

## THE FRONT COMOR – THE END OF ARBITRATION AS WE KNOW IT?

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It has long been debated whether English courts, under EU law, are permitted to serve anti-suit injunctions to restrain parties from commencing legal proceedings in breach of an arbitration agreement. In 2009, the European Court of Justice answered this question in the negative. However, the broad approach of the Opinion of Advocate General Kokott as followed by the European Court of Justice has left many unanswered questions. This article seeks to address one of them: whether an arbitral tribunal is bound, following the decision of the European Court of Justice, to apply foreign judgments which directly concern the subject matter or procedural issues in dispute. From the tenor of the judgment and Opinion, it seems relatively certain that this question must be answered in the positive. However, the more difficult issue is what effect this will have on arbitral practice and whether there is now an urgent need for change in relation to the arbitration exception found in Regulation 44/2001. After considering the negative results for arbitration if tribunals do find themselves bound to apply foreign judgments in conformity with Regulation 44/2001, this article seeks to consider the suggestions of the Commission as to how such issues can be resolved, working up from the simple starting point that the arbitration exception in the Regulation now requires change.

## I. INTRODUCTION

In *West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)*<sup>1</sup>, the House of Lords, under Article 234 EC referred to the European Court of Justice (the ‘ECJ’) the question of whether it was consistent with EC Regulation 44/2001 (the ‘Regulation’) for a national court to issue an anti-suit injunction to restrain a person from commencing legal proceedings in breach of an arbitration agreement. The ECJ<sup>2</sup>, following the opinion of Advocate-General Kokott<sup>3</sup>, has answered this question in the negative, thus ending the tradition of English courts<sup>4</sup> of granting anti-suit injunctions to prevent one party commencing court proceedings in a foreign court in breach of the arbitration agreement.

Although *The Front Comor* leaves many an unresolved issue, this article seeks to address one of them in some detail: whether an arbitration tribunal is bound, contrary to the decision and analysis of Burton J in *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd*<sup>5</sup>, to apply the Regulation and recognise a foreign judgment given in parallel proceedings in a Member State brought in breach of the arbitration agreement. It will be submitted that, considering the focus of Advocate-General Kokott on the principles of

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<sup>1</sup> [2007] UKHL 4, [2007] 1 Lloyd’s Rep. 391.

<sup>2</sup> *Allianz SpA v West Tankers Inc, The Front Comor* [2009] 1 Lloyd’s Rep. 413.

<sup>3</sup> [2008] 2 Lloyd’s Rep. 661.

<sup>4</sup> Although not outside the EC/EFTA: *Shashoua v Sharma* [2009] EWHC 957 (Comm), ICLC 716, at [39].

<sup>5</sup> [2008] EWHC 279 (Comm), [2009] 1 Lloyd’s Rep. 213, at [43] – [46].

mutual trust and *effet utile*<sup>6</sup>, an arbitral tribunal with its seat situated in Europe must apply the Regulation. Following this, it will be necessary to discuss the effect this will have on arbitration in general and whether such a result, which can only be seen as a negative one, can be avoided in the future.

The approach that will be taken will be to, firstly, consider the judgement of Burton J in *CMA CGM-SA v Hyundai Mipo Dockyard Ltd*<sup>7</sup> where it was held that arbitral tribunals were not bound by Articles 32 and 33 of the Regulation. Following this, a brief discussion and explanation of the focus of Advocate General Kokott's opinion will be given. Thirdly, taking this focus into account, it will be submitted that, considering a parallel argument by Jaksic in relation to the area of human rights<sup>8</sup>, arbitrators are in fact bound to apply Articles 32 and 33. Fourthly, it will be submitted that the effect of this on arbitration will be a negative one: the independence of arbitration will be severely curtailed as the importance of the contractual bargain will be left to play second fiddle to EC law. Finally, a brief discussion of the source of the problem and possible solutions as put forward by the Commission of the European Communities (the 'Commission')<sup>9</sup> will be entered into, leading to the general conclusion that something must be done to restrict the power of the ECJ to influence the very nature of arbitration.

