IMPACT OF BREXIT ON ANTI-SUIT INJUNCTIONS FROM THE ENGLISH COURT

Marc Delehanty and Alex Francis of Littleton Chambers consider the power of the English court to grant an anti-suit injunction following the end of the Brexit transition period.

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Before the end of the Brexit transition period, EU instruments governing issues of jurisdiction in civil and commercial matters prevented the English court from granting an anti-suit injunction to restrain the pursuit of proceedings in a court in the EU. This article explores the English court's power, following the end of the Brexit transition period, to grant an anti-suit injunction. It identifies some of the issues which might affect the English court's power to grant anti-suit relief, the effect of the transitional provisions in the EU-UK Withdrawal Agreement and the implications of the UK's application to accede to the Lugano Convention 2007.

For a more detailed discussion of the English court's power to grant an anti-suit injunction, see *Practice note, Jurisdiction: common law rules*, in particular the sections *Anti-suit injunctions (exclusive jurisdiction clauses)* and *Anti-suit injunctions (non-exclusive or no jurisdiction clause)*.

For the principles which the English court will apply when determining an application for an anti-suit injunction in the arbitration context, see *Practice note, Remedies for breach of the arbitration agreement: anti-suit injunctions in the English courts: Principles governing grant of arbitration anti-suit injunctions in English court.*

PRE-BREXIT POSITION: ANTI-SUIT RELIEF IN RESPECT OF ACTIONS IN EU COURTS PROHIBITED

Prior to Brexit, EU instruments concerning jurisdiction for civil and commercial matters, the Brussels Convention 1968 and Brussels Regulation (*(EC) 44/2001*), were interpreted by the ECJ as prohibiting EU member state courts from making an anti-suit injunction restraining the pursuit of actions in such matters in the courts of another EU member state (*Turner v Grovit (Case C-159/02) EU:C:2004:228*). This prohibition held even where an action in the other EU member state court would be in breach of an arbitration agreement (*West Tankers v Allianz (Case C-185/07) EU:C:2009:69*).

This prohibition continued to apply under the most recent iteration of these instruments, the Recast Brussels Regulation (*(EU) 1215/2012*) (*Nori Holdings v Bank Okritie [2018] EWHC 1343 (Comm)*).

The Lugano Convention 2007, which governs issues of jurisdiction as between courts in EU member states and the EFTA countries (Iceland, Norway and Switzerland, but not Liechtenstein) is interpreted consistently with the Brussels instruments, so this prohibition also precluded anti-suit relief in respect of actions in the courts in Lugano states.

EFFECT OF BREXIT

Subject to transitional provisions (see *Transitional provisions*), the Brussels and Lugano jurisdictional instruments no longer apply in the UK where the proceedings were commenced after the end of the transition period. Therefore, the prohibition against English courts granting anti-suit relief in respect of actions in EU and Lugano states no longer applies. (The UK was never a party to the Lugano Convention 2007 in its own right; the EU is a party and the Convention's application to the UK depended on the UK being an EU member state.)

The availability of such anti-suit relief now is not precluded by any treatment of the ECJ's decisions in *Grovit* and *West Tankers* as "retained EU case law" (as defined in section 6(7) of the European Union (Withdrawal) Act 2018 (EUWA 2018)). This is because those ECJ decisions were expressly only in the nature of interpretations of the Brussels jurisdictional instruments and so did not lay down any free-standing principle, right or restriction in EU law. Therefore, as the relevant instruments have not been retained in English law, those ECJ decisions do not apply to preclude anti-suit relief.

In this new landscape, two issues in particular arise when considering anti-suit relief in respect of actions in EU or Lugano state courts.

Effect of Hague Convention 2005

The first issue to consider is the effect of the Hague Convention on Choice of Court Agreements 2005 (Hague Convention) in circumstances where anti-suit relief is sought to restrain breach of an exclusive choice of court agreement.

Where there is an exclusive jurisdiction clause in favour of either a UK court or the courts of an EU27 state, issues of jurisdiction as between the UK and EU member states are now governed by the Hague Convention, as the UK and EU are both parties to it. (The Lugano states are not.) Article 6 of the Hague Convention provides that the court of a contracting state other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies, subject to certain exceptions.

It might be argued that, rather than the English court granting anti-suit relief, it should instead rely on the EU member state court to properly apply Article 6.

However, while this may well be an important discretionary factor, it is very unlikely that the English court would adopt the absolute approach from *Grovit* and *West Tankers* (that is, precluding anti-suit relief altogether, in favour of trusting the courts of counterparties to the jurisdictional instrument to correctly apply the rules) in the context of the Hague Convention. One of the key objections to that absolute approach is not so much that an EU member state court might apply the rules incorrectly, but that it would take a long time to do so and thereby slow down litigation to the undesirable tactical advantage of the party who has commenced proceedings in a court other than the agreed jurisdiction (commonly referred to as a party deploying an "Italian torpedo").

Further, the temporal scope of the Hague Convention is relevant. It only applies to exclusive jurisdiction agreements entered into after the Convention entered into force in the country of the court chosen in the agreement (*Article 16*). The question of when it entered into force for the UK is unsettled. The UK government's view (set out in Ministry of Justice guidance (*MOJ: Cross-border civil and commercial legal cases: guidance for legal professionals (21 December 2020)*)) is that the date is 1 October 2015, which is when the Convention entered into force for the EU of which the UK was then a member state. The contrary view (which is the view taken by the European Commission (*Commission Communication: Getting ready for changes*)) is that the date is 1 January 2021, after the end of the Brexit transition period, when the Convention entered into force in the UK by virtue of the UK being a party to it in its own right.

