Anti-suit injunctions in support of arbitration agreements are contrary to EU law, according to the Opinion of Advocate General Kokott delivered 4 September 2008

The question whether anti-suit injunctions to protect an arbitration agreement are compatible with European Union law is currently pending before the European Court of Justice ("the ECJ") in Case C-185/07 Allianz (formerly Riunione Adriatica di Sicurtà Spa) and Others v West Tankers Inc. In her Opinion delivered today Advocate General Kokott proposes that the Court should answer that question in the negative with potentially wide ranging implications for arbitration across Member States including, in particular, in London, Paris and Stockholm.

The role of the Advocate General is to propose a solution to the judges in a given case. The Opinion is not binding on them, although it is probably safe to say that it is followed more often than not. The judges will now start their deliberations; judgement is unlikely to be delivered for some months.

The Background
Regulation (EC) No 44/2001 ("the Regulation") lays down rules for determining jurisdiction in civil and commercial matters involving more than one Member State. The Regulation states that it does not apply to arbitration. In its judgement in Case C-159/02 Turner v Grovitt the ECJ held, in a different context, that the Brussels Convention (the relevant provisions of which are essentially the same as those of the Regulation, which has superseded it) precludes anti-suit injunctions. The question before the ECJ in West Tankers is whether anti-suit injunctions are also impermissible when made in support of arbitral proceedings.

The West Tankers case arose out of the collision of a vessel owned by West Tankers and chartered to an Italian company, Erg Petroli SpA, with a jetty owned by Erg Petroli in Sicily, which caused significant damage. The charterparty, which was governed by English law, provided for arbitration in London. Erg claimed on its insurers, including Allianz, up to the limit of its insurance cover and commenced arbitration proceedings against West Tankers in London for uninsured losses. The insurers commenced proceedings against West Tankers in Italy to recover the amounts which they had paid Erg Petroli under the policies, relying on their statutory right of subrogation to Erg Petroli's claims under Italian law and on Article 5(3) of the Regulation, which confers jurisdiction in matters relating to tort or delict to the courts of the Member State where in which the harmful event occurred.
West Tankers commenced proceedings against the insurers in London, claiming that the dispute which was the subject of the proceedings in Italy arose out of the charterparty and that the insurers were therefore bound by the agreement to refer it to arbitration in London. The High Court accepted that argument and granted an injunction requiring the insurers to discontinue the proceedings in Italy. RAS appealed to the House of Lords, arguing that a court of an EU Member State could not grant an injunction against a person bound by an arbitration agreement to restrain him from commencing or prosecuting proceedings, in breach of the agreement, in a court of another Member State which has jurisdiction to entertain the proceedings under the Regulation. The House of Lords referred to the ECJ the question whether it is 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 Opinion
AG Kokott considers that the Regulation precludes anti-suit injunctions made to protect an arbitration agreement

She notes first that in Turner v Grovitt the ECJ held that the Brussels Convention precludes the imposition of an anti-suit injunction in connection with proceedings before the court of another Member State, even where the foreign proceedings are brought in bad faith with a view to frustrating the existing proceedings. In that judgement, the ECJ relies, essentially, on the principle of mutual trust which underpins the system of the Convention.

The House of Lords (and other courts in the United Kingdom), however, take the view that Turner v Grovitt cannot apply to anti-suit injunctions made in support of an arbitration agreement, because arbitration is excluded from the scope of the Regulation. “Arbitration” includes not only arbitration proceedings themselves and the recognition and enforcement of arbitral awards but also all national court proceedings in which the subject-matter is arbitration. As anti-suit injunctions support the conduct of arbitration proceedings, it is argued that proceedings seeking the issue of such injunctions are excluded from the Regulation.

AG Kokott disagrees with that analysis. She considers that the decisive question 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 whether the proceedings against which the anti-suit injunction is directed – the proceedings before the court in Italy – do so.

