

# Cross-border disputes

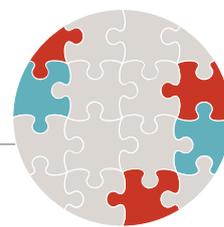
## Forum/jurisdiction and parallel proceedings

### International interim/protective relief

## Anti-suit injunctions: English High Court restrains “vexatious/oppressive” Singaporean proceedings against entity not party to English jurisdiction agreements

### A. Summary

1. In (1) *Clearlake Shipping Pte Ltd and (2) Guvnor Singapore Pte Ltd v Xiang Da Marine Pte Ltd* [2019] EWHC 2284 (Comm), the English High Court continued anti-suit injunctions (previously obtained “without notice”) restraining the owner of a vessel from bringing/continuing (third party) claims in the Singaporean Courts:
  - against the charterer of the vessel which, like the owner, was party to a charterparty and letters of indemnity containing (differently-worded) jurisdiction clauses in favour of the English Courts; and
  - against a sub-charterer which had no contractual relationship, and thus no jurisdiction agreement, with the owner.
2. As regards the claims against the charterer, this was because the English jurisdiction agreements between it and the owner should be interpreted consistently where possible - in this case as exclusive clauses – and, as such, they should be enforced by means of an anti-suit injunction on the “contractual basis” in the absence of any strong reasons to the contrary.
3. As regards the claims against the sub-charterer, the anti-suit injunction was continued on the basis that it would be “vexatious or oppressive” from the sub-charterer’s perspective for such claims to be heard in Singapore, since:
  - England was the natural forum for the dispute between the owner and the charterer and sub-charterer (since, although all three entities were incorporated in Singapore, there were exclusive English jurisdiction clauses in the charterparty, the sub-charter and the bills of lading);
  - by bringing a tortious misrepresentation claim solely against the sub-charterer and not against the charterer, the owner had manipulated its Singaporean claims to try to avoid being caught by the exclusive jurisdiction clause in the charterparty;



- the claims against the charterer would be heard in England and, so as to avoid forum fragmentation on the same issues, there was good reason to have all the claims between the owner and the charterer and sub-charterer in the same jurisdiction (i.e. England); and
  - consequently, it was necessary in the interests of justice to grant the anti-suit injunction taking in to account considerations of comity.
4. In view of those decisions, the Judge declined to decide whether the charterer was itself entitled to an anti-suit injunction in respect of the Singaporean claims against the sub-charterer:
- on the “contractual basis” via an assertion that the jurisdiction clause extended to the Singaporean claims against the sub-charterer; and/or
  - on the basis that those claims against the sub-charterer were “vexatious or oppressive” from the charterer’s perspective.
5. As the Judge himself noted, the owner’s procedural manoeuvre – designed to evade the jurisdiction clause – may well be of a type that had not previously triggered an English anti-suit injunction. Consequently, this Judgment may pave the way for the granting of anti-suit injunctions in other circumstances in which such tactics are employed – especially in view of the Court of Appeal’s previous indication that “*the categories of factors which indicate vexation or oppression are not closed*”.

## B. The parties, the contracts and the forum selection clauses

6. The Claimants/Applicants “**Clearlake**” and “**Gunvor**” were, respectively, charterers and sub-charterers of the M/T “Chang Hang Guang Rong” (the “**Vessel**”) which was owned by the defendant Xiang da Marine Pte Ltd (the “**Owner**”).
7. The charterparty between Clearlake and the Owner (the “**Clearlake Charter**”) contained an exclusive jurisdiction clause in favour of the High Court in London, which extended to “*any dispute which might arise out of this Charter*” (save for those worth less than \$50,000)<sup>1</sup>. The sub-charter agreement between Clearlake and Guvnor (the “**Guvnor Sub-Charter**”) also included a clause making disputes involving amounts in excess of US\$50,000 “*subject to the jurisdiction of the English High Court*”.
8. During the course of the charter, Clearlake issued letters of indemnity containing a jurisdiction clause by which “*every person liable under this indemnity shall at your<sup>2</sup> request submit to the jurisdiction of the High Court of Justice of England*”. Bills of lading were also issued and incorporated the exclusive jurisdiction clause contained in the Clearlake Charter.

