

**Arbitration: anti-suit injunctions to restrain foreign court proceedings in breach of an arbitration agreement.**

**Through Transport Mutual Insurance Association (Eurasia) Limited v New India Assurance Association Company Limited**

(2004) EWCA Civ 1598

UK Court of Appeal  
2 December 2004

Arbitration seems to have survived another ambush and lives on, possibly stronger than ever. Its latest escape is recorded in a recent Court of Appeal decision in the UK and in a European context, but the general principles are just as applicable in Australia and our region.

The case is *Through Transport Mutual Insurance Association (Eurasia) Limited v New India Assurance Association Company Limited*, sometimes referred to as *The Hari Bhum*, the name of the ship carrying the cargo which disappeared and which gave rise to the litigation.

The case is valuable because it gives us some, but not complete, clarity on how the courts will handle the situation where there are arbitration and *Scott v Avery* clauses in a contract, where one party wants the parties held to arbitration, but the other party has started and wants to bring or continue with court proceedings in a foreign country.

Will the former be able to get what is called an anti-suit injunction to restrain the latter from continuing with its court proceedings in the foreign court and drag him back to face the music in England or wherever the contract provided?

Equally, would that party be able to compel the other party to abandon its foreign court proceedings and face arbitration where the contract provided?

For a some years, the English courts and English practitioners were faced with a major problem thrown up by two decisions of the European Court of Justice when they, the English courts, were deciding whether to grant injunctions to restrain parties from continuing with foreign court proceedings.

### **The cases in the European Court of Justice**

Those two decisions, *Erich Gasser GmbH v. MISSAT Srl*<sup>1</sup> (Gasser) and *Turner v. Grovit*<sup>2</sup>, had decided that anti-suit injunctions should no longer be issued in one jurisdiction, say England, to restrain a party from continuing with proceedings in another, say Spain, when the two countries were covered by the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968, namely the European Community countries.

In *Gasser*, the European Court of Justice had held that an Austrian Court should not have issued an anti-suit injunction to restrain a company from proceeding in an Italian court, even although the injunction had been based on the ground that there was a clause in the parties' contract conferring exclusive jurisdiction over disputes on the Austrian courts.

This decision was based was on the ground that 'mutual trust and confidence' had to be given by the courts of one contracting state to those of another, ie by Austria to Italy.

In *Turner v. Grovit*, the House of Lords had wondered if it should issue an anti-suit injunction to stop a company from continuing with proceedings in a Spanish court when they had been brought in that court vexatiously and to avoid proceedings in England.

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<sup>1</sup> ECR C-116/02

<sup>2</sup> (2004) All ER (EC) 485

The European Court of Justice held that the House of Lords should not issue the anti-suit injunction and that to do so would be against the Brussels Convention, even if the injunction was designed to stop unconscionable behaviour and an abuse of process which would have occurred by continuing with the proceedings in Spain. Again it was said that mutual trust between Convention countries carried the day and required the court that was 'first seised' with the proceedings, the Spanish court, to proceed.

The combined result of the two cases was fairly clearly to bring to an end the possibility of obtaining anti-suit injunctions to restrain court proceedings in Europe, certainly in cases where they would previously have been granted on the ground either that the foreign proceedings were in breach of an exclusive jurisdiction clause in the contract or on the ground that they were vexatious and oppressive.

But, as there was still a desire to hold parties to their bargains, a lot of ingenuity went into how to avoid the effect of *Gasser* and *Turner v. Govit*. If your contract had a clause in it providing for exclusive jurisdiction in the English High Court over disputes arising under the contract, you would, more likely than not, want things to stay that way.

One suggestion made at the time was that if clauses like exclusive jurisdiction clauses were not going to stand up in the new Europe, then the next best thing was to put a clause

in the contract providing that disputes had to be resolved by arbitration in England.

This was so because the European Council Regulation, which superseded the Brussels Convention and which is known as Brussels<sup>1</sup>, provides specifically that it does not apply to ‘matters relating to arbitration’. So if you had a matter relating to arbitration, perhaps you could insist on its going to arbitration rather than a foreign court.

