Pfeiffer on West Tankers

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1) For those who have read the famous opinion of Lord Ellenborough in Buchanan v. Rucker (Court of King's Bench 1808), the following may sound familiar:

Can the island of Britannia render a judgment to bind the rights of the whole world? Would the world submit to such an assumed jurisdiction? – For EC Member States, according to Allianz v. West Tankers, the answer is "not any more", not only with regard to anti-suit injunctions in general but also with regard to injunctions meant to protect arbitration agreements.

2) The exception for "arbitration" in Art. 1 II lit. d) Regulation 44/2001 applies if the subject matter of the case falls within its scope. Based on this criterion, it seems correct to say that the London High Court proceedings fall under the arbitration exception whereas the Syracuse proceedings do not. My only objection against the Court's reasoning on this issue relates to the statement that, in Syracuse, where the defendant raised the arbitration agreement as a defence, the validity of the agreement only formed a "preliminary question". In Private International Law, the term "preliminary question" or "incidental question" refers to situations where one legal relationship (e.g. succession) depends on the existence of another legal relationship (e.g. marriage). The arbitration issue raised in Syracuse was relevant for the admissibility of the proceedings. Procedural admissibility is a separate issue of its own, not a mere preliminary question for the subject matter (insofar I agree with Andrew Dickinson). However, even if it is not a mere preliminary issue, the arbitration agreement still is only a defence so that it is correct to say that it is outside the scope of the subject matter of the Syracuse proceedings. In other words: the Syracuse proceedings fall under the regulation whereas the London proceedings do not.

3) Under these circumstances, the legal situation is the following: An English injunction can in no way at all touch the Syracuse Court's legal competence to determine its international jurisdiction (governed by the Brussels I Regulation) on

its own. Instead, such an injunction would have affected the court's ability to effectively make use of this competence as a matter of fact. According to the ECJ, such a factual effect constitutes an infringement of EC law, and this view can indeed be based on the general principle of practical effectiveness of EC-law and the principle of loyalty under Art. 10 EC-Treaty. No Member State must conceive its law in a way so that EC law is deprived of its practical effectiveness.

4) In West Tankers, it was argued that the court at the seat of the arbitral tribunal is best able to protect the arbitration agreement by supportive measures so that there is a conflict between the principle of effectiveness of community law on the one hand and of effectiveness of the procedural system on the other hand. The ECJ gives a formal answer to that: The formal answer is that, in the European area of Freedom, Justice and Security under Art. 65 EC-Treaty, both the London and the Syracuse Court are Courts of the same system and of equal quality. That is both legally correct and fiction with regard to reality.

5) Despite of these reservations, there are good reasons why the result of the ECJ deserves support. According to the logic of anti-suit injunctions, the outcome of jurisdictional conflicts depends on the effectiveness of enforcement proceedings available on both sides and on other accidental factors such as the localisation of assets that can be seized to enforce court decisions. Letting the outcome of cases depend on factors like these is a concept that is essentially unjust, unless one claims that the stronger system is automatically better. International cooperation between legal systems is possible only on the basis of equality and the mutual respect. Trying to impose the view of one country's courts on the court system of another country is a concept which might have been appropriate in the times of hegemony. And although I admire many of the superb qualities of the English legal system and profession, there should be no space for such a one-sided concept in the context of international co-operation.

6) English lawyers will certainly come up with other ideas of how to protect English arbitration proceedings such as e.g. penalty clauses and other contractual constructions, the validity of which will raise interesting new questions.

7) Instead of a conclusion: Why is everybody talking about the "West Tankers" and not of "Allianz"? It seems that Britannia, despite of the outcome of this case, does not only still rule the waves but also the names. Be that a comfort for all my English friends.