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ESSEX
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ANTI-SUIT INJUNCTIONS AND SHIPPING ARBITRATION

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I Outline of English position

II Impact of Recast Brussels I Regulation

III Remedies available from the arbitral tribunal

A LONDON ARBITRATION AGREEMENT

- +ve promise to arbitrate in London
- -ve promise not to bring proceedings elsewhere
- *JSC Ust Kamenogorsk* [2013]

WHERE COURTS OF EU/ EEA STATES NOT INVOLVED

- Injunction available to enforce negative promise
- *Donohue v Armco* [2001] strong reason required to outweigh entitlement to an injunction e.g. delay, parallel proceedings e.g. *Essar Shipping v Bank of China* [2015]

THE NEW YORK CONVENTION

- Article II.3 – court when seised in a matter in respect of which parties have arbitration agreement, shall refer parties to arbitration “*unless agreement null and void...inoperative or incapable of being performed*”
- Article III and V: obligation to recognise and enforce foreign awards, subject to limited exceptions – e.g. public policy

RECAST BRUSSELS I REGULATION - 1215/2012

- **Applicable to EU proceedings commenced from 10 January 2015**

BRUSSELS CONVENTION 1968

- Uniform rules on jurisdiction for civil and commercial matters
- Free movement of judgments

BUT ARBITRATION EXCLUDED

**“Art 1(4) This Convention shall not apply to:
...(d) arbitration”**

BRUSSELS I REGULATION 2001

- Same arbitration exception
- *West Tankers v Allianz* [2009]
- 2007 to 2012 – highly disputed proposals for amendment of Regulation

**DISARMING TORPEDO
VS
AVOIDING EU RULES ON ARBITRATION**

RESULT: COMPROMISE

RECAST BRUSSELS I REGULATION - 1215/2012

SAME EXCEPTION

Art 1(4): *“The Regulation shall not apply to:d) arbitration....”*

Art 73(2): *“This Regulation shall not affect the application of the New York Convention”*

NEW Recital 12

RECITAL 12(2)- RULINGS ON JURISDICTION

- Ruling by EU court on validity of arbitration agreement not subject to rules of recognition of Regulation (whether decided as principal issue or as preliminary issue).

RECITAL 12(2) - CONSEQUENCES

- English court can rule on arbitral tribunal's jurisdiction even if another EU court seised and asked same question *Toyota Tsusho Sugar v Prolat* [2014]
- *The Wadi Sudr* [2009] would be decided differently now
- **Leaves potential for inconsistent court rulings**
- *West Tankers*– unlikely to be decided differently on question of anti-suit injunctions from English court (limited debate after *Gazprom* decision)

RECITAL 12(3)- RULINGS ON SUBSTANCE

- Recognition and enforcement of EU judgment on substance not precluded even though its conclusion on validity of arbitration agreement does not require recognition under the Regulation.
- However recognition without prejudice to enforcement of awards under New York Convention which takes precedence.

RECITAL LEAVES UNCERTAINTY AS TO ENFORCEMENT

- Successful enforcement will depend on
 - good drafting of clauses
 - getting fastest decision
 - where enforcement takes place (e.g. Italy, London, third country?)
 - different approaches to public policy

APPROACH OF ENGLISH COURT ON RECOGNITION & ENFORCEMENT

- Italian judgment on jurisdiction v London award on jurisdiction
- Italian judgment on merits v London award on merits
- NOTE: English award is not NY Convention award in UK court

RECITAL 12(4)- ANCILLARY PROCEEDINGS

- Not controversial
- Covers appointment, conduct of arbitration and challenges
- Follows *The Atlantic Emperor* (C-190/89)

REMEDIES AVAILABLE FROM ARBITRAL TRIBUNAL

- Declarations – well established – *West Tankers (No.2)* [2012] CA
- Damages - Flaux J in *West Tankers (No.3)* [2012]
- Anti-suit injunctions – *Gazprom OAO*

GAZPROM OAO C-564/13(CJEU)

- SCC Tribunal issued anti-suit injunction
- Reference to CJEU from Lithuanian court
- CJEU ruled that Brussels I Regulation does not preclude an EU court enforcing an award containing an anti-suit injunction stopping EU proceedings

HAVE TRIBUNALS ENOUGH POWERS?

LMAA TERMS

- no power to grant interim injunctions – s39 of Arbitration Act 1996
- only power to grant final injunctions
- no emergency relief (cf LCIA)

CONCLUSIONS

- **West Tankers decision remains good law**
- **BUT English court can now rule on jurisdiction even if other EU court seized of the issue – but uncertainty on enforcement**
- **Gazprom confirms enforceability of tribunal's injunctions**
- **Only final injunctions available under LMAA Terms**
- **Damages and declarations remain available from tribunal**



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