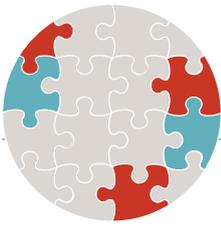
## C. The dispute

9. A dispute subsequently arose after the Vessel was detained by Chinese Customs on the basis that, despite what was stated in the shipping documents, the cargo had not originated in the Philippines. As a result, a portion of the Vessel’s cargo was seized.

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<sup>1</sup> The clause stated: “*The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter*”.

<sup>2</sup> I.e. for these purposes, “the Owner’s”.

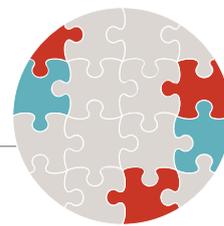


#### D. The Singaporean proceedings and third party claims

10. Following the seizure of cargo, the purchaser of the cargo (the “**Cargo Purchaser**”) commenced proceedings against the Owner in Singapore, alleging misrepresentations in the shipping documents (the “**Singaporean Proceedings**”).
11. The Owner, in turn, sought to join Clearlake and Guvnor to the Singaporean Proceedings, seeking an indemnity or contribution (the “**Singaporean Third Party Claims**”). In particular, the Owner initially asserted:
  - against both Clearlake and Guvnor, claims for fraudulent misrepresentation and/or negligent misstatement and/or breach of duty and/or breach of contract; and
  - against Clearlake only, an additional claim for an indemnity under the relevant letter of indemnity.

#### E. The applications for interim anti-suit injunctions and the English proceedings

12. As a consequence, Clearlake and Guvnor applied “without notice” to the English Court for interim anti-suit injunctions in order to restrain the Owner from bringing or continuing the Singaporean Third Party Claims, and commenced English proceedings also seeking various declarations.
13. The “without notice” application was granted in that:
  - Clearlake was awarded an anti-suit injunction in respect of the Singaporean Third Party Claims made against it - on the basis that the jurisdiction clauses in the Clearlake Charter and the letters of indemnity which covered the respective claims did not conflict and should be enforced;
  - Guvnor was awarded an anti-suit injunction in respect of the Singaporean Third Party Claims made against it - on a “quasi-contractual” basis (in view of the contractual claims purportedly made against it and its position that it was not a party to the contract in question) and/or on the basis that those claims were “vexatious or oppressive”.
14. The Owner then indicated that it proposed to amend its statement of claim in the Singaporean Third Party Claims such that:
  - the claim against Clearlake made there was solely based on the letter of indemnity claim; and
  - the claim against Guvnor made there was solely brought in tort for fraudulent and/or negligent misrepresentation (or other breach of duty in tort).
15. It reinforced that stance by undertaking to the English Court that it would not pursue any claims against Clearlake or Guvnor before the Singapore Courts save for those set out in the amended Singaporean Third Party Claims (although the undertaking did not preclude the Owner from bringing other claims against them in England).
16. Consequently, the Owner also applied to vary the terms of the anti-suit injunctions significantly such that they did not cover the claims in its revised Singaporean statement of claim.



17. In addition, Clearlake and Guvnor sought permission to amend their English statements of case to reflect the amendments in the Singapore Third Party Claims, and also to seek declarations of non-liability, including that of Guvnor in respect of the alleged misrepresentations. The Owner only challenged the latter amendments:
- on the basis that Clearlake had no real prospect of success in seeking the negative declaration in question (including bearing in mind that the declaration sought concerned the liability of Guvnor); and
  - on the basis that the English Court lacked jurisdiction in relation to Guvnor's claim for the negative declaration in question<sup>3</sup>.

