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Barring the Courthouse Door? Anti-Suit Injunctions in International Arbitration

Margaret Moses (Loyola University Chicago School of Law) · Monday, November 14th, 2011 · Institute for Transnational Arbitration (ITA), Academic Council

One purpose for anti-suit injunctions is to stop parallel proceedings, that is, to stop parties from pursuing litigation or arbitration involving the same parties and the same claims in two different jurisdictions simultaneously. To stop parallel proceedings in arbitration, a party will go to the court at the seat of the arbitration and will ask that court to enjoin the other party from commencing or continuing litigation in a foreign jurisdiction. The court's order will only enjoin the party, and not the other court, but the anti-suit injunction is an interference with the foreign court's jurisdiction, because a party is forced to stop its proceeding in that court. This post will focus primarily on recent developments in the European Union with respect to the problem of parallel proceedings, and will consider whether these developments have anything to suggest about dealing with the problem of parallel proceedings internationally.

One of the concerns about parallel proceedings is the potential for abuse. In Europe, a parallel proceeding is sometimes referred to as a "torpedo action." A torpedo action is the deliberate attempt by one party to prevent proceedings from being heard in one Member State by commencing proceedings in another Member State where the judicial system is extremely slow, such as Belgium or Italy. Under the European law, once a court of a Member State is seized of an action and establishes its jurisdiction, any other Member State court will have to decline jurisdiction. So the second action is torpedoed, because it may take so long for the first court ever to hear or decide the case.

An anti-suit injunction in arbitration frequently comes about when one party, despite the agreement to arbitrate, initiates litigation, usually in its home country. In the arbitration clause, the parties most likely chose as the seat of the arbitration a third country they viewed as neutral – one that was not the place of business of either of the two parties. When one party starts a lawsuit in its home country, however, the other party will likely start an arbitration in the country chosen by the parties as the seat, creating parallel proceedings.

Having parallel proceedings undermines the purposes of arbitration, which are to have the dispute resolved in a neutral forum, to have confidentiality, to have a faster, more efficient, and less costly proceeding. So parallel proceedings create delays, inefficiencies, costs, and also the uncertainty that you may end up with conflicting decisions. That is what anti-suit injunctions are supposed to stop.

Some recent European developments with respect to anti-suit injunctions have involved two matters: first, a European Regulation known as the Brussels Regulation (Council Regulation (EC) No. 44/2001), and second, a case from the European Court of Justice (the ECJ) — the *West Tankers* case (*Allianz Spa v. West Tankers*, Case C-185-07 [10 Feb.2009], 2009 WL 303723).

The Brussels Regulation, which provides rules that govern the jurisdiction of courts, and the recognition and enforcement of judgments in European Union countries, has a provision that excludes arbitration (Article 1(2)(d)). The question in *West Tankers* was whether, given this arbitration exclusion, an anti-suit injunction to protect an arbitration agreement was compatible with the Brussels Regulation. In *West Tankers*, a vessel owned by West Tankers and chartered by Erg Petroli had damaged a jetty owned by Erg in Italy. Erg was immediately paid by its insurers, but its damages exceeded the policy. Therefore, Erg began an arbitration in London pursuant to an arbitration clause in its agreement with West Tankers, to recover from West Tankers the excess damages. The insurers, meanwhile, began a lawsuit in Italy against West Tankers to recover the damages they had paid to Erg. West Tankers then began a third action in London, asking the court for an injunction against the insurers in Italy. West Tankers argued that because the insurers were subrogated to Erg's claim, they had to bring their claim against West Tankers in the arbitration in London. The English court agreed, and issued an anti-suit injunction. On appeal, the House of Lords referred to the ECJ the question whether an anti-suit injunction in this case was compatible with the Brussels Regulation.

The ECJ held that an anti-suit injunction was prohibited by the Brussels Regulation, despite the arbitration exclusion. The Court reasoned that the subject matter of the dispute was of paramount importance, and in *West Tankers*, the subject matter was a tort claim for damages, which was clearly within the scope of the Brussels Regulation. The validity of the arbitration agreement, according to the ECJ, was only a preliminary issue, which was within the jurisdiction of the Italian court. The ECJ said that the court of one Member State did not have the right to strip another Member State court of the power to rule on its own jurisdiction. Such a step would be against the mutual trust principle that was at the core of the Brussels Regulation.

The reaction from the arbitration community, particularly the English, was quite negative. The English were concerned that parties would no longer choose London as an arbitration seat because of the inability of English courts to enjoin parallel proceedings. In fact, there appeared pretty quickly some articles saying that parties concerned about the possibility of vexatious parallel litigation should decide to seat their arbitration in the United States.

There was also a barrage of commentary and papers and working groups criticizing the ECJ decision, and discussing the proper interface between arbitration and the Brussels Regulation. And there were many calls to amend the Brussels Regulation. The arbitration community, however, and the European Parliament, wanted to keep the arbitration exclusion in the Brussels Regulation and there were many very strong proposals and resolutions to this effect. The European Commission, which had been considering endorsing a partial deletion of the arbitration exclusion, in the face of this opposition, essentially changed course. In December 2010, it proposed keeping the arbitration exclusion in the Brussels Regulation, but with a limited exception (Article 29(4)). The exception was that once either the court or an arbitral tribunal at the seat of the arbitration has been seized of proceedings, then litigation brought in another Member State, and challenged based on the arbitration agreement, would have to be stayed. And, once the existence, validity or effect of the arbitration agreement were established in the seat, the foreign court would be required to decline jurisdiction. This is known as a *lis pendens* rule. Under the Commission Proposal, this is the only

matter pertaining to arbitration that would be part of the Brussels Regulation – any other arbitration matters would be governed by national law.

