 of 12 December 2012 (the "Recast Regulation"). In *Nori Holding Limited v Public Joint Stock Company*,<sup>18</sup> the English Commercial Court was approached to determine whether given the Recast Regulation, the decision of the CJEU in *West Tankers Inc*. remains good law. The court held that "*there is nothing in the Recast Regulation to cast doubt on the continuing validity of the decision in West Tankers... which remains an authoritative statement of EU law.*"

14. See the judgment of the European Court of Justice in *Allianz SPA v West Tankers Inc.*, Case No. C-185/07, [2009] ECR I-633.
15. See *Gregory Paul Turner v Felix Freed Ismail Grovit* [2004] ECR I-3565 (ECJ).
16. *Gregory Paul Turner* (n 16).
17. *West Tankers Inc.* (n 14).
18. [2018] EWHC 1343 (Comm).



Notwithstanding the approach of the CJEU, the English courts have held that anti-suit injunctions in support of arbitration are still available where proceedings have been brought in breach of an arbitration agreement in non-EU states.<sup>19</sup> Regrettably, the foregoing stance of the CJEU and indeed the national courts of many civil law countries on anti-suit injunctions in arbitration is misconceived for many reasons and problematic, at least for arbitrations.

First, an anti-suit injunction is directed only to the defendant and is in respect of the conduct of the defendant and does not call into question the jurisdiction of the foreign court. Foreign proceedings in breach of an arbitration agreement are a breach of contract which the grant of an injunction should ordinarily restrain unless there are strong reasons to the contrary.<sup>20</sup> The consequence of such an injunction is against the party who institutes the foreign proceedings and it cannot be a violation of a foreign state's sovereignty. As aptly stated by the English Court of Appeal in *Aggeliki Charis Compania Maritima SA v Pagnan SPA (The Angelic Grace)*<sup>21</sup>

In my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings [brought in violation of an arbitration agreement] on the clear and simple ground that the defendant has promised not to bring them... I cannot accept the proposition that any Court would be offended by the grant of an injunction to restrain a party from invoking a jurisdiction which he had promised not to invoke and which it has its own duty to decline.

It is generally accepted that contractual agreements shall be enforced. Therefore, it appears justifiable in my view that anti-suit injunctions are granted to enforce the contractual agreement to arbitrate. This should not be seen as an interference with the judicial process of a foreign state. Even the foreign court has a duty to decline jurisdiction to entertain an action over a subject-matter already subject to a valid arbitration agreement. For this same reason, foreign courts should be willing to enforce anti-suit injunctions obtained in another jurisdiction within its territory.

### ***SPECIALISED VESSEL SERVICES LIMITED V. MOP MARINE NIGERIA LIMITED AND THE STANCE OF NIGERIAN COURTS***

As noted earlier, there appears to be no case law where a Nigerian Court has granted an anti-suit injunction enjoining parallel court proceedings in violation of an arbitration agreement. However, the case of *Specialised Vessel Services Limited v MOP Marine Nigeria Limited*<sup>22</sup> shows the disposition of Nigerian courts to grant anti-arbitration injunctions readily and, on the other hand, the commitment of the English courts to grant anti-suit injunctions to protect arbitration agreements. In that case, Specialised Vessel Services Limited's ("SVS") vessel "*SVS Cochrane*" was in October 2019 involved in a collision with a tugboat in Nigerian waters whilst bareboat chartered to the MOP Marine Nigeria Limited ("MOP"). SVS had several claims arising from the collision, including outstanding hire (US\$ 1,209,137.50) and loss equivalent to the value of the vessel.

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19. See *Ust-Kamenogorsk Hydropower Plant JSC* (n 5), Gary B Born (n 2). With the exit of the UK from the European Union, it can be envisaged that English courts may now grant anti-suit injunctions enjoining proceedings in EU member states.
  20. *Donoghue v Armco* [2002] 1 Lloyd's Rep 425 at 24.
  21. [1995] 1 Lloyd's Rep. 87, 96.
  22. *Specialised Vessel Services Limited* (n 4).



Although clause 30 of the Bareboat Charter provided for English law and LMAA arbitration, MOP commenced an action in the Federal High Court, Rivers State, Nigeria on November 22, 2019, for: (i) negative declarations in relation to its liability under the bareboat charter; and (ii) an injunction preventing the SVS from insisting on the payment of any outstanding hire.

SVS nevertheless commenced arbitration in London. In response, MOP filed another action in the Federal High Court against SVS and the arbitrator. MOP also sought and obtained an *ex parte* injunction from the Federal High Court against SVS and the arbitrator restraining them from proceeding with the arbitration in London.

SVS sought injunctive relief from the English Commercial Court (the "Commercial Court") alleging that the commencement of the suits in Nigeria by MOP was a clear breach of contract and that the obtaining of the injunction restraining it and the arbitrator from proceeding with the LMAA arbitration was itself a breach of contract.

