Arbitration Agreements & Collusive Litigation

The express language of an arbitration agreement contains the primary promise of the contracting parties to submit relevant disputes to arbitration. It may also stipulate various features or requirements for any arbitral process commenced pursuant to such agreement, which would then ordinarily (also) comprise terms of any subsequent reference to arbitration - each such reference being or involving a distinct contract as a matter of English law.[1]

It is less common for an arbitration agreement to contain language covering incidental or consequential matters such as confidentiality or mutual cooperation or performance of any subsequent arbitral award. These ancillary rights and obligations may be supplied and governed by institutional rules expressly chosen by the parties or by applicable statutory provisions or by implication as a matter of common law contractual analysis.

This note considers the nature and extent of implied obligations facilitating the efficacy or integrity of arbitration agreements under English law. Whilst the implication of terms is conceptually distinct from proper construction, both processes are influenced by resort to business common sense in one way or another - an approach specifically endorsed in the context of dispute resolution bargains such as arbitration agreements.[2]

The specific focus of the present discussion concerns the existence of an implied prohibition against steps to circumvent or subvert the parties' express mutual obligation to submit relevant disputes to arbitration. (For convenience, the latter is referred to as the "express positive obligation.") The impetus for such an implied mutual obligation is the occurrence of collusive or circumventive litigation whereby a third party (C) brings foreign court proceedings against A and B seeking (for example) invalidation or nullification of the substantive agreement containing an arbitration agreement between A and B. Whether or not an arbitral process is on foot, or has produced a substantive award, A can in certain circumstances obtain an anti-suit injunction ('ASI' for short) against both B and C in respect

[1] The ascertainment of the proper law of the arbitration agreement, as distinct from the substantive agreement in which it is contained, is a separate and complex issue. The present discussion assumes that English law governs the arbitration agreement as well as any specific reference to arbitration with English seat.

[2] Fiona Trust & Holding Corporation v. Privalov [2007] UKHL 40; [2008] 1 Lloyd's Rep. 254. As to the general position for implication of terms: see Marks & Spencer v. BNP Paribas [2015] UKSC 72; [2016] AC 742.

of the foreign court proceedings. This is so notwithstanding the procedural twist created by the fact that B (a contracting party) is not the foreign claimant whereas C (who is the foreign claimant) is not a contracting party or otherwise bound by the arbitration agreement.

The basis for such injunctive relief is vexation or oppression (aka unconscionability) through collusion between B and C. More specifically, collusive conduct designed to undermine or subvert the integrity or utility of any (existing or subsequent) arbitral process or consequent award(s) through complicity in such foreign court proceedings.[3] To date, vexatious collusion of this kind has been recognised where there is corporate affiliation between B and C; but this feature is neither necessary nor sufficient - it all depends on the circumstances.[4]

One preliminary question which may arise at the jurisdictional stage in such proceedings is whether B - who may be needed as an 'anchor' defendant in order to serve proceedings out of the jurisdiction upon C under 6BPD gateway (3) - has acted *unlawfully*, as distinct from vexatiously or oppressively or unconscionably, through its complicity in C's commencement and pursuit of the foreign court proceedings. This may matter if the only available basis for service upon B as 'anchor' defendant is 6BPD gateway (6), i.e. a claim made in respect of a contract (between A and B, i.e. the arbitration agreement) which is governed by English law.[5]

In those circumstances, the question arises directly whether B impliedly promised to its counterparty (A) - and indeed vice versa - not to circumvent or subvert their express positive obligation to submit relevant disputes to arbitration. For convenience, and without needing to resolve its precise formulation here and now, such implied obligation is referred to as the "non-circumvention" obligation.

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[3] Vexatious circumvention or evasion of the express positive obligation has also been restrained by ASI where a contracting party brings (foreign) litigation against a non-party: see Clearlake Shipping Pte Ltd & another v. Xiang Da Marine Pte Ltd [2019] EWHC 2284 (Comm); [2020] 1 All ER (Comm) 61 at [33]-[35] ("*a procedural manoeuvre designed to evade the exclusive jurisdiction clause*").

