

DISPUTE RESOLUTION IN M & A TRANSACTIONS – INTERNATIONAL CONFERENCE 2026

THE HIDDEN ALLY: STATE COURTS' SUPPORT IN M&A ARBITRATIONS

COURT ACTIONS IN AID OF ARBITRATION

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1. The focus of what I say over the next 10 minutes or so will be on the willingness of English Courts to enforce arbitration agreement by anti-suit order. The DIFC Court is an international commercial and civil court. Its jurisdiction is statutory but most of what I am going to say applies equally to anti suit injunctions sought from the DIFC Courts. I should make clear that what I am going to say represents my personal views. It does not reflect the views of either the Judiciary of England and Wales or the Judiciary of the DIFC Courts.
2. **SLIDE 2** English law attaches a particular value to an agreement to arbitrate disputes², to ensuring that such agreements operate in a businesslike way and are not undermined. **SLIDE 3** This long established policy is reflected in the special approach to the construction of arbitration agreements, and the readiness of its courts to grant injunctions prohibiting parties to arbitration agreements from attempting to litigate their disputes elsewhere. **SLIDE 4** Broadly such applications arise in three distinct situations:
 - . where one party to an arbitration agreement providing for Arbitration seated in England sues another party to that agreement, to restrain it from

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² See JP Morgan Securities Plc & Ors, J P Morgan Chase Bank, N.A., London Branch & Ors v VTB Bank Plc [2025] EWHC 1368 (Comm) per Foxton J as he then was at [112]

pursuing the applicant otherwise than by arbitral reference in accordance with the parties arbitration agreement;

- . Similar claims where a party with no connection to England seeks an injunction against a party over whom the English court has personal jurisdiction, restraining that party from commencing proceeding either in England or elsewhere otherwise than in accordance with their agreement to arbitrate by arbitration seated outside England;
- . Where one party to an arbitration agreement seeks to prevent a party other than a counter party to the relevant arbitration agreement from pursuing claims other than in accordance with that agreement.

Unsurprisingly perhaps it is this last type of anti-suit injunction that has given rise to most difficulty. Injunctions falling within the first two of these categories are mostly straight forward legally and are readily granted by the English Commercial Court and the London Circuit Commercial Court on an almost weekly basis. The third category has become much more significant since the introduction of sanction regimes by the UK and EU as well as the United States, where refusals to make payments to sanctioned entities of monies due under agreements containing arbitration or exclusive jurisdiction agreements have resulted in attempts to advance claims in foreign jurisdictions against companies associated with the non-paying entity.

3. **SLIDE 5** Turning first to the contractual route, the general principles that apply to are well established. The court's power to grant such orders is contained in s.37 of the Senior Courts Act 1981. An applicant is required to establish to a "*high degree of probability*" that the arbitration agreement relied on both exists and that it has been or will be breached. This high standard is required because an anti-suit order is likely to be final, preventing the enjoined party from contending that there was no such agreement otherwise than before the arbitral tribunal³. Once that

³ Transfield Shipping v Chipping Xinfa Huayu Alumina [2009] EWHC 3629 (Comm), per Christopher Clark J (as he then was) at [51]-[52]

hurdle has been overcome the applicant is ordinarily entitled to an anti-suit injunction to enforce compliance with the parties' arbitration agreement unless the respondent shows strong reasons why such relief should not be granted⁴ - For at least 30 years it has been accepted by the English courts that this should be the outcome as long as the anti-suit order is sought promptly and before the foreign proceedings are too far advanced⁵. Delay of itself is generally immaterial – English law treats comity and delay as linked with the primary focus being on the extent to which delay in applying for anti-suit relief has materially increased the perceived interference with the process of the foreign court or led to a waste of its time or resources⁶. Unless there are good grounds for thinking that the Respondent was not aware of the arbitration agreement, the fact that granting the injunction will preclude a party from bringing a claim because of a contractual or statutory time bar will be ignored⁷

