Milbank

19 June 2018

CONTACT

Tom Canning
Partner
+44(0) 207 615 3047
tcanning@milbank.com

Peter Edworthy
Senior Associate
+44(0) 207 615 3070
pedworthy@milbank.com

Vasiliki Katsarou
Associate
+44(0) 207 615 3282
vkatsarou@milbank.com

Litigation & Arbitration Group Client Alert: Case update – anti-suit injunctions, and arbitrating insolvency-related claims

On 6 June 2018, the Commercial Court handed down its judgment in Nori Holdings Ltd v Bank Otkritie Financial Corp [2018] EWHC 1343 (Comm), and provided helpful guidance on three important issues:

1. The Court clarified that *West Tankers*[1] remains good law in that parties will not be granted anti-suit injunctions by the English Court to restrain proceedings commenced in other Member States in breach of an agreement to arbitrate, notwithstanding the contrary opinion expressed by Attorney General Wathelet in *Gazprom* (C-536/13).

2. The Court confirmed that parties are entitled to seek anti-suit relief from the Court, rather than being obliged to apply to the arbitral tribunal.

3.The Court held that the arbitrability of claims arising in an insolvency situation (which generally do not fall within the scope of arbitration, largely because tribunals cannot make orders that bind non-consenting third parties (such as other creditors)) should be considered by reference to the nature of the relief sought in the particular case in question, rather than by the fact that the claim arises in an insolvency situation.

We set out below a brief summary of each of these issues.

1. *WEST TANKERS* CONFIRMED

The Court's judgment in relation to anti-suit injunctions is welcome clarification following AG Wathelet's 2014 opinion in the *Gazprom* case (and the CJEU's failure to address the issue in its subsequent judgment in that case).[2]

By way of brief recap, in 2009, the CJEU held in *West Tankers* that it would be inconsistent with the Brussels I Regulation (44/2001) (the "**Brussels I Regulation**") for the English Court (or, indeed, the courts of any Member State) to issue an anti-suit injunction staying court proceedings that had been started in another Member State, in breach of a binding arbitration agreement. The decision appeared, on its face, to contradict the arbitration exception provided in the Brussels I

[1] West Tankers Inc v Allianz SpA (formerly RAS Riunione Adriatica di Sicurta) (Case – 185/07), [2009] 1 AC 1138.

[2] Please see here for our briefing note on AG Wathelet's opinion, and here for our briefing note on the subsequent CJEU decision in that matter.

Regulation and prompted concern in the arbitration community that it would effectively legitimise the 'Italian Torpedo' strategy.[3]

In December 2014, AG Wathelet issued an opinion in the *Gazprom* case that questioned the decision in *West Tankers.* AG Wathelet expressed the view that the preamble to the recast Brussels Regulation (that came into effect in January 2015) (the "**Recast Regulation**") confirmed that the arbitration exception was intended to apply to ancillary proceedings relating to arbitration (and, accordingly, that *West Tankers* may have been wrongly decided). However, the CJEU did not offer a view on this issue in the *Gazprom* judgment and the question has therefore remained open.

In *Nori Holdings*, the Commercial Court had to consider this point in order to determine whether it could issue an anti-suit injunction staying proceedings that had been commenced in Cyprus in breach of an arbitration agreement. In short, the Court confirmed that *West Tankers* was still good law under the Recast Regulation, and thus dismissed the application for anti-suit relief. The Court's reasoning is hard to fault: AG Wathelet's opinion was not binding and was not adopted by the CJEU in *Gazprom* (and so has no bearing on the CJEU's decision in *West Tankers*). The Court also expressed the view that AG Wathelet's underlying reasoning was, in any event, "*fundamentally flawed*".[4] Therefore, unless or until the CJEU reverses the *West Tankers* decision, it seems likely that the English Courts will remain bound by that decision.

Nevertheless, and as noted in the Court's judgment (and in our earlier briefing), parties to binding arbitration agreements do have other forms of recourse when faced with a party breaching that agreement to arbitrate. These include (for example): seeking declaratory relief from the English Court or the Tribunal (which could then potentially bind other Member States); seeking an indemnity or an award of damages from the Tribunal for breach of the arbitration agreement; pursuing concurrent arbitral proceedings and seeking enforcement of any arbitral award obtained; and/or seeking an anti-suit injunction from the Tribunal itself.

It is also worth noting that, post-Brexit, the English Court's position may change, as the United Kingdom will no longer be a Member State and may no longer be bound by the Recast Regulation.

2. ANTI-SUIT RELIEF – COURT OR TRIBUNAL?

In *Nori Holdings*, the Commercial Court also determined that an application for anti-suit relief can be made to the Court, and not just to the arbitral tribunal (if constituted). Whilst the Court's decision was clear, interestingly the Court did not address the potentially thorny issue of how that decision can be reconciled with the Commercial Court's 2016 decision in Gerald Metals SA v The Trustees of the Timis Trust & others [2016] EWHC 2327 (Ch) (see our briefing note here).

In *Gerald Metals*, the Court rejected an application for a freezing order on the basis that its jurisdiction under s.44 of the Arbitration Act 1996 (the Court's jurisdiction to grant injunctive relief in support of arbitral proceedings) only arises where "*the case is one of urgency*" (s.44(3)) and the Tribunal or relevant institution "*has no power or is unable for the time being to act effectively*" (s.44(5)). The Court reasoned that "*urgency*" in the context of s.44 should therefore

[3] This is the tactic of stalling arbitration proceedings by initiating proceedings in the Court of another Member State, knowing that the Court in question may take a significant amount of time to decide the issue of which forum has jurisdiction.

