Nori Holdings: England & Wales High Court confirms 'continuing validity of the decision in West Tankers' under Brussels I Recast

Earlier this month, the English High Court rendered an interesting decision on the (un-)availability of anti-suit injunctions in protection of arbitration agreements under the Brussels I Recast Regulation (No 1215/2012). In *Nori Holdings v Bank Otkritie* [2018] EWHC 1343 (Comm), Males J critically discussed (and openly disagreed with) AG Wathelet's Opinion on Case C-536/13 *Gazprom* and confirmed that such injunctions continue to not be available where they would restrain proceedings in another EU Member State.

The application for an anti-suit injunction was made by three companies that had all entered into a number of transactions with the defendant bank involving shares of companies incorporated in Cyprus. These arrangements were restructured in August 2017. In October 2017, the defendant alleged that the agreements entered into in the course of this restructuring were fraudulent and started proceedings in Russia – based, *inter alia*, on Russian bankruptcy law – to set them aside. In January 2018, the claimants reacted by commencing LCIA arbitrations against the bank – based on an arbitration clause in the original agreements, to which the restructuring agreements referred – seeking a declaration that the restructuring agreements are valid and an arbitral anti-suit injunction against the Russian proceedings. Meanwhile, each of the parties also commenced proceedings in Cyprus.

The defendant bank advanced several reasons for why the High Court should not grant the injunction, including the availability of injunctive relief from the arbitrators and the non-arbitrability of the insolvency claim. While none of these defences succeeded with regard to the proceedings in Russia, the largest individual part of the decision ([69]–[102]) is dedicated to the question whether the High Court had the power to also grant an anti-suit injunction with regard to the proceedings in Cyprus, an EU member state.

The European Court of Justice famously held in *West Tankers* (Case C-185/07)

that ‘even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness’ (at [24]) and that

> *[30] […] in obstructing the court of another Member State in the exercise of the powers conferred on it by [the Regulation], namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another’s legal systems and judicial institutions and on which the system of jurisdiction under [the Regulation] is based […].*

Accordingly, it would be ‘incompatible with [the Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement’ (at [34]).

Shortly thereafter, the European legislator tried to clarify the relationship between the Brussels-I framework and arbitration in Recital (12) of the recast Regulation. This Recital included, among other things, a clarification that a decision on the validity of an arbitration agreement is not subject to the Regulation’s rules on recognition and enforcement. Rather surprisingly, this was understood by Advocate General Wathelet, in his Opinion on Case C-536/13 *Gazprom*, as an attempt to ‘correct the boundary which the Court had traced between the application of the Brussels I Regulation and arbitration’ (at [132]); consequently, he argued that ‘if the case which gave rise to the judgment in [*West Tankers*] had been brought under the regime of the Brussels I Regulation (recast) […] the anti-suit injunction forming the subject-matter of [this judgment] would not have been held to be incompatible with the Brussels I Regulation’ (at [133]). AG Wathelet went even further when he opined that Recital (12) constituted a ‘retroactive interpretative law’, which explained how the exclusion of arbitration from the Regulation ‘must be and always should have been interpreted’ (at [91]), very much implying that *West Tankers* had been wrongly decided.

The Court of Justice, of course, did not follow the Advocate General and, instead, reaffirmed its decision in *West Tankers* in Case C-536/13 *Gazprom*. As Males J rightly points out (at [91]), the Court did not only ignore the Advocate General’s

Opinion, it also very clearly regarded *West Tankers* a correct statement of the law under the old Regulation. While Males J considered this observation alone to be 'sufficient to demonstrate that the opinion of the Advocate General on this issue on [sic] was fundamentally flawed' (at [91]), he went on to point out six (!) further problems with the Advocate General's argument. In particular, he argued (at [93]) that if the Advocate General were right, any proceedings in which the validity of an arbitration were contested would be excluded from the Regulation, which, indeed, would go much further than what the Recital seems to try to achieve.

