Donohue v. Armco: A Sensible and Pragmatic Approach to Anti-suit Injunctions

By Richard Tett

The House of Lords recent decision in *Donohue v Armco* clarifies the law on anti-suit injunctions. It is particularly relevant to international multi-party disputes with claims subject to different contractual jurisdiction clauses. The decision gives guidance as to how the Court will seek to balance these different and potentially competing contractual and equitable rights.

Background facts

There were many parties and potential parties to the *Donohue v Armco* litigation but essentially they fell into two camps. The Claimant in the English proceedings was Roger Donohue who was the Defendant in proceedings in New York brought by Armco. After Mr Donohue had issued his anti-suit injunction application in England, six other parties applied to join his application. These were Patrick Rossi, Larry Stinson, two of their US companies, ITRS and IROS, and two Jersey companies Wingfield and CISHL. These six applicants were referred to as the Potential Co-Claimants ("the PCCs") and along with Mr Donohue were also Defendants in Armco's New York proceedings.

In the other camp were five Armco companies – four US companies; Armco Inc, AFSC, AFSIL and Northwestern, and one Singaporean company; APL. These five were the Plaintiffs in New York in the substantive action and the Defendants to Mr Donohue's English anti-suit application.

Armco's substantive allegations were that there had been a conspiracy in around 1991 between Mr Donohue, Mr Rossi, Mr Stinson and Mr Atkins to defraud the five Armco companies of tens of millions of dollars. The allegation was that there had been a secret agreement between the four individuals which had been worked out in three ways by manipulating (i) a management buy-out relating to AFSC, AFSIL and, indirectly, Armco Inc., (ii) two trust funds relating to Northwestern, and (iii) a debt collection agreement relating to APL.

In the early 1990s, Mr Donohue and Mr Atkins had been employed in the insurance division of Armco, the British National Insurance Group. The Group had been in run-off since 1984 and Armco decided to dispose of the British National Insurance Group by way of a management buy-out ("MBO") to Mr Donohue and Mr Atkins. This sale was negotiated for Armco by two senior and long-serving executives Mr Rossi and Mr Stinson. As part of the structure

of the MBO, Mr Donohue and Mr Atkins used two corporate vehicles incorporated in Jersey known as Wingfield and CISHL. Importantly, the MBO documentation was expressly governed by English law and subject to English exclusive jurisdiction clauses ("EJCs"). Various of the Armco companies on one side and Mr Donohue, Wingfield and CISHL on the other side were party to the EJCs. However, Northwestern, APL, arguably Armco Inc, Mr Rossi, Mr Stinson and their two US companies were not party to those EJCs. The trust fund agreements and the collection agreement had no EJCs and were subject to either US law or no express governing law.

Armco's evidence was that it uncovered the fraud around the time that the British National Insurance Group (re-named the North Atlantic Insurance Group) went into provisional liquidation in 1997. At that time, Mr Atkins had explained to Armco about the secret agreement and the conspiracy to defraud the Armco companies. In August 1998, Armco commenced the substantive proceedings in New York and ancillary proceedings in Singapore (where Mr Donohue, a British citizen, was domiciled), Jersey, Guernsey, England and Hong Kong to freeze assets and obtain disclosure.

By the time Mr Donohue issued his anti-suit injunction application in England in March 1999, all the ancillary proceedings had been stayed. The issue was essentially whether an anti-injunction should be granted by the English Court to restrain Armco's New York proceedings. At the same time Mr Rossi and Mr Stinson were applying for the dismissal of the New York proceedings on similar grounds to those relied upon by Mr Donohue, namely the EJCs and arguing that England was a more convenient forum. As Mr Donohue was disputing the jurisdiction of the New York Courts, he took no part in the New York proceedings.

In essence, the position was that some parties and some claims were subject to English EJCs but others were not. Against that background, the question was should Armco's various claims against the different parties be split between New York and England; or should they proceed in a single forum?

