The anti-suit injunction: on borrowed time?

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This article explains the current legal status of the anti-suit injunction in the EU, and analyses a recent decision by the House of Lords on its application to arbitration.

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The European Court of Justice (the ECJ) has severely limited the circumstances in which a national court of an EU member state can grant an injunction restraining a party from pursuing court proceedings in the courts of another member state (an anti-suit injunction). Only in the area of arbitration have the courts of certain member states (most notably those in England) continued to grant anti-suit injunctions to prevent parties from proceeding with actions before the courts of other member states. This is based on the so-called "arbitration exception" contained in article 1(2) (d) of Council Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Regulation).

However, this may be set to change following the recent House of Lords decision in the case of West Tankers Inc v RAS Riunione Adriatica di Sicurita SPA & Ors ([2007] UKHL 4) (West Tankers). In West Tankers, the court referred to the ECJ the issue of whether the grant of an anti-suit injunction in the context of arbitration is consistent with the Regulation.

Against this backdrop, this article sets out:

- The current position in the EU regarding anti-suit injunctions in court proceedings and arbitrations.
- The facts of the West Tankers case and the House of Lord’s decision.
- The potential impact on future arbitrations in the EU if the ECJ limits the application of the arbitration exception.

The current position

Court proceedings

The well known cases of Gasser GmbH v MISAT srl (Case C-116/02 [2003] ECR I-14693) and Turner v Grovit (Case C-159/02 [2004] ECR I-3565) have stripped away the ability of a party to enforce by anti-suit injunction a contractual clause under which the parties agree to submit disputes to the courts of one member state. If court proceedings are commenced in another member state in contravention of any such clause, it is now for the party to assert its contractual choice before the court first seized of the dispute.

The essential logic underpinning the Gasser and Turner v Grovit decisions is that:

- The Regulation provides a complete set of uniform rules for the allocation of jurisdiction between member states, and all courts in all the member states are equally able to apply those
rules. As a result, it is inappropriate for the courts of one member state to become concerned with an issue of jurisdiction once another court in another member state has been seized with the dispute.

- Any party that feels that a court of a member state that was not the court first seized but which has been conferred exclusive jurisdiction under article 23 of the Regulation must now make its argument to the court first seized.

- All other courts in the other member states should trust and respect the judges in the court first seized to apply the Regulation properly.

The arbitration exception

Article 1(2)(d) of the Regulation expressly states that the Regulation does not apply to arbitration. Party autonomy is a key principle of arbitration. As Lord Hoffmann in West Tankers noted: "The basic principles by which the Regulation allocates jurisdiction, giving priority (subject to exceptions) to the domicile of the defendant, are entirely unsuited to arbitration".

The parties to a contract are free to decide the dispute resolution mechanism that they wish to apply to determine their existing or future disputes. This can include the applicable law and, if arbitration is chosen:

- The seat or legal place of the arbitration.
- The identity of the tribunal (or procedure for its selection).
- The language in which the arbitration will be conducted.
- Any procedural rules that will apply.

In making their selections parties weigh a range of factors. While all member states are party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) there is no EU-wide system for the allocation of jurisdiction in any way comparable with the Regulation.

The ECJ decision in Marc Rich & Co AG v Societa Italiana Impianti PA ([1991] ECR I-3855) (Atlantic Emperor) established that the arbitration exception applies not only to arbitration proceedings but also to court proceedings in which the "subject matter" is arbitration. Some years later, in Van Uden Maritime BV v Deco-Line ([1998] ECR I-7091), the ECJ confirmed that arbitration could be the "subject matter" where the court proceedings serve to protect the right to have the dispute determined by arbitration. This case concerned provisional measures rather than an anti-suit injunction.