The application for injunctive relief was heard on 18 February 2021. The Commercial Court granting the relief considered that it had the power to grant SVS an 'anti-anti suit injunction' to counter the injunction obtained by MOP in Nigeria. According to the Commercial Court, parties had agreed on an exclusive English forum clause in the Bareboat Charter and a foreign anti-suit injunction to restrain substantive proceedings in England was a breach of the relevant clause and could be restrained by injunction on that basis.

The *Specialised Vessel Services Limited's* case is fascinating because the English Court held that it had the power to (and did indeed) grant an 'anti-anti suit injunction' to counter the anti-arbitration injunction obtained in Nigeria, as it considered even the anti-arbitration injunction to be a breach of the arbitration clause in the bareboat charter.

Unfortunately, the Nigerian courts appear to have a history of granting anti-arbitration injunction. In *Shell Petroleum Development Company of Nigeria Limited & 2 Ors v Crestar Integrated Natural Resources Limited*,<sup>23</sup> the Court of Appeal granted an anti-arbitration injunction restraining the continuation of arbitral proceedings commenced in London further to an arbitration clause in a Share Purchase Agreement (the "SPA") between the parties. Also, in *Zenith Global Merchant Limited v Zhongfu International Investment (Nig) FZE & Ors*,<sup>24</sup> the High Court of Ogun State, relying on *Crestar's* case, granted an anti-arbitration injunction restraining the parties from continuing with arbitral proceedings in Singapore.

In both cases, it may be argued that the Nigerian courts had a reasonable basis for the grant of the anti-arbitration injunctions.<sup>25</sup> The basis for the grant of the anti-arbitration injunction in *Crestar's* case, according to the court, was because it will be oppressive, vexatious or unconscionable to allow the arbitration proceeding to continue before the question 'whether clause 25 of the SPA upon

23. [2016] 9 NWLR (pt 1517) 300.

24. High Court of Ogun State delivered on 29 March 2017.

25. For instance, the main basis for the grant of the anti-arbitration injunction in *Zenith's* case was that the 1<sup>st</sup> Respondent having commenced an action at the Federal High Court Abuja to enforce its right under the JVA must be taken to have waived its right to compel arbitration, especially as the other parties have taken steps to respond to the suit.



which the arbitration is founded is invalid' is determined, as same will subject the applicant to duplication of work and needless expense. This reason may not be tenable. Where a party has freely agreed to refer a dispute to arbitration, such a party should not be allowed to rely on 'inconvenience' or 'lack of funds' to obtain an anti-arbitration injunction or interim anti-arbitration injunction before the issue of the validity of the arbitration agreement is determined. Further, the question of whether or not the arbitration clause is valid is a question that could have been determined by the arbitration tribunal under the principle of competence-competence.

## CONCLUSION

An antisuit injunction simply enforces the contractual agreement of the parties to arbitrate. Where a court is faced with an application for an anti-suit injunction, a court should be willing to grant such an injunction enjoining any litigation in violation of a valid arbitration agreement. This is so because once parties enter into an agreement to arbitrate, there is an underlying 'negative promise' from both parties not to institute actions in court in respect of any dispute subject to the agreement. Consequently, at the point of determining whether or not to grant an anti-suit injunction, and indeed where a court is faced with an application for an anti-arbitration injunction, the court must have it in mind that it is not being invited to consider whether arbitration is convenient in the circumstance or whether it will be interfering with a foreign court's judicial process, but rather whether the parties have initially agreed to submit their disputes to arbitration. Once an arbitration agreement is valid, a court must not assist a party to renege on his promise to refer the dispute to arbitration. As rightly opined by the English Supreme Court in *Ust-Kamenogorsk Hydropower Plant JSC*,<sup>26</sup> "Such an injunction is not for the purposes of and in relation to arbitral proceedings, but for the purposes and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which is enforceable regardless of whether or not arbitral proceedings are on foot or proposed."

It is not yet known what stance the Nigerian courts would take when faced with applications for anti-suit injunctions to enjoin a party from commencing proceedings in a foreign forum or a national court in violation of an arbitration clause. Still, it can be fairly envisaged, and it is hoped that being a common law jurisdiction, the Nigerian courts will follow the position of English courts and courts in other common law jurisdictions in seeking to protect valid arbitration agreements. Unfortunately, the position of the Nigerian Court of Appeal in *Crestar's case* and the Federal High Court in *Specialised Vessel Services Limited* do not inspire much confidence as to the positive disposition of Nigerian Courts to protect valid arbitration agreements. This ultimately may make Nigeria a less attractive location as an arbitral seat since the availability of an anti-suit injunction may very likely affect parties' choice of arbitral seat. Parties will not invariably choose a jurisdiction known for frequently granting anti-arbitration injunctions as their arbitral seat.

26. *Ust-Kamenogorsk Hydropower Plant JSC* (n 6).

