

Setting sail once more

Revisiting the West Tankers decision, Gautam Bhattacharyya and Victoria Walker comment on the state of arbitration today



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'English courts do not consider themselves bound to recognise European decisions which fall within the scope of the Brussels Regulation where the case is itself outside the confines of the Brussels Regulation because of the arbitration exemption in Article 1(2)(d)'

Regular readers will recall 'A place to stand' in *CLJ25*, which considered the implications of the decision of the European Court of Justice (ECJ) in *Allianz SpA v West Tankers Inc* [2007]. In *West Tankers* it was held that an anti-suit injunction by the English courts, which prevented the respondent from continuing proceedings in the courts of a member state because those proceedings had been commenced in breach of an arbitration clause, would be incompatible with European Council Regulation No 44/2001 (the Brussels Regulation) and would amount to 'stripping that court of the power to rule on its own jurisdiction'.

The decision, although not unexpected, was met with disappointment, as it removed one of the English court's key weapons for enforcing compliance with arbitration clauses. In the recent High Court decision of *National Navigation Co v Endesa Generacion SA* [2009], Gloster J conceded that, following *West Tankers*, the claimant's application for an anti-suit injunction to enforce an arbitration clause must fail. However, Gloster J instead agreed to grant a declaration confirming that the arbitration clause had been validly incorporated into the bill of lading despite the Spanish court's finding to the contrary. This article considers the significance of the *National Navigation* ruling and looks at the effect it has had on the *West Tankers* decision.

West Tankers

A quick reminder of the facts in the *West Tankers* case. A vessel was owned by West Tankers Inc, but chartered to an Italian oil refinery company, Erg Petroli SpA, in August 2000. The charterparty was governed by English law and contained a clause stating that disputes

were to be resolved by arbitration, with London as its seat. The vessel collided with a jetty owned by Erg in Syracuse, in Italy, causing damage to the jetty.

Erg claimed from its insurers, Ras Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA, and commenced arbitration against West Tankers in London to recover its excess payment under the policy. The insurers subsequently brought proceedings in the courts in Italy against West Tankers, to recover the insured losses 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 directly from 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 as expressly set out in the charterparty.

Relevant law

Under s37 of the Supreme Court Act 1981, the High Court has jurisdiction to grant an injunction where it appears just and convenient. This power includes the ability to make injunctions preventing parties from continuing proceedings overseas in breach of an arbitration or jurisdiction agreement. Additionally, Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires a court of a contracting state to refer the parties to arbitration where the matter before it falls within an arbitration agreement, unless it finds that the agreement is null and void, inoperative or otherwise incapable of being performed.

However, Preamble 16 to the Brussels Regulation states:

Mutual trust in the administration of justice in the Community justifies judgments given in a member state being recognised automatically without the need for any procedure.

Article 27 of the Brussels Regulation states that the EU court first seised in a dispute has exclusive jurisdiction over that dispute. Therefore, if there is an issue about the actual jurisdiction of that court, then only that court can resolve the matter. Article 33 provides for judgments given in Brussels Regulation member states to be recognised in other signatory member states. Notably, however, Article 1(2)(d) states that the Brussels Regulation does not apply to arbitration.

ECJ ruling in West Tankers

The House of Lords referred the following question to the ECJ:

Is it consistent with [the Brussels 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?

In an unusual move, Lord Hoffmann offered his opinion on the question ‘in case it should be of any assistance to the Court of Justice’:

People engaged in commerce choose arbitration in order to be outside the procedures of any national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal, which arbitration offers... The principle of autonomy of the parties should allow them these choices.

Advocate General Kokott delivered his opinion on 4 September 2008, in which he disagreed with Lord Hoffmann. The House of Lords had expressed concerns about the impact on London as a venue for international arbitration if the power to grant anti-suit injunctions was eroded, but AG Kokott said that economic aims alone were insufficient to justify infringements of EU law. He stated that:

... the decisive question is not whether the application for an anti-suit injunction in this case, the proceedings

must address when examining whether it has jurisdiction.

The ECJ also disagreed with the opinions of Lord Hoffmann and Lord Mance of 10 February 2009. The ECJ held that if the dispute came within the scope of the Brussels Regulation, a preliminary issue concerning the applicability of an arbitration agreement, including its validity, also falls within the scope of the Regulation. The ECJ found that the proceedings in the English court for anti-suit relief were caught by the arbitration

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before the English courts, falls within the scope of the application of the Regulation, but whether the proceedings against which the anti-suit injunction is directed, the proceedings before the court in Syracuse, do so.

AG Kokott reasoned that if the court first seised was prevented from ruling on its own jurisdiction, those proceedings could be avoided simply by stating that there was an arbitration clause. This would prevent the other party from continuing action in that court. AG Kokott added that:

... the existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seised

exception and therefore fell outside the scope of the Brussels Regulation. However, the proceedings in the Italian court, including the preliminary issue concerning whether the claim fell within the scope of a valid arbitration agreement, came within the ambit of the Brussels Regulation.

