Harris on West Tankers

(*Jonathan Harris is the Professor of International Commercial Law at the University of Birmingham, and a barrister at Brick Court Chambers. He is one of the authors of Dicey, Morris & Collins: The Conflict of Laws, and is co-editor of the Journal of Private International Law.)*

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

Andrew Dickinson is a Solicitor Advocate, Consultant to Clifford Chance LLP and Visiting Fellow in Private International Law at the British Institute of International & Comparative Law. His commentary on the Rome II Regulation is published by Oxford University Press.

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.

III International Seminar on Private International Law

The III International Seminar on Private International Law, coordinated by Professors José Carlos Fernández Rozas and Pedro de Miguel Asensio, took place at the Faculty of Law, Universidad Complutense de Madrid, on the 5th and 6th February. The Seminar, entitled "Self-regulation and unification of international contract law", was divided into five sessions dedicated to offering a different perspective on the leitmotif of the encounter. Each session involved a general introduction, followed by communications from researchers and professionals of law. The seminar was rich in contents, and also a good opportunity for the meeting and discussion of academics and lawyers from different parts of Spain, as well as from European and Latin American countries.

As was only to be expected, the recent Rome I Regulation was the main topic of the first session. The general introduction was given by the Spanish representative in the negotiations, Professor Garcimartín Alferez, who highlighted the main features of the text and explained the reasons that led to them. His intervention was followed by five papers on specific aspects of the new instrument. First, Professor Asin Cabrera, from La Laguna, focused on International maritime labour contracts, and in particular on the difficulties in determining the law applicable to them with the criteria laid down by art. 8 of the Rome I Regulation. Professor Gardeñes Santiago, from Barcelona (Universidad Autonoma), also referred to Art. 8 of the Regulation, this time from a general point of view, regretting the missed opportunity to change the orientation of the article: that is, correcting its logic of proximity in order to transform it into a rule with substantive guidance. After him, Rosa Miquel Sala, from Bayreuth, presented art. 7, which incorporates insurance contracts into the Regulation. Alberto Muñoz Fernandez, from the University of Navarra, reflected on legal representation as a phenomenon partially excluded from the Regulation. Finally, Paula Paradela Areán, from Santiago de Compostela, summarized the Spanish courts practice on the Rome Convention throughout its 15 years of life.

The second session, entitled "Substantive Unification and international trade: universal dimension", was held on Thursday afternoon. Professor Sánchez

Lorenzo, from Granada, took charge of the general introduction. He was followed by Professor M.J. Bonell, from La Sapienza (Italy), who focused on the UNIDROIT principles and their possible contribution to a global law of contracts. Professor Garau Juaneda, from the University of Palma de Mallorca, exposed the problems of the retention of title in today's international trade. Professor Espiniella González, from the University of Oviedo, explained the dual role of the place of delivery in international contracts: for the determination of the applicable law, and as a criterion of international jurisdiction. Speaking from his own experience in international arbitration, Alfedro de Jesús O. referred to the arbitrator's role as an agent to promote internacional self-regulation. Professor Otero García, from the ComplutenseUniversity of Madrid, referred to standards in international trade regulation, highlighting the efforts undertaken by stakeholders in their harmonization. Professor Carmen Vaquero from Valladolidtalked about the legal treatment of the delay to comply withobligations. The session ended with the intervention of Professor Boutin, from Panama, with an entertaining account of the history of the freedom of choice of the applicable law in Latin American countries.

The first session on Friday morning dealt with international unification from a European perspective. The general introduction, given by Professor Pedro de Miguel, discussed the need for standardization at the European level in parallel to the UNIDROIT Principles; his presentation brought up points like the scope of standardization and how it could be carried out. Professor Leible, of Bayreuth, addressed the question of whether the common frame of reference can be chosen by the parties to a contract as applicable law: a question that raised an interesting debate between Professor Leible and Professor M.J. Bonell. Marta Requejo Isidro, from Santiago de Compostela, made reference to the relationship between the harmonization of consumer protection through Directives, and art. 3.4 of the Rome I Regulation. Professor D. Pina, from Lisbon, then alluded to the influence of competition rules on private contracts, and finally, Cristian Oró from Barcelona (Universidad Autonoma) reflected on art. 9 of the Rome I Regulation and its implications for competition rules as mandatory provisions.

The fourth session, on the new trends on international contracts, also took place on Friday morning. The general introduction this time was presented by Professor Forner Delaygua (University of Barcelona). He was followed by A. Boggiano, from Buenos Aires, who recalled the traditional dispute centered on the choice of lex

mercatoria as the law applicable to an international contract. Professor Juan José Álvarez Rubio from the University of País Vascospoke about international maritime transport in the Rome I Regulation, indicating the continuity with respect to the Rome Convention, and highlighting divergences from the UN Draft of 2007. Professor Nicolás Zambrana Tévar, from University of Navarra, presented some of the main issues that determine the character of the indirect holding system; the exposition paid special attention to the transaction mechanism of financial instruments. José Heriberto García Peña, from the Instituto Tecnologico deMonterrey, closed the meeting with a paper centered on the difficulties in determining the law applicable to on-line contracts, especially in the absence of choice of law.