4. **SLIDE 6** The threshold question involves two issues – firstly whether the arbitration agreement has been incorporated and secondly whether as a matter of construction the dispute comes within the scope of the arbitration agreement. Ultimately of course both these issues will be determined by the arbitral tribunal. For present purposes in most bespoke agreements the issue concerning incorporation will not be in doubt although it can become more complex where an attempt has been made to incorporate an arbitration agreement by reference to either other agreements or standard terms and conditions. In relation to

⁴ Donohue v Armco Inc and others [2001] UKHL 64; [2002] 1 Lloyd's Rep 425 at 24 (Lord Bingham)

⁵ The Angelic Grace [1995] 1 Lloyd's Rep 87, per Millett LJ as he then was at 96

⁶ Qingdao Huiquan Shipping v Shanghai Dong He Xin Industry Group [2018] EWHC 3009 (Comm); [2019] 1 Lloyd's Rep 520, per Bryan J at [28]

⁷ See the analysis in Times Trading v. National Bank of Fujairah [2020] EWHC 1078; [2020] 2 Lloyds Rep 317 per Cockerill J (as she then was) at [84] – [97] where a time bar being missed reasonably/not unreasonably was held to be a necessary but not to be a sufficient reason of itself for refusing an anti-suit injunction.

construction, English law adopts an uncompromising broad approach to these questions – not merely are the usually wide words of an arbitration agreement given their full force and effect but the construction exercise is also heavily informed by the benevolent presumption of one stop adjudication⁸ – that is the assumption that all rational business people will have intended that all their disputes would be resolved in a single forum.

5. **SLIDE 7** English law applies a strict derived rights principle which means that a party deriving a substantive legal right contained in a contract containing an arbitration agreement or exclusive jurisdiction clause will be prevented from attempting to assert that right otherwise than by the mechanisms that bound the original parties. This applies very frequently to parties that have acquired such rights by subrogation but also applies where rights have been acquired by assignment⁹. This approach applies to both derived contractual and delictual or tortious claims¹⁰ brought by a third party relying on derived rights where the same approach is adopted as for wholly contractual anti suit injunctions.
6. **SLIDE 8** I have touched briefly on the availability of injunctions from the English courts in aid of overseas seated arbitrations. The availability of this remedy was finally resolved by the Supreme Court in the UK in 2024¹¹. The claim concerned performance bonds issued by a German bank guaranteeing the performance of various German contractors under a construction contract with a Russian company. The bonds were governed by English law with all disputes to be settled by arbitration in Paris. The defendant brought proceedings against the claimant in

⁸ Approved in Fiona Trust & Holding Corp v Privalov [2007] UKHL 40

⁹ The Jay Bola [1997] 2 Lloyd's Rep 279, per Hobhouse LJ at 286 approved by the Supreme Court in Aspen Underwriting Ltd and others v. Credit Europe Bank NV [2020] UKSC 11; [2021] AC 493

¹⁰ Airbus SAS v Generali Italia SpA and others [2019] EWCA Civ 805; [2019] Bus LR 2997 per Males LJ at [96]-[97].

¹¹ UniCredit Bank GmbH v RusChemAlliance LLC [2024] UKSC 30; [2025] AC 1177

Russia and the German bank brought proceedings in England seeking an anti-suit injunction. The Supreme Court held that if a contract contained an arbitration agreement, including where the seat of the arbitration was outside England and Wales or no seat had been designated or determined, the English court would in principle grant an injunction to restrain breach of the arbitration agreement by a party over whom it had personal jurisdiction unless there was a strong reason why the court ought not to exercise its jurisdiction to restrain a breach of the parties contractual bargain – in other words applying the same conventional qualification that applies in domestic anti-suit cases. In arriving at this conclusion, the Supreme Court emphasised what has become the well-established policy of the English courts (and internationally through the New York Convention Art II(3)) that parties to an arbitration agreement should be held to their contractual bargain by any court before whom they had been or could properly be brought; that, in particular, in order to make commercial sense of an arbitration agreement and give it such efficacy as the parties had intended it to have, an arbitration agreement should be interpreted as not impliedly prohibiting a party from applying to a court for relief needed to hold the other party to its agreement or to support the process of arbitration.

