

# Kluwer Arbitration Blog

## Anti-Suit Injunctions in Support of Foreign-Seated Arbitrations

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Anti-suit injunctions (ASIs) are orders which a court or arbitral tribunal may issue to restrain a party from commencing or continuing a proceeding in another jurisdiction. Several recent decisions have considered whether English courts should grant ASIs pursuant to section 37(1) of the Senior Courts Act 1981 and/or section 44 of the Arbitration Act 1996 in support of foreign-seated arbitrations. The divergent conclusions reached in these decisions invite an analysis of the principled bases of this remedy and how they influenced their outcomes.

This post summarises four recent decisions on this issue and illustrates their divergent outcomes, before analysing the competing issues of principle which underpin this division of opinion.

### Summary of Divergent Outcomes in Recent Decisions on ASIs

On 21 August 2023, Bright J refused in *SQD v QYP* [2023] EWHC 2145 (*SQD*) to grant an interim ASI restraining court proceedings commenced in breach of an arbitration agreement that expressly provided for ICC arbitration in Paris. After QYP commenced court proceedings in Russia, SQD issued: (i) a request for arbitration, seeking *inter alia*, an order that QYP must discontinue those court proceedings; and (ii) an application in England for interim anti-suit relief.

Bright J stated that in principle he would very likely have granted an ASI if the case concerned an English-seated arbitration, but expressed concern about granting an ASI in relation to a Paris-seated arbitration ([17]). Evidence of foreign law had established that an ASI would not have been available under French law (the law of the seat) for reasons of public policy ([80]-[85]). Bright J reasoned that English courts should defer to: (i) French law to avoid any conflict or clash; and (ii) the objective intention of the parties, who had selected Paris as the seat knowing that French courts would not grant ASIs ([95]-[96]).

On 11 October 2023, the Court of Appeal published its full reasons for allowing an appeal from Bright J's judgment, in *Deutsche Bank AG v RusChemAlliance LLC* [2023] EWCA 1144 (*DBAG*). The relevant ground of appeal was: "*The Court should not have held that the application was contrary to any French public policy*". The Court of Appeal allowed the appeal not because it disagreed with Bright J's reasoning, but on the basis fresh evidence showing that French courts did not have a principled objection to anti-suit relief being sought in other courts ([30]-[31]), notwithstanding that they would not grant it themselves. This removed the perceived conflict or clash which justified Bright J's original decision ([32]-[33]).

On 24 August 2023 (prior to the publication of *DBAG*), Robin Knowles J had also distinguished *SQD* in granting an interim ASI, pending a contested final hearing, in response to court proceedings commenced in Russia that similarly concerned contracts providing for Paris-seated ICC arbitration. The claimant argued an ASI granted by the English courts would not offend, or be contrary to, French public policy. Robin Knowles J agreed, concluding that granting anti-suit relief would further comity between English and French courts, which shared a common objective of upholding the parties' bargain<sup>1</sup>).

On 22 September 2023, Teare J heard an expedited final hearing of these proceedings, and refused to grant the ASI in *G v R* [2023] EWHC 2365 (Comm). Teare J dealt with the claimant's five submissions in support of an ASI as follows:

- notwithstanding that French courts will sometimes enforce ASIs ordered by a foreign court, substantial justice could be done in the arbitration in France because other remedies (e.g. damages) would be available ([36]-[39]);
- that conclusion does not change even if the remedies available in France may be less advantageous than those available in England ([40]);
- England was therefore not the only available forum in which justice can be done ([41]);
- while English courts must protect the juridical interest of holding contracting parties to their bargains, an arbitral tribunal would do the same and it is insufficient to say the remedy available in the English court was more effective ([44]); and
- *DBAG* was distinguished since it was an *ex parte* appeal involving an absent defendant who made no submissions ([45]).

Since substantive justice could be done in any Paris-seated arbitration notwithstanding the unavailability of ASIs, and the parties had chosen Paris as the seat, Teare J concluded he could not grant an ASI.

### Competing Issues of Principle

Several related principles are at play in these four decisions: public policy, comity, access to justice and party autonomy. The divergent outcomes may be attributable to a difference in emphasis as to how those principles were conceptualised and balanced.

