Dispute Resolution

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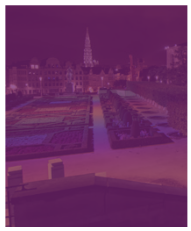
DISPUTE RESOLUTION BULLETIN



Welcome to the January edition of our Dispute Resolution Bulletin.

This edition focuses on anti-suit injunctions.

In our first article, Senior Associate Andrew Williams considers a recent opinion delivered in the Court of Justice of the Europe Union (CJEU) which looks set to reverse the controversial 2009 *West Tankers* decision. This opinion is significant for arbitration practitioners as it gives an early indication as to how the CJEU would approach the interaction between anti-suit injunctions and the Recast Regulation - Regulation (EU) number 1215/2012 - which replaced the Brussels Regulation on 10 January 2015.

Next, when a company is being wound up in a given jurisdiction, can an anti-suit injunction be sought against relevant creditors or members to prevent them from pursuing proceedings in another jurisdiction with a view to securing priority in the liquidation? This was the issue recently before the Privy Council in *Stichting Shell Pensioenfonds v Krys and another* (*British Virgin Islands*) (26 November 2014). The decision is reviewed by Associate Marina Rogers-Nash in our second article.

Finally, Associate Vanessa Tattersall reflects on two recent cases in which HFW has acted and in which the English Commercial Court considered the circumstances in which it is prepared to exercise its discretion to grant an anti-suit injunction to restrain foreign proceedings.

Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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The Reversal of *West Tankers*? The opinion in *Gazprom* (C-536/13)

An opinion delivered in the Court of Justice of the European Union (CJEU) looks set to reverse the controversial 2009 *West Tankers* decision[1].

The opinion was delivered by Advocate General Wathelet (AG Wathelet) in the case of Gazprom (C-536/13) following a referral from the Lithuanian Supreme Court.

It is significant for arbitration practitioners as it gives an early indication as to how the CJEU will approach the interaction between anti-suit injunctions and Regulation (EU) No 1215/2012 (the Recast Regulation), which replaced the Brussels I Regulation No. 44/2001 (the Brussels Regulation) on 10 January 2015. (*West Tankers* was decided under the Brussels Regulation, but the Recast Regulation was central to AG Wathelet's reasoning.)

Background

In *West Tankers*, the CJEU (then the ECJ) ruled that it was inconsistent with the Brussels Regulation for a Member State court to issue an anti-suit injunction restraining a party from commencing or continuing proceedings in another Member State on the grounds that such proceedings breached an arbitration agreement. This was despite the 'arbitration exclusion' in Article 1(2)(d) of the Brussels Regulation which purported to exclude arbitration from its scope.

Further, in its judgment the ECJ said that to permit injunctions restricting a Member State court's ability to determine its own jurisdiction would run contrary to: (i) the principle that every court seised determines for itself whether or not it has jurisdiction and (ii) the principle of mutual trust between Member States' legal systems underlying the Brussels Regulation.

This decision was much-criticised... it was feared that it would encourage parties to commence court proceedings in a foreign jurisdiction in breach of their arbitration agreement for tactical reasons...

ANDREW WILLIAMS, SENIOR ASSOCIATE

This decision was much-criticised. In particular, it was feared that it would encourage parties to commence court proceedings in a foreign jurisdiction in breach of their arbitration agreement for tactical reasons, eg to stall the progress of the arbitration.

The decision in *Gazprom*: the crucial points

Despite not being in force at the time of his opinion, AG Wathelet said that the Recast Regulation was a statement of the law as it should always have been interpreted – in effect, a "*retroactive interpretative law*". In support of this, he cited a series of cases pre-dating *West Tankers* which contrasted with the ECJ's decision in that case.

Accordingly, he addressed the Lithuanian referral predominantly in light of the Recast Regulation and not the then-in force Brussels Regulation (as interpreted by *West Tankers*). It was central to his reasoning in declining to follow *West Tankers*.