#### F. The principal circumstances in which one might apply for an English anti-suit injunction

18. There are two main circumstances in which it might be appropriate for an English Court to grant an anti-suit injunction restraining the commencement and/or continuation of foreign proceedings<sup>4</sup>:
- First, where the commencement/continuation of the foreign proceedings constitute a breach of a forum selection clause agreed between the parties – i.e. the “contractual basis”. In those circumstances, an injunction will be granted unless there are strong reasons not to do so<sup>5</sup>.
  - Secondly, where the foreign proceedings are otherwise “vexatious or oppressive” – in which case the Court generally must be satisfied that:
    - » England is clearly the more appropriate forum for the trial of the action (or the “natural forum”); and
    - » it is necessary in the interests of justice to grant the injunction taking account considerations of comity.

As the Judge noted in respect of the second circumstance, Lawrence Collins LJ had clarified that, taken with other matters, the inherent weakness of a claim may be an important factor<sup>6</sup>, and also emphasised that “*the categories of factors which indicate vexation or oppression are not closed*”<sup>7</sup>.

3 Since the Owner was not domiciled in an EU/Lugano State and there was no English jurisdiction agreement as between Guvnor and the Owner, the jurisdiction of the English Courts was to be determined by English national law, including the common law rules - see Article 6 of Regulation (EU) No. 1215/2012 (“Recast Brussels I”).

The Owner did not dispute the jurisdiction of the English Courts in relation to Clearlake's claims in this respect.

4 Note that, under the Brussels/Lugano regimes, it is not possible for the Courts of an EU/Lugano State to order an anti-suit injunction in respect of proceedings commenced, or to be commenced, in the Courts of another EU/Lugano State – see *Turner v Grovit* Case C-159/02 [2004] E.C.R. I-3565, [2005] A.C 101.

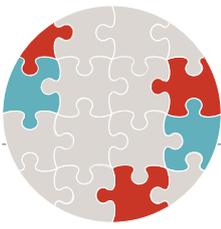
That is so even if the anti-suit injunction is sought in order to enforce an arbitration (rather than a jurisdiction) clause – see *West Tankers Inc v Allianz SpA* Case C-185/07 [2009] E.C.R. I-663, [2009] AC 1138 and, after the introduction of Recast Brussels I, *Nori Holdings Ltd v Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm).

Thus, the UK Courts cannot currently (subject to Brexit) order an anti-suit injunction in respect of proceedings commenced, or to be commenced, in the Courts of an EU Member State or of Iceland, Switzerland or Norway.

5 See *Donohue v Armco Inc* [2001] UKHL 64 at [24], per Lord Bingham.

6 See *Elektrim SA v Vivendi Holdings I Corporation* [2008] EWCA Civ 1178, at paras [84] and [121].

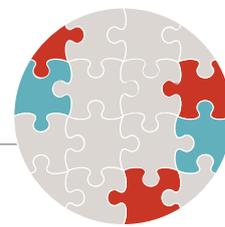
7 See *Elektrim*, at para [83].



19. Thus as the Judge noted, where foreign proceedings are commenced by a party to a contract containing an English jurisdiction clause against a non-party to that contract, one should approach in the following way the question of whether an anti-suit injunction can be obtained in respect of those proceedings:
- Does the jurisdiction clause, as a matter of interpretation, extend to cover the proceedings against the non-party?
  - If so, the “contractual basis” for an anti-suit injunction applies so that, as regards an application made by another party to the contract, an injunction will be granted unless there are strong reasons not to do so.
  - However, unless an exception to the principle of privity of contract applies, only another party to the contract, and not the non-party, can enforce the jurisdiction clause by obtaining an anti-suit injunction on the “contractual basis”.
  - Nevertheless, the non-party (and/or perhaps another contracting party, where the jurisdiction clause does not extend to the proceedings against the non-party) may instead seek an anti-suit injunction on the alternative basis that the foreign proceedings against the non-party are “vexatious or oppressive”. The existence of the jurisdiction clause (and any inherent weakness of the claim) may then be a relevant factor in the determination of whether such an anti-suit injunction should be granted.

