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Protecting enforcement rights in finance contracts: Asymmetry, anti-suit, and anti-enforcement injunctions

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Introduction

As many in the London legal world jet off on summer holidays, a number of recent decisions serve as useful reminders of the remedies available where a counterparty chooses to do similar and embark on litigation in another jurisdiction. Although not on the holiday must read list, these decisions confirm the principles applicable to anti suit injunctions ('ASI') and connected relief, as well as raising points to bear in mind when drafting the jurisdiction and arbitration clauses that are the most common foundation for such relief.

Anti-suit injunctions

The starting point is that an ASI will usually be available where:

- A party has a legal right not to be sued by party in another jurisdiction, often because that conduct is precluded by a contractual term providing for the exclusive jurisdiction of the English courts, or for arbitration; and
- There is no strong reason to refrain from making such an order.

This follows the straightforward logic of holding the respondent to its agreement. The applicant must, however, demonstrate, to a high degree of probability, that there is such an agreement between the parties which governs the dispute.

ASIs have become more commonplace in the wake of both Brexit and also the sanctions imposed on Russia after its invasion of Ukraine. The latter has led many Russian domiciled entities to choose to bring proceedings in Russia as opposed to in accordance with the dispute resolution mechanisms specified in their loan agreements to take advantage of Russian law provisions under which Western sanctions are ignored. This has, in turn led to their counterparties seeking ASIs to prevent the progress of those proceedings and protect themselves against possible future enforcement in England.

The first helpful clarification from these recent cases relates to asymmetric jurisdiction clauses. These impose exclusive jurisdiction upon only one party to an agreement, leaving the other free to bring proceedings in a number of jurisdictions. Some concern had been raised before Brexit as to its potential impact upon the court's willingness to recognise jurisdiction arising under such clauses (see, for example 3VB's finance column: Enforcing finance agreements if the UK cannot join the Lugano Convention). Fortunately, it now appears that the English courts have maintained their prior willingness to recognise such clauses as effective.

In *Barclays Bank PLC v PJSC Sovcombank [2024] EWHC 1338 (Comm)* Foxton J made a final ASI to enforce an asymmetric jurisdiction clause, where the respondent had, in breach of the exclusive limb of that clause, commenced proceedings in Russia. The relevance of the asymmetric nature of the clause does not appear to have caused the Judge particular concern from the perspective of whether or not to make that order, noting that it '*gives the English courts exclusive jurisdiction in all relevant respects so far as actions brought by Sovcombank are concerned, albeit in the usual way in finance documents Barclays would have the ability to commence proceedings elsewhere if it so wished.*'

Asymmetric jurisdiction clauses and The Hague Convention

What remains less clear, however, is the effectiveness of such asymmetric jurisdiction clauses under the Hague

Convention. It was not necessary for this issue to be considered in *Barclays Bank Plc v PJSC Sovcombank*. It has, however, been touched upon in another recent case, *Borrelli v Otaibi [2024] EWHC 1148 (Comm)*. There, Richard Salter KC followed the prevailing (but not yet binding) view of the English courts that to constitute an exclusive jurisdiction agreement within the scope of the Hague Convention, the jurisdiction must be exclusive for all the parties to an agreement. Despite this, there remain arguments that it is sufficient for just the defendant to be subject to the exclusive jurisdiction clause. The issue therefore still needs to be finally resolved in England. In addition to remaining alert for decisions on the point, parties should continue to check the position in other jurisdictions that may become relevant to their future disputes. The preparedness of the English Courts to take jurisdiction (and grant ASI relief) on the basis of an asymmetric jurisdiction clause provides no guarantee that this jurisdiction would be recognised were enforcement to be sought elsewhere.

The continuing enthusiasm of the English Courts for granting ASIs, and their preparedness to do so even in relation to an asymmetric clause also means that the focus of such applications will not be upon the type of jurisdiction clause, but upon the scope of such a clause. In each case, the critical question will be whether the clause encompasses the offending action brought in the other jurisdiction. This was, for example, the focus of detailed analysis in *Borrelli v Otaibi [2024] EWHC 1148 (Comm)* and *Qatar Investment and Projects Development Holding Co v Phoenix Ancient Art SA [2024] EWHC 1331 (KB)*. These cases emphasise the perennial importance of ensuring that the drafting of jurisdiction clauses is clear and comprehensive, and (at the least) covers any foreseeable disputes when the agreement is entered into.

This position in relation to court jurisdiction clauses is consistent with the parallel jurisdiction to grant ASIs in support of arbitration clauses. In that context, an asymmetric arbitration clause, granting one party the power to avoid arbitration and issue court proceedings, is not regarded as problematic from an English perspective (although this is not an approach shared by all New York Convention states). Thus, in *Barclays Bank Plc v VEB.RF [2024] EWHC 225 (Comm)*, Barclays Bank sought an ASI against a Russian Bank in relation to a dispute over sums due under transactions under a 1992 ISDA Master Agreement which contained provision '*in the clearest terms*' for LCIA arbitration. HHJ Pelling KC granted the order sought and was untroubled by the inclusion of an asymmetric provision within that clause giving Barclays Bank the power to refer any claim to the English courts rather than arbitration. The court rejected as unarguable the proposition that this power invalidated the arbitration clause.

