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.

Harris on West Tankers

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I have little to add about the judgment itself. Whatever one's views on the outcome of the case, it is difficult to conceive of a more thinly reasoned or incomplete judgment. It fails sufficiently to examine the central question as to the meaning and scope of the arbitration exclusion. In this respect, the question arises as to whether the validity of the arbitration clause can be so easily dismissed as a preliminary issue in foreign litigation that does not alter the civil and commercial character of those foreign proceedings. Key cases such as *Marc Rich* and *Hoffmann* are glossed over; and one is left not altogether sure why the argument that the proceedings in Syracuse fall partly within and partly outside the Regulation has been rejected.

It is no surprise that the ECJ found its answer primarily from within the text of the Regulation and was essentially uninfluenced by arguments about the practical impact of its decision. The appeal by Lord Hoffmann for the ECJ to consider the commercial realities of the situation was unlikely to carry the day. In the event, although this is alluded to by the ECJ in setting out the question referred, it receives no real consideration in the ECJ's reasoning. The nearest the ECJ gets to this is in expressing its concern that:

> *a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.*

This is not very convincing. The interests of a party who might wish to commence

proceedings in a non-designated State, perhaps in bad faith, are arguably given greater weight than the interests of the party who alleges that the agreement is binding and seeks effectively to protect his/her legal rights. One might think that the parties will normally have had a mutual expectation that any issue as to the validity of the arbitration clause would be determined by the courts of the state to which the arbitration agreement putatively points. The reference to Article II(3) of the New York Convention also fails to convince. The Convention unsurprisingly states that a court is expected to give up jurisdiction if it finds there to be a binding arbitration clause. But it does not obviously conclusively address the matter at hand, which is the question of *which courts* should determine the validity of the arbitration clause.

No doubt, the arbitration could proceed with or without an anti-suit injunction and the defendant to the foreign proceedings need not wait for the courts of that Member State to interpret the arbitration clause. Even so, the existence of parallel court and arbitral proceedings is best avoided; especially if there is a risk of them leading to irreconcilable decisions and producing a great deal of litigation for a rather inconclusive outcome. When thinking about the aftermath of *West Tankers*, perhaps we might usefully turn our attention to the question of the impact of arbitration proceedings on the foreign court proceedings.

Suppose that proceedings are commenced by X against Y in the courts of another Member State in alleged breach of an English arbitration clause. What would happen if Y nonetheless commenced or proceeded with an arbitration in London and were to obtain a declaration that the arbitration clause was binding; and/or a decision in its favour that it was not liable on the merits. How might the courts of the foreign Member State seised react? The applicant has obtained an award from arbitrators in a state which is party to the New York Convention. The Brussels I Regulation does not contain a provision permitting, still less requiring, the courts to stay their proceedings in the face of an arbitration award. Nor does it state that the court’s judgment should not be recognised or enforced in other Member States. But Article 71 of the Regulation makes it clear that the Regulation gives way to existing international Conventions to which Member States are parties.

Again, could Y seek damagers against X in the arbitration for the costs incurred in respect of the foreign proceedings; and in respect of any judgment which that court ultimately delivers in favour of X? Whatever the strengths and weaknesses of the arguments as to the competence of the English courts to award such

damages, it is less easy to see how the Regulation could control the award of such damages by arbitrators.

So, the question in essence is this: what will be the effects of proceeding with the arbitration whilst the foreign court decides if it has jurisdiction or not; and what are the implications for the foreign court proceedings, especially if they lead to a conflicting decision on the validity of the arbitration clause; and also, perhaps, to a conflicting decision on the merits of the dispute?

Dickinson on West Tankers: Another One Bites the Dust

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The views expressed below are the author's personal, initial reaction to the judgment.

> ***Scaramanga: "A duel between titans, my golden gun against your Walther PPK. Each of us with a 50-50 chance."***
>
> ***James Bond: "Six bullets to your one?"***
>
> ***Scaramanga: "I only need one."***
>
> ***(from The Man with the Golden Gun (1974))***

Reading the decision of the Court of Justice in the *West Tankers* case is a little like watching a sub-standard James Bond Movie (*The World is Not Enough*, perhaps). You know the outcome, but do not know exactly how 007 will overcome the latest plan for global domination. You check your watch, hoping that he will get on with it before last orders at the bar. So it is here, but in reverse. The common law deploys its latest weapon to defeat a perceived attempt to pervert the course of justice, but it is defeated by the greater might of European Community law. The only reason to read to the end is to see exactly how the deed is done and the corpse disposed of.

