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Does the (Recast) Brussels Regulation Allow for Court-Ordered Anti-Suit Injunctions within the EU?

Julio-César Betancourt · Thursday, August 16th, 2018

The short answer, I submit, is that it does.

Nonetheless, there is no shortage of articles and commentaries purporting to explain some of the reasons why court-ordered anti-suit injunctions continue to be prohibited under 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 Regulation"). In *West Tankers*, the Court of Justice of the European Union ("the CJEU") decided that these types of 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 ("the Brussels I Regulation"). In the recent case of *Nori Holdings Ltd & Ors v Public Joint-Stock Company 'Bank Otkritie Financial Corporation' [2018]*, the English Commercial Court was asked to consider, among other things, whether the CJEU's judgment in *West Tankers* remained good law.

The Commercial Court held that it did, and in doing so, dismissed Nori Holdings' application for a court-ordered anti-suit injunction to restrain the Bank's court proceedings in Cyprus. Although the *West Tankers* case was decided under the Brussels I Regulation, Males J opined that the effect of the Recital 12 of the recast Regulation was clear, thereby concluding that the position was no different under it. He also expounded that 'Neither the [recast] Regulation itself nor its recitals say expressly that [the principles set out in the *West Tankers* case] no longer apply or that an anti-suit injunction in support of arbitration issued by a court in a member state takes precedence over [such principles]'.

It is true that the recast Regulation does not make explicit reference to the question of whether it has reinstated the power of the courts of the Member States to grant anti-suit injunctions with the intention of restraining a person from commencing or continuing proceedings before the courts of another Member State. That is not to say, however, that the language of the recast Regulation 'clearly' suggests that this sort of relief continues to be unavailable in the EU. Quite the contrary, it does appear to suggest that *West Tankers* may no longer be good law, as I shall explicate below.

Curiously, Males J's decision seems to have placed emphasis on Recital 12 rather than on Article 73.2 of the recast Regulation (the operative provision), which, to be sure, leaves no room for doubt as to the superiority of the New York Convention ("the NYC"), hierarchically speaking, over such a Regulation. Article 73.2 unambiguously stipulates that the recast Regulation shall not affect the

application of the NYC. One of the primary objectives of the NYC is to facilitate the recognition and enforcement of international arbitration agreements. Hence, international arbitration agreements, or rather, 'the rights arising therefrom' — and this is the key — enjoy a special protection.

International arbitration agreements yield a positive and a negative effect, i.e., an 'obligation to engage in arbitration' and an 'obligation not to take legal action' in any forum other than arbitration. Each party to the agreement has correlative rights, i.e., the 'right to arbitrate' and the 'right not to be sued'. When the parties to an international arbitration agreement select the arbitration rules, the seat of the arbitration, and the law applicable to such an agreement, the list of rights and obligations that arise under the respective agreement is greatly expanded. These types of agreements, therefore, can be genuinely regarded as one of the most abundant sources of rights and obligations.[1)]

The duty to recognize and enforce these kinds of agreements resides in the national courts of Contracting States (Article II.1 of the NYC). Their role is to safeguard the parties' rights or, as the case might be, to enforce their obligations in exercise of their jurisdictional function. Consequently, the national courts' duty to protect the parties' rights is to be understood *lato sensu*. In other words, the rule is that every time that a person appears in a court of law with the aim of seeking to assert a legitimate right arising out of an international arbitration agreement, the court seized is expected to protect the right in question. The right to obtain an anti-suit injunction is no exception to such rule.

As far as English international arbitration law is concerned, an anti-suit injunction is nothing more than a remedy for breach of an international arbitration agreement. The English court's power to grant such a remedy lies in Section 37 of the Senior Courts Act 1981. This remedy is generally granted with the sole purpose of upholding the parties' commitment to arbitrate. In *Donohue v Armco*, the House of Lords made clear, *inter alia*, that 'Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed'. Thus, anti-suit injunctions are not intended to prevent the court in which proceedings have been instituted from the power to rule on its own jurisdiction. Rather, their purpose is to prevent the contract-breaker from obtaining a ruling of this nature.

The 'right to obtain an anti-suit injunction' is inextricably linked with the 'right not to be sued', both stemming from the contract to arbitrate. As legitimate rights, they can be perfectly invoked before any of the national courts of Contracting States, which, under Article II.1 of the NYC, are under an obligation to recognize and enforce such rights. If there were any doubts as to the soundness of this proposition within the context of EU law, they were certainly dispelled by the very text of the recast Regulation, which seems to suggest that it cannot be lawfully relied upon so as to impede, whether directly or indirectly, the application of the NYC.

Males J's decision did not go on to examine the relationship between the recast Regulation and the NYC, and this is the crux of the issue. The recast Regulation is an unwavering legislative commitment to protect the NYC. Instead, Males J focused on the relationship between the recast Regulation and *West Tankers*, concluding that there was nothing in the former to cast doubt on the continuing validity of the latter. Prior to the *Nori Holdings* case, a learned commentator also wrote that *West Tankers* remained applicable under the recast Regulation and that the CJEU 'in the *Gazprom* case … did not endorse Advocate General Wathelet's Opinion that *West Tankers* [had]

been impliedly reversed by Recital 12 of the [recast Regulation]'.[2)] In *Gazprom* the CJEU decided that the Brussels I Regulation 'must be interpreted as not precluding a court of a Member State from recognizing and enforcing, or from refusing to recognize and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State'. Nevertheless, it is respectfully submitted that both arguments are defeated by the fact that both *West Tankers* and *Gazprom* concerned the application of the 'Brussels I Regulation' and not the application of the 'recast Regulation.

One can make an argument that if the EU legislator had wished to maintain the restriction that the CJEU's judgment in *West Tankers* imposed, it would have said so. The intention of the EU legislator was unequivocally clear: the recast 'Regulation shall not affect the application of the 1958 New York Convention'.[3)] Consequently, one can further argue that the recast Regulation itself has impliedly abrogated the principles alluded to in *West Tankers*. This had a deleterious effect on the courts of the EU Member States' obligation to recognize and enforce the parties' right to obtain an anti-suit injunction from any of the EU national courts.

I submit that when it comes to determining whether it is permissible to grant court-ordered anti-suit injunctions (or any other remedy) within the EU, neither *West Tankers* nor *Gazprom* should be interpreted in isolation from Article 73.2 of the recast Regulation. Unlike the Brussels I Regulation, the recast Regulation is subordinate to the NYC. I further submit that the better interpretation of the recast Regulation is, or ought to be, that it is not intended to derogate from any of the rights that emanate from a given international arbitration agreement. These include the right to obtain an anti-suit injunction, which, like any other right exercisable under an international contract to arbitrate, is protected by the NYC.

References

?1 See, in general, Julio-César Betancourt, El Contrato de Arbitraje Internacional (Tirant lo Blanch 2018) 506 forthcoming.

?2 Neil Andrews, Arbitration and Contract Law: Common Law Perspectives (Springer 2016) 78.

?3 Article 73.2 of the recast Regulation.

This entry was posted on Thursday, August 16th, 2018 at 9:57 am and is filed under Anti-suit injunction, International arbitration
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