The High Court Grants Anti-suit Injunctions against EU Member State Proceedings

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KEY TAKEAWAYS

- Under EU law, the courts of one Member State are prohibited from issuing anti-suit injunctions ("**ASIs**") to restrain parties to proceedings in another Member State Court. Following the United Kingdom's departure from the EU, the High Court has once again granted ASIs to restrain parties who have commenced proceedings in the courts of EU Member States in breach of an exclusive jurisdiction clause.

- Parties located in EU Member States should bear in mind the potential consequences of commencing proceedings in the courts of EU Member States if they have entered into contracts with an exclusive jurisdiction clause in favour of the courts of England and Wales or an English arbitration clause. The English courts are willing to grant ASIs to enforce parties' contractual bargains just as they would with other Third States.

BACKGROUND

QBE Europe SA/NV v Generali España de Seguros Y Reaseguros [2022] EWHC 2062 (Comm) concerned an application for an ASI to restrain parties to proceedings commenced in Spain contrary to the terms of a London arbitration agreement. In *Ebury Partners Belgium SA/NV v Technical Touch BV* [2022] EWHC 2927 (Comm), the claimants sought an ASI in respect of proceedings commenced in Belgium contrary to the terms of an exclusive jurisdiction clause in favour of the courts of England and Wales.

In *QBE Europe*, the defendant, Generali, had commenced proceedings against QBE UK in Spain. QBE UK sought to restrain those proceedings, whilst QBE Europe sought to restrain Generali from commencing proceedings against it in Spain. The QBE parties relied on the terms of an arbitration agreement in the underlying insurance policy

between QBE and the owners of a yacht. The yacht was alleged to have caused damage to an undersea cable, the losses arising from which were indemnified by Generali. Generali therefore sought recoveries directly from QBE UK in the Spanish proceedings by denying that there was an applicable arbitration agreement.

In *Ebury Partners*, the underlying dispute related to the provision of foreign currency services by Ebury Partners Belgium SA/NV ("**Ebury**") to Technical Touch BV ("**TT**"). Although both companies were incorporated in Belgium, Ebury's parent companies were part of a corporate group based in England. TT's director, Mr Berthels, entered into a contract on TT's behalf for the provision of foreign currency services with Ebury through an application form (the "**Contract**"). Mr Berthels ticked a box, signifying agreement with Ebury's standard conditions. The standard conditions included an exclusive jurisdiction clause in favour of the courts of England and Wales. Mr Berthels subsequently provided a personal guarantee with a similar clause (the "**Guarantee**"). Both agreements included choice of law clauses adopting English law.

When TT failed to make a payment pursuant to the Contract, Ebury began to wind down the services it provided to TT. Having failed to reach a negotiated solution, TT and Mr Berthels brought proceedings in Belgium asking the court to hold the Contract and the Guarantee void under Belgian law and issue a declaration of non-liability. On 29 July 2022, Ebury commenced proceedings in England for the outstanding payment and damages, filing an application for an ASI on the same day.

THE DECISIONS

Below we set out the necessary elements to be met before an ASI can be issued below but these decisions are primarily significant because of what Mr Justice Jacobs directly acknowledged in *Ebury Partners*: "*[p]rior to Brexit, it would not have been possible for anti-suit relief to be granted in a case such as the present*." This is because the position under EU law prevented Member State's courts from issuing ASIs in respect of proceedings commenced in another Member State. The grounds for issuing ASIs in respect of proceedings in the courts of EU Member States now fall to be determined according to ordinary principles of English law.

One of the key elements determining whether to grant an ASI is the existence of an enforceable jurisdiction or arbitration clause. Mr Justice Foxton in *QBE Europe* noted the difference between this particular case and most applications for ASIs, namely that in the latter (of which *Ebury Partners* is a good example) the claimant relies on a direct, contractually agreed jurisdiction or arbitration clause. In *QBE Europe*, there was no direct contractual relationship between the QBE parties and Generali.

Before an English court will grant an ASI, it must consider the following principles, as Foxton J set out in some detail, relevantly:

- The court's power to grant ASIs is based on s. 37(1) of the Senior Courts Act 1981. The court will grant such relief when it is just and convenient, the touchstone being what the ends of justice require.

- The claimant has to demonstrate a "high degree of probability" that there is an agreement regarding jurisdiction that covers the dispute.

- If the alleged jurisdiction agreement arises in a quasi-contractual context (as in QBE Europe), then the underlying jurisdiction clause will be a highly significant factor where the right sought to be enforced in the non-contractual forum arises from an obligation under the contract containing the jurisdiction clause, and the right sought to be enforced is ancillary to that contract.

- If the claimant satisfies the court that there is an agreement on jurisdiction, then the defendant has the burden of satisfying the court that there are strong reasons to refuse the relief; otherwise the court will "*ordinarily exercise its discretion to restrain the pursuit of proceedings*" brought in contravention of the jurisdiction agreement.