The ECJ therefore ruled that it was for the Italian court to consider the appropriateness of its own jurisdiction under the Brussels Regulation, and that this included ruling on whether the arbitration clause was validly incorporated into the contract. The ECJ stated:

... an anti-suit injunction... is contrary to the general principle which emerges

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from the case law of the court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it... Thus in no case is a court of one member state in a better position to determine whether the court of another member state has jurisdiction.

According to the ECJ, the anti-suit injunction constituted an impermissible interference in the Italian court's powers and was contrary to the principles of trust inherent in the Brussels Regulation. The ECJ ruled:

It is incompatible with the Council Regulation number 44/2001 of 22 December 2000... for a court of a member state to make an order to restrain a person from commencing or continuing proceedings before the courts

the coal short of its destination. Endesa brought proceedings in Spain against National for the loss incurred in purchasing a second shipment of coal (the Spanish action). National brought proceedings at the same time in the English Commercial Court (the Commercial Court action) and sought a declaration that it was not liable to Endesa and that the English court was the court first seised of the dispute under the Brussels Regulation. National also commenced arbitration proceedings in London and sought a declaration from the High Court that the London arbitration clause was validly incorporated into the bill of lading, and an anti-suit injunction to terminate Endesa's Spanish action.

Spanish action

The Spanish court held that Spanish law was the correct law to apply to the

proceedings that were not themselves within the ambit of the Brussels Regulation, as was the case with National's arbitration action (which fell within the arbitration exception to the Brussels Regulation in Article 1(2)(d)).

Although the Spanish court's judgment was within the scope of the Brussels Regulation, it did not, in Gloster J's view, have to be recognised pursuant to Article 33(1) of the Brussels Regulation, in proceedings in another member state which were not themselves classified as proceedings within the Brussels Regulation.

Gloster J held that English law was clearly the appropriate law to determine the issue, as all the relevant charterparties had express or implied English choice of law clauses. Further, the bill of lading was clearly subject to an English arbitration clause and the fact that National had commenced the Commercial Court action was insufficient, in Gloster J's opinion, to waive the agreement to arbitrate. Accordingly, Gloster J made the declaration sought, stating that it would not offend principles of comity and commenting that:

... the fact that arbitration is excluded from the scope of the Regulation means that, from time to time, there are likely to be conflicting judgments in different member states in relation to 'arbitration' issues.

In any event, Gloster J ruled that it would be contrary to public policy in England to recognise a judgment obtained in breach of a valid arbitration agreement.

Significance of *National Navigation*

It has been argued by some commentators that a declaration, similar to the one issued by Gloster J in *National Navigation*, infringes the *West Tankers* ruling. It can be said that a declaration is simply 'an injunction in disguise' that prevents the enforceability of the foreign court's judgment in England should that court rule against the existence of an arbitration clause. However, in reality, a declaration does not actually restrain the foreign proceedings from taking place and it is doubtful that Gloster J had intended to ignore the *West Tankers* principles, given the references made to the ECJ's decision throughout her judgment. As the Spanish action in

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of another member state on the ground that such proceedings would be contrary to an arbitration agreement.

Following *West Tankers* it was, therefore, reasonably assumed that anti-suit injunctions were no longer available to terminate proceedings brought, in breach of an arbitration clause, in the courts of a Brussels Regulation member state.

National Navigation

National Navigation gave the High Court a chance to revisit the subject of anti-suit injunctions in the aftermath of the ECJ's *West Tankers* decision. The facts of the case can be briefly summarised.

A ship owned by National Navigation was hired to ship coal owned by Endesa Generacion SA to a Spanish port. The agreement was documented in a bill of lading which stated that it incorporated all the terms of the relevant charterparty. There were a number of charterparties, each of which contained a London arbitration clause. The ship's rudder was damaged while at sea, and the ship discharged

dispute. The Spanish court's decision had been based on its finding that the arbitration clause had not been validly incorporated, and that the claimant had waived its right to arbitration by commencing the Commercial Court action.

Commercial Court action

Gloster J held that the relevant charterparties contained arbitration clauses, and as such the English court had no jurisdiction to hear the claims. Following the ECJ's findings in *West Tankers*, National's application for an anti-suit injunction to enforce an arbitration agreement did not succeed either. However, Gloster J granted the declaration sought by National that the arbitration clause was incorporated into the bill of lading and that the dispute was referable to London arbitration. Despite the fact that the Spanish court had decided to the contrary on this issue, and even though this decision was within the scope of the Brussels Regulation, Gloster J held that the English courts were not bound to recognise the Spanish action in

National Navigation is ongoing, the real effect of the declaration will only be seen if the Spanish Court rules in Endesa's favour and it attempts to enforce the judgment in England.