## II. CMA CGM SA v HYUNDAI MIPO DOCKYARD LTD

### A. The Facts

In *CMA CGM SA*<sup>10</sup>, the Defendant (HMD) had entered into four shipbuilding contracts with subsidiaries of ER Schiffahrt GmbH (ERS)<sup>11</sup>, all of which contained London arbitration clauses and a requirement that any party wishing to transfer his rights and obligations under the contract to a third party would first need to gain the consent (which could not be unreasonably withheld) of the other party. CMD (the claimant) wished to take over the rights and obligations of ERS. However, HMD refused. As a result, CMD sued HMD in the Marseilles Commercial Court, alleging that it had unreasonably withheld its consent. CMD was successful in gaining a judgment against HMD (importantly, after a novation agreement had been made between CMD and ERS). At the same time, however, London arbitrations had been commenced pursuant to the arbitration clauses in the original shipbuilding contracts, HMD claiming that CMD was in breach of the arbitration agreement by commencing court proceedings and was therefore liable to pay damages. The arbitration tribunal held that CMD had not initially been in breach by commencing the proceedings but had become in breach by continuing them after the novation agreements had been signed (all rights and obligations, including the obligation to submit to arbitration having passed upon the signing of the novation agreements). Furthermore the tribunal held that it was not bound, under the Regulation, by the Marseille Court's decision and therefore found in

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<sup>6</sup> [2008] 2 Lloyd's Rep. 661, at [31] – [37].

<sup>7</sup> [2008] EWHC 279 (Comm), [2009] 1 Lloyd's Rep. 213.

<sup>8</sup> 'Procedural Guarantees of Human Rights in Arbitration Proceedings: A Still Unsettled Problem?', (2007) J. Int'l Arb 24(2), pp. 159-171.

<sup>9</sup> Commission of the European Communities Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, EU: COM(2009) 175.

<sup>10</sup> *Ibid.*

<sup>11</sup> Arbitration Act 1996, s. 69 (the 'Act').

favour of HMD. CMD appealed to the English Commercial Court on a point of law<sup>12</sup>, arguing, *inter alia*, that the arbitrators were bound by Articles 32 and 33 of the Regulation and had therefore been obliged to apply the ruling of the Marseille Court in the subsequent arbitration.

### B. The Decision

Burton J. found largely in favour of HMD. In relation to whether the arbitrators were bound to recognise foreign judgments under Articles 32 and 33 of the Regulation, the learned judge held that the arbitrators were not so bound. His lordship gave two reasons for this decision: firstly, that a tribunal of a Member State, under Article 32, is not the same as a tribunal *in* a Member State. In other words, the wording of the Article itself suggests that there is no direct requirement on arbitration tribunals to apply the Regulation.<sup>13</sup> Indeed, this conclusion seems correct and in line with the jurisprudence of the ECJ<sup>14</sup> on the nature of arbitral tribunals. His lordship further held, however, that there was no *indirect* requirement for tribunals to apply the Regulation as they are not bound by the procedural requirements imposed upon English courts, even where the substantive law of the contract is English law.<sup>15</sup> It is this second part of the decision that, following *The 'Front Comor'*, is in issue and, it will be argued, in doubt.

### III. THE OPINION OF ADVOCATE-GENERAL KOKOTT

The ECJ followed the Opinion of Advocate-General Kokott – the tenor of the Opinion and the Judgment being largely the same.<sup>16</sup> However, as Advocate-General Kokott provides a more in-depth analysis of the issues, it is this Opinion, as opposed to the substantive judgment, that will largely be discussed.

The Advocate General focused on the interpretation of the arbitration exception (Article 1(2)(d) of the Regulation) and the conflicting views of the common law (a broad approach) and the civil law (a narrow approach). To the common law, ‘as soon as it is claimed that there is an arbitration agreement, all disputes arising from the legal relationship are subject exclusively to arbitration’ and therefore to the exclusive jurisdiction of the arbitral tribunal and the courts at the seat.<sup>17</sup> In contrast, the civil law ‘takes account first and foremost of the substantive subject-matter’ of the court proceedings in issue.<sup>18</sup> If these fall within the Regulation, then it is the duty of the court first seised to settle the matter in issue. The Advocate-General, by analysing the Schlosser Report<sup>19</sup>, took the latter approach thus aligning the European jurisprudence with the overwhelming majority of commentators.<sup>20</sup> As such, anti-suit injunction

<sup>12</sup> [2008] EWHC 279 (Comm), [2009] 1 Lloyd's Rep. 213 at [45].

<sup>13</sup> *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG* [1982] ECR 1095.

<sup>14</sup> [2008] EWHC 279 (Comm), [2009] 1 Lloyd's Rep. 213 at [46].

<sup>15</sup> See in particular [2009] 1 Lloyd's Rep 413 at [24].

<sup>16</sup> [2008] 2 Lloyd's Rep 661, at [43].

<sup>17</sup> *Ibid.*, at [44].

<sup>18</sup> Schlosser Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice [1979] O.J. C59/71 at [61].

<sup>19</sup> See for example: Int. A.L.R. 2007, 10(5), at p. 149 where the learned authors argue the question is whether the impact on the proceedings of the measure in issue could be described as ‘direct and immediate’.