[4] *Nori Holdings*, per Males J, at paragraph 91.

be understood to mean that the time it would take a party to obtain relief through the Tribunal (or institutional court) would render that relief ineffective.

The Court in *Nori Holdings* did not expressly consider the urgency requirement established in *Gerald Metals*. This is perhaps because *Gerald Metals* concerned an application for interim injunctive relief, whereas *Nori Holdings* concerned a final mandatory order. Thus it could be said that the Court's jurisdiction in *Nori Holdings* arises pursuant to s. 37 of the Senior Courts Act 1981, as opposed to s.44 of the Arbitration Act 1996.[5]

Accordingly, whilst the decision in *Nori Holdings* provides some clarification as to the appropriate forum for anti-suit applications under the Arbitration Act 1996, there is scope for parties to argue that the decision should only apply to final mandatory orders, and not applications for urgent interim relief.

3. ARBITRATING INSOLVENCY CLAIMS

It is generally considered that pure insolvency law claims cannot be resolved by arbitration, only by the national courts (largely on the basis that third parties (such as creditors) will not have consented to arbitration and cannot, therefore, be bound by the arbitration process or an arbitral award rendered pursuant to that process).

In *Nori Holdings*, the Court considered whether claims to set aside a transaction at an undervalue in the context of insolvency proceedings fell within the scope of the parties' agreement to arbitrate. The Court held, as a matter of English law,[6] that there is no general presumption that arbitration agreements should be construed in such a way so as to exclude claims in an insolvency context.

Instead, relying on the Court of Appeal's decision in Fulham Football Club (1987) Ltd v Richards and another [2011] EWCA Civ 855 (and referencing the lack of express exclusion of such claims in the Arbitration Act 1996 or the Companies Act 2006), the Court confirmed that the proper test is to consider whether the relief sought is capable of being granted by an arbitral tribunal. For example, a tribunal may not be entitled to grant an order for the winding up of a company or an order binding other shareholders (given the lack of consent to arbitration), but a tribunal is able to determine (as in *Nori Holdings*) whether a particular transaction constituted a fraud and whether that entitles a party to relief arising from that fraud.

Therefore, the important question when considering the arbitrability of an insolvency-related claim is whether "*the remedy claimed…would affect the status of the* [relevant party] *or …the position of third parties in such a manner as to take the case beyond the consensually derived jurisdiction of the arbitrators*".[7]

[5] The same argument might apply to mandatory stays of court proceedings in aid of arbitration agreements (under s.9 of the Arbitration Act and/or s. 49 of the Senior Courts Act).

[6] In contrast to, for example, Singaporean law, which the Court in *Nori Holdings* was referred to in relation to certain case law in the Singapore courts that established this presumption.

[7] *Nori Holdings*, per Males J at paragraph 64.

LITIGATION & ARBITRATION GROUP

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any of the members of our Litigation & Arbitration Group.

If you would like copies of our other Client Alerts, please visit our website at www.milbank.com and choose “Client Alerts” under “News.”

LONDON
10 Gresham Street, London EC2V 7JD, England

Tom Canning	tcanning@milbank.com	+44-20-7615-3047
Charles Evans	cevans@milbank.com	+44-20-7615-3090
Julian Stait	jstait@milbank.com	+44-20-7615-3005

NEW YORK
28 Liberty Street, New York, NY 10005-1413

Wayne M. Aaron	waaron@milbank.com	+1-212-530-5284
Antonia Apps	aapps@milbank.com	+1-212-530-5357
Thomas A. Arena	tarena@milbank.com	+1-212-530-5828
James G. Cavoli	jcavoli@milbank.com	+1-212-530-5172
George S. Canellos *Global Head of Litigation*	gcanellos@milbank.com	+1-212-530-5792
Scott Edelman *Firm Chairman*	sedelman@milbank.com	+1-212-530-5149
Christopher J. Gaspar	cgaspar@milbank.com	+1-212-530-5019
David R. Gelfand	dgelfand@milbank.com	+1-212-530-5520
Katherine R. Goldstein	kgoldstein@milbank.com	+1-212-530-5138
Robert C. Hora	rhora@milbank.com	+1-212-530-5170
Atara Miller	amiller@milbank.com	+1-212-530-5421
Sean M. Murphy	smurphy@milbank.com	+1-212-530-5688
Daniel Perry *Practice Group Leader*	dperry@milbank.com	+1-212-530-5083
Tawfiq Rangwala	trangwala@milbank.com	+1-212-530-5587
Stacey J. Rappaport	srappaport@milbank.com	+1-212-530-5347
Fiona A. Schaeffer	fschaeffer@milbank.com	+1-212-530-5651
Jed M. Schwartz	jschwartz@milbank.com	+1-212-530-5283
Alan Stone	astone@milbank.com	+1-212-530-5285
Errol B. Taylor	etaylor@milbank.com	+1-212-530-5545

Fredrick M. Zullow	fzullow@milbank.com	+1-212-530-5533

WASHINGTON, DC
International Square Building, 1850 K Street, NW, Suite 1100, Washington, D.C. 20006

David S. Cohen	dcohen2@milbank.com	+1-202-835-7517
Andrew M. Leblanc	aleblanc@milbank.com	+1-202-835-7574
Michael D. Nolan	mnolan@milbank.com	+1-202-835-7524

LOS ANGELES
2029 Century Park East, 33rd Floor, Los Angeles, CA 90067-3019

Robert J. Liubicic	rliubicic@milbank.com	+1-424-386-4525
Jerry L. Marks	jmarks@milbank.com	+1-424-386-4550
Mark Scarsi	mscarsi@milbank.com	+1-424-386-4580