7. The control on the scope of this jurisdiction is the existence of Personal jurisdiction which means in this context someone who can be validly served with proceedings either within or outside England and Wales applying English law principles. Where a party is located outside England and Wales permission can be obtained to serve proceedings where the underlying contract is governed by English law. As the law stood when *UniCredit* was decided, English law treated the governing law of a contract as applying to the arbitration agreement unless a contrary outcome was provided for expressly and that was so even if a foreign seat was agreed. **SLIDE 9** That has now changed because s.1 of the Arbitration Act 2025 inserts a new s.6A into the Arbitration 1996 which provides that the law of the seat applies to an arbitration agreement unless the parties expressly agree otherwise. This is likely to limit the jurisdictional reach of the UK courts, unless

the arbitration agreement has been drafted incorporating an express choice of English law as the applicable curial law.

8. However, that has been ameliorated to some extent in relation to arbitration agreements incorporating institutional rules which permit the appointment of an emergency arbitrator. S.8 of the 2025 Act inserts a new s.41A into the 1996 Act which amongst other things provides that an emergency arbitrator may make a peremptory order if a party to an arbitration fails to comply with a previous order and where that happens and that order is not obeyed then by s.42 of the 1996 Act the Court is empowered to make the emergency arbitrator's order an order of the court either on the application of the tribunal or by a party with the permission of the tribunal. If that order is not then obeyed it is enforceable as any other injunction or mandatory order – that is by imprisonment for up to 2 years and/or an unlimited fine.
9. **SLIDE 10** Finally, I turn to what has become a controversial issue in English law - the degree to which if at all the court has jurisdiction to restrain by injunction a party to an arbitration agreement from advancing claims governed by foreign law against third parties in foreign jurisdictions. The problem arises because the effect of agreeing a particular forum (in this context an arbitration agreement) will almost invariably involve a contractual waiver of the right to bring claims under causes of action recognised in other jurisdictions other than in accordance with the arbitration agreement¹². That is not very difficult to understand. It is a necessary consequence of entering into an arbitration or exclusive jurisdiction agreement. It is much more conceptually difficult where it is suggested that an agreement between A and B precludes either A or B from suing a third party in either a state court other than one it had been agreed would have exclusive

¹² See by way of example Starlight Shipping Company v Allianz Marine and Aviation Versicherungs AG [2014] EWCA Civ 1010 at [12] and Riverrock Securities Ltd v International Bank of St Petersburg [2020] EWHC 2483 (Comm) at [61]).

jurisdiction¹³ or by reference to arbitration in accordance with an arbitration agreement between A and B. The problem is if anything more extreme where an arbitration agreement is relied on to which the third party is not a party because in that circumstance the third party would be entitled to maintain that it was not bound by the arbitration agreement and thereby preclude either A or B as the case may be from pursuing its claim against the third party at all¹⁴ unless the institutional rules chosen by the parties permit the forced joinder of the third party concerned¹⁵. This problem is at its most acute where a claim is available to A against B which is jointly and severally liable with C, a non-party to the arbitration agreement between A and B¹⁶

10. The issue arose in stark terms in Renaissance Securities (Cyprus) v Chlodwig Enterprises¹⁷ It was common ground that (but for the EU and UK sanctions regime that applied to various Russian owned and controlled entities) the Defendant was entitled to the return of assets held under various investment agreements by the claimant, each of which was governed by English law and contained an arbitration clause. The defendant sued the claimant in Russia and was enjoined from continuing those proceedings applying the principles I have been discussing. The defendant then commenced proceedings against various Russian registered affiliates of the claimant in Russia. The claims were formulated in delict, governed by Russian law and sought damages based on the sums to which the defendant

¹³ A proposition rejected for example in Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd [1999] 1 All ER 37

¹⁴ See JP Morgan Securities Plc & Ors, J P Morgan Chase Bank, N.A., London Branch & Ors v VTB Bank Plc *ibid.* per Foxton J at [105 (ii)]

¹⁵ Article 22.1(x) of the LCIA Rules is an example of such a provision.

