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Revisiting Anti-Suit Injunctions Post Brexit: Some Lessons from the US

David Ndolo, Margaret Liu (Coventry Law School, Coventry University) · Friday, March 23rd, 2018

Background

UK courts senior courts have the power to issue an anti-suit injunction in favor of arbitration where a party commences foreign court proceedings in breach of a valid arbitration agreement (**Senior Courts Act 1981 s.37(1)**). At the heart of this controversial remedy lies a concern that anti-suit injunction is an indirect interference with the process of a foreign sovereign court. Consequently, it may convey the message that the UK courts have little confidence in the foreign court's ability to adjudicate the dispute fairly.[1)]

Indeed, the Court of Justice of the European Union (CJEU) held in **West Tankers [(C-185/07) EU:C:2009:69 (ECJ (Grand Chamber)]** that anti-suit injunctions of this nature run counter to the principle of mutual trust among the EU member states as required by the **Brussels I Regulation**. The UK courts, therefore, cannot issue an anti-suit injunction in favour of arbitration where a party starts foreign court proceedings in an EU state.

In 2015, the Brussels I Recast replaced the **Brussels I Regulation**, and expressly removed arbitration from its scope. This has led to further debate as to whether the Recast can accommodate anti-suit injunctions. Interestingly, in **Gazprom [EU:C:2014:2414]** Advocate General Wathelet held that, if **West Tankers** had been decided under the **Brussels I Recast**, anti-suit injunctions in favour of arbitration would not have been held to be incompatible with the Regulation because the arbitration exception;

> '…also excludes ancillary proceedings, which in my view covers anti-suit injunctions issued by national courts… supporting… the arbitration.'

Such a stance indicates a possibility of a departure from **West Tankers** under the **Brussels I Regulation**. Until then, however, the CJEU decision in **West Tankers** still bans the issuance of anti-suit injunctions within EU state courts. The CJEU affirmed

this rule in **Gazprom** by emphasizing the importance of the principle of mutual trust.

Brexit

The impact of Brexit on anti-suit injunctions in the arbitration context will depend almost entirely on the terms of the final deal.[2)] The current position of the UK is to end the jurisdiction of the CJEU and the application of EU law in the UK.[3)] Indeed, the EU Withdrawal Bill is currently being debated in the UK Parliament. The purpose of the Bill is to copy all existing EU law and regulations including Brussels I Recast into UK law, with appropriate changes where necessary. As a result, the UK Supreme Court (UKSC) will no longer be bound by CJEU decisions and will be the highest court of appeal on all legal cases in the UK.

In the unlikely event, the UK courts rule that **Brussels I Recast** does not accommodate anti-suit injunctions, UK parliament will have to amend or repeal it first for UK courts to regain full power to issue anti-suit injunctions. However, since UK courts have ruled before that arbitration is excluded from **Brussels I** and in light of Advocate General's opinion in **Gazprom**, it is likely that there may be no need to reform it as it can accommodate anti-suit injunctions.

If so, post-Brexit, it is likely that the UK courts will rule to change the practice such that UK courts will be able to enjoin parties who have stated foreign litigation in EU state courts. Indeed, the UK House of Lords (UKHL) in **West Tankers [2007] UKHL 4** referred to the power to grant anti-suit injunctions as an 'important and valuable weapon', (**Id at 19**), stating that such orders are consistent with the **Brussels I Regulation**, since arbitration is excluded from its material scope. The UKHL held that the power of the English courts to grant anti-suit injunctions gives London seat an added advantage over its competitors (**Id**). Evidently, there is a vested interest to use anti-suit injunctions to protect international arbitration, particularly in London.

However, even if the UK courts were to regain full power to issue anti-suit injunctions, it will not be completely unfettered. Following **U&M Mining Zambia v Konkola Copper Mines [2013] All ER 193**, anti-suit injunctions are only granted in appropriate cases. Moreover, it is well established that anti-suit injunctions are a fault remedy. Hence, the foreign litigation must be inter alia 'unconscionable', 'vexatious' or 'oppressive' in the eyes of English law (**Fort Dodge Animal v Akzo Nobel [1998] F.S.R. 222, at 246**).