Consequently, Males J concluded that

> *[99] […] there is nothing in the Recast Regulation to cast doubt on the continuing validity of the decision [in West Tankers] which remains an authoritative statement of EU law. […] Accordingly there can be no injunction to restrain the further pursuit of the Bank's proceedings in Cyprus.*

Of course, this does not mean that claimants will receive no redress from the English courts in a case where an arbitration agreement has been breached through proceedings brought in the courts of another EU member state. As Males J explained (at [101]), the claimants may be entitled to an indemnity 'against (1) any costs incurred by them in connection with the Cypriot proceedings and (2) any liability they are held to owe in those proceedings.' While one might consider such an award to be 'an antisuit injunction in all but name' (Hartley (2014) 63 ICLQ 843, 863), the continued availability of this remedy in the English courts despite *West Tankers* has been confirmed in *The Alexandros T* [2014] EWCA Civ 1010. In the present case, Males J nonetheless deferred a decision on this point as the Cypriot court could still stay the proceedings and because the claimants might still be able to obtain an anti-suit injunction from the arbitral tribunal.

The Protection of Arbitration

Agreements within the EU after West Tankers, Gazprom, and the Brussels I Recast

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The ECJ's recent decision in *Gazprom* (Case C-536/13) is the latest addition to a series of judgments by the Court that have considerably reduced the remedies available to claimants who seek to enforce the negative dimension of an arbitration agreement, i.e. the other party's obligation not to initiate court proceedings. They have created a coherent framework for the protection of arbitration agreements within the EU, which has been sanctioned and complemented by the recast of the Brussels I Regulation. Yet, a number of questions still remain open – some of which are unlikely to be answered any time soon.

The current status quo

Traditionally, four types of remedies are available to parties seeking enforcement of the negative dimension of an arbitration agreement from a court. First, they may ask the court seised by the other party to stay or dismiss the proceedings. Second, they may ask another court to issue an injunction against the party in breach in order to restrain the latter from initiating or continuing litigation (so-called 'anti-suit injunctions'). Third, they may bring an action for damages to recover the loss incurred due to the litigation. Fourth, they may apply for the foreign judgment not to be recognized and enforced.

While courts in all member states of the EU regularly dismiss or stay proceedings brought in violation of an arbitration agreement, and refuse to recognize and enforce judgments obtained in breach of such an agreement, only English courts have granted anti-suit injunctions and awarded damages for breach of an arbitration agreement in the past. Yet, as far as litigation in the courts of EU member states is concerned, all of these remedies have been affected by the harmonized regime of jurisdiction and recognition and enforcement of judgments

in civil and commercial matters that has been established by the Brussels Convention and its successor regulations.

It is true, though, that regarding the **first remedy**, i.e. a dismissal or stay of local proceedings, there has never been much doubt that the European instruments do not require the courts of a member state to adjudicate if this would violate a valid arbitration agreement; instead, they have to send the case to arbitration, as required by Art. II(3) of the New York Convention. The ECJ's decision in *Gazprom* and the first paragraph of the new recital (12) of the Brussels I Recast merely confirm that this is still the case.

Access to the **second remedy**, i.e. anti-suit injunctions issued by English courts to prevent a party from litigating in breach of an arbitration agreement, has however been radically restricted by the ECJ's case law. Consistently with its reasoning in *Gasser* (Case C-116/02) and *Turner v Grovit* (Case C-259/02), the Court held in *West Tankers* that "even though proceedings [to enforce an arbitration agreement via an anti-suit injunction] do not come within the scope of [the Brussels I Regulation], they may nevertheless have consequences which undermine its effectiveness", if they "prevent a court of another Member State from exercising the jurisdiction conferred on it by [the Regulation]", which includes the decision on the jurisdictional defence based on an arbitration agreement. Accordingly, "it is incompatible with [the Regulation] for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."

