20 ESSEX STREET

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Go West! Did the recasting of the Brussels Regulation sink *West Tankers*?

Nori Holdings Ltd & Others v Public Joint-Stock Company Bank Otkritie Financial Corporation [2018] EWHC 1343 (Comm)

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In an important and erudite new judgment, Mr Justice Males comprehensively dismantles Advocate General Wathelet's opinion that *West Tankers* should no longer apply.

In a judgment that also dissects and rejects the Singapore Court of Appeal's recent approach to arbitration clauses, Males J has brought some welcome clarity to the difficult choices which have to be made when opponents breach an arbitration clause.

Get yourself ready!

The case concerned an application for a final anti-suit injunction restraining court proceedings in Russia and Cyprus alleged to be brought in breach of an arbitration clause. The key points arising are that:

- *West Tankers* remains binding; the English Court will not grant anti-suit injunctions to restrain the pursuit of proceedings in EU Member States [69] – [102].
- The English Court can grant an anti-suit injunction even though a London arbitral tribunal has been constituted and is capable of granting the same relief [32] – [42].
- An arbitration clause in wide and general terms ("*any dispute or disagreement arising under, or in connection with, this Agreement*") covers insolvency claims if those claims are capable of being determined in arbitration [43] – [68].
- The fact that the foreign proceedings will continue against other defendants even if the anti-suit injunction is granted is not, in itself, a "*strong reason*" to refuse to grant that relief [103] – [114].
- There was no real delay where the application for the anti-suit injunction was made four months after foreign proceedings were commenced [115] – [118].

A leopard cannot change its spots

In *Proceedings concerning Gazprom OAO* (Case C-536/13) [2015] 1 WLR 4937, AG Wathelet suggested that the Recast Brussels Regulation (Council Regulation (EU) 1215/2012) was intended to reverse the *West Tankers* decision. With some apparent relish, Males J methodically took apart the Attorney General's arguments. Having argued the *West Tankers* case before the English and European Courts, there was, perhaps, no one better placed than Males J to do so.

The Judge's masterful analysis of the AG's flawed reasoning is at [91] – [99]. There is, as he concluded, nothing in the Recast Regulation to undermine or even to address the fundamental principles affirmed in *West Tankers* and reiterated in *Gazprom*. Anti-suit injunctions are not available if the Court proceedings are taking place in another EU Member State.

Stand at the crossroads and look

Should the injunction be requested from the Court or from the arbitral tribunal? In *Nori Holdings*, Males J made clear that the existence of a fully constituted LCIA tribunal was no barrier to the Court granting an anti-suit injunction. Where the Court has jurisdiction to grant that relief and a binding arbitration agreement has been breached, the anti-suit injunction should ordinarily be granted [36].

The defendant has the option to stay that application under section 9 of the Arbitration Act 1996. However, in a case where the jurisdiction of the tribunal is in dispute, this is of no benefit - the stay application would require the defendant to accept the binding force of the arbitration clause.[1]

1 As noted in Raphael, *The Anti-Suit Injunction* (OUP 2008), page 194, footnote 95.

A lion has come out of his lair

Males J went on to reject in comprehensive terms the novel approach to arbitration clauses adopted by the Singapore Court of Appeal in *Larsen Oil & Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21. In that case, the Singapore Court of Appeal held that there was a general presumption that, in the absence of express language, arbitration clauses do not extend to claims to avoid a transaction made by a liquidator in insolvency proceedings. This, held Males J, is not part of English law [61]. What matters is whether the claim is capable of being determined in arbitration [62]. For example, is there a remedy claimed which would affect the status of the defendant or which would affect the position of third parties so as to take the case beyond the jurisdiction of the tribunal [64]?

Is there no balm in Gilead?

As to the discretionary factors involved in all applications to restrain foreign proceedings, Males J held that there were no "strong reasons" for refusing to injunct the Russian proceedings (which were unaffected by the West Tankers decision) and that there had been no real delay. Both decisions should provide further comfort to potential applicants. The relief was not sought until five months after receipt of a pre-action letter, but nevertheless, did not preclude the order sought [118].

In addition, the Judge confined the *Donohue v Armco* [2002] 1 Lloyd's Rep 425 exception to cases where, if no injunction is granted, the whole dispute will be submitted to a single forum [113]. As such, even though the result of the injunction is that the same issue will be tried in Russia against some defendants and by the LCIA against others, that did not amount to a "*strong reason*" to refuse to grant the relief.

The tumult will resound to the ends of the earth

Much, largely academic, ink has been spilt discussing whether West Tankers survived the Recast Regulation. Welcome clarity has been provided; at least for the moment.

Whether or not *West Tankers* survives Brexit remains to be seen. However, absent agreement that the Recast Regulation continues to bind the UK post Brexit, its days may be numbered. Whether that is a good or bad thing is another controversial question.

The views and opinions expressed in this article are those of the authors and do not necessarily reflect the position of other members of 20 Essex Street.

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