It was thought, therefore, that despite the two cases in the European Court of Justice, an anti-suit injunction might still be able to be obtained in an English court to restrain a party from continuing with foreign court proceedings if it had been agreed in the contract that all disputes had to be submitted to arbitration.

Or would it still be the case that even if you did have an arbitration clause in your contract, the concern for mutual trust and confidence would be so strong that it would require that the court first seised with the matter, the foreign court, be allowed to go on with the proceedings?

It was that question that came before the Court of Appeal in the *Through Transport Case*.

## **The Facts in *Through Transport***

An Indian merchant shipped goods to Finland on *The Hari Bhum* and insured them with New India. When the goods were lost, New India paid the merchant's claim and was thus subrogated to the claim the merchant had against the shipper who had lost the goods and who was, indirectly, insured with Through Transport.

Under that claim, New India naturally got the benefits of the merchant's contract, including the right to sue the carrier under a Finnish statute. This it did, by suing its insurer Through Transport, for the carrier was bankrupt.

But that was of immense concern to Through Transport. It did not want to battle it out in the courts in Finland, especially as the disputes clause in the insurance policy under which New India was suing, said that all disputes had to be resolved by arbitration in London. Through Transport wanted to keep the dispute in London and wanted it dealt with by arbitration.

It succeeded with this argument before the Judge at first instance, but the decision by the Court of Appeal was a mixed blessing. The company was found to be right on the law, for the court held that an arbitration clause would be enforced, but wrong on the facts and it failed to win its injunction. So the case would proceed in Finland. How did this happen?

### **The first leg of the Court of Appeal's decision**

The Court took the view, in the first leg of its decision, that an anti-suit injunction would certainly be granted to stop court proceedings which are brought in breach of an agreement between parties to submit disputes to arbitration. In such a case, arbitration would prevail. In that regard the Court followed an earlier Court of Appeal decision in *The Angelic Grace* in 1994 on the jurisdiction to grant anti-suit injunctions.

In *The Angelic Grace* the Court had said in a forthright manner:

" ... the time has come to lay aside the ritual incantation that this is a jurisdiction which should only be exercised sparingly and with great caution (because of) ... sensitivity to the

feelings of a foreign Court ... (T)here is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them’.

This robust statement of the law was followed in *Through Transport*. The Court of Appeal said:

‘We do not accept (the) submission that the court should not grant an anti-suit injunction in a case where a party to an arbitration agreement begins proceedings in the courts of a contracting state in breach of an arbitration clause in a contract’.

And, again:

‘...there is no reason why any court should be offended by an injunction granted to restrain a party from invoking a jurisdiction in breach of a contractual promise that the

dispute would be referred to arbitration in England. The English court would not be offended if a claimant were enjoined from commencing or continuing proceedings in England in breach of an agreement to arbitrate in another contracting state’.

In general terms, that clarifies the issue and it must give renewed hope to those seeking to hold parties to their arbitration bargain and provide some certainty and predictability on the venue for dispute resolution.

The substance of the view expressed by the Court of Appeal must be, in a practical sense, that where there are arbitration and *Scott v Avery* clauses in a contract, the parties will be held to them and in whatever locale the contract provides. They will not be allowed to make a pre-emptive strike by launching court proceedings in a foreign state.

**The second leg of the Court of Appeal’s decision**

However, the case gives rise to an additional complexity, for on the facts and in the exercise of its discretion, the Court of Appeal declined to issue the injunction. This is the second leg of the Court of Appeal's decision.

The anti-suit injunction to restrain New India's proceedings in Finland was not granted because, although the contract under which the Indian insurer was subrogated, certainly provided for arbitration, New India was not itself a party to that contract and hence it was not a party to any contract that required it to submit the dispute to arbitration.

In fact, it was not a party to any contract with Through Transport. It had paid its own insured, could not recover against that company's carrier, which had gone bankrupt, and was now claiming against the carrier's insurer under its, the carrier's, contract of insurance. The arbitration clause was in the contract of insurance and not in any contract to which New India was a party.

New India was therefore not in breach of contract in suing Through Transport in Finland rather than going to arbitration in England; it had no contract with Through Transport that it could break.

It was entitled to take all of the benefits of that contract and it was also subject to its detriments, including the obligation to proceed by way of arbitration.