While the new recital (12) tries to clarify the scope of the exclusion of arbitration in Art. 1(2)(d) of the Regulation, nothing in the legislative history of the Recast, which left the actual text of the regulation otherwise unchanged, suggests that it was supposed to reverse the decision of the Grand Chamber in *West Tankers*. Thus, it was to the surprise of many that Advocate General Wathelet, in his opinion on *Gazprom*, argued that "the EU legislature intended to correct the boundary which the Court [in *West Tankers*] had traced between the application of the Brussels I Regulation and arbitration" with the Recast. He opined that para. 2 of recital (12), which excludes decisions "as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed" from the rules on recognition and enforcement, should be understood as excluding "the verification, as an incidental question, of the validity of an arbitration agreement

[entirely!] from the scope of the Brussels I Regulation". Consequently, "the fact that the Tribunale di Siracusa [in *West Tankers*] had been seised of an action the subject-matter of which fell within the scope of the Brussels I Regulation would not have affected the English courts' power to issue anti-suit injunctions in support of the arbitration because […] the verification, as an incidental question, of the validity of an arbitration agreement is excluded from the scope of that regulation."

But as the question submitted to the ECJ concerned the pre-recast regulation (No. 44/2001), the Court – while implicitly rejecting the Advocate General's proposition that recital (12) "in the manner of a retroactive interpretative law, explains how that exclusion must be and *always should have been* interpreted" – did not need to (and did not) discuss this proposition; instead, the Court simply distinguished the present question of recognition and enforcement of "an arbitral award prohibiting a party from bringing certain claims before a court of that Member State from the question of the court issuing itself "an injunction […] requiring a party to arbitration proceedings not to continue proceedings before a court of another Member State", only the latter type of injunction being "contrary to the general principle which emerges from the case-law of the Court that every court seised itself determines, under the applicable rules, whether it has jurisdiction to resolve the dispute before it". Yet, the fact that the Court deemed such a distinction necessary and referred repeatedly to its decision in *West Tankers* may be seen as an indication that it does not consider this decision to be already overruled by the Recast.

Against this background, it certainly is surprising that the **third remedy**, i.e. damages for the breach of an arbitration agreement, has yet to be subject to a decision of the ECJ – and has neither been affected by any paragraph of the new recital (12). As English courts may no longer issue anti-suit injunctions – a remedy expressly admitted to prevent that "the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy" (Lord Millett in *The Angelic Grace* [1995] 1 Lloyd's Rep 87) – it seems very likely that damage awards will become much more prevalent in English courts. They have thus been allowed by the High Court after the ECJ's decision in *West Tankers* ([2012] EWHC 854 (Comm)) and awarded by the Court of Appeal in *The Alexandros T* [2014] EWCA Civ 1010.

Regarding the **fourth remedy**, i.e. the refusal to recognize and enforce a

judgment obtained in breach of an arbitration agreement, recital (12) now provides a clear solution, which seems to limit the ECJ's decision in *Gothaer* (Case C-456/11) and to reverse recent English case law (cf *The Wadi Sudr* [2009] EWCA Civ 1397). According to its paras 2 and 3, decisions as to the validity of an arbitration agreement are excluded from the provisions on recognition and enforcement, while decisions as to the substance of the dispute are subject to these provisions unless this would require a member state to violate its obligations (i.e. to enforce a valid arbitral award) under the New York Convention. This is not only a welcome step towards the legal certainty that the difficult relationship between the Regulation and the Convention indubitably requires but should also be understood as an attempt to counter-balance the absence of anti-suit injunctions within the Brussels I framework.

Open Questions

The case law of the ECJ and recital (12) of the Recast seem to provide a coherent and workable framework for the protection of arbitration agreements; they put a strong emphasis on the principle of mutual trust between the member states, but balance it out with their obligations under the New York Convention. Still, some questions remain open.