¹⁶ See by way of Egiazaryan v OJSC OEK Finance [2015] EWHC 3252 (Comm) at [31] and VTB Commodities Trading DAC v JSC Antipinsky Refinery [2019] EWHC 3292 (Comm) at [57].

¹⁷ [2024] EWHC 2843 (Comm) and on appeal [2025] EWCA Civ 369

was entitled from the claimant. It was not suggested that the third party claims were demurrable and it was common ground that none of the affiliates were parties to the relevant arbitration agreements. The claimant sought an injunction, which came before me and was refused. There was an appeal which in the result failed. However, it did so because the Court of Appeal considered that the Claimant was behaving in a manner that was less than straightforward. This led one of the judges to confine himself to dismissing the appeal on that basis. The other two judges did so as well but commented on the issue of principle that arose albeit in guarded and highly qualified terms.

11. **SLIDE 11** One of the judges (Singh LJ) rejected a submission that the effect of the arbitration agreements was to preclude the defendant from suing the affiliates as the result of an implied term of the arbitration agreement. Males LJ considered the contrary argument was arguable on the basis that the only purpose of the Russian claims was to circumvent the Claimant's arbitration claims. The difficulty is in formulating an appropriate implied term. It was this difficulty that led Foxton J (as he then was) to reject the implied term analysis in what for the moment is the last word on these issues¹⁸. This left as the only possible alternative the possibility that an injunction might be granted on the ground that the defendant's conduct was vexatious and oppressive on the basis that the Russian proceedings were no more than a manoeuvre to evade the arbitration agreement. Singh LJ considered there was some force in this argument. Foxton J considered it appropriate to use this mechanism in J.P Morgan v. VTB Bank¹⁹ on the basis that the Russian claims in issue in that case were intending to circumvent the arbitration agreements in issue.

¹⁸ See JP Morgan Securities Plc & Ors, J P Morgan Chase Bank, N.A., London Branch & Ors v VTB Bank Plc *ibid.* per Foxton J at [141]

¹⁹ See JP Morgan Securities Plc & Ors, J P Morgan Chase Bank, N.A., London Branch & Ors v VTB Bank Plc *ibid.* per Foxton J at [151]

12. **SLIDE 12** All this gives rise to real controversy. It does so because it ignores altogether the right of a party to pursue who it wants in whatever jurisdiction it wishes to. It ignores the fact that in Renaissance Securities (ibid.) at least it was not in dispute that the defendant had a legitimate cause of action available to it against the Russian subsidiaries and it exposes the court to having to make potentially highly subjective judgments as to what genuine claims a party to an arbitration agreement may be entitled to pursue. How this will be resolved finally is unclear. As things stand however, the position adopted by English law is consistent with the high degree of support it provides for arbitration and I suspect that ultimately the issues will be addressed on a highly pragmatic basis with support for arbitration trumping rights to pursue third party claims for substantially the same relief as otherwise could only be recovered in arbitration between A and B.

13. **SLIDE 13** what then are the takeaways from all this – they are I think that ASIs are powerful tools in the hands of courts whose policy is strongly to support dispute resolution by arbitration. The availability of the remedy in England and the DIFC Courts depends on the court having personal jurisdiction. In England the position has been strengthened by increased statutory support for coercive orders made by Emergency Arbitrators. In relation to the third party issue, again choice of institutional arbitration with mandatory third party joinder provisions may provide at least a partial answer. For drafting purposes, it may make sense to choose institutional arbitration with robust emergency arbitrator provisions or alternatively drafting arbitration clauses with express curial governing law provisions.