The AG Opinion in West Tankers

Advocate General Kokott's Opinion in **Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc.** is out, and the House of Lords (and most common law practitioners) are not going to find it a pleasurable read.

The question, you will remember, is whether anti-suit injunctions to give effect to arbitration agreements are compatible with the Brussels I Regulation (No 44/2001), in the wake of the ECJ decisions in *Gasser* and *Turner*. The door had been closed on issuing injunctions restraining legal proceedings in other Member States, except (as was quickly pointed out in London) perhaps where that injunction was granted in order to uphold an agreement to arbitrate. Article 1(2)(d) of the Brussels I Regulation does, after all, provide that the Regulation shall not apply to arbitration.

The reference by the House of Lords also cited (among other things) the practical effect that a negative answer would have on arbitration in London; if injunctions were no longer to be part of the judicial arsenal, then London's popularity as an arbitral seat would significantly diminish. Parties would simply choose New York, Singapore, or other arbitration centres, where injunctions could still be issued.

The exclusion argument under 1(2)(d) is given short shrift by AG Kokott:

> *56. Every court seised is therefore entitled, under the New York Convention, before referring the parties to arbitration to examine those three conditions. It cannot be inferred from the Convention that that entitlement is reserved solely to the arbitral body or the national courts at its seat. As the exclusion of arbitration from the scope of Regulation No 44/2001 serves the purpose of not impairing the application of the New York Convention, the limitation on the scope of the Regulation also need not go beyond what is provided for under that Convention.*
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> *In its judgment in Gasser the Court recognised that a court second seised should not anticipate the examination as to jurisdiction by the court first seised in respect of the same subject-matter, even if it is claimed that there is an agreement conferring jurisdiction in favour of the court second seised. () As the Commission correctly explains, from that may be deduced the general principle*

that every court is entitled to examine its own jurisdiction (doctrine of Kompetenz-Kompetenz). The claim that there is a derogating agreement between the parties – in that case an agreement conferring jurisdiction, here an arbitration agreement – cannot remove that entitlement from the court seised.

That includes the right to examine the validity and scope of the agreement put forward as a preliminary issue. If the court were barred from ruling on such preliminary issues, a party could avoid proceedings merely by claiming that there was an arbitration agreement. At the same time a claimant who has brought the matter before the court because he considers that the agreement is invalid or inapplicable would be denied access to the national court. That would be contrary to the principle of effective judicial protection which, according to settled case-law, is a general principle of Community law and one of the fundamental rights protected in the Community. ()

There is no indication otherwise in Van Uden. In that case the Court had to give a ruling regarding jurisdiction in respect of interim measures in a case which had been referred to arbitration in the main proceedings. In that context the Court stated that, where the parties have excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Brussels Convention. ()

That statement is certainly correct. The justification for the exclusive jurisdiction of the arbitral body specifically requires, however, an effective arbitration agreement covering the subject-matter concerned. It cannot be inferred from the judgment in Van Uden that examination of preliminary issues relating thereto is removed from the national courts.

It is also not obvious why such examination should be reserved to the arbitral body alone, as its jurisdiction depends on the effectiveness and scope of the arbitration agreement in just the same way as the jurisdiction of the court in the other Member State. The fact that the law of the arbitral seat has been chosen as the law applicable to the contract cannot confer on the arbitral body an exclusive right to examine the arbitration clause. The court in the other Member State – here the court in Syracuse – is in principle in a position to apply foreign law, which is indeed often the case under private international

law.

Finally it should be emphasised that a legal relationship does not fall outside the scope of Regulation No 44/2001 simply because the parties have entered into an arbitration agreement. Rather the Regulation becomes applicable if the substantive subject-matter is covered by it. The preliminary issue to be addressed by the court seised as to whether it lacks jurisdiction because of an arbitration clause and must refer the dispute to arbitration in application of the New York Convention is a separate issue. An anti-suit injunction which restrains a party in that situation from commencing or continuing proceedings before the national court of a Member State interferes with proceedings which fall within the scope of the Regulation.

The Advocate General found the House of Lords' practical arguments similarly unconvincing. The comparison with other arbitration centres such as New York and Bermuda was rebuffed with, "To begin with it must be stated that aims of a purely economic nature cannot justify infringements of Community law." The point Lord Hoffman made about individual autonomy – the parties' choice to submit to arbitration, and not be bothered by the fuss of court proceedings – was seen as co-existing peacefully with a negative answer to the question: "proceedings before a national court outside the place of arbitration will result only if the parties disagree as to whether the arbitration clause is valid and applicable to the dispute in question. In that situation it is thus in fact unclear whether there is consensus between the parties to submit a specific dispute to arbitration." AG Kokott does, however, go on to point out the flaw in that argument:

If it follows from the national court's examination that the arbitration clause is valid and applicable to the dispute, the New York Convention requires a reference to arbitration. There is therefore no risk of circumvention of arbitration. It is true that the seising of the national court is an additional step in the proceedings. For the reasons set out above, however, a party which takes the view that it is not bound by the arbitration clause cannot be barred from having access to the courts having jurisdiction under Regulation No 44/2001.

One more problem was alluded to (echoing the concerns of the House of Lords): the arbitral body (and its supporting national courts) and the courts which take

subject-matter jurisdiction under the Regulation may not agree on the scope or validity of the arbitration clause. Conflicting decisions then follow. The Regulation, capable of keeping the peace between two national courts when conflicting decisions arise under Arts 27 and 28, is powerless to solve the dilemma; Article 1(2)(d), you will still remember, *excludes* arbitration. What to do, then? Kokott concludes:

> *72. A unilateral anti-suit injunction is not, however, a suitable measure to rectify that situation. In particular, if other Member States were to follow the English example and also introduce anti-suit injunctions, reciprocal injunctions would ensue. Ultimately the jurisdiction which could impose higher penalties for failure to comply with the injunction would prevail.*
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> *Instead of a solution by way of such coercive measures, a solution by way of law is called for. In that respect only the inclusion of arbitration in the scheme of Regulation No 44/2001 could remedy the situation. Until then, if necessary, divergent decisions must be accepted. However it should once more be pointed out that these cases are exceptions. If an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts have no reason not to refer the parties to the arbitral body appointed in accordance with the New York Convention.*

It may come as a disappointment to common law lawyers, but the Opinion won't really come as a surprise; the writing was on the wall post-*Gasser* and *Turner*, and it would have been extraordinary for the powers that be in Luxembourg to upset the delicate conflicts ecosystem created by those decisions (and the one in *Owusu*) by placing those cases involving a *prima facie* valid arbitration clause outside of the scope of the Regulation entirely. If you're going to produce poor decisions, one could say, you might as well do it *consistently*.

Those in civil law jurisdictions may disagree that the Opinion in *West Tankers* represents a bad day for the business of solving disputes in London – see the articles by the Max Plank Institute, for instance. Some others, however, may begin to wonder whether the European Union's pursuit of the hallowed principle of 'legal certainty' will end with the removal of any and all discretionary national court powers – indeed, the removal of common law private international law itself. The tension between common and civil law traditions is likely to continue as we

proceed along the path to complete Europeanization of the conflict of laws; and at the moment, the common law is looking decidedly battered and bruised.