AG Kokott notes that it has always been a matter of dispute between the Anglo-Saxon and the continental European schools of law whether the exclusion of arbitration should be understood in the broad sense advocated by the House of Lords.
According to the Anglo-Saxon approach, only the arbitral body itself and the national courts at the seat of arbitration, which support its activities, may determine who has jurisdiction to examine the effectiveness and scope of the arbitration clause: as soon as it is claimed that there is an arbitration agreement, all disputes arising from the legal relationship are subject exclusively to arbitration, irrespective of the substantive subject-matter. The High Court therefore not only issued the anti-suit injunction but also found that the dispute arose from the charterparty and affirmed that the insurance companies, which were not themselves parties to the contract but were claiming by right of subrogation, were bound by the arbitration clause.

According to the continental European approach, it depends on whether the claim for damages falls, in principle, within the scope of the Regulation and whether the Italian court – subject to the arbitration plea – has jurisdiction as the place in which the harmful event occurred in accordance with Article 5(3) of the Regulation. If the defendant legitimately invokes the arbitration clause in those proceedings, the court would be obliged in principle under Article II(3) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards to refer the dispute to the arbitral body.

AG Kokott accepts that the wording of the exception gives no clear indication as to which interpretation should be preferred. On the basis of the explanatory reports on the Brussels Convention, the case-law of the ECJ and the scope of the New York Convention, she concludes that not only the actual arbitration proceedings but also related proceedings before the national courts can be excluded from the scope of the Regulation. Whether or not proceedings fall within the scope of the Regulation must therefore be determined from the substantive subject-matter of the dispute. In the dispute before the court in Italy, the insurers are claiming damages by right of subrogation for loss caused to Erg Petroli following the collision between the ship and the jetty. The subject-matter is therefore a claim in tort (possibly also in contract) for damages, which falls within the scope of the Regulation, and not arbitration. The existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seised must address when examining whether it has jurisdiction. Even if the view were taken that that issue fell within the ambit of arbitration, as a preliminary issue it could not change the classification of the proceedings for the purpose of the Regulation. If the court were barred from ruling on such preliminary issues, a party could avoid proceedings merely by claiming that there was an arbitration agreement. At the same time a claimant who considers that the agreement is invalid or inapplicable would be denied access to the national court. That would be contrary to the principle of effective judicial protection which is a general principle of Community law and one of the fundamental rights protected in the Community.

AG Kokott then considers - and dismisses - the argument (made strongly by the House of Lords in its order for reference) that the practical reality of arbitration proceedings as a method of resolving commercial disputes none the less (in her words) "requires the English courts to be able to grant anti-suit injunctions in support of arbitration".
In particular, it was argued, national courts should respect the parties’ decision to refer disputes to arbitration, a decision made in order to avoid their becoming involved in protracted proceedings before national courts. In their choice of the place of arbitration, business people will have regard to whether the courts there have effective remedies in support of arbitration. While accepting that the international rules on arbitration should not be interfered with by the Regulation, AG Kokott considers that her interpretation respects individual autonomy and does not call into question the operation of arbitration. Proceedings before a national court outside the place of arbitration will result only if the parties disagree as to whether the arbitration clause is valid and applicable to the dispute in question, in which case it is in fact unclear whether there is consensus between the parties to submit a specific dispute to arbitration. If the national court concludes that the arbitration clause is valid and applicable to the dispute, the New York Convention requires a reference to arbitration. There is therefore no risk of circumvention of arbitration. If proceedings before national courts which may have jurisdiction were prevented by an anti-suit injunction, those courts might later refuse to recognise and enforce the arbitral award in reliance on Article V of the New York Convention.

AG Kokott concedes that there is a risk that the arbitral body or the national courts at its seat, on the one hand, and the courts in another Member State which have jurisdiction under the Regulation in respect of the subject-matter of the proceedings, on the other, may reach divergent decisions regarding the scope of the arbitration clause. Moreover if both the arbitral body and the national court declare that they have jurisdiction, conflicting decisions on the merits could result, as pointed out by the House of Lords. She considers, however, that a unilateral anti-suit injunction is not a suitable measure to rectify that situation. In particular, if other Member States were to follow the English example and also introduce anti-suit injunctions, reciprocal injunctions would ensue. Ultimately the jurisdiction which could impose higher penalties for failure to comply with the injunction would prevail. This risk can be obviated only by the inclusion of arbitration in the scheme of the Regulation. Until then, if necessary, divergent decisions must be accepted. However, such cases are exceptions. If an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts have no reason not to refer the parties to the arbitral body appointed in accordance with the New York Convention.