First, and foremost, the ECJ has held in *Gazprom* that the Regulation does not preclude the courts of a member state "from recognising and enforcing […] an arbitral award prohibiting a party from bringing certain claims before a court *of that Member State*". But does the same apply to an arbitral anti-suit injunction restricting proceedings before a court *of another member state*? Several of the Court's arguments – which are all carefully limited to the question of recognition and enforcement in the state where the relevant proceedings are brought – indicate that this might not be the case: while enforcing an arbitral award by ordering a party to stop or limit local proceedings raises "no question of an […] interference of a court of one Member State in the jurisdiction of the court of another Member State", enforcing an award by ordering a party to stop or limit proceedings elsewhere might indeed amount to such an interference. While there is no risk "to bar an applicant who considers that an arbitration agreement is void, inoperative or incapable of being performed from access to the court before which he nevertheless brought proceedings" if they can contest recognition and enforcement in this very court, the defendant will indeed be denied access to that court if the courts of another member state enforce an arbitral award by ordering

him to stay these proceedings. And while failure to comply with an arbitral anti-suit injunction "is not capable of resulting in penalties being imposed upon it by a court of another Member State", the enforcement of such an injunction in another member state would attach to the award that exact kind of penalty. Thus, while the recognition of such an arbitral award in the member state where the proceedings are brought is no more contrary to the Brussels I Regulation than the court's power to stay proceedings of its own motion in order to give effect to an arbitration clause, the enforcement of such an award by the courts of another member state would be much more similar to the situation which the ECJ ruled out in *West Tankers*.

Second, the ECJ has not yet decided on the admissibility of damage awards in view of its restrictive approach to anti-suit injunctions. English courts seem to distinguish the one from the other by treating anti-suit injunctions as a remedy for the *jurisdictional* dimension of arbitration agreements while considering damages as a remedy for their *contractual* dimension. Yet, one may argue that the practical effects of both remedies are still very similar, especially if damages are granted, as in *The Alexandros T*, by way of an indemnity even before litigation has finished. But although it is hard to see why the ECJ would not consider damage awards to be contrary to "the general principle that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it" as formulated in *West Tankers*, it is indeed not very likely that the Court will get a chance to make such a decision after the English courts – the only courts that actually grant such awards – saw no need to submit the question in *The Alexandros T*.

Finally, it has been noted (by Hartley [2014] ICLQ 843, 866) that the new rules on recognition and enforcement of decisions that have been obtained in violation of an arbitration agreement in paras 2 and 3 of recital (12) leave open one particular case, namely the situation where a court is asked to recognize and enforce both an arbitral award made within the jurisdiction (and thus not creating an obligation under the New York Convention) and a conflicting judgment on the merits from another member state. While the wording of recital (12) indicates that the court has to give effect to the judgment, this would give the arbitral award the weakest effect in its "home jurisdiction". The better approach therefore seems to be to consider arbitral awards made within the jurisdiction as a "judgment given between the same parties in the Member state addressed" and

apply Art. 45(1)(c) of Brussels I by analogy.

And the winner is … West Tankers (again)

Another win for the West Tankers' team in the latest round of the long running litigation. In a decision delivered on 4 April 2012 ([2012] EWHC 854 (Comm)), Flaux J held that EU law (specifically, the decision of the CJEU in West Tankers (Case C-185/07)) did not exclude the jurisdiction of the arbitral tribunal to award damages (specifically, equitable damages) for breach of an arbitration agreement by the bringing of proceedings before a national (Italian) court.

In his Lordship's view (para. 68):

> "In my judgment, arbitration falls outside the Regulation and an arbitral tribunal is not bound to give effect to the principle of effective judicial protection. It follows that the tribunal was wrong to conclude that it did not have jurisdiction to make an award of damages for breach of the obligation to arbitrate or for an indemnity."

Which Strategy for West Tankers?

As reported yesterday, West Tankers has now won its arbitration against the insurers of Erg Petroli and obtained a judgment in England in the terms of the award.