The Court's reasoning is brief, more than can be said of some of Mr Bond's adventures. It is, nevertheless, unconvincing.

The Court concludes, it is submitted correctly, that the subject matter of the English proceedings falls outside the scope of the Brussels I Regulation (para 23) whereas the (principal) subject matter of the Italian proceedings falls within scope (para 26). The second of these findings, in accordance with the reasoning in the *Van Uden* case, would arguably have been sufficient in itself to dispose of the question presented to the Court in *West Tankers*, having regard to the very broad way in which the injunction had been framed by the English Court (preventing the taking of any steps in connection with the Italian case).

No doubt mindful of a more targeted weapon being produced by the enemy (perhaps an injunction to restrain a party from making any application or submission before the Italian court contesting the validity or applicability of the arbitration agreement) the Court felt it necessary to supplement its reasoning with the propositions that (a) a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity also comes within the scope of application (para 26), (b) under the Brussels I Regulation, this preliminary issue is exclusively a matter for the court (here, the Italian court) seised of the proceedings in which the issue is raised (para 27), and (c) the anti-suit injunction constitutes an unwarranted interference in the Italian court's decision making process (paras 28-30).

It cannot be denied that an anti-suit injunction, whether in the wider or narrower form suggested above, indirectly interferes with the foreign proceedings to which it refers. For some, that is enough to condemn it as an unwarranted interference in the affairs of a foreign sovereign State. It may be questioned, however,

whether an injunction in the narrower form woud interfere in any way with the effectiveness of Community law, in the form of the Brussels I Regulation. That, of course, is the only question that the Court could address.

We can accept, for the sake of argument at least, that (putative) competence under the Regulation's rules of jurisdiction carries with it competence to determine any question of fact or law bearing on the application of those rules. The Court, drawing succour from a passage in the Evrigenis and Kerameus Report, no less, concludes that questions concerning the validity or application of an arbitration agreement relate to the scope of application of the Regulation and, therefore, fall within this category (paras 26 and 29).

The conclusion seems, however, open to several objections. First, the Regulation excludes "arbitration" (Art 1(2)(d)). The Court accepts that proceedings founded on an arbitration agreement, and having therefore as their subject matter the validity and application of an arbitration agreement, fall outside the the Regulation's scope (para 23). The Court fails, however, to explain why a preliminary issue of precisely the same character is brought within scope. As the Court recognised in its decision in *Hoffmann v Krieg*, a decision may relate partly to matters within scope and partly to matters outside – the fact that the former may be said to constitute the principal subject matter of proceedings does not (or at least has never before been understood by the author to) require a decision, often a separate decision, on the latter in the same case to be recognised under the Regulation. If the Court was intending to develop a theory of parasitic jurisdiction/recognition in this context (cf. Schlosser Report, para 64; *Van Uden*, para 32), it should have made this clear and explained its reasoning in greater detail.

Secondly, the Court's view that the right to apply the Regulation includes the right to determine its scope, fails to lift its argument to a higher level. As the decision in *Van Uden* makes clear, the assessment whether the subject matter of proceedings falls within the scope of the Regulation (and outside the scope of the arbitration exception in Art 1(2)(d)) cannot be influenced by the fact that the parties may have chosen arbitration as their method of dispute resolution or that arbitration proceedings have been commenced. Accordingly, the Italian court could determine that the proceedings before it fell outside the arbitration exception and within scope without the need to characterise the preliminary issue, still less to treat that issue as independently or parasitically falling within

the scope of the Regulation.

Thirdly, as the Court admitted (para 33), the Italian court in considering whether to give effect to an arbitration agreement between the parties is not applying a rule in the Brussels I Regulation but, instead, is applying the rules contained in the New York Convention, as a convention which (to the extent that its effect is not excluded from scope by Art 1(2)(d)) takes priority over the Regulation's rules by virtue of Art 71(1) of the Regulation. On this view, the anti-suit injunction (at least in the narrower form suggested above) interferes only with the proper functioning of that Convention rather than with the Regulation and does not fall foul of the EC Treaty. Even if, as the Court appeared to assume, it is contrary to the letter or spirit of the New York Convention to preclude a Contracting State court from carrying out its functions under Art II(3), that question was not one that the ECJ had power to determine. Without the New York Convention, there might be scope for argument that the Regulation's rules of jurisdiction are somehow modified by an arbitration agreement (cf. *Van Uden*, para 24), Where the New York Convention applies, the Regulation's rules provide merely the preliminary course and do not apply at all to determine the validity or effect of the arbitration agreement.

