International Arbitration and Anti-Suit Injunctions

The Effect of West Tankers: Death of Anti-Suit Injunctions in Europe

I. INTRODUCTION

Anti-suit injunctions are often sought in international commercial arbitration cases where one of the parties to the arbitration agreement seeks to avoid the consequences of that agreement by pursuing litigation in another jurisdiction. In contrast with other European Union member states, the English courts have shown themselves willing to restrain foreign court proceedings brought by a party in breach of an arbitration agreement where the seat of the arbitration is in England. This paper examines the legal framework of anti-suit injunctions and their application in international arbitration with a focus on the European Court of Justice’s recent landmark decision in West Tankers. The effect of West Tankers means that English courts can no longer offer judicial protection in the form of anti-suit injunctions in arbitration cases. Only a few weeks after West Tankers, the English High Court in DHL (discussed in Section V of this paper) applied the ECJ’s ground-breaking decision. This paper concludes that there is little doubt for what the future holds: namely the death of anti-suit injunctions within Europe.

1 ECJ Judgment of 10.2.2009 C-185/07 Riunione Adriatica di Sicurta SpA RAS v West Tankers Inc.
II. THE LEGAL FRAMEWORK OF ANTI-SUIT INJUNCTIONS

The legal basis for anti-suit injunctions in the United Kingdom is contained in the Supreme Court Act of 1981, which gives the High Court the right to grant anti-suit injunctions when foreign proceedings have been brought in breach of arbitration agreements\(^2\). This principle is supported by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention")\(^3\). The European Council (EC) Regulation 44/2001 ("Regulation") on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters specifically excludes arbitration from its scope\(^4\). The New York Convention states that, when seized with an arbitral dispute that the parties have agreed should be submitted to arbitration, the courts shall refer the parties to arbitration\(^5\). The Regulation supports the autonomy of commercial parties and provides that, in the interest of the harmonious administration of justice throughout the European Union, there should be no parallel and conflicting proceedings throughout member states.

Although there had been various movements in recent years towards limiting the

\(^2\) E.g. *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 LT 846. By section 37(1) of the Supreme Court Act 1981, the High Court has jurisdiction to grant an injunction (whether interlocutory or final) "in all cases in which it appears to the court to be just and convenient to do so." By section 44(1) and (2)(e) of the Arbitration Act 1996, the court has power to grant an interim injunction "for the purposes of and in relation to arbitral proceedings."


\(^5\) Supra n. 3.
circumstances in which anti-suit relief was available, the courts of member states had, until the European Court of Justice’s (ECJ) decision in *West Tankers*, nevertheless retained the power to grant anti-suit injunctions. The rationale behind this was to restrain litigation commenced in another member state in breach of an arbitration clause pursuant to the “arbitration exception” contained in EC Regulation 44/2001. The position has now changed as a result of *West Tankers*.

III. THE *WEST TANKERS CASE*

i. INTRODUCTION

On February 10, 2009, the Grand Chamber of the ECJ released its preliminary ruling in the *West Tankers* case removing the ability of European member states’ courts to grant an anti-suit injunction in support of an arbitration agreement. The case was referred to the ECJ by the House of Lords on April 2, 2007. The House of Lords asked the ECJ for a preliminary ruling on the question “Is it consistent with EC Regulation 44/2001 for a court of a member state to make an order to restrain a person from commencing or continuing proceedings in another member state on the ground that such proceedings are in breach of an arbitration agreement?” Despite the views expressed by the House of Lords in support of this common law remedy, the ECJ confirmed the Opinion of the

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6 Supra n. 1.
8 Supra n. 4.
Advocate General\(^9\) by ruling that an order in such circumstances is not compatible with the Regulation. The ruling, which was largely expected and consistent with prior ECJ jurisprudence regarding anti-suit injunctions, resolves important questions about the often competing jurisdiction between courts and arbitrators.

ii. FACTS OF WEST TANKERS

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 Regulation. On appeal, the House of Lords took a similar view to the High Court but referred the question to the ECJ\(^{10}\). The Regulation provides a set of rules for the allocation of jurisdiction between member states and is

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\(^9\) Opinion of Advocate General Juliane Kokott delivered on 4 September 2008. Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc. (Case C/185/07).

