Rafael Arenas on West Tankers

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Regulation 44/2001 also applies to arbitral proceedings

The key words of the decision are clear enough: "recognition and enforcement of foreign arbitral awards", "Regulation (EC) No 44/2001" "scope of application" "Jurisdiction of a court of a Member State to issue an order restraining a party from commencing or continuing proceedings before a court of another Member State on the ground that those proceedings would be contrary to an arbitration agreement", "New York Convention". It is obvious that the ECJ is dealing with an arbitral case, and it is also obvious that Regulation 44/2001 does not apply to arbitration. These are obvious statements, but the final conclusion of the Court is that the English proceeding (which falls outside the scope of Regulation 44/2001, see number 23 of the decision) is not compatible with the Regulation. How can this be possible?

The reasoning of the ECJ is based on two facts. First, there is an Italian proceeding that falls within the scope of Regulation 44/2001; second, this Italian proceeding could be affected by the English proceeding. The conclusion is that the English proceeding is not compatible with Regulation 44/2001. Obviously, there is some kind of gap in the reasoning: if the proceeding is not compatible with Regulation 44/2001, this means that Regulation has an influence of some kind on the English proceeding, but this influence does not fit with the assertion that "proceedings, such as those in the main proceedings (…) cannot, therefore, come within the scope of Regulation No 44/2001" (number 23 of the decision).

The conclusion of the ECJ is not problem-free. The reasoning is not strong enough to justify the extension of Regulation 44/2001 to arbitral proceedings, which are excluded of the Regulation expresis verbis (art. 1). From my point of view it is also a dangerous decision. The reasoning of the Court implies that every proceeding that could affect a proceeding within the scope of Regulation 44/2001

must be examined in order to determine if it is compatible with the Regulation. This is new and shocking. Let's think about proceedings before an arbitral court. They obviously fall outside the Regulation scope but this is not a justification for not applying Regulation 44/2001 anymore. If the proceeding affects another proceeding falling within the scope of Regulation 44/2001, then we must analyse the compatibility of the first proceeding with the Regulation; and it is obvious that a proceeding before an arbitral court could affect proceedings falling within the scope of the Regulation. How about a court decision designating an arbitrator? Is this decision compatible with the Regulation in the case that a judicial proceeding involving the same cause of action has already started in a member State? I think that Regulation 44/2001 has nothing to say in this case, but following the "West Tanker doctrine" the answer to these questions could be a different one. I can imagine a decision of the Luxembourg Court establishing something like this: "In the light of the foregoing considerations the answer to the question referred is that a court of a Member State cannot help a proceeding that could limit the application of a judgment that falls within the scope of Regulation 44/2001" In this sense, the Opinion of the Court 1/03 (Lugano Convention) must also be considered.

Finally, I would like to point out that this decision can only be understood if we consider the supremacy of the Community legal order. The "useful effect" doctrine implies that in conflicts between Community Law and other legal sources Community Law always prevails; even when the case is not ruled directly by Community Law. The consequence of this is that the "indirect" effect of Community Law expands the scope of the Community competences more and more; in the same way that a black hole becomes bigger and bigger thanks to the matter that it soaks up. In the end, nevertheless, bigger does not necessarily mean greater or better.