Introduced partly in response to *West Tankers*, the Recast Regulation explicitly bolsters the 'arbitration exclusion' at Recital 12, which begins:

> *"This Regulation should not apply to arbitration"*

AG Wathelet said that the primary effect of Recital 12 was to exclude arbitration from the remit of the Recast Regulation. Consequently, in *Gazprom*, the Lithuanian Supreme Court was not required to reject the anti-suit measures instituted in support of the arbitration in question, as the English House of Lords had been in *West Tankers*. In addition, he said that verification of the validity of an arbitration award – whether this is the principal issue in question or incidental to it – does not come within the scope of the Recast Regulation.

AG Wathelet also emphasised the final paragraph of Recital 12, which he said:

> *"Not only [...] exclude[s] the recognition and enforcement of arbitral awards from the scope of [the Recast Regulation] but it also excludes ancillary proceedings, which in my view covers anti-suit injunctions issued by national courts in their capacity as court supporting the arbitration".*

1 Case C-185/07, 10 February 2009

Consequently, he said, there is nothing prohibiting a Member State court from issuing an anti-suit injunction in support of an arbitration held within its jurisdiction, as such a measure would be an 'ancillary proceeding' coming within the broad 'arbitration exclusion' in Recital 12.

He added that arbitral tribunals are not the same as Member State courts. Accordingly, the fear in *West Tankers* that anti-suit injunctions in support of arbitrations could undermine the principle of mutual trust between Member State courts was misplaced as arbitral tribunals are not bound by the principle. Further, he noted that anti-suit injunctions are the only effective remedy available to arbitral tribunals to rule in favour of an 'innocent' party to an arbitration agreement when it deems that the counterparty is in breach.

AG Wathelet concluded by reaffirming that the recognition and enforcement of the *Gazprom* arbitration award fell exclusively within the scope of the New York Convention, to which Recital 12 gives precedence over the Recast Regulation.

Conclusion

The preliminary CJEU judgment is expected in the coming months. Whilst AG Wathelet's opinion is not binding on the CJEU, which can decline to apply it, such a course of action would be highly unusual.

The judgment will reveal whether, and to what degree, the introduction of the Recast Regulation will mark a new departure in the CJEU's approach to Member States' ability to issue anti-suit injunctions in support of arbitration.

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Anti-suit injunctions and insolvency: a recent decision

When a company is being wound up in a given jurisdiction, can an anti-suit injunction be sought against relevant creditors or members to prevent them from pursuing proceedings in another jurisdiction with a view to securing priority in the liquidation?

This was the issue for the Privy Council to decide in *Stichting Shell Pensioenfonds v Krys and another (British Virgin Islands)* (26 November 2014), in what is an interesting instance of the application of anti-suit injunctions within the insolvency framework.

Facts

Fairfield Sentry Ltd (Fairfield), a mutual fund incorporated in the BVI, was the largest feeder fund of Bernard L. Madoff Investment Securities LLC (BLMIS), a New York-based fund manager controlled by the now infamous Bernard Madoff, who undertook what appears to be the largest Ponzi scheme in history. Stichting Shell Pensioenfonds (Shell), a Dutch pension fund, was an investor in BLMIS through shares held in Fairfield.

Following Mr Madoff's arrest in 2008, Shell sought to redeem its Fairfield shares. As no redemption payment was received, Shell successfully applied to the Amsterdam District Court for a conservatory order over Fairfield's assets, including over a substantial cash deposit held at Citco Bank's Dublin branch (the Attachments). Under Dutch law however, such Attachments did not create any form of proprietary interest and would only be available to satisfy any potential subsequent judgment against Fairfield.

In July 2009, an order was made in the High Court of the BVI placing Fairfield into liquidation. Shell submitted its proof of debt in the liquidation of Fairfield in November 2009. This was rejected by the liquidators, who promptly applied to the BVI Court for an anti-suit injunction preventing Shell from enforcing the Attachments. The liquidators' claim was rejected at first instance on the basis that the BVI Court could not prevent a foreign creditor from resorting to its own courts. This decision was overturned by the BVI Court of Appeal, which granted the anti-suit injunction. Shell appealed before the Privy Council.

