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THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION PRACTICE TO ISSUE ANTI-SUIT INJUNCTIONS

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SUMMARY

The paper deals with the issue of parallel proceedings avoidance by means of anti-suit injunctions orders issued by courts or arbitrations within EU. The paper contains reasons why EU courts are reluctant to issue such measures and explains why EU-based arbitration institutions are excluded from EU legislation, that deals with avoidance of parallel proceedings and issuance of anti-suit injunctions. Thus, regulation of the question, whether arbitrations may issue anti-suit injunctions, could be found in the practice of CJEU. The paper gives analysis of crucial CJEU cases, which deal with anti-suit injunctions, explains the importance of anti-suit injunctions for the UK and provides forecast of the attitude of UK and EU to the issue of anti-suit injunctions after Brexit.

Key words: anti-suit injunctions, international commercial arbitration, Brussels Regulation, commercial disputes, Brexit.

ВЛИЯНИЕ ПРАВА ЕС НА ПРАКТИКУ ПРИНЯТИЯ АНТИ-ИСКОВЫХ МЕР МЕЖДУНАРОДНЫМ КОММЕРЧЕСКИМ АРБИТРАЖНЫМ СУДОМ

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АННОТАЦИЯ

В статье рассматривается вопрос избегания параллельного судопроизводства посредством принятия судами или арбитражами анти-исковых мер в рамках ЕС. В статье приводятся причины, по которым суды ЕС неохотно издают такие меры, и объясняется, почему арбитражные институты ЕС исключены из законодательства ЕС, которое касается избегания параллельных разбирательств и вынесения анти-исковых мер. Таким образом, урегулирование вопроса о том, могут ли арбитражные суды применять анти-исковые меры, можно найти в практике суда ЕС. В документе дается анализ важнейших дел суда ЕС, которые касаются анти-исковых мер, объясняется важность применения анти-исковых мер для Великобритании и прогнозируется отношение Великобритании и ЕС к вопросу применения таких мер после Брексита.

Ключевые слова: анти-исковые меры, международный коммерческий арбитраж, Брюссельский Регламент, коммерческие иски, Брексит.

Introduction. Anti-suit injunctions can be defined as a measure issued by court or arbitration that prohibits an opposing party to the dispute to file a claim or continue a proceeding in another court or arbitration. These measures usually used to preclude litigation in fora other than the exclusive forum to which parties have agreed – for instance, arbitration. International arbitrators are increasingly issuing anti-suit injunctions to prevent parties from having recourse to the courts in breach of their arbitration agreements [1]. So, the main reason to use anti-suit injunctions is to avoid parallel proceedings.

Historically, anti-suit injunctions appeared in the United Kingdom. However, the application of such measures in EU countries is extremely limited. There are three main reasons why EU court are reluctant to issue anti-suit injunctions:

1) Such anti-suit measures are directed against the foreign forum thus they constitute an implied interference in judicial jurisdiction of another EU state [2];

2) The concept of mutual trust among courts of EU members falls under question when anti-suit injunctions are used [3];

3) Anti-suit measures are regarded as measures which prevent parties from exercising their right of access to justice, since they restrain a party from failing a case before a court or arbitration [4].

As a result, the legality of the anti-suit injunctions issuance by the courts and arbitration within EU is under the dispute. Taking into consideration that the UK is currently a member of the EU, the application of anti-suit measures by English courts is arguable too. However, under the legislation of the UK, namely, under Senior Courts Act 1981 s.37(1), senior courts have the power to issue an anti-suit injunction in favor of arbitration where a party commences foreign court proceedings in breach of a valid arbitration agreement [5]. Taking into account the Brexit process, there certainly will be impact on the application of anti-suit injunctions by English courts. Another important question is under which circumstances application of the anti-suit injunctions is available in EU law countries.

So, this paper analyzes the circumstances under which the issuance of anti-suit injunctions is possible within EU countries and what impact the Brexit process will have on practice of English courts to issue anti-suit injunctions orders. For these reasons, the paper includes brief history reference on EU legislation development concerning the issue of anti-suit injunctions, provides study of case law of CJEU and English courts and gives analysis of current development of EU law.

History. An understanding of the present is strongly connected with some knowledge of history. Concerning the issue of anti-suit injunctions

regulation in EU law, it is important to consider the history of three components of legal regulation which constitutes present EU law attitude to anti-suit injunctions. These three components are: first, the European regime governing jurisdiction of the courts in civil and commercial matters, starting with the Brussels Convention of 1968 and currently represented by the so-called "Brussels I Recast" Regulation; second, the New York Convention; and third, the case-law of CJEU on anti-suit injunctions [6].

