High Court refuses to restrain EU court proceedings brought in breach of arbitration agreement

August 16 2018 | Contributed by Clifford Chance LLP

AUTHORS

Marie Berard

Anna Kirkpatrick

Introduction

The English courts will not grant anti-suit injunctions to restrain court proceedings brought in breach of arbitration clauses in the courts of other EU member states. In *Nori Holdings Ltd v Public Joint-Stock Company "Bank Otkritie" Financial Corporation*,(1) the High Court refused an application for anti-suit relief to restrain court proceedings in Cyprus, another EU member state, but was prepared to grant an anti-suit injunction targeted at court proceedings in Russia, which is not an EU member state. This decision provides, at least for now, clarity in an area of law that has been subject to debate. It confirms that the European Court of Justice's (ECJ's) decision in *Allianz SpA v West Tankers Inc*(2) remains good law even following the introduction of the recast EU Brussels Regulation (1215/2012).

Facts

The claimants applied for anti-suit injunctions to restrain court proceedings which the defendant, a Russian bank, had brought in Cyprus and Russia.

The transactions between the claimants and the defendant bank involved loans by the defendant secured by share pledges, which were subsequently replaced by unsecured bonds.

The defendant bank, which was temporarily placed into administration, argued that these changes to the transaction amounted to fraud against it and commenced proceedings in the Cypriot and Russian courts.

The loan agreements were governed by Russian law and provided for disputes to be settled by the Russian courts. The pledge agreements and the pledge termination agreements were governed by Cypriot law and provided for disputes to be settled by the London Court of International Arbitration.

The claimants applied to the English court for anti-suit injunctions on the basis that the proceedings in Cyprus and Russia breached the arbitration clauses in the pledge and pledge termination agreements.

Decision

The defendant bank advanced five reasons as to why no injunction should be granted, arguing that:

- any application for anti-suit relief should be made to the arbitral tribunal now that it had been constituted and the court should not intervene;

- the Russian proceedings were not in breach of the arbitration clauses because the arbitration clauses should be construed as not extending to insolvency claims to set aside transactions at an undervalue which were within the exclusive jurisdiction of the Russian courts and such claims were not arbitrable;
- there could be no injunction to restrain proceedings in Cyprus, another EU member state;
- there were strong reasons why no injunction should be granted – in particular, because the proceedings in those jurisdictions would in any event continue; and
- there should be no injunction to restrain the proceedings brought in Russia because the claimants had delayed in applying for injunctive relief.

The court dealt with each argument in turn.

Should the claimants have applied to the arbitral tribunal instead of the court?

The court dismissed the bank's argument that the claimants should have applied to the arbitral tribunal and confirmed that the fact that the arbitral tribunal could grant an anti-suit injunction was not a reason for the court to refuse one.

Did the Russian proceedings breach the arbitration clauses?

The court also rejected the bank's argument that the Russian court proceedings did not breach the arbitration clauses. It held that the arbitration clauses were drafted in wide and general terms and that there was no good reason to imply a limitation into the clause to exclude insolvency claims if they were capable of being determined by arbitration. The presumption established in a decision by the Singaporean courts that, in the absence of express language, arbitration clauses do not extend to insolvency proceedings does not form part of English law.(3) The claim in the present case was a straightforward factual dispute that was plainly arbitrable.

Can the English court grant anti-suit injunctions to restrain court proceedings brought in another EU member state in breach of arbitration clauses?

The High Court accepted the bank's argument that no anti-suit injunction could be granted to restrain proceedings in another EU member state and rejected the claimants' application for an injunction to restrain proceedings in Cyprus. The court held that the recast EU Brussels Regulation (1215/2012) had not affected the validity of the ECJ's decision in *West Tankers*. The ECJ had held that the granting of an anti-suit injunction restraining the pursuit of court proceedings in another EU member state was incompatible with the EU Brussels Regulation (44/2001), notwithstanding an exception for arbitration therein. The High Court confirmed that this remained the position, rejecting the claimants' submissions based on the additional wording introduced in the recast EU Brussels Regulation (1215/2012) and an opinion by Advocate General Wathelet in the ECJ decision in *Gazprom OAO v Republic of Lithuania*(4) in which he suggested that *West Tankers* had been wrongly decided.

Were there strong reasons against granting the anti-suit injunctions?

The High Court found that there were no such reasons. Rejecting the bank's argument, the court held that the fact that proceedings in Russia were going to continue against certain parties regardless of whether it granted an anti-suit injunction did not amount to a strong reason to refuse the injunction. The court distinguished the present case from an earlier decision in which an anti-suit injunction had been refused so that the whole dispute could be submitted to a single forum in New York.(5) In the present case, the submission of the whole dispute to a single forum was not achievable and the parties' agreement to arbitrate was the decisive factor.

Should the claimants' application be refused because they were too late in making it?

The High Court rejected the bank's argument that the anti-suit injunction should be refused because the claimant companies had made it four months after the commencement of the Russian proceedings and granted the injunction sought. The court held that there had been no real delay on the part of the claimants, since the Russian proceedings had not advanced significantly. The extent to which there had been a delay was outweighed by the claimants' entitlement to rely on their right to arbitration.

Comment

While the High Court dealt with a number of issues in this case, its ruling that the English courts

cannot grant anti-suit injunctions to restrain court proceedings brought in other EU member states in breach of arbitration clauses has clarified the position as a matter of English law. However, that clarity may be short-lived in circumstances where the position post-Brexit remains uncertain and will depend on what civil cooperation regime is agreed between the United Kingdom and the European Union as part of the former's withdrawal.

For now, parties to arbitrations in London faced with court proceedings brought in other EU member states in breach of arbitration clauses will need to look to the arbitral tribunal or the courts in the EU member state in question rather than to the English court for relief to discourage the other party from continuing those proceedings.

For further information on this topic please contact Marie Berard or Anna Kirkpatrick at Clifford Chance LLP by telephone (+44 20 7006 1000) or email (marie.berard@cliffordchance.com or anna.kirkpatrick@cliffordchance.com). The Clifford Chance website can be accessed at www.cliffordchance.com.

Endnotes

(1) [2018] EWHC 1343.

(2) Case C-185/07.

(3) *Larsen Oil & Gas Pte Ltd v Petropod Ltd* [2011] SGCA 21.

(4) Case C-536/13.

(5) *Donohue v Armco* [2002] 1 Lloyds Rep 425.