[4] See BNP Paribas SA v. OJSC Russian Machines & another [2011] EWHC 308 (Comm); [2012] 1 Lloyd's Rep. 61 (Blair J); Joint Stock Asset Management Co Ingosstrakh-Investments v. BNP Paribas SA [2012] EWCA Civ 644; [2012] 1 Lloyd's Rep. 649 (CA); Mace (Russia) Ltd v. Retansel Enterprises Ltd [2016] EWHC 1209 (Comm); cf. Evison Holdings Ltd v. International Co Finnvision Holdings [2019] EWHC 3057 (Comm).

[5] The present analysis assumes that the words "*in respect of*" in gateway (6) would require a sufficiently arguable case that B has breached or would (continue to) breach a term of the arbitration agreement, but this may not be required in practice. It is also assumed for present purposes that only limb (c) (English law) is potentially engaged, although other limbs of gateway (6) might be engaged depending on the circumstances.

The starting point for such an implied prohibition is the modern recognition in English arbitration law of the so-called "*negative aspect*" or "*negative promise*" within an arbitration agreement to the effect that neither party will litigate a relevant dispute.[6] Whilst this negative promise is often framed in terms of *foreign* litigation, as a pragmatic response to its alleged breach in any given case, it is a promise not to litigate anywhere or at all, including in the courts of arbitral seat.[7] It is referred to for convenience as the "non-litigation" obligation.

The non-litigation obligation is not articulated as an implied term. Its description as the "*silent concomitant*" is euphemistic in this sense.[8] It is, on any view, an unexpressed negative obligation said to arise as a necessary consequence or corollary of an express positive obligation. It forms an important component of the arbitration agreement itself, not the distinct contract(s) of reference which may arise pursuant to the arbitration agreement. As such it can be enforced (including by ASI) even where there has been and will be no reference of any dispute to arbitration, as in AES itself.

Other well-known terms implied into arbitration agreements include the following: a mutual obligation of cooperation (Bremer Vulkan Schiffbau und Maschinenefabrik v. South India Shipping Corp. Ltd [1981] AC 909); a mutual obligation of confidentiality (Ali Shipping Corporation v. Shipyard Trogir [1999] 1 WLR 314); a mutual obligation to abide by and perform an award (recently analysed in Ministry of Defence & Support for Armed Forces of The Islamic Republic of Iran v. International Military Services Ltd [2020] EWCA Civ 145); and an implied exclusive supervisory jurisdiction agreement through choice of English seat (C v D [2007] EWCA Civ 1282; [2008] 1 Lloyd's Rep. 239). Whilst some of these implied terms might, on closer analysis, be said to inhabit the specific arbitral reference as distinct from the arbitration agreement itself, and whilst some have been enshrined in statutory provisions or

[6] AES UST-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35; [2013] 1 WLR 1889 at [1], [12] & [21]-[28] (describing this negative aspect as the "*concomitant to arbitration*"). More recently, see Enka Insaat ve Sanayi A.S v. OOO "Insurance Company Chubb" & others [2019] EWHC 3568 (Comm) per Andrew Baker J at [66] ("*corresponding negative obligation not to litigate anywhere in the world*").

[7] The availability of a stay of court proceedings under s.9 of the Arbitration Act 1996 obviates the need in most cases to identify any actionable breach of contract on the part of the litigation claimant in the domestic context; cf. where a claim for damages (for breach of the arbitration agreement) is made by the counterparty following a stay of court proceedings.

[8] Anzen Ltd v. Hermes One Ltd [2016] UKPC 1; [2016] 1 WLR 4098 at [12].

institutional rules, their traditional recognition as implied terms at common law has potential significance in the present context.

The readiness of English courts to supply incidental rights and obligations to make sense of or support the express positive obligation suggests that the door is open to acceptance of the non-circumvention obligation so long as it can be formulated with sufficient precision and proportionality. The non-litigation obligation is an obvious and necessary corollary of the express mutual promise to arbitrate. The same might be said about the non-circumvention obligation, at least by analogy. Both obligations support the express positive obligation. Both are designed to protect the integrity and utility of that express bargain and any consequent arbitral process. Both can be characterised as forms of 'anti-avoidance' provision.

