

English High Court Rules on Anti-Suit Injunctions and Disregards AG Wathelet's Opinion in Gazprom



On 6 June 2018, the English High Court (the *Court*) ruled in *Nori Holding Limited et al.* that a European court was not entitled to grant anti-suit injunctions in order to prevent parallel judicial proceedings taking place in another EU Member State. The Court's judgment is in line with the *West Tankers* ruling handed down by the Court of Justice of the European Union (the *CJEU*) in 2009.

In the case at hand, the claimants (*Nori Holding Ltd and al.*) asked the Court to issue an anti-suit injunction in order to halt court proceedings in Russia and Cyprus which, they argued, violated arbitration clauses contained in several agreements entered into with the defendant.

The facts of the case are rather complex and are not necessary to understand the opinion of the Court. The most interesting part of the case concerns the possibility, for an English court, to issue an anti-suit injunction against a Cypriot court (*i.e.* another EU court). Consequently, only this aspect

of the case is discussed here.

As most of you know, in the *West Tankers* case the CJEU ruled that EU law (and in particular Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels I Regulation***)) prohibited the grant, by a court of an EU Member State, of anti-suit injunctions issued to restrain court proceedings brought in another EU Member State in violation of an arbitration agreement.

In the case at hand, however, the claimants argued that two developments took place since the CJEU handed down its *West Tankers*' decision, which justified the reconsideration of those findings.

The first development was the adoption of Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the ***Brussels Recast Regulation***), which replaced the Brussels I Regulation. In particular, the Brussels Recast Regulation contains a Recital 12 which makes abundantly clear that arbitration proceedings are excluded from the scope of that regulation and that nothing prevents "*the courts of a Member State, when seized of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration*".

The second development was the reasoning of Advocate General Wathelet in his Opinion delivered in the *Gazprom* case before the CJEU. In this Opinion, Advocate General Wathelet found that Recital 12 of the Brussels Recast Regulation was "*a retroactive interpretative law [which] explains how [the exclusion of arbitration from the scope of the European rules on courts' jurisdiction] should always have been interpreted*".

According to the claimants, these two developments have “*effectively reversed the decision in West Tankers*”. More specifically, they argue that those developments removed the basis under which the CJEU in *West Tankers* prevented the grant of an anti-suit injunction restraining continuation of court proceedings in breach of an arbitration agreement. This is because Recital 12 of the Brussels Recast Regulation, which expressly excludes arbitration from the scope of the European rules on courts’ jurisdiction, has (according to Advocate General Wathelet) a retroactive effect. In other words, arbitration is now considered as having always been excluded from the scope of the European jurisdictional rules, and, consequently, the *West Tankers* decision is no longer valid – or, at least, would have to be decided differently if it came before the CJEU today. Therefore, according to the claimants, nothing prevents an English court from issuing an anti-suit injunction in order to restrain the pursuit of proceedings in another EU Member State which are in violation of an arbitration agreement.

The Court disagreed with this position.

According to the Court, “[n]either the [Brussels] Recast Regulation itself nor its recitals say expressly that [the principles affirmed in *West Tankers*] no longer apply or that an anti-suit injunction in support of arbitration issued by a court in a member state takes precedence over them. If the EU legislature intended to reverse the *West Tankers* decision, it chose an odd way in which to do so”.

The Court also recalled that the views expressed by Advocate General Wathelet in his *Gazprom* Opinion were not in fact followed by the CJEU in its judgment and that the CJEU “*plainly regarded West Tankers as a correct statement of the position under the [Brussels I Regulation]*”.

Importantly, the Court added that its findings did not necessarily mean that the proceedings in Cyprus would

continue. According to the Court, the Cypriot court might very well stay the proceedings or the arbitrators (and not a court) might issue an anti-suit injunction restraining the further pursuit of the case in Cyprus (something that the CJEU precisely accepted in *Gazprom*).

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