Kluwer Arbitration Blog

The 'West Tankers' Saga Continues (2) : The Arbitral Tribunal Dodges the Torpedo

Stephen Lacey (Linklaters) · Friday, May 4th, 2012

This post follows on from the highly informative Kluwer Arbitration Blog post by Elizabeth Kantor, "The 'West Tankers' Saga Continues: Can Damages Compensate for Breach of an Arbitration Clause?"

Whilst that focussed principally on the implications for, and efficacy of, the type of award in issue the purpose this post is, in contrast, to look again at the argument that initially prevailed before the tribunal and what it would have meant for English arbitrations more generally had Flaux J accepted it.

The basis upon which the tribunal ruled that it could not make any award of damages will strike many as highly controversial.
The starting point was the reasoning of the ECJ that it deployed to outlaw the grant of an anti-suit injunction by one EU Member State court against proceedings brought in another in breach of an arbitration clause. In doing so the ECJ held that, although the proceedings for relief in the former came within the arbitration exclusion of Council Regulation 44/2001 (the "Regulation"), this did not mean they could be permitted to otherwise undermine the effectiveness of the Regulation. In the ECJ's view an anti-suit injunction did this as it restricted the ability of the first seised court to rule on its own jurisdiction and interfered with a litigant's right to a form of judicial protection to which it was entitled.

In the tribunal's view (which is set out at paragraphs 22-26 of Flaux J's judgment and was largely relied upon by the insurers before him) the "underlying theme" of the ECJ's decision was that the right to bring proceedings before an EU Member State court in accordance with the Regulation is therefore to be given pre-eminence. That being the case, a decision by a tribunal with seat in England which would effectively punish a party for so doing could not be sustained. The Regulation accordingly constrained the ability of the tribunal to act for essentially the same reasons that an English court is precluded from granting the anti-suit injunction.

One can find great difficulties with this conclusion. Primarily, there is the arbitration exclusion to consider. Surely, it wholly covers the proceedings before the tribunal – which should therefore be free from any constraints. Crossing that threshold is an entirely different proposition from the matters that were before the ECJ.

Buttressing that argument are the observations made by AG Kokott at paragraphs 70-73 of her

opinion (with which the ECJ did not disagree). She acknowledged that a consequence of arbitration's place outside the Regulation was that parallel proceedings within the EU before an arbitral tribunal and a Member State court can arise and that this could lead to inconsistent rulings on jurisdiction and the merits of the case. Indeed, rectifying that exact situation was what that she saw as being the goal of the anti-suit injunction (albeit such being an impermissible means of achieving it).

These objections, which formed the thrust of West Tankers' arguments before Flaux J, were, for the tribunal, not enough to displace its view of the width of the ECJ's ruling.

Correctly, it is suggested, Flaux J disagreed with the tribunal. His primary conclusion (see paragraphs 51-68 of his judgment) was that the tribunal had erred in law and that it was not barred from making the award of damages. In particular, he held that there absolutely nothing in the reasoning of either the AG or ECJ to support the far-reaching conclusion that the tribunal itself fell within the scope of the ECJ's decision.

In Flaux J's opinion, not only was it the AG's clear view (as evidenced by those parts of her opinion mentioned above) that a tribunal was simply not affected by the Regulation, it was, additionally, wrong to suggest that there could be any meaningful difference between living with the possibility of inconsistent decisions on the merits or jurisdiction, which the AG expressly recognised, and allowing the tribunal to award damages as a result of a breach of the arbitration clause. The latter was merely a manifestation of the aforesaid state of affairs. More generally, there was nothing in the reasoning of the ECJ itself to suggest that the type of constraints imposed on a national court by its decision should also extend to an arbitral tribunal.

Flaux J's decision is clearly to be welcomed. If the insurers' (and tribunal's) position had been accepted it would not only have negated the ability of an English tribunal to grant the type of relief in issue but would have left it with difficult questions as to what else it cannot do if proceedings are brought in another EU Member State court. In that latter regard it is perhaps arguable, given the direct subject matter of the damages award, that distinguishing between other action taken and the award of damages for breach might not carry the difficulties that Flaux J suggested (at paragraph 74 of his judgment). Having said that, it is understandable why the judge would want to emphasise such a point in order to help ensure that any need for a tribunal to address such problems was avoided entirely.

Such problems would, of course, be the natural consequence of accepting an argument which amounts to little more than requiring the arbitration exclusion to be overridden by the Regulation even in those proceedings to which it should most clearly find application. The emergence of such arguments is perhaps no surprise given the use of similar reasoning by the ECJ in its decision. More happily, it appears that the English courts are more than ready to sensibly interpret the more difficult aspects of the ECJ's ruling and to reaffirm the remaining boundaries between the courts and arbitration in this sphere.

The judgment is available here.

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