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Will Antisuit Injunctions Rise Again in Europe?

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The new Recast Brussels I Regulation, which governs the jurisdiction of courts and the recognition and enforcement of judgments in the Member States of the European Union, has taken the strong position that arbitration will continue to be excluded from its coverage. The Recast Regulation will begin to apply to Member States in January 2015, but its impact on arbitration, particularly the effect of the explanatory provisions in Recital 12, will probably take years of court decisions to clarify. One area that Recital 12 may affect is the use of antisuit injunctions to prevent parallel proceedings in arbitration.

At present, antisuit injunctions to protect arbitration are not permitted in the EU. This is the result of a 2009 decision of the Court of Justice of the European Union (the "CJEU," formerly the "ECJ") in Allianz SpA v. West Tankers, Inc. (Case C-185-07 [10 Feb. 2009] (*West Tankers*). An injunction had been issued by an English court ordering plaintiffs to cease litigation before an Italian court because they were bound by an arbitration agreement to arbitrate in London. On appeal, the House of Lords referred to the CJEU the question of whether an injunction to protect arbitration was permitted under the Brussels 1 Regulation. However, the House of Lords made clear to the court its view that because all arbitration matters fall outside the scope of Brussels 1, an injunction restraining parties to the arbitration agreement from continuing proceedings in Italy could not infringe that Regulation.

The CJEU disagreed. It found that an arbitration matter was not always excluded from the Regulation's regime. In *West Tankers*, it held that because the subject matter of the case before the Italian court — a question of tort damages – was clearly within the scope of the Regulation, then "a preliminary question concerning the applicability of an arbitration agreement, including its validity, also comes within its scope of application." From this core conclusion, the rest of the court's reasoning followed. The court moved from finding the validity of an arbitration agreement to be within the Regulation's scope, to holding that "it is therefore exclusively for the [Italian] court to rule on its own jurisdiction." It further ruled that "accordingly," the use of an antisuit injunction by a Member State court which restricts the ability of another Member State court to rule on its jurisdiction is incompatible with Brussels I. And "further," such an injunction runs counter to the trust Member States accord to one another's legal system. "Lastly," if the Italian court could not examine the validity of the arbitration agreement because of the antisuit injunction, the plaintiff would be deprived of its right under Article 5(3) of the Regulation to bring its tort suit, which is "a form of judicial protection to which it is entitled." Thus, each and every step of the CJEU's reasoning hangs on its initial finding that when the validity of the arbitration agreement is

a preliminary question, it can come within the Regulation's scope.

Recital 12, however, may have knocked down this house of cards. The first sentence of the Recital clearly states, "The Regulation should not apply to arbitration." Even more importantly, the second paragraph of Recital 12 undercuts the CJEU's basic premise that an arbitration matter can be covered by the Regulation if it is a preliminary issue. Recital 12 states that "[a] ruling by the court of a Member State as to whether or not an arbitration agreement [is valid] should not be subject to the rules of recognition and enforcement laid down in this Regulation, **regardless of whether the court decided on this as a principal issue or as an incidental question.**" (*Emphasis added*). In other words, arbitration matters are excluded from the Regulation, whether "preliminary" or not. Thus, the CJEU's core holding, from which every other position in its decision derives, has been vitiated by Recital 12 of the Recast.

Because the Recital makes clear that a ruling on validity of an arbitration agreement is not subject to the Regulation, it becomes much more difficult to assert that an antisuit injunction preventing such a ruling is within the scope of the Regulation. Recital 12 says that "nothing in the Regulation" should prevent a Member State court from examining an arbitration agreement for validity. However, an anti-suit injunction to protect arbitration is not "in the Regulation." Rather, it could be considered an "ancillary proceeding," which is definitely not covered by the Regulation. The fourth paragraph of Recital 12 deals with those arbitration-related "actions or ancillary proceedings" to which the Regulation should not apply:

> The Regulation should not apply to any actions or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, **the conduct of an arbitration procedure or any other aspects of such a procedure**, nor to any action or judgment concerning the annulment, review, appeal, recognition of enforcement of an arbitral award. (*Emphasis added*).