The final session, held on Friday afternoon, focused on Latin America, with the attendance of Professor Lionel Perez Nieto, from the UNAM of Mexico, who explained the evolution of international uniform (conventional) law in Latin American countries, differentiating the experience of Mexico and Venezuela from that of the other States. Professor Roberto Davalos, from Havana, made an entertaining description of the cultural and legal features of China, emphasizing those that, from his experience, make it difficult to contract with partners from this Asian country. Hernán Muriel Ciceri, from Sergio Arboleda University in Bogota, offered a comparison between the Rome I Regulation and the Convention of Mexico of 1994. Finally, Iñigo Iruretagoiena Aguirrezabalaga (University of País Vasco) referred to investment arbitration, underlining the characteristics that make it different from the paradigm of contractual arbitration.

The seminar was brought to a close by Professor Ms Elisa Pérez Vera, now a member of the Spanish Constitutional Court. All the presentations and papers will soon be published in the Anuario Español de Derecho Internacional Privado.

Many thanks to Paula Paradela Areán and Vesela Andreeva Andreeva.

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.

Verona Conference on the Rome I

Regulation

The Faculty of Law at Verona are hosting a conference on the Rome I Regulation on 19-20 March 2009. The conference flyer describes its scope thusly:

> *Since it is believed that the proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-laws rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought, it cannot surprise that efforts have been made to draft uniform European conflict-of-laws rules in the area of contract law as well. This conference will examine in detail the result to which these efforts have led, namely the Regulation (EC) No 593/2008 of the European Parliament and the of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).*

The programme itself, along with details on how to register, can be found on the flyer.

Volume 4, Issue 3, Journal of Private International Law

The latest issue of the *Journal of Private International Law* is out, and the contents are:

- **Understanding the English Response to the Europeanisation of Private International Law** by *Jonathan Harris*
- **Licences and Assignments of Intellectual Property Rights Under the Rome I Regulation** by *Paul LC Torremans*
- **Matrimonial Property on Divorce: All Change in Europe** by *CMV Clarkson*

- **A Defence of the Established Approach to the Grave Risk Exception in the Hague Child Abduction Convention** by *Peter Ripley*
- **Cross-Border Recognition and Enforcement of Foreign Judgments in Vietnam** by *Ngoc Bich Du*
- **The Damage of Damages: *Agreements on Jurisdiction and Choice of Law*** by *CJS Knight*

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Respect for Algerian/Moroccan Children's Origin

I am grateful to Horatia Muir Watt to have accepted to react to my post on Adoption of Algerian/Moroccan Children in France.

I certainly agree with Gilles Cuniberti that the prohibition resulting from article 370-3 of the Civil Code certainly lacks nuance. In many cases, it seems clearly contrary to the interests of a child who has been abandoned at birth in her country of origin and is growing up in France with a foster parent under a *kefala*, to refuse to allow the adoption. As Gilles Cuniberti points out, the lower courts are very often ready in such cases to overlook the prohibitive content of the personal law of the child and the *Cour de cassation*'s own approach before the legislative reform in 2001 was to facilitate adoption whenever the natural parents or guardians of the child were fully aware of the radical consequences of an "adoption plénière" under French law, which cuts off all blood-ties between the child and its natural family.

Beyond the policy of discouraging financial transactions between prosperous prospective adoptive parents and young women from poor countries who are ready to conceive and abandon a child for money (a problem not specific to cases involving children from countries where adoption is unknown or prohibited), which is more generally that of the 1993 Hague Convention (under the aegis of which, henceforth, the 2001 channels the flow of inter-country adoptions), the

2001 reform was designed to defer to the refusal of other legal systems to accept adoption, either for religious reasons, or to avoid a generation of children from being drained from developing economies towards Western homes.

This "cultural deference" argument was not based on mere diplomatic considerations – as such it would not have passed muster under the New York Convention, which requires the interest of the child (not of governments) to be paramount – but was formulated in the name of the superior interest of the child. The idea was that the potential trauma linked, in the context of any adoption (whether domestic or inter-country, legal or illegal), to the fact that the child, whose own birth may often already be accompanied by psychologically damaging circumstances, is severed from her natural parents, is likely to be accentuated by ignoring the cultural content of the child's personal status. "Respect for the child's origins" meant respect for the prohibition contained in the child's national law.