<sup>20</sup> [2008] 2 Lloyd's Rep 661 at [34].

proceedings would fail this test as not being intrinsic to the continuation or initiation of arbitration proceedings while, for example, the appointment of an arbitrator would fall under the exception.

The Advocate-General did not, however, stop here. It was further argued that the principle of mutual trust supported the conclusion that the anti-suit injunction was contrary to the Regulation as 'the principle of mutual trust can also be infringed by a decision of a court of a Member State which does not fall within the scope of the Regulation obstructing the court of another Member State from exercising its competence under the Regulation'.<sup>21</sup> In other words, even if the anti-suit injunction proceedings had fallen outside the ambit of the Regulation, this would not automatically have made them immune from it: any court must not only consider the direct effect of its actions, but also the indirect effect in order to make sure that it does not infringe the underlying principle embodied in the Regulation. This essentially has the effect of adding 'except where this would offend the underlying principles of the Regulation' to the end of Article 1(2) and, as a direct result, suggests that an arbitral tribunal must recognise foreign-judgments that affect the substantive or procedural matters in dispute.

#### IV. CONSIDERATIONS DRAWN FROM A PARALLEL ARGUMENT

In the field of human rights, it is generally accepted that an arbitral tribunal must apply Article 6(1) of the European Convention on Human Rights (the 'ECHR'). Furthermore, it is accepted that this applies regardless of whether Article 6 is categorised as a procedural or substantive law. The argument in favour of this position is best put forward by Jaksic<sup>22</sup> who argues that, out of commercial necessity, arbitrators are to be considered bound *ab initio* by Article 6(1) as '[o]nly in such a case is it to be expected that arbitral awards will not run the risk of being set aside and that they will have full transnational effect', particular reference being made here to the Art. V(2)(b) option under the New York Convention (the 'NYC')<sup>23</sup> to refuse enforcement on the grounds of public policy. It is uncontroversial to suggest that a European national court would be well within its rights to refuse enforcement where an arbitral award was contrary to human rights under the ECHR in some fashion as this forms part of the public policy of those states who have assented to the ECHR.

How, then, does this argument apply to the issue of 'mutual trust' and the duty of arbitrators to apply foreign judgments? It is submitted that 'mutual trust' must, following *The Front Comor*, be given a broad interpretation and that the focus must be on the effect of measures taken and not their nature (or focus). As such, the focus is not on the fact that the arbitration tribunal does not fall under the Regulation but, rather, that a national court of the European Union (the 'EU') enforcing the award does. It is the obligation of the latter to consider whether *any measure taken by it* is contrary to the principle of mutual trust and this, it is submitted, must include the decision whether or not to enforce an arbitral award - that blatantly ignores the decision of another European court. If the award was to be enforced, this would indirectly act as a failure to respect the decision of another European national court, contrary to the spirit, as opposed to the letter, of Articles 32 and 33, regardless of whether the proceedings fell

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<sup>21</sup> 'Procedural Guarantees of Human Rights in Arbitration Proceedings: A Still Unsettled Problem?', (2007) J. Int'l Arb 24(2), pp. 159-171.

<sup>22</sup> 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

<sup>23</sup> On this point, see Int. A.L.R. 2007, 10(5), at p. 149 where the authors argue that a 'functional', and therefore narrow, approach must be taken in relation to the arbitration exception, implying a broad approach to be taken when considering the issue of mutual trust.

directly under the exception in Article 1(2)(d). Although the focus of the decision would not, therefore, be on the decision of the other European national court and, therefore the Regulation, the effect would be to fail to uphold the decision. Thus, in *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd*<sup>24</sup>, the Commercial Court asked to apply the award that had ignored the ruling of the Marseille Commercial court would have been obliged, contrary to the analysis of the learned judge in that case, to apply Article V(2) (b) of the NYC and refuse enforcement upon grounds of public policy or risk contravening the fundamental principle of the supremacy of EU law.<sup>25</sup>

In relation to the arbitral tribunal, its mission is, simply put, to resolve the dispute of the parties with a degree of finality that cannot be achieved through litigation. This can only occur if a viable award is issued.<sup>26</sup> For a viable award to be issued, the award must be enforceable and not contrary to Article V of the NYC. As such, out of commercial necessity, the arbitral tribunal must respect the decision of any European national court that has ruled upon the substantive claim in issue or the validity or applicability of the arbitration agreement. A failure to do so would almost certainly lead to the award would being set aside in a European national court applying the principle of mutual trust as part of the public policy exception under Article V(2)(b).