If an antisuit injunction is an "action or ancillary proceeding" relating to "the conduct of an arbitration procedure or any other aspects of such a procedure," then the Regulation should not apply to it. This interpretation undercuts the CJEU's position in *West Tankers* that an antisuit injunction is incompatible with the Regulation's system of jurisdiction based on mutual trust, because the Regulation simply does not apply to an action or ancillary proceeding relating to the conduct of an arbitration.

Despite arguments that Recital 12 of the Recast Regulation supports the view of the House of Lords that an antisuit injunction protecting an arbitration proceeding falls outside the scope of the Regulation, the CJEU may well find other bases for prohibiting antisuit injunctions. Antisuit injunctions tend to be issued only by common law courts; the vast majority of court systems in the European Union are civil law systems which tend to have strong negative views of antisuit injunctions and would not be likely to grant them in any case. However, it is clear that the Recast Regulation has not solved the problem of parallel proceedings, with the risk of inconsistent judgments, and that the lack of a solution makes arbitration less desirable because of increased costs and inefficiencies. There needs to be a way to prevent vexatious breaches of arbitration agreements by parties who commence litigation as a tactic to delay and to harass the other side.

One possible route that may be insulated from the Regulation's reach is that an arbitral tribunal can

issue an order that would have the effect of an antisuit injunction. Certain arbitration rules, in particular the UNCITRAL Arbitration Rules, provide a tribunal with the power to grant interim measures for the purpose of preventing harm to the arbitral process. UNCITRAL Article 26 states as follows:

> 1. The arbitral tribunal may, at the request of a party, grant interim measures.
> 2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example, and without limitation, to:
> …(b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;

Thus, a tribunal subject to the UNCITRAL Arbitration Rules could determine that it should grant such an interim measure. It could order a party to refrain from commencing or continuing litigation regarding the same issues that are to be determined in the arbitration because such litigation would likely cause either "current or imminent harm or prejudice to the arbitral process itself. "

It could be argued that such an order by the tribunal would not have the same effect as an antisuit injunction issued by a court, because a court's ability to impose penalties on a recalcitrant party, such as fines or contempt sanctions, is what gives the antisuit injunction its teeth. In contrast, tribunals tend to lack coercive powers.

However, another recent *West Tankers* decision sheds some light on a tribunal's power to impose damages. (See West Tankers Inc v. Alianz SpA & Anor [2012] EWHC854 (Comm) (04 April 2012)). West Tankers had asked the arbitral tribunal to award it damages against the insurers for breach of the arbitration agreement, and also an indemnity to cover any potential liability that might be found by the Italian court. The tribunal refused to do so, relying on the CJEU's reasoning in its 2009 *West Tankers* decision that the insurers had a fundamental right under Article 5(3) of the Regulation to bring suit in Italy, and that such a right was assured by the principle of "effective judicial protection." The tribunal, therefore, did not think it could award damages against a party for exercising a fundamental right.

Flaux, J., in the English High Court took a different view. Noting that the Advocate General in *West Tankers* had specifically commented that a tribunal could issue a different decision from a court, he found that the tribunal's jurisdiction was not circumscribed by the Regulation. According to Flaux, J., the principles relied upon by the CJEU in *West Tankers*, such as mutual trust and effective judicial protection, were based on the Regulation's regime, which did not apply to arbitration. In the view of the English High Court:

> The…conclusion [of the CJEU] makes the point . . . that the grant by the English court of the anti-suit injunction is contrary to the mutual trust which member states accord to one another's legal systems. The Respondent [insurers] can point to no wider principle of European law which requires a private arbitral tribunal in one member state to repose mutual trust in any system of law other than that of the national court which supervises and protects the arbitral process in the jurisdiction where the arbitration takes place.

This conclusion that an arbitral tribunal is not constrained by the Regulation from awarding damages for breach of an arbitration agreement also lends support to a tribunal's authority to award damages for failure to comply with a tribunal order to refrain from causing harm or prejudice to the arbitration process. Thus, a preliminary measure from a tribunal requiring a party not to bring or to maintain a lawsuit in violation of an arbitration agreement may have enough force to be effective when it is supported by a potential damage award from the tribunal.

Whether the Europeans will ever permit some form of antisuit injunction to protect arbitration is yet to be determined, but in the meantime, the inevitability of parallel proceedings and inconsistent judgments remains a thorny problem in need of a solution.

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