Returning to the Court's first conclusion, that the English proceedings to obtain an injunction fell outside the Regulation's scope, it may be thought to follow that, equally, proceedings in a Member State court for a declaration that the parties have entered into a valid arbitration agreement or for damages following breach of an arbitration agreement would also fall outside scope, having as their subject matter the arbitration agreement (whether it is seen as having a contractual or quasi-public law effect). On that view, judgments in such proceedings would not be recognised or enforceable under the Regulation but, in view of this characteristic, might also be argued not to interfere directly or indirectly with the "right" of another Member State court to determine its own jurisdiction under the Regulation. These questions must be faced by the Englsh courts and perhaps even the ECJ in years to come. Further, the possibility would appear to remain open of taking steps (by default processes, if necessary, as occurred in the *West Tankers* case) to establish an arbitration tribunal for the purpose not only of disposing swiftly of the substantive dispute between the parties in such a way as to create an award enforceable under the New York Convention, but of obtaining an enforceable award for an anti-suit injunction or damages for breach of the

arbitration agreement. Although arbitrators sitting in Member States are bound, to a certain extent, to apply EC law (Case C-126/97, *Eco Swiss*), an interesting debate may emerge as to whether they are obliged to comply with the principle of "mutual trust" embodied in the Brussels I Regulation.

Finally, if some satisfaction is to be gained from the *West Tankers* judgment, it is that arbitration and jurisdiction agreements have been restored to greater parity in terms of securing their effectiveness within the Community legal order. One curious side-product of the ECJ's decisions in *Gasser* and *Turner* was that the potential availability of an anti-suit injunction was thought to provide a reason for choosing arbitration instead of judicial resolution. *West Tankers* has once again levelled the playing field in this respect, at least within the legal systems of the Member States. The unsatisfactory consequences of *Gasser* and the risk of a flight to dispute resolution outside the European Community, by whatever method, must be addressed head on in the forthcoming review of the Brussels I Regulation.

Hess on West Tankers

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1. The outcome of the ECJ's judgment is not surprising and, from the point of view of continental procedural law, the findings are completely in line with the framework of the Brussels I Regulation. As the Italian court in Syracuse has been seised under the Regulation, it is for this court to decide on its jurisdiction (Article 5 no 3 Brussels I) and (this is only the second issue) on the scope and the validity of the arbitration clause (Article II NYC).

Despite of some heated criticism which has been brought forward against the conclusions of AG *Kokott*, the Court comprehensively followed her reasoning. The

line of arguments developed in para. 24 of the judgment seems to be similar to the arguments of the ECJ in the Lugano Opinion: The Grand Chamber relies on the *effet utile* of the Regulation, its "objective of unification of the rules of conflicts of jurisdiction in civil and commercial matters and the free movement of decisions in those matters". Mutual trust is only used as an additional argument, but much later (para. 30). In my view the judgment demonstrates that the ECJ is "defending" the proper operation of the Regulation and, finally, the priority of Community law. West Tankers is, as Lugano, a political decision.

2. However, as the AG clearly stated, the present situation under the Brussels I Regulation is not satisfactory. With all due respect, I disagree with *Adrian Briggs* that the issues raised by the House of Lords and the ECJ are not important. After West Tankers, the issue should be addressed in the context of the expected revision of the Brussels I Regulation. In this respect I would like to come back to the proposals of the Heidelberg Report:

The Heidelberg Report on the Application of Brussels I proposed a different mechanism for the protection of arbitration agreements. According to this proposal, a new Article 27 A shall address the situation of threatening parallel arbitral and litigious proceedings, especially when a party institutes proceedings in a domestic court of a Member State instead of enforcing the arbitration agreement. Article 27 A should read as follows: *"A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that is designated as place of arbitration in the arbitration agreement is seised for declaratory relief in respect to the existence, the validity, and/or scope of that arbitration agreement".*

This provision aims to concentrate all proceedings on the validity of the arbitration agreement in the domestic courts of the Member State where the arbitration takes place. In this respect, the Heidelberg Report proposes to insert a new Article 22 no 6 to the Brussels I_Regulation. The new articles shall establish an exclusive competence for proceedings challenging the validity of the arbitration agreement. These proceedings shall exclusively take place in the Member State in which the arbitration takes place.

