The Execution of the Anti-Suit Injunction

I am grateful to Thomas Raphael, a barrister at 20 Essex Street and the author of a major work on The Anti-Suit Injunction*, to have accepted to comment on the recent* In Zone Brands *decision of the* Cour de cassation.

> **King Duncan:**
> Is execution done on Cawdor? Are not
> Those in commission yet return'd?
>
> **Malcolm:**
> My liege,
> They are not yet come back. But I have spoke
> With one that saw him die; who did report
> That very frankly he confessed his treasons,
> Implor'd your Highness' pardon, and set forth
> A deep repentance. Nothing in his life
> Became him like the leaving it.
>
> *Macbeth Act 1, scene 4, 1–8*

In a judgment of 14 October 2009 (Decision no 1017 of 14 October 2009) the Première Chambre Civile of the Cour de Cassation refused to set aside a decision of the Versailles Court of Appeal which gave "exequatur" to an anti-suit injunction granted by the Superior Court of Georgia to enforce an exclusive jurisdiction clause in favour of the Courts of the State of Georgia (USA). The Georgian anti-suit injunction had restrained litigation before the Tribunal de Commerce of Nanterre, which was apparently civil and commercial litigation.

In loose translation the Première Chambre Civile concluded:

> *But given that the decision [of the Versailles Court of Appeal] records precisely, in the first place, that in the light of the jurisdiction clause freely agreed by the parties, no fraud could result from the invocation by the American company of the jurisdiction expressly designated as the competent jurisdiction;*

> *and given that there could not be any deprivation of the right of access to a court, since the aim of the decision taken by the Georgian judge was specifically to rule on his own competence and, for the purposes of finality, to cause the jurisdiction clause undertaken by the parties to be respected;*
>
> *and given there is no inconsistency between public international law and an anti-suit injunction whose aim, as in the present case, is solely, outside the field of application of the operation of the conventions and community law, to punish the violation of a pre-existing contractual obligation; and given that therefore the decision is legally justified; for these reasons, [the Première Chambre Civile] rejects the appeal."*

To understand private international law a strong sense of irony is often helpful, and here there are three ironies I would like to highlight.

First, one of the paradoxical results of the *West Tankers* imbroglio is that the bright light it shone on the anti-suit injunction may have led to a greater degree of understanding, and in some cases sympathy, for this particular English vice among our continental colleagues – just as the European Court of Justice was limbering up to deliver what it may have hoped was a final blow to the remedy. So while "civilian" academic opinion was once (it seems) overwhelmingly hostile, the mood has changed. Recently a number of distinguished civilian voices have supported the use of anti-suit injunction in certain circumstances (see e.g. Kessedjian on West Tankers). And while previous decisions from continental courts, including the Cour de Cassation itself (*Stolzenberg v Daimler Chrysler Canada*, Cour de Cassation, 30 June 2004 [2005] Il Pr 24; see also in Belgium Civ Bruxelles, 18 December 1989, RW 1990-1991), had been opposed to the anti-suit injunction, the Cour de Cassation now seems to find the enforcement of a contractual anti-suit injunction entirely unproblematic. So we can say that, like the Thane of Cawdor, nothing in the anti-suit injunction's life "*became him like the leaving it.*"

Second, execution may have been done in (and on) Cawdor, but reports of the anti-suit injunction's death are greatly exaggerated; and now execution of it is done in France. There was a degree of crowing in certain quarters after *West Tankers*. But the anti-suit injunction is alive and kicking in respect of litigation outside Europe. Even within Europe the anti-suit injunction is not entirely dead –

it is difficult to see how the European Court could prohibit an anti-suit injunction to restrain proceedings in another state where the "targeted" proceedings are themselves outside the scope of the regulation.

And now, rather surprisingly, the Cour de Cassation apparently shows us that *Turner* and *West Tankers* can be circumvented by executing a non-Brussels Lugano state's anti-suit injunction, at least in some states. If right, and if other European national courts take a similar course, this opens up contrasting possibilities. On the one hand, Lord Hoffmann's warnings in *West Tankers* prohibiting the English courts from granting anti-suit injunctions would drive business off-shore may now be given renewed vigour, if you can rely on your American anti-suit injunction by enforcing it in France. On the other hand, the possibility of obtaining anti-suit injunctions from a *third party court* to enforce an *English* arbitration clause (as the Bermuda and Eastern Caribbean Courts have done, although the Singapore High Court thinks that this is a bad idea as you become an "*international busybody*"), suddenly takes on far greater practical utility.