#### V. THE RESULT FOR ARBITRATION

If the above analysis is accepted, the results for arbitration can only be seen as negative ones. The first, and most obvious result, is that the principle of Kompetenz-Kompetenz<sup>27</sup>, which grants the tribunal a great degree of freedom to decide the issues before them is reduced in importance by the European approach. Indeed, as Merkin notes<sup>28</sup>, the Opinion of Advocate General Kokott represents a ‘fundamental misunderstanding of arbitration’ as the learned Advocate General fails to draw a distinction between the ‘first seised’ rule in relation to the court-court relationship and the Kompetenz-Kompetenz rule in relation to the court-tribunal relationship. Under s. 30(1) of the Arbitration Act 1996, ‘[u]nless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction’. This is not a position that is respected solely by the English courts; under Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration (the ‘Model Law’) which has been adopted either wholesale or in modified form by over 50 countries<sup>29</sup>, many of them members of the EU, ‘[t]he arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement’. As a result of the ‘*Front Comor*’, it is doubtful whether the principle of Kompetenz-Kompetenz can be given full effect. A tribunal presented with a contrary European national court decision on its jurisdiction will have two choices: ignore it and risk making an invalid award or bow to the decision of another tribunal as to jurisdiction – a power which even the court at the seat does

<sup>24</sup> *Costa v ENEL* [1964] CMLR 425 at p. 456.

<sup>25</sup> The author is aware that under English arbitration law (i.e. the Arbitration Act 1996), there is no direct duty on the arbitrators to produce an enforceable award. However, it is at least conceivable that the award of a tribunal that ignored a principle that would almost certainly invalidate the award would be subject to a challenge under s. 68(2)(a) (failure by the tribunal to comply with s. 33).

<sup>26</sup> The principle that the arbitral tribunal has the power to decide on its own jurisdictional competence to hear the dispute.

<sup>27</sup> Merkin, *Arbitration Law* (LLP, London, looseleaf), at [8.91].

<sup>28</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html).

<sup>29</sup> In England, although the English court (as the seat court) can decide on jurisdictional issues, it is the tribunal that must be given the first opportunity. Under the Act, see in particular sections 33(1), 32(2), 67, 70(2)(a) and 73(1).

not have over the arbitral tribunal.<sup>30</sup> The result, therefore, is to turn the institution of arbitration into a 'second-rate dispute resolution process'<sup>31</sup> – a mere link between two European national courts. This is something arbitration was not designed to be.

The answer to the question proposed by the Advocate-General (why a decision as to jurisdiction should be reserved to the arbitration tribunal alone) is the simple fact that this is what the parties, by contract, have agreed to. If this is not enough of a reason to respect the jurisdictional capacity of the tribunal, then the broader question of 'what is the point of arbitration' or, better yet, 'what is the point of alternative dispute resolution', must also be raised. By attacking arbitration not at the outset (as court proceedings concerning, for example, the appointment of an arbitrator would fall under the arbitration exception in the Regulation<sup>32</sup>), but in the final result, using the analysis of the Advocate General's Opinion provided above, it is not the nature of the decision of the ECJ but its effect that has devastating results for arbitration.

A further issue relates to the position of the seat of arbitration. The seat, it is submitted, is representative of the limited relationship between the national court on the one hand and the arbitral tribunal on the other. By demarking the role of the state through the seat, the tribunal is given greater freedom to act.<sup>33</sup> However, if a tribunal is forced to recognise the authority not only of the court at the seat but also of any European national court whose decision relates to the issues being decided by the arbitration, then the purpose of the seat is lost. As opposed to limiting court control over arbitration, the Regulation expands it, turning the jurisdiction of the EU into one seat with the power to dictate issues of arbitrability, public policy and so on – an approach that runs contrary to the very purpose of arbitration. Furthermore, this has the effect of side-lining the contractual bargain and putting the interests of the party in breach of that agreement over the interests of the party acting in pursuance of it. As Lord Mance stated when referring the issue, along with the rest of the House, to the ECJ, 'Engagement in the foreign litigation is precisely what the person pursuing such litigation wishes to draw the other party into, but is precisely what the latter party aim and bargained to avoid'.<sup>34</sup>

## VI. THE SOURCE OF THE PROBLEM

As can be grasped from the above, the main source of the problem that has arisen in relation to the relationship between the EU and the institution of arbitration is the great degree of freedom given to the ECJ to dictate the way the Regulation applies to arbitration tribunals. This problem arises solely from the fact that when one looks to Article 1(2) and the exceptions contained therein, the only guidance given on this complex area is that 'The Regulation shall not apply to... arbitration' which is no form of guidance at all.<sup>35</sup> Perhaps in other areas of law, such a simple exclusion would suffice; but where

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<sup>30</sup> Seriki, 'Anti-suit injunctions, arbitration and the ECJ: an approach too far?' J.B.L. 2010, 1, 24-35 at pp. 28-29.