Various commentators (some referenced by Lord Hoffmann in West Tankers) advance a contrary argument to the view taken in Atlantic Emperor and Van Uden, asserting that any anti-suit injunction which restrains a party from invoking the jurisdiction which would be available to them under the Regulation is contrary to that Regulation even if the proceedings fall outside its ambit. It remains possible that the ECJ will adopt this view and effectively extend the Gasser and Turner v Grovit line of authority to arbitration.
One theme that some have suggested is discernible from ECJ decisions in this area since 2000 is an attempt to underpin a principle of equal competence of all courts across all the member states. In the case of court proceedings conflicting with choice of court clauses it has been determined that it is inappropriate for the court of one member state to interfere in any way with the jurisdiction of a court of another member state if that court was first seized. It is always possible the ECJ will seek to find a rationale, however tenuous, to support an extension of the same approach across all forms of dispute resolution, negating the impact of the arbitration exception.

**West Tankers**

**The facts**

*West Tankers* involved a vessel called Front Comor, owned by West Tankers Inc, but chartered to an Italian oil refinery company, Erg Petroli SpA (Erg). The vessel was involved in a collision with a jetty owned by Erg in Syracuse in Italy. The charterparty was expressed to be governed by English Law and contained an arbitration clause with London established as the seat of the arbitration.

Erg claimed on its insurers, Ras Riunione Adriatic di Sicurta SpA and Generali Assicurazioni Generali SpA (the Insurers) and commenced an arbitration against West Tankers in London to recover its excess. Some time later, the Insurers brought an action in the courts in Italy (the place where the damage occurred) against West Tankers to recover the monies it had paid to Erg (the Italian Action).

West Tankers applied to the Commercial Court in London for an anti-suit injunction to prevent the continuation of the Italian Action on the basis that it arose out of the charterparty. West Tankers claimed that as the Insurers were claiming under rights of subrogation, they were bound by their insured’s agreement to arbitrate contained in the charterparty. The judge granted a permanent anti-suit injunction to West Tankers but permission was given to appeal straight to the House of Lords on the issue.

**The decision**

The House of Lords referred the following question to the ECJ: "Is it consistent with [the Regulation] 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?"

The House of Lords made clear its own view, in a leading judgment given by Lord Hoffman, that a court in one member state (if it is in the country of the seat of the arbitration) should be able to support the arbitral process by granting an anti-suit injunction restraining the courts of another member state from proceeding with litigation in conflict with a clear agreement to arbitrate. Lord Hoffman felt able to reach this view because he determined that court proceedings commenced solely to enforce a contractual agreement to arbitrate were proceedings that had arbitration as their "subject matter" and so fell within the arbitration exception.

It is, however, as the House of Lords acknowledged in referring the question to the ECJ, far from clear whether the latter body will support that view.

**Potential impact of the referral to the ECJ**

While the reasoning set out by Lord Hoffmann to justify the retention of the anti-suit injunction
appears to be compelling, it should be remembered that the *Atlantic Emperor* and *Van Uden* cases both pre-date *Gasser* and *Turner v Grovit*. It remains possible that the ECJ will use the opportunity it has now been given to revisit the boundaries of the arbitration exception and the anti-suit injunction may not survive its further review (as far as it relates to the restraining of a party from pursuing court proceedings in one member state in conflict with an agreement to arbitrate at a seat in another member state).

International arbitration has enjoyed rapid growth over recent years as a dispute resolution mechanism of choice for commercial parties. It is to be hoped that the ECJ takes note of Lord Hoffman's concluding observation in *West Tankers* that the competition between international arbitral centres is now very strong and some of the world's leading arbitration centres are currently to be found in the EU (London, Paris, Stockholm, Frankfurt and Vienna, among others).

The member states of the EU do, however, compete against countries outside the EU to be selected by commercial parties as the seat of prospective arbitrations. Leading arbitral centres like New York, Singapore and Bermuda (to name but a few) all provide parties with the ability to police their agreement to arbitrate by anti-suit injunctions (or their equivalent).

If the ECJ ultimately determines that anti-suit injunctions are inconsistent with the Regulation, this can only serve to damage the interests of the leading arbitration centres within the EU.

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