Layton on West Tankers

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Much of what I would have said on this judgment has already been said, more cogently, by others. My comments will therefore be brief.

First, it seems that the ECJ may well have applied one law correctly, namely the law of unintended consequences. In its use of simple – or at least sparse – reasoning to resolve a complex problem is reminiscent of what Alex Tabarrock has written in a different context:

> *The law of unintended consequences is what happens when a simple system tries to regulate a complex system. The political system is simple. It operates with limited information (rational ignorance), short time horizons, low feedback, and poor and misaligned incentives. Society in contrast is a complex, evolving, high-feedback, incentive-driven system. When a simple system tries to regulate a complex system you often get unintended consequences.*

The unintended consequences here are, surely, the disruption which may flow to the exercise of arbitrators' powers. As Andrew Dickinson and Jonathan Harris have already pointed out, the extent to which these are affected by this decision is unclear.

The Court has held that court proceedings based on the arbitration agreement are outside the scope of the Regulation (paragraph 23) and so its decision that such proceedings contravene European law is based not on an application of the Regulation, but on that part of the *acquis communautaire* which is based on the doctrine of *effet utile.* (It is striking how thinly reasoned this part of the judgment – paragraph 24 – is; there is no reference to any earlier decision on the point at all). While we may agree that Regulation 44/2001 does not affect the jurisdiction of arbitrators, can the same be said of wider European law? Very possibly not. If you take this decision alongside the *Eco-Swiss* decision, you are left in great doubt whether it is contrary to EU law for arbitrators even to rule on the validity

of an arbitration agreement, let alone award damages for its breach. The use of lax language by the Court in paragraph 27 ("it is … exclusively for [the court seised of the underlying dispute] to rule on that objection" – i.e., an objection as to the existence of an arbitration agreement) is particularly regrettable.

An extra layer of confusion arises in respect of arbitrators' powers to award anti-suit injunctions. The basis on which this specific procedural device was outlawed in *Turner*, and which forms a subsidiary basis for outlawing the anti-suit injunction in this case (paragraph 30) is that it is contrary to the doctrine of mutual trust. But, as *Gasser* (paragraph 72, where the doctrine was first identified in the Court's jurisprudence) makes clear, that doctrine is specifically based on the structure and principles underlying the Brussels I Regulation, namely the existence of uniform jurisdictional rules for *courts* and the largely automatic recognition and enforcement which is the corollary of those rules. The uniformity of jurisdictional rules does not apply to arbitrators and such rules for the recognition and enforcement of awards as there may be arise not under European law at all, but under the New York Convention and under the varying domestic laws of Member States. How then can the doctrine of mutual trust apply to preclude arbitrators from granting anti-suit injunctions?

The second and much briefer comment I wish to make is to echo the sense of disappointment that the European Court has again failed to rise to the occasion in grappling with complex issues of private law and procedure. In a Community of 27 Member States, the Court cannot perhaps be expected to provide reasoning which shows sensitivity to the complexities which arise from the panoply of national legal systems and international norms; but it can surely be expected to grapple with the issues which arise from its own previous case law. I have already referred to *Eco-Swiss* as an example. In the present case, it is surprising that the Court founds its decision on the scope of Article 1(2)(d) on paragraph 35 of the Kerameus and Evrigenis Report, without acknowledging that that paragraph has been the subject of scrutiny and strong adverse comment by Advocate General Darmon in his Opinion in *Marc Rich* (paragraphs 43 to 48).

Thirdly, a comment directed to the future. There appears to be a welcome consensus emerging, encompassing commentators from at least Germany, France and the United Kingdom, that legislative change is needed to grapple with the unsatisfactory state of the law in this context. The suggestion in the Heidelberg Report, to which Professor Hess refers, that Brussels I be amended so as to bring

proceedings ancillary to arbitration within it, and to confer exclusive jurisdiction on the courts of the state of the arbitration deserves support (as do similar proposals relating to choice of forum clauses).