Harris on West Tankers

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I have little to add about the judgment itself. Whatever one's views on the outcome of the case, it is difficult to conceive of a more thinly reasoned or incomplete judgment. It fails sufficiently to examine the central question as to the meaning and scope of the arbitration exclusion. In this respect, the question arises as to whether the validity of the arbitration clause can be so easily dismissed as a preliminary issue in foreign litigation that does not alter the civil and commercial character of those foreign proceedings. Key cases such as *Marc Rich* and *Hoffmann* are glossed over; and one is left not altogether sure why the argument that the proceedings in Syracuse fall partly within and partly outside the Regulation has been rejected.

It is no surprise that the ECJ found its answer primarily from within the text of the Regulation and was essentially uninfluenced by arguments about the practical impact of its decision. The appeal by Lord Hoffmann for the ECJ to consider the commercial realities of the situation was unlikely to carry the day. In the event, although this is alluded to by the ECJ in setting out the question referred, it receives no real consideration in the ECJ's reasoning. The nearest the ECJ gets to this is in expressing its concern that:

> *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 thus be barred from access to the court before which it brought proceedings under Article 5(3) of*

> *Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.*

This is not very convincing. The interests of a party who might wish to commence proceedings in a non-designated State, perhaps in bad faith, are arguably given greater weight than the interests of the party who alleges that the agreement is binding and seeks effectively to protect his/her legal rights. One might think that the parties will normally have had a mutual expectation that any issue as to the validity of the arbitration clause would be determined by the courts of the state to which the arbitration agreement putatively points. The reference to Article II(3) of the New York Convention also fails to convince. The Convention unsurprisingly states that a court is expected to give up jurisdiction if it finds there to be a binding arbitration clause. But it does not obviously conclusively address the matter at hand, which is the question of *which courts* should determine the validity of the arbitration clause.

No doubt, the arbitration could proceed with or without an anti-suit injunction and the defendant to the foreign proceedings need not wait for the courts of that Member State to interpret the arbitration clause. Even so, the existence of parallel court and arbitral proceedings is best avoided; especially if there is a risk of them leading to irreconcilable decisions and producing a great deal of litigation for a rather inconclusive outcome. When thinking about the aftermath of *West Tankers*, perhaps we might usefully turn our attention to the question of the impact of arbitration proceedings on the foreign court proceedings.

Suppose that proceedings are commenced by X against Y in the courts of another Member State in alleged breach of an English arbitration clause. What would happen if Y nonetheless commenced or proceeded with an arbitration in London and were to obtain a declaration that the arbitration clause was

binding; and/or a decision in its favour that it was not liable on the merits. How might the courts of the foreign Member State seised react? The applicant has obtained an award from arbitrators in a state which is party to the New York Convention. The Brussels I Regulation does not contain a provision permitting, still less requiring, the courts to stay their proceedings in the face of an arbitration award. Nor does it state that the court's judgment should not be recognised or enforced in other Member States. But Article 71 of the Regulation makes it clear that the Regulation gives way to existing international Conventions to which Member States are parties.

Again, could Y seek damagers against X in the arbitration for the costs incurred in respect of the foreign proceedings; and in respect of any judgment which that court ultimately delivers in favour of X? Whatever the strengths and weaknesses of the arguments as to the competence of the English courts to award such damages, it is less easy to see how the Regulation could control the award of such damages by arbitrators.

So, the question in essence is this: what will be the effects of proceeding with the arbitration whilst the foreign court decides if it has jurisdiction or not; and what are the implications for the foreign court proceedings, especially if they lead to a conflicting decision on the validity of the arbitration clause; and also, perhaps, to a conflicting decision on the merits of the dispute?