Anti-Suit Injunctions in the EU: Are They Finally Back on the Menu?

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While the United Kingdom ("UK") was a member of the European Union ("EU"), the power of the English courts to grant anti-suit injunctions was considerably constrained by EU law. Now that the UK has left the EU, it is worth asking the question: are anti-suit injunctions back on the menu?

This blog post provides a snapshot of the English courts' power to grant anti-suit injunctions, both before and after Brexit. In doing so, it will look at the question whether, and the extent to which, these types of injunctions might be revived in the light of the most recent legislation.

Brexit and the transition period

The UK left the EU on 31 January 2020. The UK's departure from the EU led to the repeal of the European Communities Act 1972 ("1972 Act"), which, essentially, made EU law directly applicable in the UK.

The 1972 Act was repealed by the EU Withdrawal Act 2018 ("EUWA 2018"), which, inter alia, was intended to ensure an orderly period of transition post-Brexit. The EUWA 2018 was subsequently amended by the European Union (Withdrawal Agreement) Act 2020 ("EUWAA 2020").

Part 1 of the EUWAA 2020 formalised the adoption of a period of transition (otherwise known as the implementation period). The implementation period started when the UK left the EU and ended on 31 December 2020.

During such period, the vast bulk of EU law, including decisions of the Court of Justice of the European Union ("the CJEU") continued to have effect in the UK, and the same can be said about the rules relating to the CJEU's jurisdiction over the UK.

The position pre-Brexit (in a nutshell)

Before Brexit, the limitations on the powers of English courts to grant anti-suit injunctions were well understood. Those limitations can be easily explained by reference to a handful of cases, namely *West Tankers*, *Gazprom*, and *Nori Holding*. The pre-Brexit position may be summarised as follows:

In *West Tankers*, the CJEU decided that court-connected anti-suit injunctions were incompatible with Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("Brussels I Regulation").

In *Gazprom*, the CJEU adopted a more flexible approach by concluding that the Brussels I Regulation did not preclude Member State courts from recognising and enforcing an arbitral tribunal's award granting an anti-suit injunction.

The Brussels I Regulation was later repealed by Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) ("the Recast Brussels Regulation").

In *Nori Holding*, the English High Court was asked to consider, among other things, whether the CJEU's judgment in *West Tankers* remained good law.

The High Court held that it did. It also held that the position as regards the granting of anti-suit injunctions was no different under the Recast Brussels Regulation.

The position after the implementation period and the notion of retained EU law

The EUWA 2018 has been accurately described as 'a giant "copy and paste" exercise', meaning that what was once regarded as EU legislation would later become a new form of domestic legislation, i.e., retained EU law. Yet the notion of retained EU law is to be treated with caution, not least because not all EU law has been fully retained.

The *West Tankers* case, for instance, has gained the status of 'retained EU case law', a new concept which is defined by Section 6(7) of the EUWA 2018. Whereas the Recast Brussels Regulation has been revoked by Regulation 89 of the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 No 479 (as amended).

As a matter of English law, the High Court, as a first-instance court, is not bound by its previous decisions, with the consequence that the *Nori Holding* case may be cited (whether in the High Court, the Court of Appeal, or the Supreme Court) as persuasive — but not as binding — authority.

Furthermore, Section 6(4)(a) and (ba) of the EUWA 2018, in conjunction with Regulation 3(b) of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 ("the 2020 Regulations"), make clear that neither the Supreme Court nor the Court of Appeal are bound by any retained EU case law.

Thus, the Supreme Court or the Court of Appeal may, potentially, depart from the *West Tankers* case and resuscitate anti-suit injunctions (if it appears right to do so), within the meaning of Regulation 5 of the 2020 Regulations and Practice Statement (Judicial Precedent) 1966.

Because the Supreme Court and the Court of Appeal (viz., the Civil Division) bind all lower courts, it is clear that, if they were to depart from *West Tankers*, the High Court would be bound to follow suit.

To depart, or not to depart, that is the question

In *The Front Comor*, the House of Lords (now the Supreme Court) stated that: 'It is

in practice no or little comfort or use for a person entitled to the benefit of a London arbitration clause to be told that (where a binding arbitration clause is being — however clearly — disregarded) the only remedy is to become engaged in the foreign litigation pursued in disregard of the clause' (as per Lord Mance).

The CJEU's ruling in *West Tankers* does nothing to address this problem. Quite the opposite, it deprives the party against whom foreign court proceedings have been brought of the opportunity to seek court relief in order to put an end to those proceedings, thereby thwarting that party's right to obtain judicial protection against the party in breach.

However, *West Tankers* was decided under the Brussels I Regulation. Unlike the Brussels I Regulation, Article 73.2 of the Recast Brussels Regulation expressly states that it 'shall not affect the application of the 1958 New York Convention' ("the NYC"). Although the NYC does not explicitly refer to the availability of anti-suit injunctions, it can be said that anti-suit injunctions are certainly not incompatible with it.

On the contrary, it can be argued that anti-suit injunctions fall within the scope of UNCITRAL's recommendation regarding the interpretation of Article VII(1) of the NYC, which provides for an all-embracing protection of the various different rights that a party to an arbitration agreement may have, whether under domestic or international law.

This is consonant with the UNCITRAL Secretariat's Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which indicates that 'a Contracting State will not be in breach of the Convention by enforcing arbitral awards and arbitration agreements pursuant to more liberal regimes than the Convention itself' (at page 2).

As far as English law is concerned, the right to apply for an anti-suit injunction is embedded in Section 37 of the Senior Courts Act 1981. It is submitted that a party seeking to rely on this section in order to obtain injunctive relief in respect of the commencement or continuation of court proceedings in the courts of a Member State should no longer be deprived of such right.

Conclusions

So, what does the future hold for the English courts' power to grant anti-suit injunctions in the EU?

The High Court's decision in *Nori Holding*, albeit highly persuasive, is not binding on other High Court judges. Nonetheless, there is no doubt that good reasons will be needed to persuade the Court to depart from such a decision.

De lege data, it is plain that, should the circumstances so require, both the Supreme Court and the Court of Appeal may now grant an anti-suit injunction so as to restrain a party to an arbitration agreement from commencing or continuing legal proceedings before the courts of a Member State.

It remains to be seen, however, whether the Supreme Court or the Court of Appeal will eventually depart from the existing case law.