Bright J understood comity as requiring English courts to determine, and defer to, the approach French courts would adopt, including their general stance toward anti-suit relief; the principled incongruity in characterising an act disavowed by the foreign court as support constituted the very conflict or clash of which Bright J warned. By contrast, Robin Knowles J conceptualised comity as the English and French courts fulfilling a shared objective of upholding the parties' bargain. However, as Bright J recognised, the parties chose a seat whose courts did not grant ASIs when they could easily have selected another seat whose courts did. To grant anti-suit relief in such circumstances arguably subverts the parties' bargain instead of upholding it.

In *DBAG*, Nugee LJ distinguished a philosophical objection to ASIs from a willingness to recognise them insofar as international public policy is preserved ([32]). It is unclear why this principally justifies the intervention of English courts in a Paris-seated arbitration that the parties have chosen. It is one thing to say that, notwithstanding the absence of domestic procedures to

grant ASIs, French courts would recognise ASIs that do not offend international public policy where they are ordered by foreign courts to restrain French proceedings commenced in breach of a contractual agreement to arbitrate outside France (as was the case in *In Zone Brands International* referred to by Nugee LJ in [30(4)]). It is quite another to say that French courts would do so to restrain foreign proceedings where the arbitration agreement provides for arbitration in France. The former scenario may well illustrate judicial comity by restraining domestic proceedings (from the French courts' perspective) in support of foreign proceedings; however, the latter scenario overrides the approach the chosen court would take pursuant to its procedural law vis-à-vis an arbitration within its domestic purview. Were that to occur, it is unclear why any ASI granted by the English courts should be understood as upholding comity. Against those concerns, the Court of Appeal's decision had scant regard to party autonomy, and the parties' choice of seat.

Both Robin Knowles J and Nugee LJ arguably understated the importance of the seat in arbitration. Arbitration does not exist in a vacuum and English law requires an arbitration to be connected to a seat. As Kerr LJ stated in *Bank Mellat v Helliniki Techniki* [1984] QB 291 at 301: "*our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law*". The seat provides the procedural framework for the arbitration, and the supervisory court is responsible for ensuring that procedure is followed. The way to uphold the parties' bargain is to respect their choice of seat, and by extension their selection of a particular legal framework and their acceptance of any ensuing remedial limitations.

Instead of comity or public policy, Teare J's judgment in *G v R* foregrounds access to justice as the primary principle to justify not granting an ASI: the possibility of obtaining substantial justice in any arbitration in France was an adequate answer to the claimant's arguments ([36]-[45]). However, future cases may question the underlying premise of this decision (that other remedies such as damages would allow substantial justice to be done) since the inadequacy of damages is a precondition to the award of injunctive relief under English law. If the unavailability of ASIs in the courts of the foreign seat meant that substantial justice cannot be done in the arbitration, access to justice could militate in favour of an ASI. However, even if such criticisms were made, Teare J's reasoning is nevertheless consistent with orthodox principles that respect party autonomy.

Finally, it may be argued that English courts adopting an expansive pro-arbitration approach would make them more attractive in the eyes of prospective parties, making them more likely to select England as their arbitral seat. However, no such benefit accrues here. It is uncontroversial that English courts can, and often do, grant ASIs in aid of English-seated arbitrations. That they may legitimately refuse to do so vis-à-vis foreign-seated arbitrations is unlikely to impact the attractiveness of England as a prospective seat because parties could already ensure their entitlement to such relief by selecting England now. Indeed, if English courts continued to intervene in foreign-seated arbitrations notwithstanding that those jurisdictions would not themselves grant ASIs, parties may even be disincentivised from selecting England, in the knowledge that they could likely obtain ASIs from English courts in any event.

## Conclusion

Two sets of decisions, two inverted outcomes: ASI initially refused in *SQD* but granted on appeal; ASI initially granted in *G v R* but refused at the final hearing. While these decisions only constitute

a small sample size, the divisiveness of the issue means more cases will arise (especially since Paris is a popular arbitral seat). That some claimants have been successful will encourage others to try their luck, and the jurisprudence will therefore continue to develop. It will be particularly interesting to see how English courts treat future cases which involve other arbitral seats besides Paris (and therefore other courts besides French courts).

As it stands, English courts will likely exercise caution before granting ASIs in support of foreign-seated arbitrations, since Teare J's decision in *G v R* is the only contested decision to date, and his reasoning accords with orthodox principles of English law.


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### References

?1 <https://essexcourt.com/anti-suit-injunction-to-enforce-a-foreign-seat-arbitration-agreement/>

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