



LexisNexis®

Without notice and anti-suit injunctions (2020)

4th November 2020

Before viewing this webinar, please visit www.lexiswebinars.co.uk/test-your-system to ensure that your network and PC are configured correctly.

Tip: Press F11 on your keyboard to enlarge the webinar player.

1

Without notice and anti-suit injunctions (2020)

The law as stated during this webinar is up to date as of **28th October 2020**



2

Introductions



3

Samar Abbas Kazmi
Barrister
39 Essex Chambers

Karishma Vora
Barrister
39 Essex Chambers



LexisNexis

4

**Anti-Suit Injunctions,
Without Notice Injunctions**

LexisNexis Confidential

5

5

Without notice injunctions

LexisNexis Confidential

6

6

Introduction

What is a without notice application?

When can a without notice application be made?

- When there is a 'good reason'. For example, exceptional urgency.
- When giving notice may defeat the purpose or cause injustice.
- When the other side is not on record.
- When the respondent can only be identified by description and not by name. For example, cases against persons unknown.

Servicem80 Confidential 7

7

Types of without notice applications

- Permission to serve outside the jurisdiction
- Permission to serve by alternate means / dispensing with service / extension of time to serve
- Interim remedies such as freezing orders and search orders.

Servicem80 Confidential 8

8

Duties at without notice applications

- The duty of full and frank disclosure, judged at a high standard
- Furnish an undertaking in damages
- Serve the without notice application and order promptly after obtaining it, together with the skeleton arguments, solicitors' personal notes and transcript of the oral hearing.
- Draft the terms of the order narrowly, for a limited period and must specify a return date.

Servicem80 Confidential 9

9

What occurs on the Return date

Once served, the Defendant may apply to set aside the without notice order on the following, amongst other, grounds:

- The Claimant was in breach of their duty of full and frank disclosure
- The Claimant did not have a good arguable case

The return date is a rehearing and not a mere review of the original application.

Sensitive/Confidential 10

10

Anti-suit injunctions

Sensitive/Confidential 11

11

“Where parties agree to arbitrate, it is the policy of the law that they should be held to their bargain.”

Nori Holding Ltd v Public Joint-Stock Co Bank Otkritie Financial Corp
[2018] EWHC 1343 (Comm), [66]

Sensitive/Confidential 12

12

Court's Power to Grant Anti-Suit Injunction

- **Domestic arbitration:** relatively straightforward route under s9 of the Arbitration Act 1996
- Under s9(1), a party to an arbitration agreement against whom legal proceedings are brought may apply to the court to stay proceedings, insofar as they concern matters which, under the agreement, should have been referred to arbitration.
- Under s 9(4), the court may not refuse such an application, unless it is satisfied that the arbitration agreement is void, inoperative, or incapable of being performed
- **Foreign-seated arbitration:** slightly more complicated questions arise (discussed over the next few slides)

13

Foreign Arbitration: Nature of Anti-Suit Injunction

- Anti-suit relief is a substantive remedy as opposed to merely procedural one
- Conceptual basis: anti-suit injunctions are not directed against the foreign court itself, but against the parties proceeding or threatening to proceed in that forum (**Société Nationale Industrielle Aerospatiale v Lee Kui Jak [1987] AC 871**)
- Traditional approach: because these injunctions may have 'indirect effects' on foreign courts, a cautious approach should be adopted by English courts
- Modern approach: "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," and that anti-suit injunctions should be granted on the "simple and clear ground that the defendant has promised not to bring them." (**Ust-Kamenogorsk Hydropower Plant v AES Ust-Kamenogorsk Hydropower Plant [2013] UKSC 35**, approving **Aggeliki Charis Cia Maritime v Pagnan [1995] 1 Lloyd's Rep 87**)

