Introduction

When parties agree to an English seat of arbitration they select English procedural law and the supervisory jurisdiction of the English courts. One key reason why London has become a leading centre for international arbitration is that the English courts are widely recognised as supportive of arbitration rather than unduly interventionist. The supportive nature of the courts has been manifested in a number of ways, including their willingness to grant anti-suit injunctions to prevent parties from pursuing litigation proceedings elsewhere in breach of their arbitration agreements (which is something that many other courts will not do).

The European Court of Justice (the ECJ) has now made geographical holes in the scope of the English courts’ (amongst others) supervisory jurisdiction. The ECJ has decided that the courts of states (referred to herein as “Member States”) bound by Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ 12/1 (the Regulation) must not grant anti-suit injunctions preventing parties from bringing or continuing litigation proceedings in other Member States. Instead, the courts of one Member State should leave the courts of other Member States to decide for themselves whether or not to take jurisdiction over the dispute in question.

Of course, it can be said that by agreeing to a Member State as the seat of arbitration the parties have also selected the application of European law, including the Regulation. However, whilst some well informed parties might appreciate this going forward, few would have considered this in the past. The ECJ has therefore sparked consternation and debate by once again asserting its likely impact.3

West Tankers

Erg Petroli SpA (Erg), an Italian oil refinery company, chartered a ship from West Tankers Inc (WTI). The ship collided with Erg’s jetty. Erg made a claim under its Italian insurance policy with Riunione Adriatica di Sicurtà SpA (the “Italian insurer”) which was paid. Erg claimed the insurance excess from WTI through arbitration in London, pursuant to the terms of the charterparty.

The Italian insurer then brought a delictual claim against WTI before the Tribunale di Syracuse to recover the sums paid to Erg (pursuant to the Italian Insurer’s statutory right of subrogation to Erg’s claims under art.1916 of the Italian Civil Code).

WTI sought an anti-suit injunction from the English courts restraining the Italian insurer from taking any further steps in relation to the dispute except by way of arbitration in London in accordance with the charterparty.

The important issue raised by this case was the precise relationship between arbitration and the Regulation, the ECJ’s landmark decision was in Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc (“West Tankers”) (C-185/07) Unreported February 10, 2009.2 We consider below that decision, its limits and its likely impact.7

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1. For an excellent overview of some of the criticisms that might be levelled at the ECJ from an English law perspective, see Professor Adrian Briggs’ recent article, “The Impact of Recent Judgments of the European Court on English Procedural Law and Practice” in University of Oxford Faculty of Law Legal Studies Research Paper Series, Research Paper No.11/2006 and [2005] Zeitschrift für Schweizerisches Recht 124 II 231.


which deals primarily with the recognition and enforcement of judgments from one Member State in another Member State.

Under the Regulation (as interpreted in cases like Erich Gasser GmbH v MISAT Srl⁶ and Turner v Grovit⁷), the courts of one Member State may not generally issue an anti-suit injunction to restrain proceedings already commenced in another Member State (the Member State “first seised”). In order to hear the dispute themselves, However, art.1(2)(d) of the Regulation expressly states that it does not apply to arbitration.

In Marc Rich & Co AG v Società Italiana Impianti SpA (“Atlantic Emperor”)⁸ and Van Uden Maritime BV v Deco-Line KG, the ECJ appeared to decide that, in broad terms, the arbitration exception applies not only to arbitration proceedings but also to court proceedings where the subject matter is arbitration.⁹

At first instance in the English High Court in the West Tankers case, Colman J. granted the anti-suit injunction but certified that, as the question of whether an injunction could be granted in similar circumstances had been previously decided by the Court of Appeal (in Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd), the case was suitable for appeal directly to the House of Lords. The Italian insurer appealed.

The House of Lords considered that it was consistent with the Regulation for the court of a Member State to restrain a party from commencing or continuing proceedings in a court of another Member State in breach of an arbitration agreement. The basis for this was that such anti-suit proceedings had arbitration as their “subject matter” and so fell within the art.1(2)(d) arbitration exception in the Regulation. However, the House of Lords referred the question to the ECJ because the answer was “not obvious” and of “very considerable practical importance”.