But it could not be bound by the disputes clause in the insurance policy between Through Transport and the carrier.

Moreover, it had a cause of action by statute in Finland and it was not vexatious and oppressive for it to be suing in Finland.

So the question was whether in its discretion an English court should on the facts of the case exercise its discretion to prevent a party with those rights from pursuing a court action in another European country.

The Court of Appeal decided that in the exercise of its discretion, this was not an appropriate case.

It gave four reasons for reaching that conclusion. First, New India, the company sought to be restrained was not in breach of its own contract in suing in the Finnish court.

Secondly, this was a unique case.

Thirdly, the proceedings in Finland were not vexatious or oppressive and there was a legitimate cause of action under the Finnish statute.

Fourthly, because of a combination of all of the circumstances, including the 'reasoning underlying the approach of the ECJ in *Turner v. Govit*', ( i.e. , the comity between courts) and the fact that it was not 'just and convenient to issue an injunction'.

So the court proceedings in Finland were not to be prohibited by an anti - suit injunction in favour of an English arbitration.

Fortunately, the court made it perfectly clear that it was only the 'unique' facts and circumstances of *Through Transport* that prevented an injunction being granted.

### **Conclusions to be drawn from *Through Transport***

What conclusions can then be drawn from all of this? I believe they are as follows.

1. The principle in *Through Transport* is that an anti-suit injunction may still be granted to restrain a breach of an arbitration and *Scott v Avery* clause in a contract if the party to be restrained by the injunction is a party to the contract in which the arbitration clause is contained.

2. The European Court of Justice cases do not prevent such an injunction being issued to restrain a clear breach of an arbitration agreement.

3. In an appropriate case of an arbitration agreement, an injunction will be granted. But an appropriate case will not be one where the arbitration clause is simply in a contract to which the party to be restrained has been subrogated and on which it is relying. An appropriate case will only be one where the party to be restrained is actually a party to the arbitration agreement, has agreed in that contract to go to arbitration and then is in breach of its own agreement.

4. But in the absence of an arbitration clause, an English court will not grant an anti-suit injunction to prevent a party continuing with legitimate foreign court proceedings.

Arbitration has therefore carried the day, as it were, and is alive and well, for a properly drawn arbitration and *Scott v. Avery* clause between the

actual parties to the contract will be a good foundation for obliging all parties to stick to the agreement they made on how their disputes will be resolved. *Through Transport* will probably also lead to many such clauses being written into commercial contracts in an attempt to keep parties to those contractual obligations.

Finally, it must be remembered that all of this has been happening in a purely European context.

In Australia and our region we also have some strong parameters that reinforce the notion that where the parties have agreed on arbitration, generally they will generally be held to it. First, there are our State Commercial Arbitration Acts. For example, the New South Wales Commercial Arbitration Act 1984 provides in Section 53 that court proceedings may be stayed if the parties had previously agreed that the dispute should be referred to arbitration. Likewise, in the international context, the International Arbitration Act (Cwlth) 1974 incorporates the UNCITRAL Model Law on International Commercial Arbitration. The

Model Law may also be used to require a party to pursue arbitration rather than court proceedings when the dispute in question is subject to an arbitration agreement between the parties.

Although these statutes are not concerned with staying court proceedings in a foreign court, but only court proceedings in Australia, they nevertheless re-enforce the notion that parties should in general be held to an agreement to submit their disputes to arbitration. This is the same principle emerging from *Through Transport*.

Moreover, we have the comfort of a High Court decision, *CSR Ltd v. CIGNA Insurance Ltd*<sup>3</sup>, to the effect that respect for foreign courts and the comity between them, whilst important, are only factors to be weighed by a court in exercising its discretion whether to grant an anti-suit injunction. The objective will be to prevent injustice and it is reasonable to conclude that such a principle should be enough to save an arbitration agreement and require a party to go to arbitration where the contract provides and to desist from litigating in a foreign court.

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<sup>3</sup> (1996 -1997) 189 CLR 345

Practitioners should feel reasonably secure, therefore, that in appropriate cases, the Australian courts will not be mesmerized by any ‘ritual incantations’ that would prevent them requiring parties to an arbitration agreement to stick to their bargain. *Through Transport* reminds us that this should be the result.

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