This metaphor must of course be taken seriously. Adoption can be psychologically difficult for the child in any circumstances, however loving and understanding the adoptive parents may be, and when the child has been displaced from a very different cultural environment (be it exclusively pre-natal), involving far-reaching linguistic, religious, social and economic changes in her life, the consequences should not be under-estimated. One may wonder however whether the refusal to go against the prohibitive content of the child's personal status is not taking the (very legitimate) desire to "respect the child's origins" much too far. Forcing the consent of the child's mother, which should of course be severely sanctioned and is so under the Hague regime, is one thing; deferring to the content of the child's national law notwithstanding the present interest of the child is clearly another! This is, at any rate, what the French lower courts seems to think. Particularly when, as seems frequent in practice, the authorities of the country of origin allow the child (who may well not have a family to reclaim it) to leave the territory with a guardian by virtue of a *kefala*, knowing full well that the guardian may later ask for an adoption in France.

It is true that the prohibition contained in article 370-3 is only effective when the child is actually born in the country which prohibits adoption. When a foreign child is abandoned at birth in France, she will be given French citizenship and a brand new personal status (article 19 of the Code Civil). But does it make sense to treat a child differently according to the place in which he has the fortune, or the

misfortune, of being abandoned? Of course, if the child grows up in France, she may also accede to French nationality on her majority (article 21-7 of the Civil Code). But is it really worthwhile to maintain the barrier during her childhood? The child will grow up with a status which is not in line with reality. The case-law to which Gilles Cuniberti refers tends to show that the difficulty is very real. It seems to me that an eminently respectable idea such as "respect for the child's origins" should not be used to justify the rigid application of a prohibitive personal status when the child is growing up in France, with the full consent of her natural parent(s), if any, and the tacit approval of the authorities of the country of origin.

No Adoption in France for Algerian/Moroccan Children

Children from Algeria or Morocco may not be adopted in France. This is because under French law, the law of the child controls the issue of whether adoption is possible at all. Thus, children from countries where adoption is unknown are unadoptable. As there is no adoption in Islam, children from countries such as Algeria and Morocco may not be adopted.

The rule is not new. It is the result of a statutory intervention of 2001, which has amended the Civil Code.

Article 370-3 of the Civil Code now provides:

> *The requirements for adoption are governed by the national law of the adopter or, in case of adoption by two spouses, by the law which governs the effects of their union. Adoption however may not be ordered where it is prohibited by the national laws of both spouses.*
>
> *Adoption of a foreign minor may not be ordered where his personal law prohibits that institution, unless the minor was born and resides usually in France.*
>
> *Whatever the applicable law may be, adoption requires the consent of the*

statutory representative of the child. Consent must be free, obtained without any compensation, subsequent to the birth of the child and informed as to the consequences of adoption, specially where it is given for the purpose of a plenary adoption, as to the entire and irrevocable character of the breaking off of the pre-existing parental bond.

The law is crystal clear, but this does not prevent French couples or individuals to try to adopt Algerian or Moroccan children. They find the children in Algeria or Morocco, come back to France, ask a French court to grant the adoption, and … win before lower courts, including courts of appeal! French prosecutors then appeal to the supreme court for private and criminal matters (*Cour de cassation*), which allows the appeal and sets aside the judgment granting the adoption.

Only last summer, the *Cour de cassation* allowed the appeal against a judgment of the court of appeal of Limoges. The adopter was a Franco-Algerian woman who had found the child in Algeria where it had been abandoned at birth. The woman obtained from Algerian authorities the right to look after the child (*kafala*), came back to France and sought a judgment of adoption. She won before the first instance court of Limoges, then before the Court of appeal. In a judgment of July 8, 2008, the *Cour de cassation* held that *kafala* was not an adoption, and that, as the Court of appeal had noticed in its judgment, Algerian law does not allow adoption. The judgment and the adoption were set aside. On October 10, 2006, the *Cour de cassation* had already made the same decision in respect of an Algerian and a Morrocan *kafala*. In each of these cases, the lower courts had resisted and granted the adoption.

So, here are, on the one hand, tons of French couples who cannot have children, are trying to adopt, and cannot find what they are looking for. On the other hand, it is likely that there are quite a few, if not very many, children in Algeria or Morocco who have been abandoned by their parents and would have a much better life with these couples. If these couples could adopt these children, everybody would be happy. This may well appear clearly to French judges all over France, since so many lower courts just look for a way to allow the adoption. And indeed, it might be that the *Cour de cassation* does not disagree, since its case law before the reform was precisely that, as long as the person in charge of the child in the foreign country had actually understood and consented to the change

of parenthood, whether the law of origin of the child allowed was irrelevant.

But now, the law has changed, and the *Cour de cassation* probably thinks that it does not have the legitimacy to challenge the will of the French parliament.

How could the French society end up with a rule which, in most cases, so patently hurts the interests of all the persons involved?