First Instance and Court of Appeal

At first instance, Aikens J refused the anti-suit and joinder applications, thereby allowing all of Armco's claims to proceed in New York against Mr Donohue and the PCCs. On appeal, the Court of Appeal decided by a majority decision to allow both applications and to restrain Armco from pursuing the New York

proceedings. However, the Court of Appeal limited the anti-suit injunction to claims against all of the parties in respect of the MBOs, i.e., both those parties subject to the EJCs, such as Mr Donohue, and those who were not, such as Mr Rossi and Mr Stinson. As the injunction only related to the MBO claims, the Court of Appeal allowed the collection agreement and the trust fund claims to proceed in New York. Plainly this could well have led to two sets of Court proceedings from Armco's allegations of a single overall conspiracy – one in New York and one in London.

House of Lords

After a contested leave application, the House of Lords granted leave to appeal and the appeal was heard in October 2001 by Lords Bingham, Mackay, Nicholls, Hobhouse and Scott. Their Lordships held that the legal issues were more the application of existing law, rather than disputed questions as to what was the law. However and unusually, they unanimously decided to differ with the Court of Appeal's exercise of its discretion.

The Joinder and Service Out Applications

The first disputed issue was the order in which to consider the applications – should Mr Donohue's anti-suit application or the PCCs' joinder application be considered first? Mr Donohue argued that Armco had agreed in the MBO agreement to English EJCs and therefore he was clearly entitled to an injunction, that that should be decided first and it was then against the backdrop of his injunction, and the MBO claims being brought against him in England, that the House of Lords should consider how to exercise their discretion in respect of the joinder application. Conversely, the Armco companies argued that first the Court should determine who was properly before the Court, and only then should it proceed to consider whether to grant an injunction and, if so, in respect of which claims against which parties. Further, so Armco argued, the question of joinder involved jurisdictional questions which were not a matter of discretion.

Their Lordships agreed with Armco and first considered the joinder application. They said that the principles governing the grant of an injunction in cases such as that between Armco and the PCCs were beyond dispute. Lord Bingham, who delivered the leading opinion, referred to Lord Goff's opinion in *Société Nationale Industrielle Aerospatiale v. Leekiu Jak* [1987] AC 871 and said the four factors were: (i) the jurisdiction is to be exercised when the ends of justice

require it; (ii) when granting an injunction, the order is directed against the party not against the foreign court; (iii) an injunction is only granted to restrain a party who is amenable to the jurisdiction of the English Court, against whom an injunction will be an effective remedy; and (iv) since such an order indirectly affects the foreign Court, the jurisdiction must be exercised with caution. Lord Bingham further quoted with approval Lord Goff's comments that generally an injunction will only be granted where England is the natural forum and the proceedings in the foreign court are vexatious or oppressive (see also *Spiliada Maritime Corp.* [1987] 1 Lloyd's Rep 1).

Lord Bingham held that England was not the natural forum nor were the New York proceedings against the PCCs vexatious or oppressive. Mr Rossi and Mr Stinson's application to dismiss the New York proceedings had been denied by the New York Court and Lord Bingham referred to that decision. US Judge Schwartz had said that the Armco case against the PCCs was far removed from those cases where the New York Courts had held New York to be a forum non conveniens.

There was a further reason, according to Lord Bingham, for refusing the joinder application, which was that it had failed the third limb of Lord Goff's test. Wingfield and CISHL aside (they were party to the EJCs), the PCCs accepted that they could not have obtained permission to serve any of the Armco companies outside the jurisdiction. The PCCs said that this did not matter as the Armco companies had been properly served by Mr Donohue and were before the English Court. The PCCs sought to rely on CPR 19.2 which states that a party may be joined if it is "desirable". They said that it was simply not necessary for them to comply with CPR 6.20 (formerly RSC Order 11).

The Lords were unreceptive to this argument. Lord Bingham described it as "emasculating" CPR 6.20. He said that it would be wrong in principle to allow Mr Donohue's application to be a "Trojan horse" to allow the PCCs to enter proceedings when they could have shown no possible reason for doing so in their own right. Similarly, Lord Hobhouse said that the joinder application was "misconceived and should have been refused".

It follows from their Lordships' opinions that there can now be no doubt that, to seek an anti-suit injunction against an overseas party, you must be able to obtain permission to serve that party out of jurisdiction. An application to join existing proceedings does not circumvent the usual hurdles that need to be cleared regarding service out of jurisdiction.