\(^{10}\) Supra n. 7.
based on the concept that the courts of each member state should trust other EU courts to apply those rules correctly. (As previously noted above, the Regulation\textsuperscript{11} provides that arbitration is excluded from the scope of the application of the Regulation, the so-called “arbitration exception.”) The House of Lords took the view that the arbitration exception was applicable given that the purpose of proceedings before the English courts was to protect West Tankers' right to have the dispute determined by arbitration. This meant that the proceedings fell outside of the Regulation and therefore could not be inconsistent with the provisions of the Regulation\textsuperscript{12}.

iii. THE HOUSE OF LORDS’ OBSERVATIONS

The House of Lords recognized that the question of whether or not to extend European authority to the arbitral context would affect the efficacy of arbitration as a method of resolving commercial disputes. Lord Hoffmann underlined the importance of the principle of “autonomy of the parties to choose the seat of arbitration and governing law”\textsuperscript{13}. Lord Hoffmann explained that “arbitration is altogether excluded from the scope of the Regulation by article 1(2)(d)...there is no set of uniform Community rules which member states can or must trust each other to apply” and that “the Convention is not a Community instrument and does not create a system for the allocation of

\textsuperscript{11} Supra n. 3, Art I (2)(d).
\textsuperscript{12} Supra n. 7.
\textsuperscript{13} Supra n. 7.
jurisdiction comparable with the Regulation”14. An anti-suite injunction is a valuable weapon, which promotes legal certainty and reduces the possibility of conflict between an arbitration award and the judgment of a national court.

iv. THE ADVOCATE GENERAL’S OPINION

On September 4, 2008, the Advocate General was unconvinced by the “arbitration exception” argument under Article 1(2)(d). The Advocate General concluded that the English court does not have the power to grant an anti-suite injunction on the grounds that this would constitute an unwarranted interference with the autonomy of the courts of another member state. The rationale of the Advocate General's Opinion reflects the European concern that the anti-suite injunction is a common law creation, alien to other European member states, and is at odds with the principles of mutual trust, thereby impairing the effectiveness of the Regulation15. The Advocate General first determined whether court proceedings related to an arbitration agreement fell within the scope of the arbitration exception found in the Regulation. In her view, the important issue was “not whether the application for an anti-suite injunction falls within the scope of application of the Regulation, but whether the proceedings against which the anti-suite injunction is directed to do so.”16 This inquiry should focus on the substantive nature of

14 Supra n. 7.
15 Anti-suite Injunctions: ECJ decision of 10 February 2009 in West Tankers case, Mayer Brown, March 2009
16 Opinion of Advocate General Kokott, para. 33.
the claim sought to be enjoined and whether Regulation 44-2001 was applicable to that action\textsuperscript{17}. The Advocate General noted that “a legal relationship does not fall outside the scope of the Regulation simply because the parties have entered into an arbitration agreement. Rather, the Regulation becomes applicable if the substantive subject matter of the dispute is covered by it”\textsuperscript{18}. Where the subject matter of the dispute falls within the Regulation\textsuperscript{19}, a court which presumptively has jurisdiction is entitled to examine whether the exception to arbitration applies, and, if necessary, refer the case to the arbitral body\textsuperscript{20}. In support of this conclusion, the Advocate General cited the principle of ‘kompetenz-kompetenz’\textsuperscript{21}, providing that every court is entitled to examine its own jurisdiction. The Gasser rule was also cited\textsuperscript{22}, which provides that a court that has obtained jurisdiction over a case after another court has already asserted jurisdiction over a similar case involving the same subject matter, does not have the authority to make determinations regarding the first court’s jurisdiction. The court must await the first court’s determination of its own jurisdiction before continuing with its own proceedings. This is the case even where it appears clear to the second court that the first court has no jurisdiction based upon an agreement conferring jurisdiction.

\begin{footnotes}
\item[17] Opinion of Advocate General Kokott, para. 50.
\item[18] Opinion of Advocate General Kokott, para. 62.
\item[19] See Article 1(1) of Regulation 44-2001, providing “this Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.”
\item[20] See Opinion of Advocate General Kokott, para. 8.
\item[21] \textit{Supra}. n. 18
\end{footnotes}
Since the *West Tankers* case involved a claim in tort for damages, the Advocate General found that it fell within the scope of the Regulation, and further that it was for the Italian court as the court first-seized of jurisdiction to address the issue of the arbitration clause\(^{23}\). In response to the House of Lords’ concern that precluding the anti-suit injunction remedy would unfairly place London at a competitive disadvantage by making arbitration in London less popular, the Advocate General stated that “aims of a purely economic nature cannot justify infringements of Community law”\(^{24}\).

