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ECJ in West Tanker Shocker: London Anti-suit Injunctions Fall Foul of EC Law

John P Gaffney (Al Tamimi & Company) · Thursday, February 12th, 2009

The European Court of Justice issued its eagerly awaited judgment in the so-called *West Tankers* or *Front Comor* case on 10 February 2009. To many in the arbitration community, especially those based in London, it will come as a disappointing, if not altogether surprising, conclusion of a lengthy legal saga, which began over eight years ago in Syracuse, Italy.

For reasons of space, it is not possible to elaborate on the background to the case, which involved a reference by the English House of Lords to the Court of Justice on the issue of whether anti-suit injunctions granted to give effect to arbitration agreements are compatible with the Brussels I Regulation (No 44/2001), in the wake of the Court's decisions in *Gasser* and *Turner*. The Court answered that it is indeed incompatible, endorsing the much critisised Opinion of Advocate General Kokott of September last year.

Notwithstanding that the Regulation excludes arbitration from its scope, the Court found that the Regulation applies to anti-suit injunctions granted to give effect to arbitration agreements. The Court first examined whether the proceedings sought to be prevented fell within the scope of the Regulation and then considered the effects of the anti-suit injunction on those proceedings:

> 26 … the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. ….

Once the Regulation was found to apply, it followed that the Court would not allow anti-suit injunctions:

> 28. Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own

> jurisdiction under Regulation No 44/2001.
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> 29. It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it …
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> 30. Further … such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based …

Finally, the Court observed:

> 31. … if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed … would therefore be deprived of a form of judicial protection to which it is entitled.

The judgment obviously has significant implications for arbitration in Europe and possibly further afield. It is likely to be greeted with misgivings by London practitioners, who consider anti-suit injunctions in favour of arbitration as essential to upholding arbitration agreements with a London seat. As a consequence of this judgment, it is arguable that reluctant parties to arbitration can effectively torpedo London arbitration clauses by commencing litigation elsewhere in Europe (the so-called "Syracuse Torpedo"). Those outside the London arbitral community, especially civil lawyers, will take a more sanguine view of the judgment; most likely they will regard its findings, from the point of view of continental procedural law, as completely in line with the framework of the Regulation.

Whatever one's perspective on the judgment, one unsatisfactory aspect of the ruling is its failure to fully consider how the Regulation relates to the New York Convention (the Court simply notes in paragraph 33 that its finding "*is supported by Article II(3) of the New York Convention*" without saying why). The exclusion of arbitration from the scope of the Regulation recognizes the lack of Community competence in this area and the consequent exclusion of matters governed by international and bilateral instruments, notably the New York Convention. In the earlier *Van Uden* judgment, the Court of Justice observed: "*…the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts…*". Consequently, the Regulation ought not to apply to the proceedings of the type to which an anti-suit injunction in the *West Tankers* case was directed, and logically, such anti-suit proceedings ought also to fall outside the Regulation. This is the approach advocated, for example, in the so-called Hartley / Dogauchi Report on the Hague Convention on Choice of Court Agreements, which also excludes arbitration from its scope. That Report posits that this exclusion: "*… should be interpreted widely and covers any proceedings in which the court gives assistance to the arbitral process – for example, deciding whether an arbitration agreement is valid or not… The purpose of this provision is to ensure that the present Convention does not interfere with existing instruments on*

arbitration."

In any event, such criticism is likely to be of academic interest only. However, the judgment does not necessarily represent the final word: the so-called Heidelberg Report on Brussels I Regulation, while proposing to abolish the arbitration exception, advocates establishing a different mechanism for the protection of arbitration agreements, such as to establish an exclusive competence for proceedings challenging the validity of the arbitration agreement in the Member State in which the arbitration takes place. It remains to be seen whether this will come to pass, but it seems likely that the battle will shift from the courtrooms of London and Luxembourg to the political domain. In the meantime, the question whether the Court's findings also relate to third states, an entirely unsettling prospect for the arbitration community, will remain a subject of debate.

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