Comity considerations

The second issue is the potential significance of the previous longstanding position of English courts respecting EU member state courts' determination of their own jurisdiction, albeit mandated by the ECJ's prohibition on anti-suit

relief. It remains to be seen whether this means the English court will be slower to grant anti-suit relief on the basis of an action in an EU or Lugano state being "oppressive or vexatious" than might be the case for actions in other foreign countries. Considerations of comity are very important on applications for anti-suit relief on this basis and have, in some cases, persuaded the English courts to grant appropriate declaratory rather than injunctive relief. (See, for example, *Noble Assurance Co v Gerling-Konzern General Insurance Co [2007] EWHC 253 (Comm).*)

TRANSITIONAL PROVISIONS

The Brussels jurisdictional regime applied during the Brexit transition period and continues to apply in England in respect of actions instituted during that period (that is, up to 11.00 pm (GMT) on 31 December 2020). The EU-UK Withdrawal Agreement provides for this: Article 69(2) regarding Denmark and Article 67(1)(a) for all other EU member states. The EU-UK Withdrawal Agreement does not provide for the continued application of the Lugano Convention to proceedings instituted before the end of the transition period but the UK has made provision in domestic legislation for the Lugano Convention to apply to such proceedings (albeit using the language of the English court being "seised" rather than the proceedings in England having been "instituted"; *regulation 92, Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019*), and Norway has agreed to reciprocate application of the Lugano Convention in such cases (*Article 2(1), UK-Norway Agreement of 13 October 2020*).

As to what constitutes the "instituting" of a proceeding or when a court is "seised", the usual test from Article 32 of the Recast Brussels Regulation (*Article 30, Lugano Convention*), based on when relevant documents were lodged at court, can be expected to apply.

The availability of anti-suit relief can be understood by reference to some hypothetical examples were a party to now (that is, after the end of the Brexit transition period) apply to obtain anti-suit relief from the English court.

Example 1: the proceedings that the party wants to restrain are or would be in an EU member state court and either have not been commenced yet or were instituted after the end of the transition period. Anti-suit relief will be available; the transitional provisions do not apply.

Example 2: the proceedings that the party wants to restrain are in an EU member state court and were instituted before the end of the transition period. It is very unlikely that an anti-suit injunction would be available.

The position in this Example 2 is not certain because there is now power to depart from ECJ decisions such as *Grovit* and *West Tankers*. However, a departure from these decisions would be very unlikely because:

- Those decisions are binding on the High Court. An applicant would have to successfully appeal to the Court of Appeal or Supreme Court to reach a court with the power to depart from those decisions (under the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (*SI 2020/1525*) and section 6(4) and (5) of the EUWA 2018, respectively).

- Even if the applicant were prepared to go that far, there is a high threshold test for departing from that ECJ case law: the restrictive test which the Supreme Court applies in deciding whether to depart from its own case law. (The Court of Appeal considered how and when it is appropriate to depart from ECJ case law in *Tunein v Warner Music [2021] EWCA Civ 441*.)

- The rules governing jurisdiction, recognition and enforcement of judicial decisions, and related co-operation during the Brexit transition period, were designed to preserve the status quo for cases instituted in that period. It would be inconsistent with that aim if a party to proceedings brought during the transition period could escape the consequences of *Grovit* or *West Tankers* by making an application for an anti-suit injunction after the Brexit transition period.

Example 3: the proceedings that the party wants to restrain are or would be in a Lugano state court and have not yet been commenced or were instituted after the end of the transition period. Anti-suit relief will be available; the transitional provisions do not apply.

Example 4: the proceedings that the party wants to restrain are in a Lugano state and were instituted before the end of the transition period. The likelihood that an anti-suit injunction would be available depends on which Lugano state is involved. This is because only Norway has agreed to reciprocate application of provisions of the Lugano Convention to cases instituted during the Brexit transition period (*Article 2(1), UK-Norway Agreement of 13 October 2020*); Switzerland and Iceland have not. So, for Norway, the position is expected to be as per Example 2 above. For Iceland and Switzerland, there is much greater scope to argue for distinguishing or departing from the ECJ case law prohibiting anti-suit injunctions.

Potential future return of prohibition: effect of UK acceding to Lugano Convention

The overall position described above may change in the future, as the UK has applied to accede to the Lugano Convention. If the application is approved by the EU, then that Convention would govern jurisdiction in English courts for civil and commercial matters concerning EU member states as well as Switzerland, Norway and Iceland. (When the Lugano Convention previously applied in the UK, it only governed matters in respect of the latter three countries as, in respect of EU member state matters, the EU Brussels instruments applied.) If the UK does become a party to that Convention, then it is very likely that the prohibition on anti-suit relief in relation to actions in courts of EU or Lugano states will be resurrected.

Although, strictly speaking, judgments of the ECJ in *Grovit* and *West Tankers* will not be binding on English courts (as they were when the UK was an EU member state), the English court would be required to "pay due account to the principles laid down" in those ECJ decisions (*Article 1(1), Protocol 2, Lugano Convention*). Given how fundamental the prohibition on anti-suit relief is within the Brussels and Lugano jurisdiction regime, it is difficult to see how an English court could avoid applying it. However, there may be scope for its application as a general prohibition only, with an exception for cases of extremely lengthy delay, or outrageous vexatious or oppressive conduct.