v. **THE ECJ DECISION**

The ECJ’s judgment largely upheld the reasoning of the Advocate General, including as to the scope of the arbitration exception. The ECJ stated that the first issue that had to be considered was whether the Italian proceedings fell within the scope of the Regulation. The fact that English proceedings fell outside the remit of the 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 line with the Advocate General’s Opinion, and following the well-known decision in *Grovit v Turner* [2004] ECR I-3565, the ECJ held that the subject matter of foreign proceedings is of paramount importance and the decisive factor in determining whether or not the matter is placed outside the scope of the EC Regulation. In *West Tankers*, there was a

\(^{23}\) See Opinion of Advocate General Kokott, para. 53, 61.

\(^{24}\) Opinion of Advocate General Kokott, para. 66.
claim for damages, which clearly fell within the scope of the Regulation. The ECJ stated 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 5(3) of Regulation 44/2001...on the 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 44/2001”25. Furthermore, the ECJ concluded that it ran against the fundamental principles of justice as the Italian court would be prevented from examining the validity of the agreement used as the basis for the jurisdictional challenge against it, thus depriving the claimant of judicial protection. This type of anti-suit injunction was held to be incompatible with the Regulation.

vi. RATIONALE OF WEST TANKERS DECISION

The rationale for the ECJ’s decision in West Tankers is clear: it brings the EU position regarding anti-suit injunctions in support of arbitrations in line with the EU rules on anti-suit injunctions to restrain proceedings brought in breach of an exclusive jurisdiction clause. In effect, what the ECJ does in West Tankers is to use a different treaty to assure itself that the right decision will be made by the court first seized. As a practical matter, all the European Union Regulation member states are signatories to the New York

25 ECJ West Tankers Judgment C-185/07, para. 28.
Convention. The ECJ’s decision in West Tankers relies on Article II(3) of the New York Convention, according to which the member states’ courts when seized of an action in a matter in respect of which the parties have made an arbitration agreement, 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.

IV. IMPACT ON LONDON AS AN ARBITRATION VENUE

Speculation exists as to whether the West Tankers decision will make London appear less attractive as a seat of international arbitration. While West Tankers may mean that the English court is no longer able to offer judicial protection in the form of anti-suit injunctions to the relatively limited subset of anti-suit applications within Europe, the English court’s ability to offer anti-suit relief in all other cases remains unchanged. Furthermore, there are a plethora of reasons why parties choose London as their preferred seat of arbitration (including accessibility, the existence of specialized venues, the developed arbitration law, and neutrality); these factors remain unaffected by the West Tankers decision.

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27 Supra. n. 25. (para. 3)
V. ENGLISH CASES AFTER WEST TANKERS

The ECJ decision in West Tankers brings the English courts into line with the practice of courts in the rest of the EU, and this decision has already been followed by the English courts in two recent cases.28

The facts of the DHL case differ somewhat from West Tankers. Having concluded a software license agreement containing a London arbitration clause, Fallimento Finmatica SpA (acting through its Italian receiver) commenced proceedings against DHL in the Italian courts claiming sums due under the license agreement. The Italian court decided it had jurisdiction to hear the claims by virtue of the EC Insolvency Regulation, and, having determined the merits gave judgment in Fallimento’s favor. Having not participated in the Italian proceedings, DHL immediately lodged an appeal against the judgment. In the meantime, Fallimento registered the judgment in the English court. DHL lodged an appeal in the English court against the registration of the judgment arguing, inter alia, that the Italian proceedings had been brought in breach of an arbitration agreement and therefore fell within the “arbitration exception” and that it would therefore be contrary to public policy to register such judgment. DHL also made a separate application to the English court for a stay of its own appeal pending resolution of the Italian appeal. Fallimento argued that the English court lacked jurisdiction to grant such a stay. Judgment in the DHL case was deferred pending the

decision of the ECJ in *West Tankers*. Shortly thereafter, Tomlinson J declined to grant a stay of the appeal on the grounds that, following *West Tankers*, it would be difficult for DHL to establish that the Italian judgment fell outside the scope of the EC Regulation by virtue of the Italian proceedings having been commenced in breach of an arbitration agreement.

