

The rise and fall of anti-suit injunctions within the European Union

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27 August 2015

Outline

- Anti-suit injunctions
 - what are they?
 - when do English courts grant anti-suit injunctions?
 - the position within the European Union

What are anti-suit injunctions?

- English courts can grant anti-suit injunctions “to restrain a party from commencing or continuing proceedings in a foreign court”, where the foreign proceedings would be an abuse of process
- Section 37, Senior Courts Act 1981
- The injunction is granted not against the foreign court but against the party who brought foreign litigation proceedings
- A useful tool to keep forum selection agreements (i.e. jurisdiction agreements and arbitration agreements) effective

What are anti-suit injunctions?

Lord Woolf MR *Fort Dodge v Akzo Nobel* [1998] FSR 222 at 246:

“... a court can restrain a person from pursuing proceedings in a foreign court where a remedy is available both in that foreign court and [in] this country, but will only do so if pursuit by the person 'would be vexatious or oppressive'. Further, since such order indirectly affects the foreign court, the jurisdiction must be exercised with caution and only if the ends of justice so require. We emphasise that injunctions granted for such purpose are directed against the vexatious party and not the courts of the other jurisdiction.”

When do English courts grant anti-suit injunctions?

- A) Where there is no forum selection agreement between the parties, the foreign proceedings should be vexatious, oppressive or unconscionable, and England has to be the natural forum for the resolution of the dispute, *as per* Rix LJ (as he then was) in *Star Reefers Pool v. JFC Group* [2012] 1 Lloyd's Rep 376 (CA)

- A) Where foreign proceedings are brought in breach of an exclusive English court jurisdiction/London arbitration clause, there is no need to show vexation or oppression. *The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA)

The position within the European Union

The Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Recast Regulation) is the successor to Council Regulation 44/2001

Under the Regulation, English courts cannot grant an anti-suit injunction against a party who has brought litigation proceedings in the courts of another Member State:

For jurisdiction clauses, see *Turner v Grovit* (Case C-159/02) and *Erich Gasser v. MISAT* (Case C-116/02)

The position within the European Union

Arbitration is excluded from the scope of the Regulation 44/2001, see Article 1(2)(d)

But see:

The Front Comor (Case C-185/07) [2009] ECR I-663.

The Wadi Sudr [2009] EWCA Civ 1397 (CA)

The position within the European Union

On the enforcement of jurisdiction agreements within the EU

- Article 23 and the first-seised rule (Article 27)
- The ECJ decisions in
 - Erich Gasser v. MISAT (Case C-116/02)
 - Turner v Grovit (Case C-159/02)

The position within the European Union

Under the new Recast Regulation

There is now an exception to the application of the “first seised” rule: Article 31(2)

Note that Article 31(2) only talks of jurisdiction agreements designating the courts of a Member State (Article 25)

The position within the EU

The Recast Regulation enhanced the separation of arbitration agreements and the recast regulation

See the third paragraph of Recital 12: “A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.”

The position within the EU

- *See also paragraph 4 of Recital 12*
- “This Regulation should not apply to any action or “ancillary proceedings” relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.”

Does that mean that anti-suit injunctions are now allowed within the EU?

- *See the Advocate General’s opinion in the Gazprom Case*

The Gazprom case

The *Gazprom* case (Case C-536/13)

Advocate General's view (see paras 137 and 138):

“The conclusion that anti-suit injunctions in support of the arbitration are allowed by the Brussels I Regulation (Recast) is supported by the fourth paragraph of recital 12, which states that: “[t]his Regulation should not apply to an action or ancillary proceedings relating to, in particular, . . . the conduct of an arbitration procedure or any other aspects of such a procedure, nor to . . . the . . . recognition or enforcement of an arbitral award”.

“Not only does that paragraph exclude the recognition and enforcement of arbitral awards from the scope of that Regulation, which indisputably excludes the present case from its scope, 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.”

The Gazprom case

However, following the *Front Comor*, the Court of Justice of the European Union held that:

- An injunction issued by a court of a member state requiring a party to arbitration proceedings not to continue proceedings before a court of another member state is contrary to the general principle which emerges from the case law of the court that every court seised itself determines, under the applicable rules, whether it has jurisdiction to resolve the dispute before it. It should be borne in mind in that regard that Regulation (EC) No 44/2001, apart from a few limited exceptions, does not authorise the jurisdiction of a court of a member state to be reviewed by a court in another member state.

Gazprom case

- On the enforcement of arbitration awards in the form of anti-suit injunctions, the court held:

“it should be remembered first of all that ... arbitration does not fall within the scope of Regulation No 44/2001, since the latter governs only conflicts of jurisdiction between courts of the Member States. As arbitral tribunals are not courts of a State, there is, in the main proceedings, no such conflict under that regulation.”

Conclusion

- Anti-suit injunctions remain to be the most effective tool in ensuring that they parties act in compliance with their contractual bargain
- In the wake of the CJEU in the Gazprom case, much will now turn on the enforcement of arbitral awards in the form of anti-suit injunctions pursuant to the New York Convention ...

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