## G. The issues for the Judge

20. The issues for the Judge to decide were, in essence, these:
- Should he continue (with only minor amendments) Clearlake’s anti-suit injunction against the Owner in respect of the Singaporean Third Party Claims against Clearlake under the relevant letter of indemnity - bearing in mind, in particular:
    - » the difference in wording between the English jurisdiction clauses in the Clearlake Charter and that letter; and
    - » the Owner’s assertion that the clause in the letter was non-exclusive?
  - Should he continue (with only minor amendments) Guvnor’s anti-suit injunction against the Owner in respect of the Singaporean Third Party Claims against Guvnor for negligent/fraudulent misrepresentation – on the basis that they were “vexatious or oppressive”?
  - Should he grant Clearlake an anti-suit injunction against the Owner in respect of the claims against Guvnor for negligent/fraudulent misrepresentation:
    - » on the basis that the jurisdiction clause between Clearlake and the Owner extended to the claims for tortious misrepresentation against Guvnor; and/or
    - » on the basis that such claims were “vexatious or oppressive” from Clearlake’s perspective?
  - Should he permit Clearlake and Guvnor to make the amendments to their English statements of case by which they sought declarations of the non-liability of Guvnor in respect of the alleged misrepresentations?



## H. The decision of the Judge

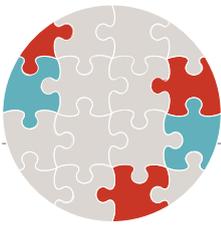
### Clearlake's anti-suit injunction restraining the Owner's claims against it under the letter of indemnity

21. As regards the claims under the relevant letter of indemnity, the Owner argued that the jurisdiction clause that letter was non-exclusive and that therefore it was not precluded from commencing/continuing the claims (in their amended form) in Singapore.
22. The Judge said that, since the claims under the letter of indemnity were also claims arising in relation to the performance of the Clearlake Charter and hence a "*dispute arising out of the* [Clearlake Charter]", there were two contracts (the relevant letter of indemnity and the Clearlake Charter), and therefore two jurisdiction clauses, in play. Consequently, it was a question of interpretation how they should be applied.
23. In the circumstances, the Judge held that the two jurisdiction clauses could, and therefore should, be interpreted consistently as requiring all disputes to be referred exclusively to the English Courts. He said that this was so despite the fact that such a consistent interpretation rendered the jurisdiction clause in the letter of indemnity superfluous.
24. The Judge therefore continued Clearlake's anti-suit injunction (on the "contractual basis" and with only minor amendments) restraining the Owner's Singaporean Third Party Claims against Clearlake.

### Guvnor's anti-suit injunction restraining the Owner's claims against it in tort

25. The Judge also upheld Guvnor's anti-suit injunction in respect of the Singaporean Third Party Claims against it. That was on the basis that it would be "vexatious or oppressive" to allow the Owner's claims in tort for misrepresentation to continue in Singapore for the following reasons:
  - There was an exclusive jurisdiction clause in favour of the English Courts in the Clearlake Charter (as well as the Guvnor Sub-Charter) and in the bills of lading (by reason of incorporation of the charter terms). England was therefore the natural forum for the third party claims between the Owner and Clearlake and Guvnor, and that was so despite the fact that all three entities were incorporated in Singapore.
  - The Owner had manipulated its Singaporean Third Party Claims to try to avoid being caught by the exclusive jurisdiction clause in the Clearlake Charter. In the Judge's view, the most obvious tortious misrepresentation claim open to the Owner was against Clearlake (rather than Guvnor) – especially since the claim against Guvnor rested on the misrepresentations being passed on by Clearlake to the Owner.
  - Given that the Owner was required to bring its claim against Clearlake in England (rather than Singapore), there was a good reason to require all the third party claims (by the Owner against Clearlake and Guvnor) to be heard in the same jurisdiction (i.e. England) to avoid "*forum-fragmentation on the same issues*". Further, there was no obvious prejudice to the Owner in having all the third party claims heard in England rather than Singapore and, whilst there may have been some overlap between the issues in the third party claims and the issues in the Singaporean Proceedings between the Cargo Purchaser and the Owner<sup>8</sup>, that would have been insignificant compared to the overlap of issues if the third party claims were split as between England and Singapore.

