

Availability of anti-suit injunctions in support of arbitration clauses following Recast Brussels I Regulation

Introduction

In *Nori Holdings Ltd v Bank Otkritie Financial Corporation*¹, the English Commercial Court considered whether to grant an anti-suit injunction to restrain proceedings brought in Cyprus and Russia in breach of an arbitration clause.

The main question to be decided was whether the case of *West Tankers Inc v Allianz SpA*² (which established that anti-suit injunctions cannot be granted by the courts of one EU member state to restrain proceedings in another, even if commenced in breach of arbitration clauses) remains good law, or whether the recasting of the Brussels I Regulation has changed the position.

Background

The Claimants (incorporated in Cyprus) owned valuable real estate in Moscow. The Defendant, a Russian bank, had loaned money to the Claimants. The loan agreements were secured by pledges of shares. The parties subsequently entered into a series of agreements which resulted in the short-term loans secured by pledges of shares being replaced with long-term unsecured bonds (which would pay a higher interest rate). Just three weeks later, the Central Bank of Russia appointed a temporary administrator to manage the Defendant.

The Defendant alleged that it had been a victim of fraud by the Claimants, which had resulted in US\$500m worth of secured loans being replaced by “worthless” unsecured bonds. As such, it had commenced civil fraud claims in Cyprus and insolvency-related proceedings in Russia against the Claimants.

The Claimants commenced LCIA arbitrations against the Defendant, relying on the arbitration clause contained in the agreements made between the parties. The Claimants also applied to the English court for a final anti-suit injunction restraining the Defendant from continuing proceedings brought by the Defendant in Cyprus and Russia allegedly in breach of the arbitration clause.

Questions to be decided by the court

The English Commercial Court was required to decide whether the Defendant had brought the foreign proceedings validly, or in breach of the arbitration clause (and if so, whether anti-suit injunctions should be granted).

Mr Justice Males commented in his judgment that the Claimants’ application for an anti-suit injunction raised “*some interesting questions*”, which included:

1. Should the application for relief have been made to the arbitral tribunal, rather than the court?
2. Can, or should, an anti-suit injunction be used to restrain insolvency proceedings?
3. Can a court in one EU member state grant an injunction to restrain proceedings brought in another EU member state in breach of an arbitration clause?

A summary of Mr Justice Males’ conclusions in relation to these questions is set out below.

(1) Should the application for relief have been made to the arbitral tribunal, rather than the court?

The Defendant bank argued that as the arbitral tribunal had already been constituted, the Claimants should have sought anti-suit relief from the tribunal and the court should not intervene.

¹ [2018] EWHC 1343 (Comm)

² Case C-185/07, [2009] AC 1138

However, Mr Justice Males concluded that the availability of anti-suit relief from arbitrators is not a reason to refuse an injunction if the Claimants could prove that the foreign proceedings had been brought in breach of an arbitration clause. The judge stated that “*there is no reason why the court should not exercise the jurisdiction to grant anti-suit relief which it undoubtedly has*”.

(2) Can, or should, an anti-suit injunction be used to restrain insolvency proceedings?

The Defendant bank asserted that the Russian insolvency proceedings (and the rights under Russian insolvency law which exist for the benefit of creditors) did not fall within the scope of the arbitration agreement. The bank also argued that the claims made in the Russian proceedings were non-arbitrable.

The judge disagreed, finding that the widely drafted arbitration clause (“*any dispute or disagreement arising under, or in connection with, this Agreement*”) did not contain an express exclusion of disputes of any kind, and therefore extended to insolvency claims.

The judge also concluded that the disputes are arbitrable, as the tribunal is able to determine whether the Claimants defrauded the bank, and can grant any remedy to which the bank may be entitled.

(3) Can a court in one EU member state grant an injunction to restrain proceedings brought in another EU member state in breach of an arbitration clause?

The Defendant bank’s case was that the English court could not grant the anti-suit injunction in respect of the Cypriot proceedings due to the decision in the case of *West Tankers*, which established that anti-suit injunctions may not be granted by the courts of one EU member state to restrain proceedings in another EU member state, even where such proceedings have been brought in breach of an arbitration clause. This is due to the fact that anti-suit injunctions are seen to contravene the principle of mutual trust between EU state courts, which is the underlying principle of the Brussels I Regulation.

However, the Claimants argued that the Recast Brussels I Regulation³ and the reasoning given by the Advocate General in the case of *Gazprom OAO*⁴ had reversed the decision in *West Tankers*.

Mr Justice Males concluded, conversely, that since the recasting of the Brussels I Regulation did not expressly reverse *West Tankers*, it remains good law and the courts’ powers to grant anti-suit injunctions in respect of proceedings that have been brought in other EU courts in breach of arbitration agreements have not been reinstated.

Conclusions

In light of the judge’s findings, the Defendant bank was ordered to discontinue the Russian proceedings and not to commence similar proceedings in any other non-EU court. However, the anti-suit injunction to restrain the Cypriot proceedings was not granted in light of *West Tankers* remaining good law.

Therefore, whilst the English court is generally considered to be pro-arbitration, as long as *West Tankers* is unaffected by the Recast Brussels I Regulation, anti-suit injunctions will not be granted to restrain EU proceedings, even if such proceedings have been brought in breach of an arbitration clause. However, this case demonstrates the willingness of the English court to interpret arbitration clauses widely and not to imply exclusions that are not expressly stated.

The decision in this case addressed a question that has existed in recent years as to whether the Recast Brussels I Regulation has reinstated EU courts’ powers to grant anti-suit injunctions in respect of proceedings brought in other EU courts in breach of arbitration agreements. Mr Justice Males has determined that it has not. Post-Brexit, the UK will not be bound by the Brussels I Regulation, but may be subject to equivalent rules, assuming a deal in relation to the handling of international disputes can be reached.

³ Council Regulation 1215/2012. See Recital 12, which confirms that the Regulation does not prevent member state courts from examining whether an arbitration clause is null and void, inoperative or incapable of being performed, in accordance with their national law. See also Article 73.2, which provides that the Regulation does not affect the application of the 1958 New York Convention.

⁴ Case C-536/13, [2015] 1 WLR 4937

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