VI. THE IMPACT OF DHL FOLLOWING WEST TANKERS

The decision in *West Tankers* (and, to a lesser extent, in *DHL*) has already attracted significant criticism. The author suggests that the likely impact of the decision is that an innocent party may no longer be able to obtain an anti-suit injunction from a member state court to prevent its counterparty from commencing or continuing proceedings in another member state court in breach of an agreement to arbitrate. This is likely to have the undesirable consequence of forcing parties to participate against their will in time consuming and costly litigation in a foreign court in circumstances where they had previously agreed to arbitrate. Practically speaking, 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.  

VII. EFFECT ON CONTRACTING PARTIES

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 recognize 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. In light of the ECJ’s decision, there is an increased risk that parties to arbitration agreements may commence foreign EU court proceedings to avoid or frustrate the onset of concurrent arbitration proceedings. Even if the member state’s court refuses jurisdiction and refers the matter to arbitration, a jurisdictional battle will incur potentially very significant additional legal costs and time. Parties who have entered into an arbitration agreement providing for arbitration in London for the purpose of avoiding protracted litigation in an unfamiliar jurisdiction, will no longer be afforded the protection of an anti-suit injunction to support their agreement.

29 Supra. n. 26.
30 The Future of Anti-Suit Injunctions, Freshfields Bruckhaus Deringer LLP, February 2009
VIII. POLICY REFORM – THE HEIDLEBERG REPORT

On a policy level, some may hope that the proposals contained in the Heidelberg Report\textsuperscript{31} are adopted to amend the Regulation so that arbitration is brought within its scope, and that exclusive jurisdiction to rule upon challenges to the validity of arbitration agreements is conferred upon the courts of the seat of the arbitration. While some commentators have described this latter proposal as contrary to the widely-accepted principle of \textit{kompetenz-kompetenz}\textsuperscript{32}, the European Commission is planning to put out a Green Book on the reform of Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in May 2009. In the meantime, the \textit{West Tankers} case decision focuses attention again on the importance of drafting arbitration clauses effectively, to minimize the scope for challenge to its existence and/or validity and limit the scope of courts to consider such jurisdictional questions.

IX. CONCLUSION

In summary, it seems that in the aftermath of the ECJ decision in \textit{West Tankers}, lawyers in London and other European centers for arbitration have echoed the practical


\textsuperscript{32} In most legal systems, the arbitral tribunal is able to rule upon its own jurisdiction (often referred to as the doctrine of "\textit{Kompetenz-Kompetenz}" in international law). The doctrine has been recognized at common law and has been widely codified into national law. See \textit{Christopher Brown Ltd v Genossenschaft Oesterreichischer Waldbesitzer R GmbH} [1954] 1 QB 8. See for example, Article 16 of the UNCITRAL Model Law on International Commercial Arbitration and section 30 of the Arbitration Act 1996 of the United Kingdom.
considerations of the House of Lords. These are that the prohibition of anti-suit injunctions between courts of member states will result in companies seeking to arbitrate in non-member state locations. In this way, the ECJ judgment opens the door a little wider to the possibility of interference of national courts in the international alternative dispute resolution process. In reality, where a breach has occurred and proceedings have been brought in a foreign court, the defendant company is faced with a series of potentially expensive choices: to challenge the proceedings to obtain a stay or dismissal in favor of arbitration, to settle the matter to save time and costs, or to proceed to judgment in that jurisdiction in the hope of resisting enforcement of an adverse judgment by relying on the breach. Those in civil law jurisdictions may disagree that the Opinion in West Tankers represents a bad day for the business of solving disputes in London. Others, however, may begin to wonder whether the European Union’s pursuit of ‘legal certainty’ will end with the removal of all discretionary national court powers, perhaps even the removal of common law private international law itself. It appears that the tension between common and civil law traditions is likely to continue as we proceed along the path to complete Europeanization of the conflict of laws. In the aftermath of West Tankers the common law is looking decidedly battered and bruised, with the death of anti-suit injunctions in Europe looming on the horizon.