Article 27 A shall operate as follows: Imagine that a civil court in Member State A is called upon by a party contesting the validity of an arbitration clause providing

for arbitration in Member State B. Under Article 27 A Brussels I, the civil court in Member State A shall stay its proceedings until the matter has been referred to the competent court in Member State B. The court in Member State B then decides exclusively on the validity of the arbitration clause (see Article 72 of the English Arbitration Act). In addition, the civil court of Member State A, when staying its proceedings, may set a time limit for the plaintiff (who is contesting the validity of the arbitration clause) to access the courts in Member State B where the arbitration shall take place. Still, the other party may seek redress in the courts of Member State B to get a judgment on the validity of the arbitration clause. If the plaintiff does not institute arbitral proceedings in the "designated" Member State B in a timely manner, the civil court of Member State A will dismiss its proceedings. This example illustrates the proposal's intention to give full effect to arbitration agreements and to achieve uniform results in all EU Member States.

3. Besides, I fully agree with *Horatia Muir Watt's* recent remark that the principle of mutual trust does not automatically imply the (absolute) priority of the court first seised in parallel litigation. European procedural law also provides for a (untechnical) hierarchy between the courts of different Member States (striking examples are found in Articles 11 and 20 of the Brussels II_*bis* Regulation). To my opinion, the Brussels I Regulation should also adopt a hierarchical system giving priority to the court agreed upon in choice of court agreements and to the courts of the place of arbitration in arbitration proceedings.

I am well aware that the proposal of the Heidelberg Report to delete the arbitration exception of Article 1 (2)(d) has been criticised by many stakeholders of the "arbitration world". However, after West Tankers/Adriatica the legal doctrine should elaborate a more balanced solution in the framework of Brussels I.

4. Finally, some authors raised the question whether the findings of the ECJ also relate to third states. I don't believe that the Grand Chamber addressed this constellation. However, as the judgment refers to general principles of EC law (paras. 24 and 30), their application in relation to third states seems to be unlikely.

West Tankers: Online Symposium

The European Court of Justice has delivered its judgment in the *West Tankers* case.

This decision was much awaited. It raises critical issues, in particular in respect of the actual scope of European civil procedure, the consequences of the principle of mutual trust and the tolerance of the European Union with regard common law procedural devices.

In the days to come, *Conflict of Laws* will organize an online symposium on this case. Leading scholars from a variety of European jurisdictions will share with us their first reaction to the judgment. We hope that this will be an occasion for debate, and we invite all interested readers to contribute by using the comment section which will be available after each post, or by contacting us. Contributions to the symposium from those leading scholars will be listed here, so that you can see at a glance all of the debates on *West Tankers*.

Contributions to the Symposium:

- **AG Opinion in *West Tankers***
- **ECJ Judgment in *West Tankers***
- **Hess on *West Tankers***
- **Dickinson on *West Tankers*: Another One Bites the Dust**
- **Harris on *West Tankers***

- **Pfeiffer on *West Tankers***
- **Kessedjian on *West Tankers***
- **Arenas on *West Tankers***
- **Layton on *West Tankers***

ECJ Judgment in West Tankers

The European Court of Justice delivered its judgment in *West Tankers* this morning (we had previously reported on the conclusions of Advocate General Kokott in this case).

The issue before the court was, in the words of the court,

> *19. … essentially, whether it is incompatible with Regulation 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, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereof*

The ECJ answers that it is indeed incompatible:

> *It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 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.*

In order to reach this conclusion, the Court offers a reasoning in two steps. First, the Regulation applies. Second, the Regulation excludes anti-suit injunctions.

Scope of Regulation 44/2001

This was arguably the key issue. The Regulation excludes arbitration from its scope. Yet, the Court finds that the Regulation still controls:

> *In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings (Rich, paragraph 26). More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (Van Uden, paragraph 33).*
>
> *Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001.*
>
> *However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.*
> *It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the anti-suit injunction on those proceedings.*
>
> *In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the*

> *Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) ('the Brussels Convention'), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.*

Regulation 44/2001 excludes anti-suit injunctions

Once the Regulation was found applicable, it could certainly be expected, in the light of *Turner*, that the Court would not allow anti-suit injunctions:

> *It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.*

> *Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.*

> *It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see, to that effect, Gasser, paragraphs 48 and 49). It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of*

a court of a Member State to be reviewed by a court in another Member State (Case C?351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 24, and Turner, paragraph 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction (OverseasUnion Insurance and Others, paragraph 23, and Gasser, paragraph 48).

Further, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, 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 Regulation No 44/2001 is based (see, to that effect, Turner, paragraph 24).
Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.

Consequently, an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001.

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.*
>
> *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.*
>
> *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.

