RUSSELL ON ARBITRATION
Twenty-Third Edition

by

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awards under the Arbitration Act 1996.[27] Arbitration applications can also be made to certain other courts.[28–29]

7–009 **Procedure.** The Civil Procedural Rules 1998, as amended ("CPR") contain the procedural code that applies to all proceedings brought before the civil courts of England and Wales. Pt 62 of the CPR specifies the rules that apply generally to arbitration applications to the court[30] and will be referred to in this book as CPR Pt 62 or more simply r.62, followed by the rule number.[31] There is also a Practice Direction that supplements CPR Pt 62,[32] which will be referred to in this book as the Arbitration Practice Direction or as PD 62 followed by the relevant paragraph number.[33]

Depending on the court in which an arbitration claim is made, rules in other parts of the CPR and other practice directions may need to be consulted.[34]

Part I of CPR Pt 62 is concerned with applications to which the Arbitration Act 1996 applies. Part II is concerned with matters to which the pre-Act arbitration law applies. Part III applies to all enforcement proceedings other than by action or claim on the award. This book will consider Pt I in this chapter and Pt III in Ch.8, except that the general procedure for all arbitration applications will be specified in Ch.8.[35]

With limited exceptions, which will be mentioned in the relevant parts of Chs 7 and 8, the general rule is that "proceedings under this Act"[36] are to be commenced or taken in the High Court.[37]

2. Staying Court Proceedings

7–010 **Introduction.** An arbitration agreement is a contractual undertaking by which the parties agree to settle certain disputes by way of arbitration rather than by proceedings in court.[38] When a dispute arises however one of the parties may

[27] Whitebook, note 2E-45 to CPR PD 62.

[28–29] For a complete list of the courts in which an arbitration claim form may be issued, see para.8–178.

[30] CPR Pt 62 and CPR PD 62 (Arbitrations) were brought into force by the Civil Procedure (Amendment No.5) Rules 2001 (SI 2001/4015).

[31] CPR r.62.1, for example, indicates the first rule in CPR Pt 62.

[32] CPR PD 62 (Arbitrations).

[33] PD 62, para.1.1, for example, indicates the first subsection in the Arbitration Practice Direction.

[34] CPR Pts 58, 59 and 60 together with practice directions and guides apply to claims in the Commercial Court, Mercantile Courts and TCC respectively. See para.8–182.

[35] Paragraphs 8–178 *et seq.* Specific provisions of procedure will be mentioned with the relevant subject (e.g. an application for a stay of court proceedings).

[36] This expression appears in the Arbitration Act 1996, s.105(2) and (3).

[37] High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996 (SI 1996/3215)—see Appendix 1.

[38] See Arbitration Act 1996, s.6(1) for definition of "arbitration agreement" for the purposes of the Act; see also para.2–002.

nevertheless commence court proceedings[39] either because he challenges the existence or validity of the arbitration agreement or because he means to breach it. A party may also wait until an unfavourable award is received and then start proceedings in an inappropriate jurisdiction to attack, set aside or otherwise impugn the award.[40]

In the first case the action may be entirely justified because arbitral proceedings must be founded on a valid arbitration agreement.[41] Therefore, rather than wait for arbitral proceedings, which he would then have to challenge as being wrongly brought,[42] the claimant may take the initiative by commencing a court action and then opposing an application to stay it.[43]

Where the court action is commenced in breach of an arbitration agreement the other party may apply to stay the court action, unless he is content to forego his right to have the dispute referred to arbitration and to defend the action before the court.[44]

Where the other party wishes to have the dispute referred to arbitration he must apply without delay to the court for a stay of the proceedings brought in breach of the agreement to arbitrate.[45] If granted, the stay will confront the other party with a choice between arbitrating the claim or not pursuing it at all, for if a stay is granted there is no third option of having it dealt with by the court.

Anti-suit injunctions. One option open to a party who faces court proceedings brought in breach of an agreement to arbitrate is to apply for an anti-suit injunction. The jurisdiction to grant an anti-suit injunction is most usually directed at proceedings commenced in the early stages of an arbitration but can also be used where proceedings to challenge an award are commenced abroad.[46] Such an injunction is directed at the respondent, not to a foreign court (although there is much debate about the true effect of such an injunction) and directs the party to take no further steps in the proceedings brought in breach of the agreement to arbitrate. However, the use of an anti-suit injunction is a secondary remedy to be deployed in situations where a stay under s.9 of the Arbitration Act will not be or is unlikely to be effective. This will particularly be the case in respect **7–011**

[39] The court will not decline to accept jurisdiction in an action simply because of the existence of the arbitration clause, see, for example, *McKellar and Westerman Ltd v Rosemary Dawn Eversfield* [1994] A.D.R.L.J. 140. It is for one of the parties to the arbitration agreement to take objection to the matter proceeding in court by applying for a stay.