This case firmly establishes the international scope of insolvency proceedings and demonstrates the English and BVI courts' willingness to exercise their equitable jurisdiction to safeguard the fundamental principle that unsecured creditors are to rank equally.

MARINA ROGERS-NASH, ASSOCIATE



Decision of the Privy Council

In establishing the BVI Court's jurisdiction to make the relevant order, the Privy Council considered the following principles:

- In the BVI, as in England and Wales, an order to wind up a company creates a statutory trust in which all of its assets, local and international, are pooled for sharing amongst the creditors according to the statutory rules of distribution. As the Attachments did not create any proprietary interest, the assets to which they related should be included in the mandatory statutory trust resulting from the BVI winding up order.
- The BVI Court has equitable jurisdiction to uphold a "pari passu" distribution (one in which unsecured creditors are ranked equally). Based on previous decisions[1], the granting of the anti-suit injunction was justified where a creditor invoked a foreign jurisdiction to bypass the statutory scheme of distribution. Failure to do so would "*disturb the general principle of equal distribution which the court is always anxious to enforce*".

The Privy Council found that the jurisdiction to grant the anti-suit injunction should be exercised because:

- Shell had submitted to the BVI Court's jurisdiction by lodging its proof in the liquidation[2]. Shell's argument that an anti-suit injunction could not prevent a foreign litigant from resorting to the courts of its home country was rejected.
- It was right to grant such relief as a matter of discretion. It was not the Privy Council's place to question the BVI Court of Appeal's exercise of discretion, save for cases of error of law and/or fact. Shell's argument that the BVI Court of Appeal should have left the Dutch court to decide whether the proceedings before it should continue was rejected.

The Privy Council rejected the appeal and upheld the anti-suit injunction granted by the BVI Court of Appeal.

Conclusion

This case firmly establishes the international scope of insolvency proceedings and demonstrates the English and BVI courts' willingness to exercise their equitable jurisdiction to safeguard the fundamental principle that unsecured creditors are to rank equally. Finally, creditors should be aware that they may submit to a jurisdiction simply by lodging a proof of debt.

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1 Including *Carron Iron Company Proprietors v Maclaren* (1855) 5 HLC 415

2 Based on *Rubin v Eurofinance SA* [2013] 1 AC 236

Anti-suit injunction applications: two recent experiences and the importance of getting it right

The past few months have seen some developments as to the circumstances in which the English Court is prepared to exercise its discretion to grant an anti-suit injunction to restrain foreign proceedings. These will be of interest to those who engage in multi-jurisdictional business or international trade.

In order for the English Court to exercise its discretion to grant an interim or final anti-suit injunction, the claimant must show either (a) breach of an exclusive jurisdiction or arbitration clause by the defendant(s) by virtue of commencement of foreign proceedings; or (b) that England is the natural forum for the dispute to be heard and pursuit of foreign proceedings by the defendant(s) is vexatious and oppressive.

HFW has acted in two recent relevant cases, the *CHANNEL RANGER (Caressa Navigation Ltd v Zurich Assurances MAROC* (21 October 2014)), a Court of Appeal decision in which HFW acted for the claimant owners, and the *GOLDEN ENDURANCE* (*Golden Endurance Shipping SA v RMA Watanya & Others* (25 November 2014)), a Commercial Court judgment in which HFW acted for the defendant cargo interests.

In the *CHANNEL RANGER*, the Court of Appeal upheld the first instance decision, finding that the English Court did have jurisdiction over the shipowner's claim for a declaration of non liability in respect of a cargo damage claim commenced in the Moroccan Court by the defendant

...parallel proceedings in different jurisdictions, although undesirable, are not necessarily vexatious or oppressive if they are properly brought and an anti-suit injunction could not be granted merely because the foreign court would not apply the English proper law of the contract.

VANESSA TATTERSALL, ASSOCIATE

cargo interests. It also found that the claimant was entitled to an interim anti-suit injunction restraining the Moroccan proceedings, on the basis that by starting proceedings in Morocco, the defendants had breached an exclusive English High Court jurisdiction clause.