The set of rules, which regulates the matter of jurisdiction, recognition and enforcement of judgments, where one of the parties is a resident of EU is called the Brussels Regime. The regime consists of four documents:

1) The Brussels Convention of 27 September 1968 [7];

2) The Lugano Convention of 16 September 1988 [8];

3) Regulation (EC) No. 44/2001 of 22 December 2000 (so called the Brussels I Regulation) [9];

4) Regulation (EU) No. 1215/2012 of 12 December 2012 (the Brussels I Regulation (Recast) [10].

The Recast version of Brussels I Regulation came into effect at 10 January 2015 and this document replaced original version of Brussels I Regulation of 22 December 2000.

However, Brussels I Regulation does not cover issues of arbitration, since it was excluded from the scope of the first Brussels Convention of 1968, as the issue of arbitration is regulated in the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards [9] and the European Convention on International Commercial Arbitration. As long as the arbitration is excluded from the scope of the Regulation it is important to study the CJEU case-law on application of anti-suit measure by courts and arbitrations.

Turner v Govit case. The first case, were the issue of anti-suit injunctions was raised before the court was *Turner v Govit* [11]. In this case the Court defined, that anti-suit injunctions are incompatible with the Convention because such injunctions undermine the concept of mutual trust among the EU courts [12]. However, the *Turner* case did not involve arbitration, thus issuance of anti-suit injunctions by arbitration and toward it remained under the question.

West Tankers case. The first case concerning anti-suit injunctions which involved arbitration was the *Allianz SpA v West Tankers Inc* [13]. In this case the question for the CJEU was whether the English court could grant West Tankers an anti-suit injunction preventing Allianz continuing with litigation in Italy. Under arbitration agreement Allianz had to resolve its dispute with West Tankers by arbitration in England but taking into consideration the fact that arbitration is outside the scope of the Brussels Regulation, the English court should not be prevented from granting such an injunction [14]. In this judgment the Court held that *"It is incompatible with Regulation (EC) No. 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement".* In such a manner the CJEU reaffirmed that the EU courts cannot issue anti-suit injunctions. That means that the question of parallel proceedings avoidance remained unsolved.

Notwithstanding the fact, that the *West Tankers* decision was focused on the applicability of anti-suit injunctions by courts toward arbitrations, the judgment had much wider impact. The judgment gave parties a possibility to act insolently, allowing them to bring substantive proceedings which fall under the scope of the Brussels Regulation before the courts of the member state. Such court will likely find the arbitration agreement invalid, and the party, who wish to uphold the arbitration agreement and other member state courts remain powerless to prevent this.

Brussels I Regulation (recast). Hence, there was serious demand in amendments to Brussels I Regulation. Such amendments were adopted at 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 (recast) [10]. As to arbitration, the vast part of the amendments placed in recitals, rather than in the main text. The only amendment in the main text is Article 73(2), which specifies that the Brussels I Regulation shall not affect the application of the 1958 New York Convention [15]. The Recital 12 reaffirms that the Brussels Regulation (recast) should not apply to arbitration and, especially, that it should not prevent the courts of member states from referring parties to arbitration, from staying or dismissing proceedings in favor of arbitration, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law. The second paragraph of recital 12 goes ahead to provide that 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 the Brussels Regulation (recast), regardless of whether the court decided on this as a principal issue or as an incidental question [10]. This means, that parties will have less opportunities to start proceedings in a court of a member state and receive court's decision recognizing invalidity of the arbitration agreement between the parties.

Further, at paragraph 3 Recital 12 provides that where a court of a member state has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognized or, as the case may be, enforced in accordance with the Brussels Regulation (recast). However, this rule is expressed to be without prejudice to the competence of the courts of member states to decide on recognition and enforcement of arbitral awards in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in 1958 (New York Convention) [14].

In the end, Recital 12 clarifies that the Brussels Regulation (recast) will not apply to actions or ancillary proceedings relating to, in particular, the establishment of the arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure, nor to any action or a judgment concerning the annulment, review, appeal,

recognition or enforcement of an arbitral award.

Despite the fact, that Brussels I Recast contains vast regulation of relationships between courts and arbitrations, some areas remain uncertain. In particular, it is not entirely clear how in practice will work the rule, which specifies the precedence of the New York Convention over the Brussels Regulation (recast). Does it mean that if there are conflicting arbitration decision and the court judgment on the same case, the decision of the arbitration should be enforced and enforcement of the court judgment should be denied? The issue of anti-suit relief also remained unsolved. Can the arbitration court issue anti-suit suit injunctions against the national courts of member states or can anti-suit relief be issued by court toward arbitrations? The answer to this question was given by CJEU in *Gazprom* case and by High Court of England and Wales in *Nori Holdings* case.