**Opinion of Advocate General Kokott**

On September 4, 2008, A.G. Kokott delivered her opinion in advance of the ECJ’s final decision.¹⁰ In her opinion, the grant of anti-suit injunctions in these circumstances was inconsistent with the principle of mutual trust between Member States (in such cases, trust that the courts of other Member States would refuse jurisdiction where they should do so) which underlies the Regulation.

A.G. Kokott considered that the decisive question in determining whether or not the arbitration exception applies is not:

“whether the application for an anti-suit injunction—in this case the proceedings before the English courts—falls within the scope of application of the Regulation”,

but rather, “whether the proceedings against which the anti-suit injunction is directed—the proceedings before the court in Syracuse—do so”.

If the Syracuse proceedings fell within the scope of the Regulation then the arbitration exception was not engaged and it would therefore be the court first seised (in this case the Italian court) which should decide whether or not to proceed. As the claim in Italy was a claim for damages, A.G. Kokott considered that it fell within the scope of the Regulation and the Italian court should therefore determine whether it had jurisdiction or must refer the matter to arbitration.

**The ECJ’s decision**

The ECJ issued its decision on February 10, 2009, concluding that, “an anti-suit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001”. The ECJ stated that:

“[I]f, 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.”

The ECJ then went on to say that the Regulation does not allow an anti-suit injunction because:

- it, “necessarily amounts to stripping [the court first seised] of the power to rule on its own jurisdiction under Regulation 44/2001”;
- it would be, “contrary to the general principle which emerges from the case law of the ECJ on the Brussels Convention, that every court seized, itself determines under the rules applicable to it whether it has jurisdiction to resolve the dispute before it”;
- it, “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”; and
- “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 then a party could avoid proceedings merely by relying on that agreement.

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8. For a detailed analysis of the impact of these two cases and the arguments over the extent of the arbitration exception, see Illner and Naumann, “Yet Another Blow” (2007) Int. A.L.R. 147.
and the applicant, which considered 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 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled11.

The ECJ also said its decision is:

“[S]upported by Article II (3) of the New York Convention, according to which it is the court of a Contracting State, when seised of an action in a matter in the respect of which the parties have made an arbitration agreement, that will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

The ECJ’s decision effectively qualifies the right of parties to choose the national legal system to supervise and support their selection of arbitration as the means to resolve their disputes. In the case of an agreement to arbitrate in London, whilst the parties have submitted to the supervisory jurisdiction of the English courts, the ECJ has now said that the English courts’ role cannot extend to preventing a party from commencing or continuing with proceedings in another Member State.

Given the ECJ’s references to an anti-suit injunction “stripping” power from the courts of another Member State and not according trust to those other courts, it is worth noting that an anti-suit injunction is made against the party found to be breaching its contract to arbitrate, not against the other court. It is the party that is restrained, not the powers of the other court. Although the whole purpose of the injunction is to prevent the litigation from proceeding in the other court, this is achieved by the threat of holding the offending party, which has, through selecting the seat of arbitration, submitted to the supervisory jurisdiction of the court issuing the injunction, in contempt of that court. It therefore seems logical for the supervising court to take action against the offending party, and not at all an affront to the other court.12

Furthermore, the Regulation does not prevent a tribunal from ordering a party to discontinue court proceedings brought in breach of an arbitration agreement. Many arbitration laws provide that the tribunal is competent to determine its own jurisdiction (the theory of Kompetenz-Kompetenz). If an arbitration has commenced and the tribunal been appointed by the time litigation proceedings are launched, the tribunal itself will often have the power to order the offending party to stop the court proceedings. It seems strange that the Regulation prevents the supervising court from granting an order that that the tribunal could grant.

Presumably the English courts would now be prevented from making an order, under s.42(1) of the Arbitration Act 1996, requiring the offending party’s compliance with a peremptory order from the tribunal in this regard, which again seems to be a strange limit on the supervising court’s supportive function.

If proceedings are brought in breach of an arbitration agreement in the courts of another Member State before a tribunal has been constituted, there will now be no possibility of interim relief, in the form of an anti-suit injunction, to preserve the situation pending the appointment of the tribunal. Rather than turning to the courts of the seat to protect the position pending the appointment of the tribunal, the parties will now either have to deal with the proceedings in the courts of the other Member State, or wait until the tribunal has been appointed and ask for an order (which order could not be enforced by the supervising court).

