Quasi anti-suit injunctions: unenforceable in the EU on grounds of public policy

The European Court of Justice (ECJ) has paved the way for the Greek courts to refuse to enforce an English High Court judgment awarding damages against a party that breached a settlement agreement containing an exclusive English jurisdiction clause by suing in Greece (*Charles Taylor Adjusting Ltd v Starlight Shipping Co C-590/21*). The ECJ held that the English judgment was a "quasi anti-suit injunction" and therefore incompatible with EU public policy.

The English judgment in this case was subject to the EU regime for the recognition and enforcement of judgments, as the proceedings were commenced before the end of the Brexit transition period (*see box "Brexit transitional provisions"*). However, the same approach will not necessarily be taken where an English judgment falls outside that regime but within the Hague Convention on Choice of Court Agreements 2005 (2005 Hague Convention) or the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters 2019 (2019 Hague Convention) if the UK signs up to it (*see Focus "Jurisdiction and enforcement: the UK landscape beyond Brexit", www.practicallaw.com/w-038-9588*).

Brexit transitional provisions

Under Article 67 of the EU-UK withdrawal agreement, the recast Brussels Regulation (*1215/2012/EC*) continues to apply to the recognition and enforcement of judgments between the UK and EU member states where the proceedings were issued before the end of the Brexit transition period on 31 December 2020.

Under Article 66 of the recast Brussels Regulation, its predecessor instrument, the Brussels Regulation (*44/2001/EU*), applies to judgments in proceedings issued before 10 January 2015.

Under both the Brussels Regulation and the recast Brussels Regulation, judgments of one member state must be recognised and enforced in another, subject to limited grounds of refusal, including where recognition would be manifestly contrary to public policy in the state addressed.

The underlying dispute

The owners of a sunken vessel issued legal proceedings in England against their insurers, which were settled under agreements governed by English law and electing exclusive English jurisdiction.

The owners then brought proceedings in the Greek courts against the insurers and various representatives of the insurers, including underwriters, employees, lawyers and loss adjusters, alleging that they had made false and defamatory statements about the owners at the time of the original insurance claim.

While the Greek proceedings were pending, the insurers and their representatives sought various orders from the English court, including a declaration that the Greek proceedings had been brought in breach of the settlement agreements and damages for losses arising from the breach comprising, in particular, costs incurred in the Greek proceedings. The High Court gave judgment in their favour in September 2014 (*Starlight Shipping Company v Allianz Marine and Aviation Versicherungs AG and others [2014] EWHC 3068 (Comm)*).

Greek enforcement proceedings

Certain of the insurers' representatives obtained from the Greek court an order for recognition of the English High Court judgment and a declaration of partial enforceability. Those orders were overturned on appeal in July 2019, on the grounds that the English High Court judgment was a quasi anti-suit injunction and was therefore contrary to public policy in Greece.

The insurers' representatives brought a further appeal to the Greek Court of Cassation which, in June 2021, stayed the proceedings and made a reference to the ECJ. The question referred was whether it was contrary to public policy for an EU member state court to recognise a judgment of another member state court, where that judgment awarded damages on the basis that proceedings had been brought in the first court in breach of a settlement agreement and the first court lacked jurisdiction due to an exclusive jurisdiction clause in favour of the court that gave the judgment.

ECJ decision

The ECJ answered this question in the affirmative. It referred to the well-established proposition that, where the recast Brussels Regulation (*1215/2012/EC*) or the Brussels Regulation (*44/2001/EU*) (together, the Brussels Regulations) apply, a member state court (which includes a UK court under the Brexit transitional provisions) cannot grant an anti-suit injunction restraining a party from commencing or continuing proceedings before another member state court. The ECJ has held in various cases, including *Turner v Grovit* and *Allianz SpA and another v West Tankers Inc*, that such an order is incompatible with the mutual trust that member state courts are required to accord to each other's legal systems and judicial institutions under the Brussels Regulations (*C-159/02; C-185/07, www.practicallaw.com/2-385-1001*).

In the ECJ's judgment, although the English High Court judgment did not formally prohibit the owners from pursuing the Greek proceedings, it at least had the effect of deterring the owners from bringing or continuing the Greek proceedings, whereas the Greek court's jurisdiction over its own proceedings was a matter for that court to determine. It could therefore be regarded as a quasi anti-suit injunction.

The ECJ emphasised that the question of whether recognition is contrary to public policy is to be interpreted strictly. An error of law in the judgment in question would be sufficient only if recognition would result in the manifest breach of an essential rule of law in the EU legal order. The ECJ concluded that this requirement was fulfilled in this case: a quasi anti-suit injunction infringes the fundamental principle, based on the mutual trust that underpins the Brussels Regulations, that each member state court is to determine its own jurisdiction.

Implications of the decision

The implications of the decision for proceedings issued before the end of the Brexit transition period are obvious. An English court judgment awarding damages on the basis that proceedings have been brought in a member state court in breach of an exclusive English jurisdiction clause is very likely to be deemed contrary to public policy and therefore unenforceable under the Brussels Regulations.

For cases commenced since the end of 2020, the position is likely to depend on whether the jurisdiction clause in question falls within the 2005 Hague Convention which, in turn, depends on whether it is an exclusive jurisdiction clause entered into since the 2005 Hague Convention came into force for the UK, that is, on 1 October 2015, when the UK became a party by virtue of its then EU membership or, possibly (as appears to be the European Commission's view), 1 January 2021, when the UK rejoined the 2005 Hague Convention in its own right after Brexit.

Where the 2005 Hague Convention applies, member state courts will be bound to enforce an English judgment given under an exclusive jurisdiction clause, unless any of the grounds for refusal under the 2005 Hague Convention apply. While these include a public policy ground, similar to under the Brussels Regulations, it is not at all clear that the ECJ's decision in *Charles Taylor Adjusting* can be read across to the 2005 Hague Convention, particularly as its decision turned on the mutual trust that member state courts are expected to accord one another to determine their own jurisdiction under the Brussels Regulations.

The extent to which the principle of mutual trust applies under the 2005 Hague Convention remains to be tested, but the lack of any rules regulating parallel proceedings in the 2005 Hague Convention is arguably an important differentiating factor between it and the Brussels Regulations. However, enforcement may also be refused under the 2005 Hague Convention if the judgment is inconsistent with a judgment given in the state of enforcement in a dispute between the same parties. This may be relevant if the proceedings brought in breach of the clause have concluded before the English proceedings.

Where the clause falls outside of the 2005 Hague Convention, for example, because it was entered into before the relevant entry into force date or because it is an asymmetric jurisdiction clause, the question of whether an English judgment awarding damages for breach of the clause would be enforced in the EU would depend on each member state's national rules and, in light of the ECJ's decision in *Charles Taylor Adjusting*, the enforcement position seems likely to be questionable at best.

This may change, so far as asymmetric clauses are concerned, if the UK accedes to the 2019 Hague Convention, as seems likely following the government's consultation on that issue, which was published on 15 December 2022 (*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1123096/hague-convention-july-2019-consultation.pdf*). Under the 2019 Hague Convention, the court of a contracting state, including all member states except Denmark, is required to enforce a judgment given by another contracting state under a jurisdiction clause in its favour, other than an exclusive jurisdiction clause and, unlike under the 2005 Hague Convention, this appears to encompass asymmetric jurisdiction clauses. The 2019 Hague Convention may therefore require member state courts to enforce English judgments awarding damages for breach of the exclusive element of such a clause, although how this will play out in practice remains to be seen.

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