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ECJ Judgement on Deko-Marty Belgium, Case C-330/07

Many thanks to Professor Laura Carballo (Santiago de Compostela University, Spain), who has asked me to upload this brief comment on the ECJ judgment following *Veronika Gaertner*'s *post* ECJ: Judgment on International Jurisdiction in Respect of Actions to set a Transaction aside by Virtue of Insolvency.

By Judgement of 12th of February 2009, the ECJ has addressed the issue of international jurisdiction for claims "which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings". These terms are contained in Recital 6 of Regulation (EC) Nr. 1346/2000, on insolvency proceedings; its Article 25.1 repeats the same definition, stating that judgments delivered in such kind of claims are to be recognized according to Articles 31 to 51, with the exception of Article 34(2), of the Brussels I Convention (now Articles 32 to 52, with the exception of Article 45.1, of the Brussels I Regulation). But Regulation (EC) Nr. 1346/2000 does not say anything about international jurisdiction rules for such claims, i.e. about a rule on *vis attractiva concursus*.

The issue was directly addressed by 1970 and 1980 Drafts of an European instrument on insolvency proceedings, both setting out which claims closely connected with insolvency proceedings must be concentrated before the *forum concursus*. Because of these statements, the silence of Regulation (EC) Nr.

1346/2000 was understood as an acknowledgment of the application of national jurisdiction rules. But this resulted to be a dangerous interpretation, because, as mentioned, Article 25 of this Regulation grants a privileged recognition system, without examination on the grounds of international jurisdiction; therefore, Member States should enforce all judgements, even when delivered by an exorbitant forum. Besides, application of national jurisdiction rules gives rise to negative conflicts of jurisdiction, because of the many understandings of the *vis attractiva concursus* rule by Member States. This is the outcome in the case underlying the recent EJC Judgement: On 14 March 2002, Frick Teppichboden Supermärkte GmbH, which has its seat in Germany, transferred EUR 50 000 to Deko Marty Belgium NV, a company with its seat in Belgium. Frick made an application for opening an insolvency proceeding the 15th March of 2002 and the named liquidator brought an action to set the transaction aside. He tried it first in Belgium, but Belgian Law establishes a *vis attractiva concursus* for avoidance proceedings and sent the matter to Germany. On the contrary, Germany places this action by the courts of the defendant's domicile, in this case Belgium. In the end, the German Bundesgerichtshof posed the two following questions to the ECJ, framing the issue in terms of European Regulations' scope of application:

"(1) Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation [No 1346/2000] in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?

(2) If the first question is to be answered in the negative:

Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation [No 44/2001]?"

The EJC gives a positive answer to the first question:

"Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State".

The EJC's answer is a logic one, given the fact that the definition stated by Recital 6 and Article 25.1,II of Regulation (EC) Nr. 1346/2000 comes from Case 133/78 Gourdain [1979] ECR 733, paragraph 4, a judgement delivered on the interpretation of Article 1(2)(b) of the Brussels I Convention, where it was decided that the so defined claims do not fall within the scope of application of the Convention, now Brussels I Regulation, in the case a French action against the de facto manager of an insolvent company. Therefore, this judgement is not a surprise, but a step forward in bringing juridical security to insolvency proceedings in the European Union. As a result of this answer, the question of which claims "are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings" and, therefore, are to be located before the courts where insolvency proceedings are conducted, is now open and should give rise to an autonomous interpretation by the ECJ. *Gourdain* and *Deko Marty Belgium* give just some clues, but the issue is far from being closed. For now, this judgement makes it clear that avoidance proceedings are one of them, but it is going to be more difficult to decide other claims, such as liability claims against managers and administrators, or claims arising from the impact of insolvency in running contracts.

ECJ: Judgment on International Jurisdiction in Respect of Actions to set a Transaction aside by Virtue of Insolvency

On 12th February, the ECJ delivered its judgment in case C-339/07 (*Christopher Seagon in his capacity as liquidator in respect of the assets of Frick Teppichboden Supermärkte GmbH v Deko Marty Belgium N.V.*).

The questions referred to the ECJ concern the international jurisdiction of courts in respect of actions to set a transaction aside by virtue of insolvency. Thus, the

case raises the question of the delimitation of Regulation (EC) No. 1346/2000 (Insolvency Regulation) and Regulation (EC) No. 44/2001 (Brussels I Regulation) or – more precisely – the question of whether Art. 3 (1) Insolvency Regulation covers actions to set a transaction aside in the context of insolvency, although they are not mentioned explicitly.

See for a short summary of the background of the case our previous post on the AG's opinion which can be found here and our post on the referring decision which can be found here.

The German Federal Court of Justice (*BGH)* had referred the **following questions** to the ECJ for a preliminary ruling:

> *(1) Do the courts of the Member State within the territory of which insolvency proceedings regarding the debtor's assets have been opened have international jurisdiction under Regulation [No 1346/2000] in respect of an action in the context of the insolvency to set a transaction aside that is brought against a person whose registered office is in another Member State?*
>
> *(2) If the first question is to be answered in the negative:*
>
> *Does an action in the context of the insolvency to set a transaction aside fall within Article 1(2)(b) of Regulation [No 44/2001]?*

Now, the **ECJ** followed the opinion given by *Advocate General Ruiz-Jarabo Colomer* and held in its **judgment** that

> *Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set a transaction aside by virtue of insolvency that is brought against a person whose registered office is in another Member State.*

In its reasoning, the Court referred to its case law on the Brussels Convention (*Gourdain*) where the Court has held that an action similar to that at issue in the main proceedings is related to bankruptcy or winding-up if it derives directly from the bankruptcy or winding-up and that such an action does not fall within the

scope of the Convention (para. 19). The Court emphasises that it is exactly this criterion – i.e. the strong connection to insolvency proceedings – which is used by Recital 6 of the Insolvency Regulation to delimit its purpose (para. 20). According to Recital 6 of the Insolvency Regulation "the Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings."

The Court concludes that "concentrating all the actions directly related to the insolvency of an undertaking before the courts of a Member State with jurisdiction to open the insolvency proceedings" is "consistent with the objective of improving the effectiveness and efficiency of insolvency proccedings having cross-border effects […]." (para. 22)

This result is supported by the Court with reference to Recital 4 of the Insolvency Regulation according to which forum shopping shall be avoided and further by means of a conclusion drawn from Art. 25 Insolvency Regulation: According to Art. 25 (1) Insolvency Regulation, judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Art. 16 Insolvency Regulation and which concern the course and closure of insolvency proceedings – and thus a court with jurisdiction under Art. 3 (1) Insolvency Regulation – have to be recognised with no further formalities. According to the second subparagraph of Art. 25 (1) Insolvency Regulation, the first subparagraph also applies to judgments deriving directly from the insolvency proceedings and which are closely linked to them. This means – in the Court's words – that this "provision allows the possibility for courts of a Member State within the territory of which insolvency proceedings have been opened, pursuant to Article 3 (1) of that regulation, also to hear and determine an action of the type at issue in the main proceedings." (para. 26)

Service of Federal Court documents outside Australia

Practitioners in Australia should be aware that, pursuant to Practice Note No 13 (4 September 2008), the Federal Court requires a party applying for leave to serve originating process or other documents outside Australia to support the application with evidence of information obtained from the Private International Law Section of the Commonwealth Attorney-General's Department in relation to the appropriate method of transmitting documents for service, including certain specified information. See the Practice Note for further details.

Layton on West Tankers

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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.

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.