The purpose of this last move, it seems, was to create a defense against the enforcement in England of any forthcoming Italian judgment finding in favour of the insurers. This would create a conflict of judgments in England, and West

Tankers hopes that pursuant to Article 34 of the Brussels I Regulation, the English judgment (in the terms of the award) would prevail.

If this strategy was to prevail, this would mean that the Italian judgment could not be enforced in England. But West Tankers may have assets in other European jurisdictions where the Italian judgment would be recognised almost automatically. In particular, it is likely that it owns vessels which could be attached in any European harbour where they stop. It might therefore be that the Italian judgment could be enforced in France, Greece, Spain, etc…

It seems, therefore, that West Tankers has two ways forward.

The most obvious one would be to seek recognition of the arbitral award in most jurisdictions of Europe, and hope that in each of these jurisdictions, a local judgment declaring the award enforceable would be considered as a judgment in the meaning of Article 34 of the Brussels I Regulation. The insurers would then be left with Italy, that West Tankers' vessels might find wise to avoid.

Alternatively, West Tankers might want to focus on the UK and try to rely on the English judgment to obtain restitution of any payment it would be forced to make abroad on the basis of the Italian judgment (for a similar example, see here). I have no idea whether this could work as a matter of UK law. But it might be a theoretical question, as the Italian insurers of Erg Petroli might not have assets there.

West Tankers: Will the Future Italian Judgment Ever be Recognised in the UK?

On April 6th, 2011, the English High Court delivered a new judgment in *West Tankers*.

Most readers will recall the basic facts of the case. A dispute arose after a collision between a ship, the Front Comor, and a pier at a refinery in Italy. The charterparty provided for arbitration in London. The charterer first initiated arbitral proceedings against the owner of ship. It then sued the defendant before Italian courts. After an English Court issued an antisuit injunction restraining the claimant from continuing the Italian proceedings, the case was referred to the European Court of Justice which held that the English court was not authorised to issue such injunction.

But on November 12th, 2008, the arbitral tribunal delivered its arbitral award and held that the defendant was under no liability to the claimant and its insurer.

The issue before the English court was essentially one of English arbitration law: whether such award could be declared enforceable in the UK. An interesting issue was whether the Brussels I regulation was relevant here, as an English judgment declaring the award enforceable in the UK might be considered as a bar to the recognition/enforcement of any inconsistent judgment rendered in another member state. And an Italian judgment ruling in favor of the claimant would be hardly concilable with an English judgment given in the terms of the arbitral award. But would such English judgment be a Regulation judgment in the first place?

In his judgment of April 6, Justice Field held that, as long as the Italian judgment had not been rendered, it was not necessary to decide the issue. In the meantime, however, he confirmed that judgment in the terms of the award could be entered into.

Tip-off: Sebastien Lootgieter

West Tankers and Indian Courts

What is the territorial scope of *West Tankers*? It certainly applies within the European Union, but does it prevent English Courts from enjoining parties to litigate outside of Europe?

In a judgment published yesterday (*Shashou & Ors v Sharma* ([2009] EWHC 957 (Comm)), Cook J. ruled that *West Tankers* is irrelevant when the injunction enjoins the parties from litigating in India in contravention with an agreement providing for ICC arbitration in London.

> *Since India has not acceded to the EU (and is not, so far as I am aware, expected ever to do so), why was West Tankers even mentioned ?*

The case was about a shareholders agreement for a venture in India between Indian parties. It provided for the substantive law of the contract to be Indian Law.

Cook J. held:

> *23 It is common ground between the parties that the basis for this court's grant of an anti-suit injunction of the kind sought depends upon the seat of the arbitration. The significance of this has been explored in a number of authorities including in particular ABB Lummus Global v Keppel Fels Ltd [1999] 2 LLR 24, C v D [2007] EWHC 1541 (at first instance) and [2007] EWCA CIV 1282 (in the Court of Appeal), Dubai Islamic Bank PJSC v Paymentech [2001] 1 LLR 65 and Braes of Doune v Alfred McAlpine [2008] EWHC 426. The effect of my decision at paragraphs 23-29 in C v D, relying on earlier authorities and confirmed by the judgment of the Court of Appeal at paragraph 16 and 17 is that an agreement as to the seat of an arbitration brings in the law of that country as the curial law and is analogous to an exclusive jurisdiction clause. Not only is there agreement to the curial law of the seat, but also to the courts of the seat having supervisory jurisdiction over the arbitration, so that, by agreeing to the seat, the parties agree that any challenge to an interim or final award is to be made only in the courts of the place designated as the seat of the arbitration. Subject to the Front Comor argument which I consider later in this judgment, the Court of Appeal's decision in C v D is to be taken as correctly stating the law.*
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> *...*
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> *35 Mr Timothy Charlton QC on behalf of the defendant submitted that the landscape of anti-suit injunctions had now been changed from the position set out by the Court of Appeal in C v D by the decision of the European Court of Justice in the Front Comor – Case C185/07 ECJ [2009] 1 AER 435. There, an English anti-suit injunction to restrain an Italian action on the grounds that the dispute in those actions had to be arbitrated in London was found to be incompatible with Regulation 44/2001. Although it was conceded that the decision specifically related to countries which were subject to Community law, it was submitted that the reasoning of both the Advocate General and the court should apply to countries which were parties to a convention such as the New York Convention. Reliance was placed on paragraph 33 of the European Court's*

judgment where, having found that an anti-suit injunction preventing proceedings being pursued in the court of a Member State was not compatible with Regulation No 44/2001, the court went onto say that the finding was supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an arbitration agreement, that will at the request of one of the parties refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. The Advocate General, in her Opinion said "incidentally, it is consistent with the New York Convention for a court which has jurisdiction over the subject matter of the proceedings under Regulation No 44/2001 to examine the preliminary issue of the existence and scope of the arbitration clause itself

36. It is plain from the way in which the matter is put both by the European Court of Justice and the Advocate General, that their concern was to show that there was no incompatibility or inconsistency between the position as they stated it to be, as a matter of European Law, and the New York Convention. This does not however mean that the rationale for that decision, which is binding in Member States, applies to the position between England on the one hand and a country which is not a Member State, whether or not that State is a party to the New York Convention. An examination of the reasoning of the European Court, and the Advocate General reveals that the basis of the decision is the uniform application of the Regulation across the Member States and the mutual trust and confidence that each state should repose in the courts of the other states which are to be granted full autonomy to decide their own jurisdiction and to apply the provisions of the Regulation themselves. Articles 27 and 28 provide a code for dealing with issues of jurisdiction and the courts of one Member State must not interfere with the decisions of the court of another Member State in its application of those provisions. Thus, although the House of Lords was able to find that anti-suit injunctions were permitted because of the exception in Article 1(2)(d) of the Regulation which excludes arbitration from the scope of it, the European Court held that, even though the English proceedings did not come within the scope of the Regulation, the anti-suit injunction granted by the English court had the effect of undermining the effectiveness of the Regulation by preventing the attainment of the objects of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters, because it had the effect of preventing a court of another member state from exercising the jurisdiction conferred on it by the Regulation (paragraph 24).

37. None of this has any application to the position as between England and India. The body of law which establishes that an agreement to the seat of an arbitration is akin to an exclusive jurisdiction clause remains good law. If the defendant is right, C v D would now have to be decided differently. Both the USA (with which C v D was concerned) and India are parties to the New York Convention, but the basis of the Convention, as explained in C v D, as applied in England in accordance with its own principles on the conflict of laws, is that the courts of the seat of arbitration are the only courts where the award can be challenged whilst, of course, under Article V of the Convention there are limited grounds upon which other contracting

states can refuse to recognise or enforce the award once made.