The result was relatively neat: the anti-suit injunction restrained the defendants from continuing with the Moroccan proceedings, forcing them to pursue their claim in the English Court (provided it was not time barred). The defendants were also ordered to pay the costs of their unsuccessful appeal and are likely ultimately to have to pay the majority of the costs of the first instance hearing of their jurisdiction challenge.

The consequences of the decision in the *GOLDEN ENDURANCE* were not so clear cut. In that case, cargo interests had brought cargo damage claims against the shipowner under three bills of lading in Morocco. The shipowner obtained (without notice) an interim anti-suit injunction from the English Court, preventing cargo interests from taking steps in the Moroccan proceedings. The shipowner also sought a declaration of non liability in respect of the Moroccan proceedings. Cargo interests challenged the English Court's jurisdiction.

All three bills of lading incorporated the English governing law clause from the related charterparty, but the English Court found that only one used wording which was sufficient to incorporate the charterparty arbitration clause. The English Court therefore granted an anti-suit injunction restraining the Moroccan proceedings under that one bill, which had been brought in breach of the arbitration clause.

The other two bills contained only general words incorporating "*[a] terms and conditions, liberties and exceptions of the Charterparty*", which are not usually sufficient to incorporate jurisdiction or arbitration clauses, and the shipowner could not show any vexatious or oppressive conduct on the part of the cargo interests. The English Court would not grant anti-suit injunctions in relation to the claims brought in Morocco under those two bills. It, however, dismissed the cargo interests' application to set aside the English proceedings relating to those bills.

The result is that parallel proceedings are now taking place in relation to the two bills, in Morocco (cargo interests' cargo damage claims) and England (the shipowner's claim for a declaration of non-liability in respect of the Moroccan proceedings), as well as a London arbitration for alleged damage to cargo carried under the third bill.This not only risks inconsistent judgments, but if the Moroccan Court delivers judgment first, there will be issues regarding the enforcement of that judgment in England and Wales - and vice versa if the English Court delivers judgment first. Res judicata may become relevant.

In reaching its judgment on the two bills, the English Court felt bound by the Court of Appeal's decision to set aside an anti-suit injunction in *Highland Crusader Offshore Partners LP v Deutsche Bank AG* (13 July 2009). The parties in that case had agreed an English non-exclusive jurisdiction clause and the Court of Appeal found that to justify the granting of an anti-suit injunction, there must be vexatious and oppressive conduct by the defendants other than commencement of the foreign proceedings themselves: parallel proceedings in different


jurisdictions, although undesirable, are not necessarily vexatious or oppressive if they are properly brought and an anti-suit injunction could not be granted merely because the foreign court would not apply the English proper law of the contract. In the *GOLDEN ENDURANCE*, there was no exclusive jurisdiction or arbitration clause in the two bills and the Moroccan proceedings were properly brought.

The decisions in the *CHANNEL RANGER* and *GOLDEN ENDURANCE* show how important it is to comply with English jurisdiction and arbitration provisions. If the English Court decides it has jurisdiction and grants an anti-suit injunction, the party in breach is likely to be penalised in costs, which could be substantial. If they are obligated to discontinue foreign proceedings, their claim may be time barred, leaving them without a remedy, and security provided in relation to the foreign proceedings may be lost or void.

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News

HFW is delighted to be a sponsor of the Global Law Summit, which takes place from 22-25 February in London, marking the 800th anniversary of Magna Carta, which was sealed in 1215. This will be a unique, high level business forum supported by the legal profession, business and government. The intention is to celebrate 800 years of legal history and to explore the legacy and values of Magna Carta but in a firmly 21st Century context. HFW will be hosting a panel session during the summit.

Further details can be found at the GLS website: www.globallawsummit.com

hfw Conferences and events

Third Annual Kluwer Law MENA International Arbitration Summit
Dubai
4 February 2015
Presenting: Simon Cartwright

West Africa: Opportunities, Practical Insights and Dispute Resolution
London
10 February 2015
Presenting: Graham Denny

Global Law Summit
London
23-25 February 2015
Attending: Damian Honey, Richard Crump and Nick Hughes

HFW International Arbitration Seminar
HFW London
11 March 2015

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