West Tankers applies, so the Commercial Court points to other options in Nori Holdings Ltd v Bank Otkritie [2018] EWHC 1343 (Comm)

Clarity has been restored following the High Court's recent decision in *Nori Holdings Ltd & Ors v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm) ('*Nori Holdings*'), which – most importantly – confirms the position in *West Tankers Inc. v Allianz SpA* [2009] AC 1138 ('*West Tankers*') continues to apply: i.e. the English Court will not grant an anti-suit injunction to restrain proceedings in another EU member state in breach of an arbitration agreement.

The decision is of interest following the doubt which was sown after the introduction of the (recast) Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation (EU) No 1215/2012) ('Brussels 1 Recast'). *Nori Holdings* is the first reported decision by the English courts considering this question since the introduction of Brussels 1 Recast.

The dispute

The dispute between the parties arose out of the following facts:

- The defendant Russian bank loaned monies under agreements governed by Russian law and subject to the jurisdiction of the Russian court.
- Those loans were secured by a series of Cypriot law share pledge agreements, each containing an arbitration clause. The arbitration clause provided that London was to be the seat of any arbitration arising from any dispute regarding the pledge agreements.
- The defendant purchased bonds and terminated the loans and the share pledge agreements were also terminated (by way of agreements incorporating the share pledge agreements' arbitration clauses).

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- The defendant commenced proceedings in the Russian and Cypriot courts, in essence alleging it was the victim of a fraud whereby the secured loans were replaced with worthless bonds. The Russian proceedings while the defendant was under temporary administration by its administrator, and involved an insolvency claim.
- In response:
    - the claimants applied to the English Commercial Court for an anti-suit injunction to restrain the court proceedings initiated by the defendant; and,
    - they commenced a series of arbitrations, seeking *inter alia* declarations that the share pledge agreements were validly terminated and also anti-suit injunctions.

The issues for Mr Justice Males

The defendant contended that no injunctions should be granted by the English Court for five reasons (see [30]):

- (1) Any application for anti-suit relief should be made to the arbitral tribunal now that it has been constituted and the court should not intervene;
- (2) The Russian proceedings are not in breach of the arbitration agreements because (a) the arbitration clauses should be construed as not extending to an insolvency claim to set aside a transaction at an undervalue which is within the exclusive jurisdiction of the Moscow Arbitrazh Court and/or (b) such claims are not arbitrable;
- (3) There can be no injunction to restrain proceedings in Cyprus, an EU member state following the *West Tankers* case;
- (4) There are strong reasons why no injunction should be granted, in particular because the Russian and Cyprus proceedings will continue in any event and those jurisdictions comprise the natural forums in which to determine the dispute.
- (5) As a matter of discretion there should be no injunction to restrain the Russian proceedings because the claimants have delayed in making this application.

The decision

There are a number of points of note from the decision:

- First and foremost, the claimant's application for an anti-suit injunction against the Cypriot court proceedings was unsuccessful. In doing so Mr Justice Males held that there was nothing

in Brussels 1 Recast (in particular, Recital (12)) to cast doubt on the continuing validity of the *West Tankers* decision [90 & 99]. In a careful section of the judgment (at [91-98]). He respectfully disagreed with the contrary opinion of Advocate General Wathelet in *Gazprom OAO (Case C-536/13)*. The effect is that Member States will not grant an anti-suit injunction preventing court proceedings in another Member State, even where there is an arbitration clause. The decision brings into relief the difference in approach between Members States and non-Member States.

- However, practitioners should note that there may well be alternative sources of relief. Mr Justice Males highlighted (at [100-102]) that:
    - The Cypriot Court may stay the proceedings itself pursuant to Article II(3) of the New York Convention;
    - The arbitrators may issue an order restraining the further pursuit of the Cypriot proceedings and, if so (as the *Gazprom* case shows), such an award will be entitled to recognition and enforcement under the New York Convention even in EU member states;
    - The claimants had an alternative claim for a declaration that they are entitled to an indemnity against: (1) any costs incurred by them in connection with the Cypriot proceedings; and (2) any liability they are held to owe in those proceedings. While Mr Justice Males deferred any decision on the alternative claim, he plainly viewed it positively as a result of *The Alexandros T* [2014] EWCA Civ 1010 at [15] to [17], a judgment by Mr Justice Flaux in *West Tankers* itself [2012] EWHC 854 (Comm), and *Gazprom.*
- The claimant was entitled to an injunction in respect of the Russian proceedings. The other issues raised by the defendant were dismissed:
    - Mr Justice Males held that, in circumstances where no stay of the English proceedings had been sought by the defendant (pursuant to s. 9 of the Arbitration Act 1996), the availability of anti-suit relief from the arbitrators was not a reason for the Court to refuse an injunction [40-42];
    - There was no presumption that arbitration clauses do not extend to transactions made in a liquidation (cf. the Singaporean Court of Appeal in *Larson Oil*) [61]. He considered there was no reason to imply such an exclusion into the (broadly drafted) arbitration

clause because it is unnecessary [60]. When considering whether the claim was arbitrable (see in particular [62-63]), it was irrelevant whether the claim is properly characterised as an insolvency claim under Russian law. It is necessary to focus on the nature of the particular claim (i.e. substance rather than form) and to consider whether that claim is capable of being determined in arbitration. Mr Justice Males found that – regardless of legal label – this was a straightforward factual dispute as to whether the later transactions constitute a fraud against the defendant to replace valuable secured loans with worthless bonds. That was a dispute which arbitrators can determine;

- The defendant failed to discharge the burden of showing there were strong reasons to refuse an injunction in respect of the Russian proceedings. In circumstances where it is not possible to achieve submission of the whole dispute to a single forum, the parties' agreement to arbitrate was the decisive factor [113]; and,
- On the facts, the four-months between Russian proceedings being commenced and bringing the application for the anti-suit injunction did not constitute a real delay and, even it had, would have been outweighed by the claimants' entitlement to rely on their right to arbitration [118]. (The defendant has also realistically acknowledged that delay was unlikely to succeed as an independent ground for refusing the injunction against the Russian proceedings [115].)

There has been no appeal against Mr Justice Males' decision on the Cypriot proceedings. Permission to appeal was refused by the Court of Appeal in respect of the Russian proceedings (see *Nori Holdings Ltd & Ors v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1642 (Comm) at [1]).

Final word

The decision offers clarity following the introduction of Brussels 1 Recast and reaffirms *West Tankers*, and useful commentary on some obstacles raised defendants to anti-suit injunction.

However, the *West Tankers* position will of course have to be reassessed as the UK looms closer to March 2019 and its departure from the EU. Subject to the precise terms of an agreement between the EU and the UK, the clarity offered by *Nori Holdings* may be short-lived.

In any event, practitioners should bear in mind the possibility of alternative 'two-step' sources of relief (first by the tribunal then by local courts). In this regard:

- They should bear in mind that Mr Justice Males' comments will be persuasive but are *obiter*;
- In order to reduce enforcement issues, parties should be seeking an **award**, rather than a procedural order from the tribunal; and,
- There is a possible enforcement risk (on public policy) in civil jurisdictions, as the anti-suit injunction is a product of the common law (although Advocate General Wathelet offered positive comments about this in *Gazprom*).

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