[40] *Noble Assurance Co and Others v Gerling-Konzen General Insurance Co—UK Branch* [2007] EWHC 253; *C v D* [2007] EWHC 1541.

[41] There may also be a statutory reference (see Appendix 3).

[42] See para.7–057.

[43] The court action need not be commenced before the arbitral proceedings; it could be commenced after arbitral proceedings have been begun and the two may run in parallel unless and until one or other is stopped.

[44] The pros and cons of arbitration are discussed in paras 1–022 *et seq.*

[45] An injunction to restrain the breach of an agreement to arbitrate might instead be appropriate where the court proceedings are brought abroad, and the grant of a stay by the English court is not appropriate. See para.7–011.

[46] *Noble Assurance Co and Others v Gerling-Konzen General Insurance Co—UK Branch* [2007] EWHC 253 at [87]; *C v D* [2007] EWHC 1541.

of proceedings brought abroad in breach of an agreement to arbitrate, in which case s.9 proceedings clearly cannot be maintained in "the court in which the proceedings have been brought", at least not under s.9. In this situation, the party seeking to rely on an arbitration agreement will usually apply to the relevant foreign court for a stay, especially where the foreign court is situated in a country that has acceded to a Convention[47] that recognises and enforces arbitration agreements. However, where the party is unsure of the reception it will receive in that foreign court, and where England is the seat of the arbitration, an anti-suit injunction may be sought. In theory, it may be possible to seek an anti-suit injunction where England is not the seat of the arbitration but where the respondent is otherwise amenable to the jurisdiction of the English courts, for example where the court exercises in personam jurisdiction over the respondent.[48] However, particularly in the light of recent authority asserting the importance of the exclusive supervisory jurisdiction of the court's of the seat,[49] it is submitted that the English court is most unlikely to act in such situations.[50]

7–012 **Availability in the EU.** The grant by the English courts of anti-suit injunctions is becoming increasingly controversial. They are no longer available in matters covered by the Brussels Regulation regime,[51] where it is now firmly established that the question of jurisdiction is, pursuant to Art.27 of the Brussels Convention on Jurisdiction (previously Art.21 of the Convention) a matter for the court first seised of the dispute. In *Turner v Grovit*[52] the ECJ held that an anti-suit injunction ordered by the English court to restrain a defendant from taking proceedings in another Contracting State of the Brussels Regulation regime is inconsistent with that regime even where it could be shown that the foreign proceedings are vexatious or oppressive. The same conclusion was reached by the ECJ in *Eric Gasser GmbH v Misat Srl*[53] in respect of an exclusive jurisdiction

[47] e.g. The New York Convention, 1958.

[48] *IPOC International Growth Fund Ltd v OAO "CT-Mobile" and Another*, Court of Appeal of Bermuda, Nos 22, 23 of 2006, March 23, 2007. The Court of Appeal of Bermuda upheld the grant of an anti-suit injunction against a respondent incorporated in Bermuda where the seat of the arbitrations in question was Switzerland and Sweden. The court considered extensive English authority, although not it seems the Court of Appeal decision in *Weissfisch v Julius and Others* [2006] EWCA 218.

[49] *Weissfisch v Julius and Others* [2006] EWCA 218; *A v B* [2006] EWHC 2006.

[50] See however *Albon (t/a NA Carriage Co) v Naza Motor Trading Sdn Bhd & Anor (No.4)* [2007] EWHC 1879 (Ch), where an anti suit injunction was granted to restrain court and arbitration proceedings in Malaysia. The effect of the decision is probably confined to situations where the court has decided that it must decide an issue as to the existence of an arbitration agreement upon a s.9 stay application having been made and the court is anxious not to allow the arbitrators to decide the same issue pending the court's decision.

[51] The Brussels Regulation regime refers to the Brussels Convention on Jurisdiction 1965 as subsequently amended. The relevant rules are no contained in Council Regulation (EC) Regulation 44/2001. The Regulation has direct effect which is recognised in the Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929) and is reflected in CPR r.6.19.

[52] [2004] 2 Lloyd's Rep. 169.

[53] [2005] 1 All E.R. (Comm) 538.