Judicial Clarification on Anti-suit Injunctions: The Right Approach?

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On 6 June 2018, Justice Males at English High court in *Nori Holdings Ltd v Bank Financial Corp [2018] EWHC 1343 (Comm) (Nori Holdings)* provided clarifications on some of the legal issues on anti-suit injunctions.

The facts revolved around an application for an anti-suit injunction to restrain the court proceedings commenced by the defendant (Bank) in Russia and Cyprus, which were alleged to be brought in breach of a London arbitration clause. The application raised the following legal issues in relation to anti-suit injunctions in the arbitration context.

Do Courts Have Jurisdiction to Grant an Anti-Suit Injunction When an Arbitral Tribunal Has Been Constituted?

It is well established under English law that senior courts in England have 'general power' to grant anti-suit injunctions in support of arbitration under s.37 of the Seniors Courts Act 1981. However, they exercise this general power cautiously and 'sensitively' in the arbitration context 'with due regard for the scheme and terms' of the Arbitration Act 1996 (AA 1996) (*see* Lord Mance, *Ust-Kamenogorsk Hydropower Plant* [2013] UKSC 35, at 60).

Of interest in *Nori Holdings* was s.44(5) AA 1996 which states that in any case *'the court shall act only if or to the extent that the arbitral tribunal … has no power or is unable for the time being to act effectively.'* Accordingly, the defendant argued that, because the arbitral tribunal had already been constituted, the court should allow the arbitrators to decide whether to grant an anti-suit injunction.

Justice Males held that there is '*no reason why the court should not exercise the jurisdiction to grant anti-suit relief which it undoubtedly has*' (at 41). To further strengthen his decision, he referred to Lord Mance's decision in *AES Case [2013] UKSC 35 (at 58-60),* in which his lordship held that *'it is inconceivable that the 1996 Act intended or should be treated sub silentio as effectively abrogating the protection enjoyed under s.37.'* It follows, therefore, that a constitution of an arbitral tribunal and the tribunal's power to issue an anti-suit injunction, was not a valid reason for a court to refuse to grant an anti-suit injunction or grant a limited injunction until arbitrators consider it (*Nori Holdings*, at 42).

Justice Males' decision does indicate that the outcome would have been different if the defendant had made a claim for a stay in proceedings under s.9 AA1996 (at 41). However, it was impractical for the defendant to make such a claim because they denied the jurisdiction of the arbitral tribunal and that the foreign proceedings (in Russia) were in breach of the arbitration proceedings.

Is West Tankers Good Law?

In a controversial and extensively analysed *West Tankers case [(C-185/07) EU:C:2009:69 (ECJ (Grand Chamber)]*, the Court of Justice of the European Union (CJEU) held that the 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 Regulation*). As a result, EU member state courts, including English courts, cannot issue an anti-suit injunction in favour of arbitration where a party commences foreign court proceedings in an EU state. In *Nori Holdings* case, the defendant argued that under West Tankers the English Court cannot issue an anti-suit injunction to stop the proceedings in Cyprus as both countries are EU Member States.

The claimant sought to rely on the fact that the Regulation was replaced by the Brussels I Recast (*the Recast*), which expressly removed arbitration from its scope (*Recital 12 para.4*). Furthermore, the claimant relied on the Advocate General Wathelet (AG) decision in *Gazprom [EU:C:2014:2414],* where the AG held that;, if West Tankers had been decided under the Recast, anti-suit injunctions in favor of arbitration would not have been held to be incompatible with the Regulation due to the arbitration exception:

> *'...also excludes ancillary proceedings, which in my view covers anti-suit injunctions issued by national courts... supporting... the arbitration'* (Opinion of the AG in *Gazprom,* at 138).

According to the claimant, that stance indicates a departure from *West Tankers* under the Recast.

However, Justice Males held that '*the opinion of the Advocate General on this issue was fundamentally flawed'* for, *inter alia*, several reasons (at 91-98). First, the CJEU did not adopt the AG's approach; instead, it reaffirmed the decision in *West Tankers* and emphasized the importance of the mutual trust principle among the national courts of the EU Member States. Second, the Recast replaced the Regulation with the aim to explain how the Regulation should be interpreted. As a result, it did not bring any change in the law. Indeed, in *Gazprom*, the CJEU affirmed such reasoning by reaffirming the interpretation in *West Tankers*. Third, the approach of the AG to treat the arbitration exception to mean excluding any proceedings in which the validity of an arbitration agreement was contested is a '*far too sweeping*' and incorrect. Instead, the exception states that such a ruling should not be subject to the rules of recognition and enforcement listed in Chapter III of the Recast. Fourth, the AG's approach incorrectly envisaged the court proceedings related to anti-suit injunctions as valid under the Recast if the court first seized issued the anti-suit injunction. The Court held such an interpretation as incorrect given that it (a) creates legal uncertainty and unpredictability, and (b) leads to jurisdictional conflicts as to which court was in fact seized first, both of which are contrary to the fundamental principles of the Recast. Following this, Justice Males held that *'there is nothing in (the Recast) to cast doubt on the continuing validity of the (CJEU) decision in West Tankers case'* (at 99). As a result, the English court could not grant an anti-suit injunction to stop the proceedings in Cyprus.

The Nori Holdings decision reaffirms *West Tankers* as good law and in doing so clears up most of the confusion that had been brought up by the *AG opinion in the Gazprom case* in relation to the arbitration exception in the Recast. The CJEU's strong decisions against the issuance of anti-suit injunctions in the arbitration context within EU Member State courts in *West Tankers* and *Gazprom*, coupled with the importance and effect they have had does indicate that if there was to be a change in practice it would come directly from a clear CJEU decision.

Is the Fragmentation of Proceedings a Strong Reason Not to Issue an Anti-Suit Injunction?

English courts usually exercise their power to grant anti-suit injunctions in favor of arbitration, unless there are strong reasons not to do so (*see* in *Donohue v Armco Inc (Donohue)* [2002] 1 Lloyd's Rep 425, (at 24)). In *Nori Holdings*, the defendant argued that there are strong reasons not to issue an anti-suit injunction to stop the foreign proceedings. Specifically, in the interest of justice, it would be necessary to allow the whole dispute to be decided in a single forum that is the Russian court as some of the claimants did not agree to the London arbitration.

However, Justice Males held that if the anti-suit injunction is issued, it would not be possible to submit the whole dispute to a single forum as some of the claimants had agreed to arbitration in London (at 113). Importantly, this case was distinguished from the *Donohue*, where the court refused to grant an anti-suit injunction to allow, *inter alia*, the whole dispute to be decided by a single forum. *Nori Holdings* was materially different as such a result was not possible. Moreover, *Nori Holdings* also adds to precedence that the fragmentation of proceedings by itself, especially where a single forum for the dispute resolution cannot be achieved either way *'is not a strong reason not to grant an anti-suit injunction'* (at 113).

Conclusion

Unsurprisingly, the English courts continue to protect their power to grant anti-suit injunctions, in this instance, it remains unfettered even where an arbitral tribunal is constituted. Pragmatically, if there is fragmentation of proceedings, in the interest of justice these courts will exercise that power depending on whether it is possible to submit the whole dispute to a single forum. With regards to issuing anti-suit injunction between EU Member state courts, despite the controversy that the AG's opinion raised in Gazprom, the English courts still firmly apply the CJEU's approach in *West Takers*. But what is yet to be seen is whether the English courts will still favor this approach post-Brexit.