Finally, AG Kokott notes that the House of Lords also referred to the competitive disadvantage with which London would be threatened, as compared to other international seats of arbitration such as New York, Bermuda and Singapore, if English courts could no longer issue anti-suit injunctions, unlike the courts of those places. She deals with this latter argument by simply stating that aims of a purely economic nature cannot justify infringements of Community law.

Some thoughts on the legal analysis
While AG Kokott’s initial conclusion that an anti-suit injunction to protect arbitration proceedings falls within the scope of the Regulation may be supported by coherent legal analysis, the same cannot be said for her dismissal of the arguments adduced by the House of Lords regarding the practical reality of arbitration proceedings. The essence of the first argument is that the reasons underlying the parties’ autonomous decision to refer disputes to arbitration - namely “privacy, informality and absence of any prolongation of the dispute by appeal” - will almost certainly be wholly
undermined if one party brings proceedings before a court of another Member State. To state that such proceedings "will result only if the parties disagree as to whether the arbitration clause is valid and applicable to the dispute in question" ignores the very real risk of bad faith. The fact that that court should ultimately refer the matter to arbitration if it finds that the arbitration clause is indeed valid and applicable does not cure the harm done by the intervening lapse of time.

Moreover simply asserting that "aims of a purely economic nature cannot justify infringements of Community law" in response to the argument concerning competitive disadvantage misses the point. The House of Lords did not in fact refer to London or to the English courts, but noted that "the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world". The AG's response, extrapolated from cases in which Member States have unsuccessfully pleaded damage to national financial interests as a justification to interference with a fundamental freedom guaranteed by the EC Treaty, is misconceived.

Finally, it is a great shame that the AG did not deal with a number of other arguments cogently made by the House of Lords in its order for reference. First, the House of Lords explicitly accepted that, under the Regulation, the Italian court had jurisdiction to try the claim in tort, but stressed that the arbitration clause was an agreement not to invoke that jurisdiction, and it is that agreement that the anti-suit injunction requires to be performed. Second, the effect of AG Kokott's approach is that any court order in any proceedings, whether falling within the scope of the Regulation or not, which restrains a party from invoking a jurisdiction under the Regulation, is contrary to it. The House of Lords - surely correctly - expressed the view that that argument "ignores the practical realities of commerce". It also noted that such an extension would logically apply not only to arbitration proceedings but also to orders made in other excluded proceedings, such as those concerning matrimonial property and insolvency. Third, the House of Lords, while explicitly accepting that in proceedings falling under the Regulation it is right that courts of Member States should trust each other to apply it, expressed the view that in cases concerning arbitration it is equally necessary that Member States should trust the arbitrators or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and if so to enforce it by orders requiring the parties to arbitrate and not litigate. It is to be regretted that AG Kokott did not deal with these arguments, particularly given the emphasis she places on mutual trust between Member States which was the starting point of her analysis.

The Implications
If AG Kokott's Opinion is followed by the European Court of Justice in its judgement, a material boost may be given to a number of seats of arbitration outside the Member States of the EU.

Clearly English Courts will retain the ability to issue anti-suit injunctions restraining parties from pursuing conflicting proceedings in courts outside the Member States (eg. in US Courts).
It will also be interesting to see the extent to which AG Kokott's approach, if ultimately followed by the Court, will impact on the drafting of arbitration clauses. In particular, will parties seek to empower the tribunal to grant injunctive relief, will there be more applications for similar relief from the tribunal itself, and will those arbitration institutions whose rules provide for an expedited procedure for tribunal formation- such as the LCIA - be viewed more positively than those which do not offer this option?

The full implications in terms of the effect upon arbitration across Member States will take some time to emerge and we await with interest the judgement of the European Court of Justice.