



The future of anti-suit injunctions

THE WEST TANKERS CASE

The Grand Chamber of the European Court of Justice (the ECJ) has published its preliminary ruling in the *West Tankers* case (case C-185/07) removing the ability of European member states' courts to grant anti-suit injunctions to restrain foreign proceedings brought in breach of arbitration agreements. This briefing outlines the legal framework, the ECJ ruling and its effects.

Legal framework

In the UK, the legal basis for such injunctions is contained in the Supreme Court Act 1981, which gives the High Court the right to grant anti-suit injunctions when foreign proceedings have been brought in breach of arbitration agreements. This principle is also supported by the New York Convention on the recognition and enforcement of foreign arbitral awards 1958 (the New York Convention) and the European Council (EC) Regulation 44/2001 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation), which specifically excludes arbitration from its scope. The New York Convention states that, when seized with an arbitrable dispute that the parties have agreed should be submitted to arbitration, the courts shall refer the parties to arbitration. The Brussels Regulation supports the autonomy of commercial parties and provides that, in the interest of the harmonious administration of justice throughout the EU, there should be no parallel and conflicting proceedings throughout member states.

Facts

In 2000, 'The Front Comor', a vessel owned by West Tankers and chartered by Erg. Petroli (Erg) collided with a jetty owned by Erg in Syracuse, Italy. The charter party was governed by English law and contained a clause for arbitration in London. Erg received monies from its insurers, Allianz and Assicurazioni Generali (Allianz and Generali) for damages relating to the collision. Erg then

started arbitration proceedings against West Tankers in London claiming the excess on its insurance policy. Allianz and Generali initiated Italian court proceedings against West Tankers to recover the amounts paid to Erg. West Tankers then started proceedings in the High Court against Allianz and Generali seeking an injunction restraining the latter from taking further steps in the Italian proceedings. The High Court granted the injunction based on the 'arbitration exception' of the Brussels Regulation. On appeal, the House of Lords took a similar view to the High Court but decided to refer the following question to the ECJ: 'Is it consistent with EC Regulation 44/2001 for a court of a member state to make an order to restrain from commencing or continuing proceedings in another member state on the grounds that such proceedings are in breach of an arbitration agreement?'

ECJ ruling

The ECJ stated that the first issue that had to be considered was whether the Italian proceedings fell within the scope of the Brussels Regulation. If they did, what would the effect of an anti-suit injunction be on those proceedings? The fact that English proceedings fell outside the remit of the Brussels Regulation because of the arbitration agreement was not to be considered until later. The ECJ avoided discussion of options to clarify the 'arbitration exception' in the Brussels Regulation.

In line with the advocate general's opinion of 4 September 2008, the ECJ stated that the subject matter

of the foreign proceedings was of paramount importance. In *West Tankers*, there was a claim for damages, which clearly fell within the scope of the Brussels Regulation. Therefore, 'a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity also [comes] within its scope of application.' The ECJ concluded that this preliminary issue was within the jurisdiction of the Italian court and that 'to prevent a court of a member state (which normally has jurisdiction to resolve a dispute from ruling, under article 1(2)(d) of that regulation) on the applicability of the regulation to the dispute brought before it, necessarily amounted to stripping that court of the power to rule on its own jurisdiction under Regulation 44/2001.' Restraining such court from ruling on its jurisdiction ran against the mutual trust principle at the core of the Brussels Regulation. It also ran against the fundamental principles of justice because the Italian court would be prevented from examining the validity of the agreement used as the very basis for the jurisdictional challenge against it, thus depriving the claimant of judicial protection. Such an anti-suit injunction was therefore incompatible with the Brussels Regulation.

What does the ruling mean for your arbitration?

If, regardless of an agreement to arbitrate naming London as the seat of arbitration, a party brings legal proceedings in the courts of another member state in breach of that arbitration agreement, the courts of England will no longer be empowered to grant anti-suit injunctions to interrupt such proceedings. This removes from the English practitioner's toolkit an effective tool for securing compliance with arbitration agreements. However, in determining whether to exercise jurisdiction, the courts of member states should show due deference to the existence of an arbitration agreement in accordance with their obligations under the New York Convention.

Claimants in arbitration should be prepared to issue arbitration proceedings at the earliest and progress them diligently. If the other party has started legal proceedings first, claimants must be ready to present their arguments in the court of the member state directed to the member state's obligation to recognise and enforce arbitration agreements.

However, neither defending proceedings in another member state's court nor racing to issue arbitration proceedings are desirable consequences of the ECJ's ruling. Parallel proceedings will inevitably cause delays and increase cost and disruption.

On a broader policy level, some may hope that the proposals contained in the Heidelberg Report¹ to confer exclusive jurisdiction on the courts of the seat of arbitration to rule upon challenges to the validity of the arbitration agreement are adopted by means of an amendment to the Brussels Regulation. In the meantime, careful attention – even more than previously – should be given when drafting the arbitration agreement to minimise the scope for challenge to its existence and/or validity. Consideration should also be given to including contractual undertakings in the arbitration agreement to the same effect as the Heidelberg proposal. However, the enforceability of such undertakings has yet to be tested.

Not too much attention should be paid to Cassandras announcing the end of London's pre-eminence as an international commercial arbitration venue. The availability of anti-suit remedies was not the foremost reason to choose London as a seat of arbitration and the ECJ's ruling is unlikely to diminish the appeal of London as an arbitration-friendly environment – as well as for its many other attractions.

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¹ A report by Professors Hess, Pfeiffer and Schlosser entitled 'Report on the Application of Regulation Brussels I in the Member States', report for the Institute of Private International Law at the University of Heidelberg, Study JLS/C4/2005/03.