West Tankers, and Worldwide Freezing Orders

There are two casenotes in the new issue of the *Cambridge Law Journal* worthy of mention. Firstly, Richard Fentiman (*Cambridge*) has written on "Arbitration and the Brussels Regulation" – discussing the recent House of Lords decision (and reference to the ECJ) in *West Tankers Inc v. RAS – Ras Riunione di Sicurata SpA* [2007] UKHL 4. The introduction reads:

> *WHEN, if at all, may English courts restrain claimants from suing in other Member States? The European Court of Justice has declared such relief to be inconsistent with the principle of mutual trust embodied in Regulation 44/2201, governing jurisdiction in national courts: Case C-281/02 Turner v. Grovit [2004] ECR I – 3565. But when does the Regulation engage, so that the ban imposed in Turner applies? Perhaps it does so whenever the foreign proceedings are within the Regulation's material scope. If so, civil proceedings in the courts of Member States can never be restrained. Alternatively, perhaps the Regulation only engages when it governs jurisdiction in both the foreign and the English proceedings. Judicial proceedings in other Member States could thus be restrained, provided relief is sought in English proceedings beyond the Regulation's reach.*

Louise Merrett (*Cambridge*) has written a note on "Worldwide Freezing Orders in Europe" (C.L.J. 2007, 66(3), 495-498). Here's the abstract:

> *Examines the Court of Appeal decision in Banco Nacional de Comercio Exterior SNC v Empresa de Telecomunicationes de Cuba SA on whether the court had jurisdiction under Regulation 44/2001 Art.47 (Brussels Regulation) or the Civil Jurisdiction and Judgments Act 1982 s.25 to grant a worldwide freezing order over the defendant's assets where it was not connected to, nor resident in, England and the court had no jurisdiction over the subject matter of the proceedings.*

Available to subscribers (both online and in print).

West Tankers Case: Articles by Max Planck Institute's Scholars

Following the **reference to the ECJ of the *West Tankers* case by the House of Lords**, first comments on the subject-matter of the preliminary question are provided by three articles written by scholars affiliated to the Max Planck Institute for Comparative and International Private Law (Hamburg).

Here's a presentation of the articles, from the Institute's website:

> *On the occasion of the House of Lords referral, Institute researchers have renewed their engagement with the question of the reconciliability of the English anti-suit injunction in support of arbitration agreements with European procedural law. Their opinions conclude that the ECJ in continuance of the judicature it has thus far developed is also likely to declare that anti-suit injunctions supporting the implementation of arbitration agreements are incompatible with EC Regulation 44/2001 and other fundamental European laws.*
>
> *As such, **Martin Illmer** and **Ingrid Naumann** explain in their article, appearing in Internationales Handelsrecht 2007, 64, that the rationale in the ECJ Turner decision is equally applicable to the legal context of arbitration agreements and that the economic considerations set forward by the House of Lords represent unjustified protectionism in favour of London arbitral settings.*
>
> *In a continuation of their earlier published work on anti-suit injunctions, **Anatol Dutta** and **Christian Heinze** consider the English legal regulations and, moreover, comprehensively examine the legality of anti-suit injunctions in protection of arbitration agreements from a European legal perspective in light of EC Regulation 44/2001. In their article "Anti-suit injunctions zum Schutz von Schiedsvereinbarungen", Recht der Internationalen Wirtschaft 2007, 411, they*

similarly argue for applying the principles of the ECJ decision in Turner and thereby conclude a breach of EC Regulation 44/2001.

Finally, in "The Impact of EU Law on Anti-suit Injunctions in aid of English Arbitration Proceedings", Civil Justice Quarterly 2007, 358, ***Ben Steinbrück*** *adopts the specific perspective of arbitration law and reasons why the decision as to the effects and scope of English arbitration agreements may not permissibly be monopolised by English courts.*

BIICL Seminar on West Tankers Case

Here's a seminar announcement from the British Institute of International & Comparative Law:

As you will undoubtedly know, the House of Lords has referred the case of *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA & Others [2007] UKHL 4* to the European Court of Justice for a preliminary ruling.

The question raised is **whether Regulation 44/2001 permits anti-suit injunctions to protect an arbitration agreement**. On **11 July (5-7pm)**, the Institute has planned a seminar where the case and its potential implications will be discussed.

Chair: – **Rt Hon Lord Justice Lawrence Collins**.

Speakers:

– **Audley Sheppard**, Clifford Chance LLP

– **Clare Ambrose**, 20 Essex Street

– **Dr Christian Heinze**, Max Planck Institute for Comparative and International Private Law

Participants can download a discussion note. The note introduces the case and further provides an overview of relevant findings of the 2007 Report of the Heidelberg Institute for Private International Law prepared for the European Commission on the application of Regulation 44/2001.

The event will be followed by a reception for all those attending. To register, please visit the Institute's website by clicking here.