**Impact of the ECJ’s decision**

Unlike the courts of some arbitration centres outside Europe (such as New York, Bermuda and Singapore13), the courts of Member States will no longer be able to grant anti-suit injunctions to prevent parties from commencing or continuing proceedings in the courts of other Member States in breach of their arbitration agreements.

Accordingly, some might see the ECJ’s decision as a blow to European arbitration centres,14 on the basis that there are parties that might now select a non-European seat of arbitration where a West Tankers type anti-suit injunction would still be available if required. However, in practice, the availability of anti-suit injunctions is unlikely to affect the choice of seat for the vast majority of parties. Zurich, Geneva, Stockholm and Paris have all flourished as arbitration centres without their courts granting anti-suit injunctions as a matter of course. The ECJ’s decision therefore seems unlikely to impact the popularity of London, which still has a myriad of features to commend it to those selecting a seat for arbitration.

The continued availability of anti-suit injunctions in relation to proceedings brought outside the Member States means that the only parties that may be adversely affected by the West Tankers case are those that will now be forced to deal with unwanted court proceedings in a Member State. Those parties will now have to fight in two jurisdictions: in the arbitration in one Member State and in the courts of the other Member State.

In reaching its decision, the ECJ seemed to draw comfort from art.II.3 of the 1958 New York Convention, which requires the courts of Contracting States15.
“when seized of an action in a matter in respect of which the parties have made an agreement ... [to] refer the parties to arbitration”. 

should one of the parties request such a referral, “unless [the court] finds that the said agreement is null and void, inoperative or incapable of being performed”. 15 However, even if a court ultimately decides to refer the matter to arbitration, parties are still likely to have suffered delays and substantially increased costs as a result of having to fight in another jurisdiction (far more than if an anti-suit injunction had been available). This could, of course, be used as a tactical weapon by recalcitrant defendants. Indeed, the real concern with the West Tankers decision is that much as the ECJ might like the idea of uniform courts (trusting one another), uniform procedures and uniform quality of decision making across the Member States, that is far from being the case at present, so the system is open to inefficiency and exploitation.

Where a court ultimately decides that it does have jurisdiction to proceed, that will not of itself require the arbitrators to stop the arbitration. There may therefore be ongoing parallel proceedings in that court and in the arbitration, requiring co-ordination and risking inconsistent decisions. If it were left to the court of the seat of arbitration to decide upon the status of the arbitration agreement, those risks would be greatly reduced because of its stronger influence over the arbitration. It will be those (hopefully very few) parties faced with such parallel proceedings which will feel most let down by the ECJ in having been denied the right to choose the venue for their disputes.

**Concluding remarks**

The wording of the Regulation left it open to the ECJ to keep alive the power of the courts of Member States to grant anti-suit injunctions in support of arbitrations in their territory. The ECJ chose not to do so. As explained above, the reasons stated for this are not wholly convincing. However, given that anti-suit injunctions are not granted by the courts of all the Member States, and the apparent reluctance of the ECJ to recognise (or be influenced by the fact) that the courts of some Member States are less efficient and reliable than others, the decision is not altogether surprising.

The difficulty could perhaps be avoided and the honour of all Member States kept intact if the Regulation were amended to embrace party autonomy and recognise the efficiency of keeping the supervisory function for all matters relating to arbitration (save for the enforcement of awards) with the courts of the seat of arbitration selected by the parties. This should include an ability for those courts to grant anti-suit injunctions because they have an immediate and direct effect on the rogue party, without having to wait for another court hopefully to reach the correct decision.

The ECJ’s decision will not have any substantial impact on London as a leading centre for international arbitration. However, it may well leave some parties vulnerable to tactical manoeuvres and forum shopping by recalcitrant defendants.

So: lost at sea or a storm in a teacup? Anti-suit injunctions in support of arbitration have been lost at sea where the court proceedings in question are those in another Member State. As for the storm in a teacup: the impact of the West Tankers decision on arbitration in England has been overstated (the desirability of London as a centre for international arbitration cannot be said to be significantly reduced as a result of the decision) and it says much about concerns regarding the increasing influence of European law that the decision has received quite so much attention.

As a final note, it has been reported that the European Commission is likely to consult on the reform of the Regulation later this year (possibly in light of the West Tankers decision). Further storms ahead?

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