Third, perhaps most ironically of all, the Cour de Cassation has apparently gone further than the English courts ever would – which may explain why English lawyers had not thought of this particular dodge before. It is a basic principle of common law enforcement that only money judgments are enforceable at common law; and therefore anti-suit injunctions, like other injunctions, are not enforceable at common law.

A good example of this is the *Airbus v Patel* litigation, which concerned the crash of an airliner made by Airbus at Bangalore airport. An action had initially been commenced against Airbus in India, but the victim's families later started duplicative claims in Texas. The dispute had no connection with Texas, but Texas at that time had no doctrine of *forum non conveniens*. The Indian courts granted an anti-suit injunction to restrain litigation in Texas, on the grounds that the Texas litigation was vexatious and oppressive. But the Indian anti-suit injunction had insufficient teeth in practice, and so an attempt was made to replicate it in England. Colman J held that the Indian injunction could not be enforced in England either under the common law or the English enforcement legislation, and that it did not create a right to an English anti-suit injunction either: *Airbus v Patel* [1996] ILPr 465. The only question was whether he could and should independently grant an anti-suit injunction to protect the Indian proceedings. He

said no. The Court of Appeal disagreed: *Airbus v Patel* [1997] 2 Lloyds Rep 8; but then the House of Lords agreed with Colman J, holding in effect that the English courts should not act as the world's policemen where a non-contractual anti-suit injunction was sought, as this would be contrary to the principle of comity: *Airbus v Patel* [1999] 1 AC 119. (Lord Goff took care to make clear that he was not necessarily prohibiting a contractual injunction to protect the contractual jurisdiction of another state, a loophole the Bermuda and Caribbean case law mentioned above has exploited.)

So the Georgian injunction would not have been enforceable as a judgment in England, yet it is enforceable in France. A prophet is not without honour save in his own country (Matthew, 13:57).

But will the Cour de Cassation's new decision stand? I can't comment on what it means as a matter of French law, so it will be for others to say whether the Cour de Cassation has, in Shakespeare's words, "*set forth a deep repentance*" of its earlier comment in *Stolzenberg v Daimler Chrysler Canada*, Cour de Cassation, 30 June 2004 [2005] Il Pr 24 that a Mareva injunction is acceptable because it "*does not prejudice any of the debtor's fundamental rights or (even indirectly) foreign sovereignty*" because it "*unlike the so-called "anti-suit" injunctions, does not affect the jurisdiction of the State in which enforcement is sought*."

I do suspect, however, that there will be some, at least in Luxembourg, who will consider the Cour de Cassation's new decision a form of "*treason*" for which pardon should be asked.

As a matter of formality there is probably nothing directly inconsistent between it and *West Tankers*. It is a matter for the French legal system to decide what third state judgments it will enforce and its exequatur decision will not directly render the Georgian judgment enforceable in other member states under the Brussels-Lugano regime.

But there is no doubt that as a matter of principle the two decisions are very uncomfortable bedfellows. The Cour de Cassation is telling us that there is nothing wrong with a foreign court ordering someone not to litigate before the French courts, at least where this is done to enforce an exclusive jurisdiction clause in favour of the foreign court. Apparently, this does not interfere with the French court's judicial sovereignty. What matters is "*to punish the violation of a*

pre-existing contractual obligation." So the French court is content for the Georgian court to assess, and directly interfere with, the French court's jurisdiction. And this is so even though the jurisdiction of the Tribunal de Commerce of Nanterre over the substantive proceedings in France which the Georgian injunction restrained would have been a jurisdiction under the Brussels-Lugano regime. All this is completely alien to the mode of thought in Luxembourg, under which it is wholly unacceptable for the English courts, even when acting *outside* the scope of the regulation, to assess, and indirectly interfere with, the Brussels-Lugano jurisdiction of other member or contracting state courts; and the importance of enforcing contractual obligations binding the parties to litigate in a particular forum is simply irrelevant.

Indeed, it might even be argued that the Cour de Cassation's decision is inconsistent with implied principles of the Brussels-Lugano regime, as it "*necessarily amounts to stripping [the Nanterre Tribunal de Commerce] of the power to rule on its own jurisdiction under Regulation 44/2001*" (contrary to *West Tankers*, §28). The Cour de Cassation did not make a reference, and there is no obvious reason why the Courts of other member states would be interested, so it is difficult to see how the point would get to Luxembourg. But perhaps one final irony awaits.