<sup>8</sup> As it happened, the Singaporean Proceedings between the Cargo Purchaser and the Owner were discontinued in the period between the English Judge sending a draft of his Judgment to the parties and the formal hand-down of the Judgment, but the Judge had made the decision he did (on the basis explained here) even without taking that development into account.



- The Judge was satisfied that, in light of the above points, it was necessary in the interests of justice to grant the anti-suit injunction, taking into account considerations of comity.

26. Consequently, the Judge continued Guvnor's anti-suit injunction (on the alternative "vexatious or oppressive basis" and with only minor amendments) restraining the Singapore Third Party Claims against Guvnor. Whilst he acknowledged that the precise type of procedural manoeuvre which the Owner had employed may not previously have triggered an English anti-suit injunction, he noted that the Court of Appeal had indicated that the categories of what counts as "vexation or oppression" should not be regarded as closed.

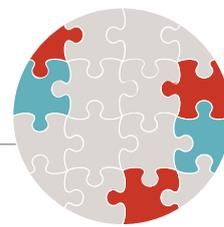
Clearlake's application for an anti-suit injunction to restrain the Owner's claim in tort against Guvnor

27. The Judge considered the implications of the fact that Guvnor was not a party to the Clearlake Charter, and whether the reference in the exclusive jurisdiction clause to "*any dispute which might arise out of*" that Charter could apply to claims against Guvnor for tortious misrepresentation.

28. He acknowledged that, whilst Guvnor could not seek an anti-suit injunction in respect of the Singaporean Third Party Claims made against it on the basis of a breach of an exclusive jurisdiction agreement (i.e. on the "contractual basis"), it may be possible for Clearlake to do so, depending upon whether the clause extended to the Singaporean Third Party Claims made by the Owner against Guvnor.

29. The Judge's starting point was that because the jurisdiction clause made no express reference to Guvnor, it did not extend to cover tortious claims against it. However, five additional factors needed to be considered against that. These were:

- the claim for misrepresentation might be said to constitute a "*dispute arising out of the* [Clearlake Charter]";
- there was nothing in the Clearlake Charter expressly indicating that the jurisdiction clause should not apply in relation to the Owner's tort claims against Guvnor;
- there was a close relationship between Clearlake and Guvnor – both being part of the same corporate group;
- had the Owners persisted with bringing their tort claim against Clearlake jointly with Guvnor, "*it would appear that the jurisdiction clause would have applied not only as regards Clearlake but also as regards Guvnor*"; and
- Clearlake had an interest in the Owner's claim against Guvnor on the basis that:
  - » if the claim against Guvnor was successful, there was a realistic prospect of Guvnor having a contribution or indemnity claim against Clearlake; and
  - » the claim against Guvnor was closely linked to the letter of indemnity claim against Clearlake and so it was in Clearlake's interests to avoid forum fragmentation.