14

Modern Approach to Anti-Suit Injunctions

- Emphasises the contractual nature of the arbitration agreements and characterises the anti-suit injunction as a remedy for a breach of contract for which damages would "manifestly" be inadequate
- Require a high degree of probability that there is an arbitration agreement which governs the dispute in question to which the respondent is a party (**Ecobank Transnational Inc v Tanoh [2015] EWCA Civ 1309**; **Michael Wilson & Partners Ltd v Emmott [2018] EWCA Civ 51**)
- As with all injunctions (and other equitable remedies), within the Court's discretion "in all cases in which it appears to the court to be just and convenient to do so"
- In practice, **strong reasons** needed to displace prima facie entitlement

15

The 'Strong Reasons' Test

"If contracting parties agree to give a particular Court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English Court will ordinarily exercise its discretion [...] to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum [...]. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case."

Donohue v Armco Inc [2001] UKHL 64

- it is for the party suing in the other forum to show that there are strong reasons for doing so
- what constitutes 'strong reasons' will depend on all the facts and circumstances of the case

LexisNexis® Confidential 16

16

Examples of 'Strong Reasons'

- "the ends of justice would be best served by a single composite trial in the only forum in which a single composite trial can be procured." (**Donohue v Armco Inc [2001] UKHL 64**)
- Interests of parties other than those bound by the exclusive jurisdiction clause
- Delay by the party seeking injunctive relief
- Voluntary participation in foreign proceedings (**Dana Gas PJSC v Dana Gas Sukuk Ltd [2018] EWHC 277 (Comm), [25]; [30]**)
- proceedings brought in breach of an arbitration agreement where the purpose of those proceedings is arrest of a vessel as security for the arbitration claim (**Sam Purpose AS v Transnav Purpose Navigation Ltd [2017] EWHC 719 (Comm)**)

LexisNexis® Confidential 17

17

Checklist for Anti-Suit Injunctions

1. Do the foreign legal proceedings fall within the scope of a valid arbitration agreement which is not void, inoperative, or incapable of being performed?
2. Is the Respondent (a) party to the arbitration agreement, and (b) amenable to the jurisdiction of the English court?
3. Is the court's discretion under s 37 of the Senior Courts Act 1981 to grant an injunction where it is 'just and convenient' to do so engaged?
4. Is it likely that the Respondent will be able discharge the burden of proving 'strong reasons' for pursuing foreign proceedings within the meaning of **Donohue** and associated case law?
5. Has the Applicant lost the claim to equitable relief through delay or other unconscionable conduct?
6. Are there any other facts particular to the case which should be taken into account?

LexisNexis® Confidential 18

18

Hot Topics webinars available on demand

- The UK Digital Services Tax: an overview (2020)
- ADR: Settlements in cross-border disputes
- Mental health and wellbeing for lawyers
- SDLT and section 75A: Where are we now?



LexisNexis

19

Thank you and reminders

- This webinar is designed to help solicitors meet requirements A2 (Maintain competence and legal knowledge) and A4 (Draw on detailed knowledge/understanding) of the SRA's Statement of solicitor competence. You may also use the quiz, which can be accessed via the "Take a quiz" link on the webinar details page, to reinforce your understanding of the webinar content. You should answer 7 out of 10 questions correctly and will have two attempts at the quiz.
- Please submit feedback via the survey screen.
- This webinar will be archived immediately, and will be available to view on-demand for 24 months.
- A transcript of the webinar can be made available on request within 48 hours.
- You can use the training and evaluation record form which is included in the supporting materials for this webinar to log this training activity and how it relates to the continuing competences that the SRA requires from all solicitors.

If you have any queries, please contact us:
webinars@lexisnexis.co.uk
+44 (0) 330 161 2401
@LexisUKWebinars
lexisnexis-webinars

LexisNexis

20

Thank you for attending.
We hope you've enjoyed this session.



Bespoke in-house training solutions

- Tailored for your business
- Extensive portfolio of expert presenters
- All areas of legal practice covered
- Location of your choice

Find out more - <http://www.lexiswebinars.co.uk/in-house-training>

LexisNexis

21