38. The Regulation provides a detailed framework for determining the jurisdiction of member courts where the New York Convention does not, since it is concerned with recognition and enforcement at a later stage. There are no "Convention rights" of the kind with which the European Court was concerned at issue in the present case. The defendant is not seeking to enforce any such rights but merely to outflank the agreed supervisory jurisdiction of this court. What the defendant is seeking to do in India is to challenge the award (the section 34 IACA Petition) in circumstances where he has failed in a challenge in the courts of the country which is the seat of the arbitration (the ss.68 and 69 Arbitration Act applications). Whilst of course the defendant is entitled to resist enforcement in India on any of the grounds set out in Article V of the New York Convention, what he has done so far is to seek to set aside the Costs Award and to prevent enforcement of the Costs Award in England, in relation to a charging order over a house in England, when the English courts have already decided the matters, which plainly fall within their remit. The defendant is seeking to persuade the Indian courts to interfere with the English courts' enforcement proceedings whilst at the same time arguing that the English courts should not interfere with the Indian courts, which he would like to replace the English courts as the supervisory jurisdiction to which the parties have contractually agreed.

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39. In my judgment therefore there is nothing in the European Court decision in Front Comor which impacts upon the law as developed in this country in relation to anti-suit injunctions which prevent parties from pursuing proceedings in the courts of a country which is not a Member State of the European Community, whether on the basis of an exclusive jurisdiction clause, or an agreement to arbitrate (in accordance with the decision in the Angelic Grace [1995] 1 LLR 87) or the agreement of the parties to the supervisory powers of this court by agreeing London as the seat of the arbitration (in accordance with the decision in C v D).

Hat tip: Hew Dundas, Jacob van de Velden

BIICL Seminar on West Tankers

The British Institute for International & Comparative Law are hosting a seminar on Tuesday 12th May (17.30-19.30) entitled *Enforcing Arbitration Agreements: West Tankers – Where are we? Where do we go from here?* Here's the synopsis:

> *The February 2009 West Tankers ruling of the European Court of Justice has the unintended consequence of disrupting the flow of arbitrators' powers. The precise extent to which these are affected remains unclear, however. In its ruling, the Court stated:*
>
> ***"It is incompatible with Council Regulation (EC) No 44/2001 … for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary***

to an arbitration agreement."

Following this ruling essentially two questions arise: "Where are we?" and "Where do we go from here?". The former question involves an assessment of West Tankers' immediate implications. The second turns on an emerging consensus, encompassing comments from at least Germany, France and the United Kingdom, that legislative change is needed to attend to the unsatisfactory state of the law in this context. The Heidelberg Report 2007 on the Brussels I Regulation proposes amendments bringing proceedings ancillary to arbitration within the Regulation's scope, and to confer exclusive jurisdiction on the courts of the state of the arbitration. Should this proposal be supported?

The Institute has convened leading practitioners and academics, including one of the authors of the Heidelberg Report, to rise to the challenge of answering these questions. There will be ample occasion for discussion, so those attending are encouraged to share their thoughts and ideas.

2 CPD hours may be claimed by both solicitors and barristers through attendance at this event.

Chair: The Hon Sir Anthony Colman, Essex Court Chambers

Speakers:
Alex Layton QC, 20 Essex Street; Chairman of the Board of Trustees, British Institute of International and Comparative Law
Professor Adrian Briggs, Oxford University
Professor Julian Lew QC, Head of the School of International Arbitration (Queen Mary), 20 Essex Street
Professor Thomas Pfeiffer, Heidelberg University; co-author of the Heidelberg Report 2007
Adam Johnson, Herbert Smith
Professor Jonathan Harris, Birmingham University and Brick Court Chambers

Details on prices and booking can be found on the BIICL website.

If you want to do your homework before the event, you might want to visit (or revisit) our West Tankers symposium, not least because four of the speakers at the BIICL seminar were also involved in our symposium.

Layton on West Tankers

Alexander Layton QC is a barrister in practice at 20 Essex Street, London. He is a specialist in private international law and arbitration, and joint general editor of European Civil Practice. Although he acted for the UK government at the oral hearing in West Tankers, the views below are purely personal.