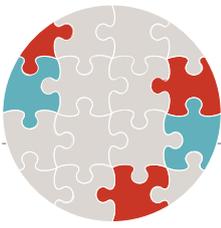
30. The Judge, however, ultimately declined to decide the point (and thus whether Clearlake was entitled to an anti-suit injunction in respect of the Singaporean Third Party Claims against Guvnor on the “contractual basis”). That was because it was unnecessary for him to do so, since he had already ordered that Guvnor was entitled to such an anti-suit injunction - on the basis that the Singaporean Third party Claims against it were “vexatious or oppressive”.
31. He also declined to decide whether, in the circumstances, such an anti-suit injunction could have been granted to Clearlake on the basis that the Singaporean Third Party Claims against Guvnor were “vexatious or oppressive” from Clearlake’s perspective.

#### Amendments to Clearlake’s and Guvnor’s English statements of case

32. The Judge gave permission to both Clearlake and Guvnor to amend their statements of case in the English proceedings, including to seek declarations of the non-liability of Guvnor in respect of the alleged misrepresentations, since:
  - it could not be said that Clearlake had no real prospect of success in seeking the negative declaration that Guvnor was not liable for tortious misrepresentation to the Owner – indeed, Clearlake had a legitimate interest in there being such a declaration since that would remove the possibility of Guvnor having a right to contribution (or an indemnity) from Clearlake; and
  - the English Courts had jurisdiction over Guvnor’s claim for the negative declaration in respect of its liability for tortious misrepresentation to the Owner. That was because:
    - » Guvnor was already making a claim for a declaration regarding the effect of the English jurisdiction clauses (over which the English Courts had jurisdiction via CPR 6BPD para 3.1(6)); and
    - » its claim for a negative declaration was one made against the same Defendant which arose out of the same or closely connected facts and so fell within CPR 6BPD para 3.1(4A).

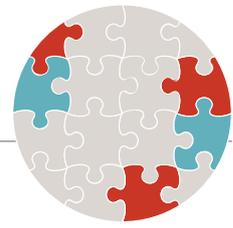
#### I. The effect of the decision and its practical and commercial implications

33. A number of points can be gleaned from this Judgment, as follows:
  - It is preferable to ensure that forum selection clauses in different but related contracts are consistent, especially where they may overlap in scope. Otherwise, there is the potential for jurisdictional arguments and/or an increased risk of parallel proceedings and thus of conflicting judgments.
  - It is crucial to check any forum selection clauses and consider their meaning, effect and scope before commencing proceedings or taking part in proceedings commenced by others.
  - The starting point when construing different jurisdiction clauses in different but related contracts is (adopting the modern objective and contextual approach to contractual interpretation) that consistency is likely to have been intended. However, if it is not possible to construe them consistently and they conflict, then other factors come to the fore – for example that the clause in the contract that is closer to the claim was intended to apply.
  - Where foreign proceedings are commenced in breach of an English forum selection clause, it may be possible to enforce that clause by obtaining an anti-suit injunction from the English Courts.
  - However, a non-party to the contract containing an English jurisdiction clause will (in the absence of an exception to privity of contract) be unable to do so on the “contractual basis”.



- That said:
    - » another party to the contract may itself obtain such an anti-suit injunction on the “contractual basis” if it can demonstrate that the jurisdiction clause extends to cover proceedings against the non-party;
    - » alternatively, the non-party (and/or perhaps another party to the contract) may obtain such an anti-suit injunction on the alternative basis that the foreign proceedings are “vexatious or oppressive”.
  - As part of the “vexatious or oppressive” test, it generally must be shown that:
    - » England is clearly the “natural forum”; and
    - » it is necessary in the interests of justice to grant the injunction taking account considerations of comity.
  - In that regard, the jurisdiction clause (and any inherent weakness of the claim) may be a relevant factor, especially if the foreign claims had been manipulated to try to avoid being caught by that clause.
34. This Judgment may pave the way for the granting of anti-suit injunctions in other circumstances which procedural manoeuvring tactics – for example to evade a jurisdiction clause - are employed, especially in view of the Court of Appeal’s previous indication that *“the categories of factors which indicate vexation or oppression are not closed”*.

**November 2019**



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