Put another way: If it is so obvious as to go without saying that parties to an arbitration agreement have undertaken not to litigate relevant disputes, why should that consensual moratorium apply only where one of them initiates the relevant litigation in their own name? In terms of morality and commercial common sense, there is no difference in principle between the situation where B itself commences such litigation, on the one hand; and where B precipitates and participates in such proceedings, often as a nominal defendant/respondent, through collusion and connivance with a third party (C) acting as foreign claimant/plaintiff, on the other hand. The only difference is one of form. Form which is, by definition, a contrivance to mask an underlying conspiracy.[9]

If such conduct can amount to vexation and oppression, as has been accepted, it may not be thought to add very much to say that it is also a breach of some implied obligation inherent in the arbitration agreement. In essence, it might be characterised as an implied obligation not to act unconscionably in respect of the package of legitimate interests created by an arbitration agreement, threading together other distinct implied terms identified above. English law has not set itself against the existence of concurrent liability (for example, in contract and negligence) and there seems no sensible objection to the existence of the non-circumvention obligation in so far as it amounts to prohibiting vexation or oppression (aka

[9] If A has a sufficiently arguable claim against B and C for the tort of conspiracy, this may provide a distinct basis for an injunction (perhaps not strictly ASI) with the possibility of serving both defendants out of the jurisdiction under gateway (9) depending on the circumstances including proper forum.

unconscionability). This much appears to have been accepted *obiter* by Males J (as he then was) in Dreymoor Fertilisers Overseas Pte v. Eurochem Trading GmbH & another [2018] EWHC 2267 (Comm); [2018] 2 Lloyd's Rep. 536 at [85].

Additional support may be found in the analogous (or perhaps synonymous) concept of abuse of process. In its strict sense, abuse of process is a legal doctrine invoked as a matter of inherent jurisdiction by courts of justice to prevent misuse of their procedures and functions so as to preserve and perform their constitutional role. Abuse of process has no direct juridical counterpart in private consensual arbitration. And yet the concept of abuse of process in the arbitral context - i.e. abuse of the *arbitral* process, including by way of so-called "collateral attack" on findings made in an award - is entrenched in the lexicon of ASI jurisprudence.[10] It might be said that this has its origins in some form of implied term inherent in the mutual arbitral bargain, at least in so far as applied in pre-award situations.[11]

As matters stand this specific point has yet to be tested. In the context of the challenge to jurisdiction in BNP Paribas v. Russian Machines (above) the existence of personal jurisdiction as against the 'anchor' defendant under gateway (6) was conceded, shifting the focus to whether the conditions for gateway (3) were satisfied in respect of the other (non-contracting) defendant. There is more than a hint in the judgment of Blair J that the underlying basis for satisfaction of gateway (6) as against the first defendant (parent guarantor) would have involved breach of an *implied* term of the arbitration agreement.[12]

It remains to be seen whether the non-circumvention obligation is recognised in the context of collusive foreign litigation. The position requires testing in different procedural contexts, pre-/post-award and indeed pre-/post-reference, in due course. This may in turn lead to some re-drawing of the traditional distinction between contractual and non-contractual bases for ASI relief in so far as there is found to be a contractual duty not to act unconscionably.[13]

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[10] Michael Wilson & Partners Ltd v. Emmott [2018] EWCA Civ 51; [2018] 1 Lloyd's Rep. 299 at [53]-[63]; Noble Assurance Co & another v. Gerling-Konzern General Insurance Co [2007] EWHC 253 (Comm); [2007] 1 CLC 85.

[11] In the post-award situation, the "*abuse*" of the arbitral process by foreign (re-)litigation can trace its consensual underpinning to the parties' implied mutual promise to abide by and perform an award and/or their implied exclusive supervisory jurisdiction agreement, summarised above.

[12] See BNP Paribas (above) at [28](1), [51], [56], [62](1)(a) & [64]-[65]. See also Court of Appeal in the same case (above) at [46] & [48].

[13] As acknowledged in Raphael: The Anti-Suit Injunction (2nd ed. 2019) at 7.67 (p.183); cf. AES (above) at [20].