



Forum Shopping and Anti-Suit Injunctions

by

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Context

- Written agreements
- How best to secure/enforce:
 - Drafting
 - Jurisdiction/Arbitration clause/law clause
 - Action when dispute arises

Outline

- What is forum shopping?
- Is it permitted in breach of:
 - High Court jurisdiction clause?
 - London arbitration clause?
- Differences:
 - Inside EU (EFTA)
 - Outside EU (EFTA)

Forum Shopping

- Most favourable Jurisdiction
- Not always same
- Depends on who represented

Why Important?

- **Legal remedies:**
 - disclosure
 - limitation
 - costs
 - quality of justice
- **Practical factors:**
 - speed
 - enforcement

Remedies/Tools Available

- Challenge jurisdiction
- Anti suit injunction
- Pre-emptive strike
- Challenge enforcement
(difficult: estoppel and Regulation 44)

Remedies/Tools Available

“ ...Navigating the tightrope between too little involvement in local proceedings and a default judgment, on the one hand, and unintended submission [to the jurisdiction of the foreign court] on the other is an exceptionally difficult exercise. It looks easy - do no more, it is said, than preserve objections to jurisdiction. But many systems, by linking substantive proceedings and jurisdictional challenge, make that easier said than done.”

Anti-Suit Injunctions

- Section 37 SCA 1981
- Restrains party from commencing or pursuing proceedings in foreign court
- Discretionary
- Does not bind foreign court
- Breach is contempt (but so what?)

Opponent starts action in Non-EU Court

- In breach of exclusive English jurisdiction clause:
 - Challenge jurisdiction
 - Start action in English court
 - Oppose enforcement in E &W (difficulties)
 - Damages: cost of defending foreign proceedings

Opponent starts action in Non-EU Court

- In breach of London arbitration clause:
 - Challenge jurisdiction (NY Convention)
 - Start London arbitration
 - Anti suit injunction
 - Oppose enforcement in E&W
 - Damages: costs of defending foreign proceedings

Will you get your Anti Suit Injunction?

- Possibly:
 - discretionary
 - To be exercised with caution
 - Only where interests of justice require
 - Generally: good reason needed to show why not (“ANGELIC GRACE” 1995)
- But might be required to mediate!
(The zeitgeist? C.V. RHL 2005)

Impact EU Law

- Council Regulation 44/2001 (Brussels Convention 1968)
- In force 1 March 2002
- Direct effect all Member States (cf Denmark)
- Denmark bound by Brussels Convention
- (EFTA nations bound by Lugano Convention)

Impact EU Law

- Generally governs where EU defendant can be sued
- Restricts ability of Courts of Members States to determine jurisdiction
- Based on “comity”, “mutual trust”
(reality: full faith and credit)

How does the Regulation Scheme Work?

- Two key provisions:
 - Article 23: exclusive jurisdiction clauses effective, but
 - Article 27: court first seized
 - (cf Article 1, arbitration)

Opponent starts first in EU Court: clear problems

- In breach of English exclusive jurisdiction clause:
 - and action between same parties and same subject matter
 - despite Article 23 any later English action must be stayed (Gasser v MISAT 2003) (***even if egregious delay...***)
 - challenge jurisdiction or fight there
 - (Article 27 trumps Article 23)
 - (Position similar for “related” actions)

What about an ASI?

- No!
 - Turner v Grovit 2004
 - “contrary to the spirit and intention of Convention” (hence Regulation)
 - counter to the principle of “mutual trust” in legal and judicial systems of Member States
 - ***even if opponent acting in bad faith to frustrate existing proceedings (irrelevant)***

Implications of Gasser and Turner

- Forum shopping not ended by Regulation (Convention)
- No anti suit injunction to restrain first action
- Risk of tactical litigation
- Delay (justice delayed is justice denied)
- Additional cost
- Home advantage: anomalous results

Implications of Gasser and Turner

- 2003 Monitoring Reports on then Accession States
 - lack of public confidence
 - judicial corruption
- Grim reading....

Opponent starts first in EU Court: the latest problem

- In breach of London arbitration clause
 - Regulation (Convention) does not apply to arbitration
 - Court “second seized” can decide jurisdiction
 - But ASI no longer available to support London arbitration clause:
“FRONT COMOR” 2009 ECJ

Conclusions: Proceedings already started by Opponent

- **Europe:**
 - Court cases: compulsory stay and no ASI. Procedural disadvantage
 - Arbitration cases: no compulsory stay and no ASI
- **Outside Europe:**
 - Court cases: no compulsory stay and ASI
 - Arbitration cases: ditto

Conclusions: Proceedings contemplated, what to do?

- **Europe:**
 - Court cases: pre emptive strike but no ASI
 - Arbitration clauses: uncertain, pre emptive strike
 - (The “WADI SUDR” 2009)
- **Outside Europe:**
 - Court or arbitration: less pressure

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