

Arbitration Agreements, Anti-Suit Injunctions and the Brussels Regulation

Martin Illmer (*Hamburg*) and Ingrid Naumann (*Berlin, currently New York*) have published a very interesting analysis of the compatibility of anti-suit injunctions in aid of arbitration agreements with the Brussels Regulation in *International Arbitration Law Review* (Int. A.L.R. 2007, 10(5), 147-159): **Yet another blow - anti-suit injunctions in support of arbitration agreements within the European Union.**

An abstract has been kindly provided by the authors:

Following the ECJ's judgment in *Turner* the issue of the compatibility of anti-suit injunctions with the regime of the Brussels Regulation has again attracted much attention due to the reference by the House of Lords to the ECJ in the *West Tankers* case. By virtue of the eagerly awaited judgment of the ECJ anti-suit injunctions in support of arbitration agreements are at risk to fall within the European Union. Illmer and Naumann provide a thorough and detailed analysis of whether anti-suit injunctions in support of arbitration agreements are compatible with the Brussels Regulation (Regulation 44/2001) and general principles of EU law. Weighing and assessing the arguments put forward in both directions they reach the compelling conclusion that anti-suit injunctions in support of arbitration agreements are incompatible not only with the Brussels Regulation but with general principles of European law. This conclusion based on legal reasoning cannot be overcome by reference to an alleged practical reality of arbitration which the authors unveil as disguised protectionism for the arbitral seat London.

In the first part of their article, Illmer and Naumann provide a detailed analysis of the scope of the arbitration exception of Art. 1(2)(d) of Regulation 44/2001 with regard to anti-suit injunctions. This comprises of an analysis of the ECJ's former judgments in *Marc Rich* and *van Uden*, the English courts' understanding and interpretation of Art. 1(2)(d) which the authors criticise as a cherry picking exercise and finally a thorough construction of the arbitration exception based on the canon of interpretation tools generally applied by the ECJ. They conclude that

the arbitration exception does not cover anti-suit injunctions in support of arbitration agreements. Caught by the the regime of the Brussels Regulation they are incompatible with it as follows inevitably from the ECJ's judgment in *Turner*.

In the second part of the article, the authors continue their analysis under the presumption that the anti-suit proceedings are covered by the arbitration exception and thus do not fall under the Brussels Regulation. Whereas one may take the view that principles underlying the Regulation, in particular the notion of mutual trust, cannot be applied to anti-suit proceedings falling outside the scope of the Regulation, one cannot bypass the general principle of *effet utile*: Even proceedings in national state courts that do not fall under the Brussels Regulation by virtue of the arbitration exception must not impair proceedings that come within the scope of the Brussels Regulation (i.e. the proceedings which are intended to be restrained by the anti-suit injunction) and thus distort the effective functioning of European law.

In a third, complementary part the authors rebut the arguments put forward by the House of Lords in the *West Tankers* reference concerning the so-called practical reality of arbitration. They show that the truth behind this argument is a protection of London as an arbitral seat vis-à-vis its European competitors in the fierce competition for arbitration amongst arbitral seats. Furthermore, the authors hint at alternatives to anti-suit injunctions in protecting the undeniable interest of the parties to an arbitration agreement in avoiding a breach or circumvention of it.