At this point, the Commission's proposed *lis pendens* rule is only a proposal. It will be several years before it becomes law, if it succeeds. But it appears to be a very positive development for arbitration. It essentially provides for an automatic anti-suit injunction, without calling it an anti-suit injunction. It defers to the parties' choice of the seat as the jurisdiction that will decide whether the arbitration is valid. This should discourage parties from filing parallel proceedings simply to delay and harass, or to torpedo the other party, because the torpedo action will simply be stayed.

The European Commission's proposal appears to be an improvement over the ECJ's interpretation that the Brussels Regulation prohibits anti-suit injunctions. The *lis pendens* rule removes discretion from the non-seat court to do anything but stay the proceeding or decline jurisdiction. This creates a strong disincentive to parties who might otherwise be inclined to start a torpedo action. So while it is not clear how the *lis pendens* rule would work in all circumstances, and there would likely be certain case by case exceptions as to how it would actually apply in practice, it may well reduce incentives for abuse and improve predictability and efficiency in arbitration.

The *lis pendens* rule will only apply within Europe, among European Union Member States. But are there any lessons to be learned for international arbitration generally? Would it be useful, for example, for UNCITRAL or UNIDROIT to draw up non-binding Principles of International Arbitration that, in cases of parallel proceedings, would encourage courts to stay proceedings or decline jurisdiction in favor of the court or tribunal at the seat of arbitration? Although rules of comity already encourage courts not to interfere with the jurisdiction of other courts by not granting anti-suit injunctions, more deference to the court of the seat could be useful.

This idea has already been developed in the U.S. and elsewhere to some extent, by means of the concept of "primary" and "secondary" jurisdiction. This concept comes from the New York Convention, where the language has been read to give the court of the seat preferential status, at least to procedural matters (V(1)(d)) and to the setting aside of awards (V(1)(e)).

A court with the jurisdiction to annul or set aside an award is said to have "primary" jurisdiction, while other courts are said to have "secondary" jurisdiction. So it would not be a giant step to encourage an international perspective that would consider the court at the seat of arbitration to also have primary jurisdiction on the question of the validity of the arbitration agreement.

Any development of such a preference or presumption, however, must await the question of whether the European Commission's *lis pendens* proposal becomes law, and if it does, how well it actually works in practice. If the rule appears to eliminate many of the abuses which stem from parallel proceedings, then it may be worth considering whether working toward a similar rule in the international arena would support a more effective and efficient framework for arbitration.

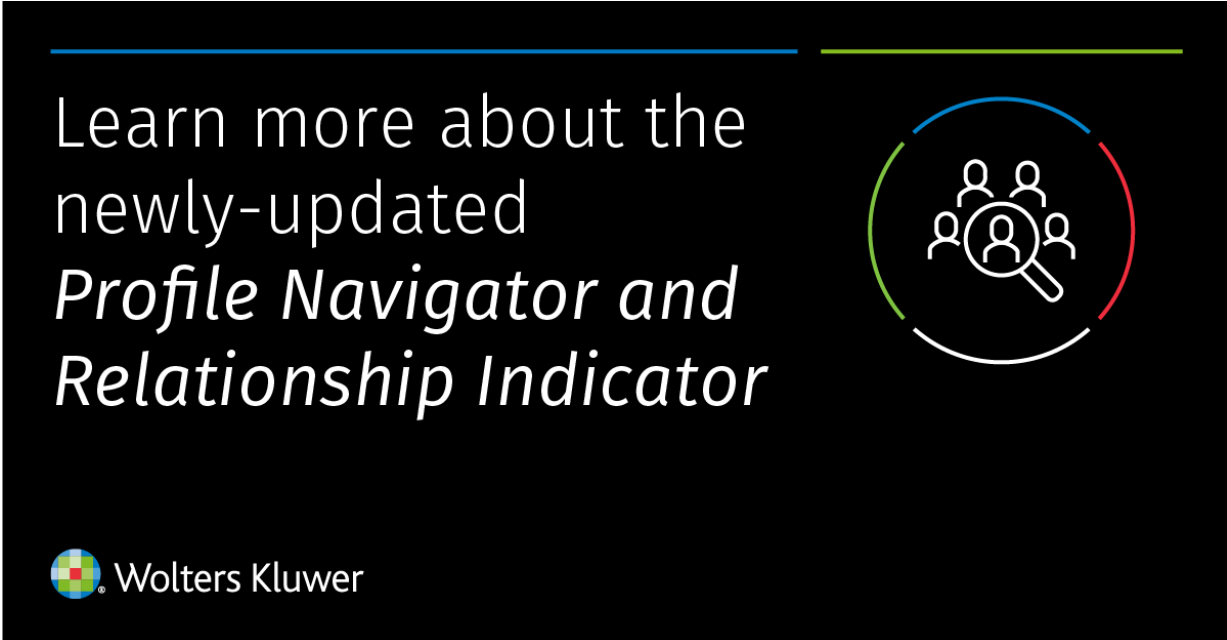
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