Much of what I would have said on this judgment has already been said, more cogently, by others. My comments will therefore be brief.

First, it seems that the ECJ may well have applied one law correctly, namely the law of unintended consequences. In its use of simple – or at least sparse – reasoning to resolve a complex problem is reminiscent of what Alex Tabarrock has written in a different context:

> *The law of unintended consequences is what happens when a simple system tries to regulate a complex system. The political system is simple. It operates with limited information (rational ignorance), short time horizons, low feedback, and poor and misaligned incentives. Society in contrast is a complex, evolving, high-feedback, incentive-driven system. When a simple system tries to regulate a complex system you often get unintended consequences.*

The unintended consequences here are, surely, the disruption which may flow to the exercise of arbitrators' powers. As Andrew Dickinson and Jonathan Harris have already pointed out, the extent to which these are affected by this decision is unclear.

The Court has held that court proceedings based on the arbitration agreement are outside the scope of the Regulation (paragraph 23) and so its decision that such proceedings contravene European law is based not on an application of the Regulation, but on that part of the *acquis communautaire* which is based on the doctrine of *effet utile.* (It is striking how thinly reasoned this part of the judgment – paragraph 24 – is; there is no reference to any earlier decision on the point at all). While we may agree that Regulation 44/2001 does not affect the jurisdiction

of arbitrators, can the same be said of wider European law? Very possibly not. If you take this decision alongside the *Eco-Swiss* decision, you are left in great doubt whether it is contrary to EU law for arbitrators even to rule on the validity of an arbitration agreement, let alone award damages for its breach. The use of lax language by the Court in paragraph 27 ("it is … exclusively for [the court seised of the underlying dispute] to rule on that objection" – i.e., an objection as to the existence of an arbitration agreement) is particularly regrettable.

An extra layer of confusion arises in respect of arbitrators' powers to award anti-suit injunctions. The basis on which this specific procedural device was outlawed in *Turner*, and which forms a subsidiary basis for outlawing the anti-suit injunction in this case (paragraph 30) is that it is contrary to the doctrine of mutual trust. But, as *Gasser* (paragraph 72, where the doctrine was first identified in the Court's jurisprudence) makes clear, that doctrine is specifically based on the structure and principles underlying the Brussels I Regulation, namely the existence of uniform jurisdictional rules for *courts* and the largely automatic recognition and enforcement which is the corollary of those rules. The uniformity of jurisdictional rules does not apply to arbitrators and such rules for the recognition and enforcement of awards as there may be arise not under European law at all, but under the New York Convention and under the varying domestic laws of Member States. How then can the doctrine of mutual trust apply to preclude arbitrators from granting anti-suit injunctions?

The second and much briefer comment I wish to make is to echo the sense of disappointment that the European Court has again failed to rise to the occasion in grappling with complex issues of private law and procedure. In a Community of 27 Member States, the Court cannot perhaps be expected to provide reasoning which shows sensitivity to the complexities which arise from the panoply of national legal systems and international norms; but it can surely be expected to grapple with the issues which arise from its own previous case law. I have already referred to *Eco-Swiss* as an example. In the present case, it is surprising that the Court founds its decision on the scope of Article 1(2)(d) on paragraph 35 of the Kerameus and Evrigenis Report, without acknowledging that that paragraph has been the subject of scrutiny and strong adverse comment by Advocate General Darmon in his Opinion in *Marc Rich* (paragraphs 43 to 48).

Thirdly, a comment directed to the future. There appears to be a welcome consensus emerging, encompassing commentators from at least Germany, France

and the United Kingdom, that legislative change is needed to grapple with the unsatisfactory state of the law in this context. The suggestion in the Heidelberg Report, to which Professor Hess refers, that Brussels I be amended so as to bring proceedings ancillary to arbitration within it, and to confer exclusive jurisdiction on the courts of the state of the arbitration deserves support (as do similar proposals relating to choice of forum clauses).

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.

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.