The US

Although the above cases involve non-EU courts, it was confirmed in T**urner v Grovit [2001] UKHL 65** and later approved in the UKHL in **West Tankers** that UK courts would apply the same standards in the EU context. If the UK courts were to regain the full power to issue anti-suit injunctions post-Brexit, the adoption of the **Brussels I Recast** and CJEU decisions in **Turner**, **West Tankers** and **Gazprom** are indications that the English courts would need to afford significant weight on the principle of mutual trust on cases involving litigation in EU state courts. Consequently, the closest principle UK courts can make reference to when considering the principle of mutual trust is the principle of international comity which is adopted in the US.

International comity, binds the US courts to respect foreign court proceedings out of mutuality and respect. It creates an atmosphere of cooperation and reciprocity between the US and foreign courts in this modern era of economic interdependence (**Microsoft Corp. v Motorola Inc. [2012] No. 12-35352 (9th Cir.), at 12113-12115**). Just as anti-suit injunctions run counter to the principle of mutual trust, they also run counter to the principle of international comity. This principle, therefore, ordinarily requires US courts not to interfere with the foreign concurrent court proceedings based on the same claim because 'the mere existence of dual grounds of jurisdiction does not oust either one.' (**Euromarkets Designs v Crate & Barrel [2000] 96 F.Supp.2d 824, at 57**). The principle of international comity is not absolute. When determining whether to issue of anti-suit injunction, it dictates US courts to balance between the public policies of the domestic and foreign sovereigns. As a result, the US courts are split in three on the appropriate weight that should be placed on international comity.

The Fifth, Seventh, Ninth and Eleventh Circuits adopt a liberal approach and place more weight on the need to provide a remedy that avoids the inconveniences and inequities that simultaneous prosecution of the same action in foreign court may otherwise entail (**E&J Gallo Winery v Andina Licores [2009] 446 F3d 984 (9th Cir.)**). Although under this approach, anti-suit injunctions are granted 'sparingly' (**Id, at 18**) it places an undesirable low weight on international comity.

The District of Columbia, Third, Sixth and Eighth Circuit adopt a conservative approach that accords more weight on non-interference with the sovereignty of the foreign court over the inconveniences of simultaneous parallel proceedings (**PT** Pertana **v Kahara Bodas (PETITION) [2007] USSC No. 07**). This is because an anti-suit injunction may affect the economic relations between the two countries and/or the foreign court may in-turn refuse to give effect to the US court judgment (**Gau Shan v Bankers Trust [1992] 956 F.2d; at 1354**).

Thus, under this approach, an anti-suit injunction would only be granted if two conditions are met. First, where a foreign court proceeding would be evading important US public policies. For example, where a party seeks to elude a statute relating to the dispute. (**Lakers Airways v Sabena Belgian World Airlines [1984] 909 F2d 731, at 931**). Second, where a foreign court action threatens appropriate jurisdiction. (**Id**) Such a case would be, for example, where there is evidence that the court may issue an anti-arbitration injunction or not refer case towards arbitration. However, this approach is too rigid as anti-suit injunctions would be granted only where these two requirements are met. (**Quaak v KPMG Belgium [2004] 361 F.3d 11 (1st Cir.)**).

Instead, the UK courts could adopt the intermediate approach adopted by the First and Second Circuit courts. Under this pragmatic approach, these courts adopt a rebuttable presumption against the issuance of issue anti-suit injunctions. This presumption can be rebutted evidence showing that the totality of the facts/circumstances, weighs in favor of issuing an anti-suit injunction. (**Ibeto Petrochemical v Bryggen Shipping [2007] 475 F.3d 56 (2nd Cir.)**). The factors considered include, inter alia, the importance of the policies at stake in the litigation and the extent to which the foreign action has the potential to undermine the

arbitration process. (**Quaak**).

Conclusion

If UK courts are to regain power to issue anti-suit injunctions to enjoin parties from commencing court proceedings in EU states in breach of arbitration agreement post-Brexit, then the CJEU decisions are strong indications that the English courts will have to place significant weight on the principle of mutual trust. Accordingly, pragmatic measures adopted by the US courts, preferably under the intermediate approach, could be used to reform the current approach.

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References

↑1 Ndolo D and Liu M 'Does the Will of the Parties Supersede the Sovereignty of the State? Anti-suit Injunctions in the UK Post-Brexit' (2017) 83(3) Arbitration 254, at 256.

↑2 Ndolo D, at 263

↑3 HM Government, The United Kingdom's Exit from and New Partnership with the European Union 2017, at 13.

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