Accordingly, the Lords held that they had no jurisdiction over the Armco companies in respect of the PCCs' application. For this and the other reasons outlined above, they denied the joinder application in respect of Mr Rossi, Mr Stinson and their two US companies and left Armco free to proceed against them in New York (in respect of the other PCCs Wingfield and CISHL who were party to the EJCs, they were in a different position and the issues for them were the same as for Mr Donohue). Their Lordships also held that the Court of Appeal had incorrectly decided the joinder issue and that meant that the exercise of their discretion in granting an anti-suit injunction was fundamentally vitiated.

Grant of an Anti-Suit Injunction

Having rejected the joinder application, their Lordships turned to Mr Donohue's anti-suit application. Whilst the grant of an injunction is always a matter of discretion, the Lords held that ordinarily the English Court will grant an injunction to secure compliance with a contractual bargain. The burden is on the party suing in breach of an EJC to show "strong reasons" why he should be permitted to proceed. There had been debate in earlier cases about the exact wording of the test and all the Lords agreed with the need for "strong reasons" if a party with the benefit of an EJC was not to be granted an anti-suit injunction. The benefit of an EJC was, Lord Bingham said, an important and substantial right, not a formal or technical one. Further, EJCs should be given "a generous interpretation" in terms of scope. That being said, a party could lose his "ordinary claim" to the equitable relief of an injunction if he had been dilatory or by reason of other unconscionable conduct.

Separately, Lord Bingham noted that, where proceedings were brought in England in breach of a jurisdiction clause in favour of an overseas' jurisdiction, a Court would ordinarily grant a stay of the English proceedings. However, he observed that the principles for the grant of stays are different to those for anti-suit injunctions. There was a question of comity in the grant of an injunction restraining foreign proceedings, whereas there was no issue of comity for the grant of a stay of English proceedings. It follows that authorities on anti-suit injunctions must be only used with care when in the context of a stay application and vice versa.

After setting out the general principles on enforcing an EJC, Lord Bingham considered authorities where the facts were complicated by there being multiple parties and claims, some subject to an EJC and some not. Lord Bingham noted

that Courts had declined to grant anti-injunctions where there was a risk of parallel proceedings and inconsistent decisions. He referred to the Court of Appeal in *Aroltra Potato Co Ltd v. Egyptian Navigation Co (The "EJ Amria")* [1981] 2 Lloyd's Rep 119 which said that separate trials were particularly inappropriate where a conspiracy claim was in issue. There were cases where a judge had granted an anti-suit injunction seemingly leading to two sets of proceedings, for example *Credit Suisse First Boston (Europe Ltd) v MLC Bermuda* [1999] 1 Lloyd's Rep 767. However, in that case the jurisdiction tangle was such that the judge had considered it impossible to make an order ensuring a trial of all the claims in a single forum.

In the present case, Lord Bingham observed that various claims would proceed in New York in any event, namely all the claims against Mr Rossi and Mr Stinson and their companies. Further, even in respect of parties with the benefit of the EJCs like Mr Donohue, the trust fund and collection agreement claims would proceed in New York as those were not the subject of the EJCs. Mr Donohue sought to lessen the significance of Northwestern's and APL's trust fund and collection agreement claims. He argued that the Armco parties should not be able to avoid their contractual obligations under the EJCs by adding into the overall action different claims not subject to EJCs brought by its subsidiaries. Mr Donohue alleged that Armco had simply got its "friends and relatives" to bring claims to dilute the effect of the EJCs. This was in contrast to situations such as in *Bouygues Offshore v. Caspion Shipping* [1998] 2 Lloyd's Rep 461 where independent third parties had related claims not subject to EJCs. The Lords did not accept this "friends and relatives" argument and they did not refer to it in their opinions.

Lord Bingham held that "great weight" should be given to the preference for a single composite trial. This seemed to be possibly the key factor for him. There was the potential for Mr Donohue to be prejudiced by Armco proceeding in New York in relation to the MBO claims in breach of the EJCs. However at the appeal, Armco offered to undertake not to enforce any multiple or penal damages as against Mr Donohue, Wingfield or CISHL. This was a similar approach to that of the parties who were proceeding in breach of EJCs in the cases of *Aerospatiale* and *Airbus Industrie GIE v. Patel* [1999] 1 AC 119. The purpose of such an undertaking is to counter a suggestion of prejudice arising from proceeding in a different jurisdiction.