Indeed, the more recent focus of ASIs in the arbitration context has been upon the expansion of the remedy, giving further cause to consider drafting arbitration clauses to ensure that there is a connection to England that would allow ASIs to be sought here if necessary. The remedy is now even available to protect arbitrations seated in other jurisdictions whose courts do not issue ASIs themselves, and where the only connection to England is that it is the applicable law of the contract and therefore arguably the law governing the arbitration clause to be protected by the ASI. In *Unicredit Bank GmbH v Ruschemalliance LLC*, the Supreme Court held that, if the applicable law of the arbitration clause was that of England, an ASI could be made. The full reasoning of that decision is yet to be handed down, but it is unsurprising in this light that an ASI can be granted in support for an asymmetric court jurisdiction clause. The expansive power indicated by that decision has been rapidly adopted by litigants. Most recently an ASI was made by Butcher J in *Bayerische Landesbank and Landesbank Baden-Wurttemberg v Ruschemalliance LLC [2024] EWHC 1822 (Comm)*. This dispute concerned the same bond as under consideration in *Unicredit*, and injuncted Russian proceedings in favour of a French seated Arbitration. The Judge held that England was the proper forum for the relief being sought.

Another theme emerging from the recent cases is the willingness of the court to bolster the protection resulting the most common form of ASI, which is prohibitory in nature: preventing the respondent from bringing an action, or from taking steps to progress an action, in breach of the relevant dispute resolution clause. The additional protections granted typically take one of two forms: an anti-enforcement injunction, or a mandatory ASI. The courts have shown a preparedness to make these orders even where the prospect of judgment or enforcement are comparatively far off, but there is a real risk of the ordinary form of ASI being ignored. Again, however, it is a critical pre-requisite, that the jurisdiction or arbitration clause clearly covers the dispute in issue in the offending proceedings.

Anti-enforcement injunctions

In *Barclays v PJSC Sovcombank*, Foxton J granted an anti-enforcement injunctions to prevent the respondent from seeking to enforce any judgment obtained in Russia in breach of the ASI that he had granted. He noted that these were rarer than ASIs, but that there was no separate jurisdictional requirement of 'exceptionality' before such an order could be made. Instead, the court could look to broader factors. He referred to and relied upon evidence that even if the respondent to the anti-suit injunction had sought to discontinue the Russian proceedings, judgment might

be entered regardless. This evidence was similar to that in *Deutsche Bank v RusChemAlliance LLC [2023] EWCA Civ 114*, in which the Court of Appeal approved the making of an anti-enforcement injunction in similar circumstances.

In *Barclays Bank Plc v VEB.RF [2024] EWHC 225 (Comm)*, there was no additional evidence as to the conduct of the Russian courts. Instead, HHJ Pelling KC granted an anti-enforcement injunction in combination with an ASI, on the basis that '*there could be no sensible objection*' to such a course because of the terms of the relevant jurisdiction clause, and the terms of the ASI that he was making. He held that the respondent had acted deliberately in breach of contract by brining proceedings in Russia and clearly concluded that there was a real risk that it would ignore the ASI.

This was a similar approach to that in *Magomedov v PJSC Transneft [2024] EWHC 1176*. In that case Bright J granted an anti-enforcement injunction in combination with an anti-anti-suit injunction, stating that the additional injunction was '*essential*' to ensure that the prohibitory injunction was effective, the court of the other jurisdiction (Russia) having already made orders against the applicant.

Mandatory anti-suit injunctions

As well as an injunction to prevent the respondent from taking steps to enforce any judgment it obtains in breach of an ASI, the court also has the power to make mandatory anti-suit injunctions (including on an interim basis). These do more than merely stipulating that the respondent should refrain from taking steps in proceedings in another jurisdiction in breach of a jurisdiction or arbitration clause, and instead require it to take positive action to bring those proceedings to an end. Like anti-enforcement injunctions, these orders are also rarer than a prohibitory ASI. It will usually be necessary for an applicant to identify additional factors than those that would support an ordinary ASI, to show that an ordinary ASI would (on its own) be ineffective.

For example, in *Re Renaissance Securities (Cyprus) Limited v ILLC Chlodwig Enterprises [2024] EWHC 1827 (Comm)*, Henshaw J made an interim mandatory ASI in relation to an arbitration clause concluding that he had a '*high degree of assurance*' as to breach of the clause and that there was a '*a strong prospect of the Defendants benefiting from their breach of contract and stealing a march via the Russian proceedings*'.

A mandatory ASI was also made in *Airbus Canada Limited Partnership v Joint Stock Company Ilyushin Finance Co [2024] EWHC 790 (Comm)*. In that case, HHJ Pelling KC, notied that '*a positive mandatory order requiring the defendant to discontinue the proceedings is likely to be of more influence than a merely negative order when issues concerning enforcement arise.*' Notably, the court also made an anti-enforcement injunction because of the likelihood of the Russian proceedings continuing to judgment.

Critically, however, both anti-enforcement and mandatory ASIs will only be available where the injuncted proceedings fall squarely within the scope of the jurisdiction or arbitration clause. This emphasises the importance of ensuring that such clauses are drafted in a broad and clear manner. They can, however, include asymmetric provision, which will be recognised by the English courts and can provide grounds for injunctive relief to hold the other party to their agreed dispute resolution method or jurisdiction. When drafting such clauses, consideration should, however, be given to the approach taken in any other jurisdictions which may be relevant to a future dispute. In addition, consideration should also be given to the inclusion of express provision for the law governing the jurisdiction or arbitration clause to ensure that the English Courts have a basis for making ASIs to support those clauses, particularly in relation to arbitration clauses in the light of the default rule for the law of the seat contained in the Arbitration Bill.