National Navigation demonstrates that the English courts do not consider themselves bound to recognise European decisions which fall within the scope of the Brussels Regulation where the case is itself outside the confines of the Brussels Regulation because of the arbitration exemption in Article 1(2)(d). Whether the ECJ would agree with Gloster J that a declaration stating that an arbitration agreement is valid would not offend principles of comity, where an anti-suit injunction along the same lines would, is unclear. Yet, under Article II of the New York Convention, a clear statutory obligation exists under English law requiring the court to give effect to an arbitration agreement. Therefore, Gloster J believed it was permissible to make a declaration that the arbitration clause was validly incorporated.

While Gloster J was clearly making a valid attempt to enforce the arbitration clause, her judgment does give rise to the possibility of two competing actions on the main issues of a case. In *National Navigation* Gloster J's declaration meant that there were conflicting decisions in England and Spain on whether the arbitration clause was validly incorporated into the contract. As Burton J confirmed in *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008], arbitrators fall outside the Brussels Regulation and are not bound by the judgment of a foreign court. Therefore, even if the member state court decides that the arbitration clause is invalid, this does not prevent the other party from bringing an arbitration action in England. AG Kokott recognised this potential difficulty and stated that one way to address it would be to change the law to include arbitration within the Brussels Regulation. The risk of competing litigations may also be reduced by ensuring that arbitration clauses are drafted to be as clear and as straightforward as possible, to avoid giving the national court any reason not to refer the dispute to arbitration in accordance with the New York Convention, and in a way that prevents their validity from being called into question. It is, however, perhaps naive to assume that this would resolve all the difficulties encountered, since

challenges to arbitration clauses are often made merely as a delaying tactic, regardless of merit.

A further possible tactical solution is for a party to act first by seeking an anti-suit injunction from the English court before any other court has been seised of the proceedings. The English courts have the authority to grant such relief under s37 of the Supreme Court Act 1981 or s44 of the Arbitration Act 1996 but, given the ECJ's ruling that it was not within the power of a court to make an order to restrain a person from 'commencing or continuing proceedings', it is debatable whether this tactic would be compatible with *West Tankers*. Whatever the stance taken

on this point, it is clear that neither defending proceedings in another member state nor racing to issue arbitration proceedings in England are advantageous consequences of the ECJ's ruling.

Comment

West Tankers appears to undermine the concept of arbitration. Arbitration is, seemingly, to be treated as merely a defence to judicial proceedings, as opposed to a distinct, independent process existing in its own right. The idea of arbitration is underpinned by the concept that arbitrators can determine their own jurisdiction, and this has been undermined by the ECJ's decision.

Further, the interpretation of *West Tankers* in *National Navigation* has paved the way for parallel proceedings to be brought in two member states, which will inevitably cause significant delay and increase the costs involved for all parties. It is likely that the English arbitration will be stalled until the court proceedings in the other member state have been stayed or jurisdiction has been declined. In some member states the decision about jurisdiction can take many months to materialise, even if the courts eventually recognise the validity of the arbitration clause. There are legitimate fears that parties seeking to sideline an arbitration clause may

take advantage of *West Tankers* to bring proceedings in breach of the agreement, and at the very least buy themselves some time.

Concerns have been expressed that London has lost its competitive advantage as an arbitration venue as a result of *West Tankers* and that parties may, for example, prefer New York or Singapore, where anti-suit injunctions remain available. While this fear has some merit within the EU, it has been largely overstated, as anti-suit relief remains available to restrain proceedings brought in breach of an arbitration clause elsewhere in the world. Further, in the recent decisions of *Shashoua & ors v Sharma* [2009] and *Midgulf International*

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Ltd v Groupe Chimiche Tunisien [2009] the Commercial Court firmly and unequivocally rejected arguments that the ECJ's decision in *West Tankers* has wider ramifications outside the EU.

In *National Navigation*, Gloster J tried to reconcile the international obligations imposed under the New York Convention with the rigid framework of the Brussels Regulation. The scope of the arbitration exception in the Brussels Regulation requires urgent clarification. Gloster J's declaration granted in *National Navigation* to uphold the principles of arbitration is to be welcomed in the interim, but it is doubtful whether her reasoning would be upheld by the ECJ, and in the meantime it does give rise to the unfortunate possibility of conflicting judgments within the EU. ■

Allianz SpA v West Tankers Inc [2007] EUECJ C-185/07
CMA CGM SA v Hyundai Mipo Dockyard Co Ltd [2008] EWHC 2791 (Comm)
Midgulf International Ltd v Groupe Chimiche Tunisien [2009] EWHC 963 (Comm)
National Navigation Co v Endesa Generacion SA [2009] EWHC 196 (Comm)
Shashoua & ors v Sharma [2009] EWHC 957 (Comm)