Aside from multiple damages, Mr Donohue argued that he would still suffer prejudice from Armco's breach of the EJCs because of procedural differences in New York. He cited trial by jury as opposed to a judge and the trial being more expensive. Lord Bingham was unimpressed by these arguments and noted that there are always points of this kind to be made when comparing jurisdictions. Lord Bingham also had in mind "the standing, authority and expertise" of the New York Court. This all led Lord Bingham to conclude that Mr Donohue should not be granted an anti-suit injunction. Rather, all the claims should be allowed to continue in New York in a single forum.

Lord Scott found further support for refusing an injunction as he said that the conspiracy allegations were peripheral to what the parties could have expected the EJCs to cover. This appears to have been a factor for him in the exercise of his discretion but was not referred to in the other opinions. A further point of interest arose in Lord Scott's opinion. He said that, if Mr Donohue was entitled to an anti-suit injunction, then that would bar claims against not only him but also against Mr Rossi and Mr Stinson. This was because Mr Donohue was jointly and severally liable with them in respect of the conspiracy allegations relating to the MBO. The point had not been argued in the parties' cases, though it was touched on during the actual hearing. Lord Scott said that if claims against Mr Donohue were within the EJCs, then so too were corresponding claims against Mr Rossi and Mr Stinson, even though Mr Rossi and Mr Stinson were not entitled to enforce the clause. According to Lord Scott, Mr Donohue could have asked the Court to restrain claims in New York covered by the EJCs brought against any party with whom Mr Donohue could be jointly and severally liable. The effect of Lord Scott's comments would be that a tortfeasor with the benefit of an EJC could obtain an anti-suit injunction to restrain claims against not only himself but also all co-tortfeasors even if they were not a party to the clause. The other Lords did not comment on this point and it was not part of the reasoning.

Damages for breach of the EJCs

Whilst Armco succeeded on the appeal and was permitted to proceed in New York in respect of all its claims, there was a potential sting in the tail. Mr Donohue was claiming, in addition to an injunction, damages for Armco's breach of contract in not abiding by the EJCs. Lord Hobhouse said that he proceeded on the basis that, if Mr Donohue could show loss as a result of the

breach of the EJCs, the ordinary remedy of damages would be open to him. Lord Bingham also noted the potential for such a claim.

This raises the question of what damages Mr Donohue could suffer. Lord Scott said that he could see no reason in principle why Mr Donohue should not recover as damages the costs of a successful defence in New York. Assuming Mr Donohue succeeded in defending Armco's allegations, had the proceedings been brought in England, Mr Donohue would generally have been awarded his costs. However, in New York generally he would not. Therefore, in such a situation he would have suffered damage by Armco's breach of the EJCs in proceeding in New York. On the other hand, if Armco succeeded in New York, there would seem to be a far smaller risk of a damages claim, as Mr Donohue would not have been generally entitled to any costs in England on losing.

Interestingly, a very similar point came up in *Union Discount Bank v Zoller* [2002] 1 All 692. In that case, the Court of Appeal held that, on the assumption that the proceedings in the foreign jurisdiction were in breach of contract, the innocent party should receive the damages suffered by the breach. The Court held that the generally accepted proposition as quoted in Halsbury's Laws that "costs incurred in foreign proceedings cannot be recovered in an English action between the same parties" was too widely stated. Rather, where there is a breach of an EJC, the costs of the foreign proceedings may be recoverable.

Summary

Anti-suit injunctions will be granted to enforce an EJC except where there are strong reasons to the contrary. A strong reason includes if granting an injunction would lead to multiple proceedings, whereas declining to grant an injunction would allow a trial of all the claims in a single forum. This is particularly important where the claims relate to an alleged conspiracy. However, if an injunction is not granted, the party breaching the EJC may be subject to a subsequent damages claim, though this is not free from doubt.

For parties without the benefit of an EJC, they can only obtain an anti-suit injunction if they can serve the defendant out of the jurisdiction, England is the natural forum for the underlying dispute, the foreign proceedings are vexatious and oppressive and the four factors set out in *Aerospatiale* are fulfilled.

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