Gazprom case. In the decision in *OAO Gazprom v. The Republic of Lithuania* [16] case the CJEU held that anti-suit injunctions issued by arbitral tribunals are not covered or prohibited by EU Regulation 44/2001. In this case, the Court determined that the Brussels I Regulation:

"*must be interpreted as not precluding a court of a Member State from recognizing and enforcing, or from refusing to recognize and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State".*

It also stated that arbitral anti-suit injunctions 'are *covered by the national and international law applicable in the Member State in which recognition and enforcement are sought*'.

Gazprom decision is the first case dealing with the issue of anti-suit injunctions after the Brussels I Regulation Recast came into force. So, the CJEU reconsidered its position on this issue, which was stated in *West Tankers.* CJEU stated that under provisions of Recital 12, contrary to the *West Tankers* decision, an EU court could grant an anti-suit injunction in support of arbitration against court proceedings elsewhere in the EU.

This case affirmed the power of an EU-seated arbitral tribunal to grant an anti-suit injunctions against court proceedings elsewhere in the EU. At the same time, the Brussels I Regulation does not preclude an EU court from enforcing of anti-suit injunctions made by an arbitration. However, this issue should be resolved under the national arbitration law applicable in the Member State in which enforcement is sought. That means, that this issue falls under regulation of the New York Convention, but not the Brussels I Regulation (recast).

As a conclusion, the judgment of CJEU on *Gazprom* case permits arbitrations to issue anti-suit injunctions against courts, but question whether courts of EU member states may issue such measures remains unanswered. As a result, it could be concluded, that arbitral tribunals now have greater anti-suit powers than judges in EU Member State courts [1].

Nori Holdings Ltd case. The answer to the question concerning power of EU courts to issue anti-suit injunctions contains in *Nori Holdings Ltd & others v. Public Joint-Stock Company, Bank Otkritie Financial* Corporation [17]. In the decision of England and Wales High Court judge Males J has held that there is nothing in the Recast Brussels Regulation (the Recast Regulation) to put under question the validity of the CJEU decision in *Allianz Sp v West Tankers Inc* [18]. The judge pointed out that:

"A court should apply Article II(3)9 of the New York Convention to determine whether it has jurisdiction; A ruling made by a court applying Article II(3) of the New York Convention is not entitled to recognition or enforcement under the Recast Regulation;

Even though the ruling that the claim is not arbitrable is not entitled to recognition or enforcement under the Recast Regulation, the court's judgment on the merits will be;

Preamble 12 contemplates that for the same dispute there may be both a court judgment on the merits and an arbitral award which conflict with each other, and in that event the award under the New York Convention takes precedence".

As the result, *Nori Holdings* case made it clear, that arbitral tribunals have the power to issue anti-suit injunctions toward courts, but EU member courts cannot issue such injunctions toward arbitrations.

Brexit. In summary, *West Tankers, Gazprom* and *Nori Holdings* decisions contain position of EU law concerning the issue of anti-suit injunctions: arbitration institutions can issue anti-suit injunctions and EU member courts have not such powers. However, it is under the question that courts of England and Wales once the UK leaves the EU will continue to abide these rules.

The current position of the UK is to terminate (after the end of the transition period) the jurisdiction of the CJEU and the application of EU law in the UK facilitated by the transfer of existing EU law and regulations into UK law under the EU Withdrawal Bill [18]. So, the Supreme Court will determine whether the Recast Regulation (if it is transferred into UK law) contains prohibition for courts to issue anti-suit injunctions toward arbitration. Given the judgment in Nori Holdings, this is likely that the High Court would not be in favor for Advocate General Wathelet's view, which he stated in *Gazprom* case. AG Wathelet stated that Recital 12 makes clear that, contrary to the *West Tankers* decision, an EU court could grant an anti-suit injunction in support of arbitration against court proceedings elsewhere in the EU [1].

However, it is possible that this approach will be followed by CJEU. If CJEU recognize the power of EU member courts to issue anti-suit injunctions toward arbitration, there will be contradiction between EU law and law of UK after Brexit. This impact of Brexit is undesirable, because issue of courts' jurisdiction is fundamental in EU law.

Conclusions. Currently, anti-suit injunction is "the weapon of last resort", as its application by courts and arbitrations poses numerous questions. However, the CJEU practice demonstrates, that such injunctions can be issued by arbitrations toward courts. Nonetheless, the application of anti-suit injunctions by EU member courts continues to be under the question after the moment, when Brussels I Regulation (recast) came into force. At the same time, the High Court of England and Wales formed its position that anti-suit injunctions cannot be issued by courts toward EU-seated arbitrations. If CJEU in its future decisions state

that courts have the power to issue such measures, there will be serious divergent between UK an EU legislation. Thus, anti-suit injunctions are not the best way to solve the issue of parallel proceedings. It would be better if members of EU create single online base of all cases to be submitted to court and arbitrations, where will be stated clear requirements for admissibility of cases.

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