- The court will exercise the jurisdiction to grant ASIs with caution.

Both Foxton and Jacobs JJ were satisfied that these conditions had been met and accordingly granted ASIs in the respective proceedings. Below we discuss two key elements—the high degree of probability that there was a jurisdiction agreement and the basis upon which the court will exercise its discretion to grant ASIs.

HIGH DEGREE OF PROBABILITY

To show a "*high degree of probability*," Ebury had to demonstrate that the jurisdiction clause was properly incorporated into the Contract. Mr Justice Jacobs concluded that Ebury satisfied this high threshold. He was guided by articles 3(5) and 10 of Regulation (EC) No 593/2008 (the "**Rome I Regulation**"), which continues to have effect in the UK as retained EU law. It was common ground that the incorporation issue was governed by English law, unless the exception in article 10(2) of the Rome I Regulation applied. TT argued that this exception allowed it to rely on Belgian law to show that it did not consent to the choice of law agreement if applying English law would be unreasonable in the circumstances.

Adopting a "*dispassionate, internationally minded approach*," Mr Justice Jacobs held that applying English law to the issue of incorporation would not be unreasonable. Both companies presented themselves as having international operations in various jurisdictions. Influenced by the transaction's "*international flavour*," Jacobs J rejected the suggestion that the parties had "*no connection with England other than by way of the disputed choice of law and jurisdiction clauses*." He further found that TT had assented to Ebury's standard terms when entering into the Contract. This was sufficient under English law to incorporate the exclusive jurisdiction clause.

QBE Europe proved more complicated. As above, the claimants in the Spanish proceedings sought damages from QBE UK on the basis of the underlying insurance policy with the yacht owners. There was no direct arbitration agreement between Generali and QBE UK or QBE Europe. Nevertheless, as Foxton J noted, under English law the court adopts the same approach as under an ordinary contractual arbitration agreement. In considering the evidence and Generali's claim, Foxton J was satisfied that QBE had shown a strong case that Generali was seeking to advance claims, which amounted to an attempt to enforce contractual rights under the insurance policy.

STRONG REASONS

In *Ebury Partners*, Jacobs J went on to consider any "*strong reasons*" that would dissuade him from granting an ASI. TT put forward nine interconnected reasons, including the language of the documents, the location of witnesses and the anticipated speed of Belgian and English proceedings.

Adopting the reasoning of the Court of Appeal in *UBS AG v HSH Nordbank AG* [2009] EWCA Civ 585, Jacobs J observed that little weight should be attached to whether litigation in a given jurisdiction would be more convenient. Parties are taken to have considered these factors when agreeing to a jurisdiction clause. Most of TT's reasons were dismissed on that basis.

While acknowledging that evidence regarding Belgian law would be needed, Jacobs J held that this was unlikely to present a challenge to an English court. Conversely, there was concern that the Belgian proceedings could be prejudicial to Ebury because Belgian courts could refuse to apply English law as agreed in the Contract and the Guarantee. Mr Justice Jacobs considered that "*the fact that a party is or may be seeking the application of a law contrary to that agreed between the parties provides a strong reason why an injunction should be granted, in order to protect the integrity of the parties' bargain*."

As for *QBE Europe*, Generali raised several reasons as to why the ASI should be refused, including comity, the wording of the arbitration agreement and the exclusion of the Contracts (Rights of Third Parties) Act 1999 all of which were dismissed by Foxton J.

COMMENT

For many years, English litigators lamented the inability of English courts to grant ASIs to restrain proceedings in the courts of EU Member States that had been brought in contravention of an exclusive jurisdiction or London arbitration clause. In short, EU law prohibited such relief largely on the basis of seeking to ensure mutual respect between each of the Member State jurisdictions. The prohibition on ASIs was particularly acute under the terms of the Lugano Convention and the Brussels Regulation as neither of these permitted the courts of the specified jurisdiction to accept jurisdiction over claims if another Member State court had already been seised. This issue was partially ameliorated (largely as a result of interventions by the United Kingdom) in the Recast Brussels I Regulation, which permitted the courts nominated in an exclusive jurisdiction clause to accept jurisdiction without having to await the other Member State court's determination of the question of jurisdiction. Nevertheless, ASIs could not be issued.

Parties located in the EU should think carefully before initiating proceedings in Member State courts contrary to the terms of an exclusive jurisdiction clause in favour of the English courts or against the terms of an English arbitration clause. They can no longer avoid the risks of ASIs now that the EU prohibition on ASIs in respect of other Member State courts has fallen away.

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Please do not hesitate to contact us with any questions.

LONDON

Christopher Boyne
cboyne @debevoise.com

Patrick Swain
pswain@debevoise.com

Luke Duggan
lduggan@debevoise.com