Kessedjian on West Tankers

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Commenting "à chaud" is contrary to the good lawyer's tradition (at least in civil law). But our world does not allow anymore reflecting for substantial periods of time and everything has to be done now. So be it!

The relation between arbitration and the Brussels I Regulation is everything but an easy question and the least to be said is that the Judges at the European Court cannot be bothered to really ask themselves the hard questions. One page or so of reasoning in West Tankers shows that, for the Court, the matter is "evident" and without much interest. This is exactly the kind of attitude which is counterproductive.

The decision is narrow-minded. It is surprisingly so since the Court has, in the past, tackled very important political issues (political in the sense of, for example, the place of Europe within the word etc…). It is about time that the European Institutions think about the policy Europe wants to establish about arbitration, and the European Court could have sent some encouraging signals to the Member States. This is a missed occasion.

On the substance of the case:

1) The starting point taken by the Court (after the Advocate General) is a mistake. If the arbitration exception in Reg 44/2001 is to be taken seriously, the Court cannot say that the validity of an arbitration agreement is a "question préalable" in the classic meaning of the expression. Indeed, as soon as there is a prima facie evidence that an arbitration agreement exists, there is a presumption that the parties wanted to free themselves from the judicial system. Consequently, any jurisdiction in the world lacks power to decide on the merits because, in matters where they are free to do so, parties have deprived courts from the power to decide on their dispute. Power is preliminary to jurisdiction. Jurisdiction is a question which does not arise if the entire judicial system is excluded from the parties' will. This is why the starting point of the analysis is to say that Reg 44/2001, which deals with jurisdiction, has nothing to say about whose power it is

to decide on questions of arbitration. Hence the exclusion of arbitration, from its scope,

2) To say that the scope of Brussels I is only to be interpreted as far as the merits of a case are concerned (point 26) may be true for other exclusions of Article 1 of 44/2001, not for arbitration. If we go the route taken by the Court, then the arbitration exclusion is emptied of its significance because every single matter referred to arbitration is indeed also capable of being arbitrated (at least in a great number of Members States). The interpretation made by the Court is contrary to the well settled principle when interpreting a legal text; i.e. that of giving an effective meaning to the provision.

3) I am not saying that West Tankers inaugurates the trend. Indeed, it was already there in the *Van Uden* decision. And we were probably not attentive enough to the potential damaging effect of *Van Uden*.

4) The validity of the arbitration agreement is consubstantial with the power to arbitrate. Therefore, it cannot be taken lightly. This is why, instead of leaving the New York Convention as an afterthought (point 33), the Court should have started the analysis with the Convention. The Court should have embraced the well known consequence of Article II-3 of the Convention: it is for the arbitral tribunal to decide on the validity of the arbitration agreement, unless (and only in that case) it is "null and void, inoperative or incapable of being performed".

5) Then the court should have asked the only legitimate question: "which court has the power to decide whether the arbitration agreement is "null and void, inoperative or incapable of being performed". Here the Court should have noted that the New York Convention is silent. And it should have noted also that Reg 44/2001 is silent too for very good reasons: because arbitration is excluded.

6) The next question would have then been: can we go beyond the text and provide for a uniform jurisdictional rule? There, I think, the Court should have paused and ask herself what is the policy behind the need for a uniform rule. Certainly, the importance of Europe as a major arbitration player in the world could have been one consideration. But there are others which I won't detail here.

7) Is it for the Court to go beyond the text it is asked to interpret (and decide contra legem)? Most of the time, the answer is NO. And the Court has, in some occasions, clearly said so and said that it is for the Member States to adopt the

proper rules (one of the last occasions of such a prudent approach by the Court is the *Cartesio* case in matters of company law). Why in the world the Court did not take that prudent approach when it comes to arbitration? I have nothing to offer as a beginning of an answer.

8) If the Court had taken that approach, then the answer to the House of Lords would have been, as European Law stands now, the matter falls under national law and there is nothing in European Law which prevents you from using your specific procedural tools, even though we may disapprove of them.

9) This, in my view, was the only approach possible. It is so much so, that part of the reasoning of the Court is based on an erroneous analysis of what is an anti suit injunction. Unless I am mistaken, I understand those injunctions to be addressed to the party not to the foreign court. Yes, at the end of the process, it is the foreign court which will be deprived of the matter because the party would have withdrawn from the proceedings. But the famous "mutual trust" (which alone would merit a whole doctoral dissertation) has no role to play here.

10) By deciding the matter the way it did, the Court does not render a service to the parties. *West Tankers* basically says that any court in the EU which could have had jurisdiction on the merits (if it were not for the arbitration agreement) has jurisdiction to review the validity of the arbitral agreement. This is the wrong message to send. It allows for mala fide persons who want to delay proceedings and harass the party who relies on an arbitration agreement. It may not have been the problem in *West Tankers* as such, but the effect of *West Tankers* is clearly contrary to a good policy.