Nori Holdings: England & Wales High Court confirms 'continuing validity of the decision in West Tankers' under Brussels I Recast

Earlier this month, the English High Court rendered an interesting decision on the (un-)availability of anti-suit injunctions in protection of arbitration agreements under the Brussels I Recast Regulation (No 1215/2012). In *Nori Holdings v Bank Otkritie* [2018] EWHC 1343 (Comm), Males J critically discussed (and openly disagreed with) AG Wathelet's Opinion on Case C-536/13 *Gazprom* and confirmed that such injunctions continue to not be available where they would restrain proceedings in another EU Member State.

The application for an anti-suit injunction was made by three companies that had all entered into a number of transactions with the defendant bank involving shares of companies incorporated in Cyprus. These arrangements were restructured in August 2017. In October 2017, the defendant alleged that the agreements entered into in the course of this restructuring were fraudulent and started proceedings in Russia – based, *inter alia*, on Russian bankruptcy law – to set them aside. In January 2018, the claimants reacted by commencing LCIA arbitrations against the bank – based on an arbitration clause in the original agreements, to which the restructuring agreements referred – seeking a declaration that the restructuring agreements are valid and an arbitral anti-suit injunction against the Russian proceedings. Meanwhile, each of the parties also commenced proceedings in Cyprus.

The defendant bank advanced several reasons for why the High Court should not grant the injunction, including the availability of injunctive relief from the arbitrators and the non-arbitrability of the insolvency claim. While none of these defences succeeded with regard to the proceedings in Russia, the largest individual part of the decision ([69]–[102]) is dedicated to the question whether the High Court had the power to also grant an anti-suit injunction with regard to the proceedings in Cyprus, an EU member state.

The European Court of Justice famously held in *West Tankers* (Case C-185/07)

that ‘even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness’ (at [24]) and that

> *[30] […] in obstructing the court of another Member State in the exercise of the powers conferred on it by [the Regulation], namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under [the Regulation] is based […].*

Accordingly, it would be ‘incompatible with [the Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement’ (at [34]).

Shortly thereafter, the European legislator tried to clarify the relationship between the Brussels-I framework and arbitration in Recital (12) of the recast Regulation. This Recital included, among other things, a clarification that a decision on the validity of an arbitration agreement is not subject to the Regulation’s rules on recognition and enforcement. Rather surprisingly, this was understood by Advocate General Wathelet, in his Opinion on Case C-536/13 *Gazprom*, as an attempt to ‘correct the boundary which the Court had traced between the application of the Brussels I Regulation and arbitration’ (at [132]); consequently, he argued that ‘if the case which gave rise to the judgment in [*West Tankers*] had been brought under the regime of the Brussels I Regulation (recast) […] the anti-suit injunction forming the subject-matter of [this judgment] would not have been held to be incompatible with the Brussels I Regulation’ (at [133]). AG Wathelet went even further when he opined that Recital (12) constituted a ‘retroactive interpretative law’, which explained how the exclusion of arbitration from the Regulation ‘must be and always should have been interpreted’ (at [91]), very much implying that *West Tankers* had been wrongly decided.

The Court of Justice, of course, did not follow the Advocate General and, instead, reaffirmed its decision in *West Tankers* in Case C-536/13 *Gazprom*. As Males J rightly points out (at [91]), the Court did not only ignore the Advocate General’s

Opinion, it also very clearly regarded *West Tankers* a correct statement of the law under the old Regulation. While Males J considered this observation alone to be 'sufficient to demonstrate that the opinion of the Advocate General on this issue on [sic] was fundamentally flawed' (at [91]), he went on to point out six (!) further problems with the Advocate General's argument. In particular, he argued (at [93]) that if the Advocate General were right, any proceedings in which the validity of an arbitration were contested would be excluded from the Regulation, which, indeed, would go much further than what the Recital seems to try to achieve.

Consequently, Males J concluded that

> *[99] […] there is nothing in the Recast Regulation to cast doubt on the continuing validity of the decision [in West Tankers] which remains an authoritative statement of EU law. […] Accordingly there can be no injunction to restrain the further pursuit of the Bank's proceedings in Cyprus.*

Of course, this does not mean that claimants will receive no redress from the English courts in a case where an arbitration agreement has been breached through proceedings brought in the courts of another EU member state. As Males J explained (at [101]), the claimants may be entitled to an indemnity 'against (1) any costs incurred by them in connection with the Cypriot proceedings and (2) any liability they are held to owe in those proceedings.' While one might consider such an award to be 'an antisuit injunction in all but name' (Hartley (2014) 63 ICLQ 843, 863), the continued availability of this remedy in the English courts despite *West Tankers* has been confirmed in *The Alexandros T* [2014] EWCA Civ 1010. In the present case, Males J nonetheless deferred a decision on this point as the Cypriot court could still stay the proceedings and because the claimants might still be able to obtain an anti-suit injunction from the arbitral tribunal.