<sup>31</sup> *Marc Rich & Co AG v Società Italiana Impianti PA (The Atlantic Emperor)*; [1992] 1 Lloyd's Rep 342.

<sup>32</sup> This approach is evidenced by ss. 1 and 4 of the Act which provide that the courts cannot and should not aim to interfere with arbitration except where this is necessary to preserve such things as public policy and human rights.

<sup>33</sup> *West Tankers Inc v Ras Riunione Adriatica di Sicurtà SpA (The 'Front Comor')* [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391 at [22].

<sup>34</sup> Indeed, what is perhaps worse is that the Regulation was not the first to attempt to touch on this area. Its precursor, The Convention of September 27 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the 'Convention'), also stated (in Article 1(d)) that 'arbitration' was excluded from its scope without any further explanation.

<sup>35</sup> *Marc Rich & Co AG v Società Italiana Impianti PA (The Atlantic Emperor)* [1992] 1 Lloyd's Rep 342.

arbitration is concerned the relationship between the arbitral tribunal, the court at the seat and other national courts is inimical to the very nature of the institution and thus simply stating that 'arbitration' is excluded from the scope of the Regulation seems misguided.

As a result, it was left to the ECJ to attempt to provide flesh to the bones of the exception. The first case to attempt a detailed examination of this area was *The Atlantic Emperor*<sup>36</sup> where the ECJ answered the question of whether an English court could assist one party attempting to appoint an arbitrator in a London arbitration where the other party had already initiated proceedings in Italy. The ECJ held that, as the drafters of the Convention recognised that arbitration was already governed by various international conventions and treaties (including the NYC), 'the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts'.<sup>37</sup> Furthermore, it was held that in the particular case of appointing an arbitrator, this was a measure 'adopted by the State as part of the process of setting arbitration proceedings in motion', epitomising the very purpose of the exception – namely, to disapply the 'first seized' rule and allow the appropriate court (the court at the seat) to assist in ensuring that the contractual bargain (resolution of disputes through arbitration) is respected.<sup>38</sup> As such, the fact that, in the case, proceedings had been commenced in Italy for a declaration that the defendants were not liable to the claimants for the \$ 7, 000, 000 of damages claimed by them did not affect the power of the English courts, under the London arbitration agreement, to appoint an arbitrator in default of an appointment being made by the defendant even though, in both sets of proceedings, the question of the validity of the arbitration agreement itself could arise. This case, therefore, suggested that the line had been drawn between Europe and international arbitration.

*The Atlantic Emperor* did not, however, provide any guidance as to whether all court proceedings in any way related to arbitration were excluded from the scope of the Convention or whether more than this was required. The answer to this question was given in Case C-391/95 *Van Uden Maritime BV v. Deco-Line*<sup>39</sup> where the ECJ was asked to consider whether provisional or interim measures were excluded from the scope of the Convention by the very fact that the parties had entered into an arbitration agreement to which the subject matter was related. The ECJ held that such measures were not excluded from the scope of the Convention as the question to be asked was whether the proceedings in the national court were ancillary to the arbitration or whether they were parallel to arbitration proceedings being intended only as measures of support.<sup>40</sup> Thus, an essentially functional approach was taken: is the measure necessary for arbitration to take place or does it simply facilitate the smooth running of those proceedings? In this manner, the ECJ was able to strike a balance between, on the one hand, the interests of the arbitral tribunal and the international institutions responsible for its running and, on the other, the interests of national courts operating under the Convention. The appointment of an arbitrator, as was the issue in *Marc Rich*, or a declaration by the court at the seat that the arbitration agreement was valid would clearly be necessary for arbitration. As such, the exception would apply automatically and it would be irrelevant whether proceedings in another Member State deciding substantially similar issues to those to be decided by the court at the seat had been commenced or not. A breaching party would not be able to benefit from the system set up by the Regulation in such circumstances.

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<sup>36</sup> *Ibid.*, at p. 350.

<sup>37</sup> *Ibid.*

<sup>38</sup> [1999] QB 1225.

<sup>39</sup> *Ibid.* at pp. 1255-1256.

<sup>40</sup> [2005] 1 AC 101.

It was only with the decision in Case C-159/02 *Turner v Grovit*<sup>41</sup>, which concerned the use of anti-suit injunctions to enforce exclusive jurisdiction clauses, that the ECJ made clear the importance of the principle of *effet utile* (the proactive twin of the principle of mutual trust) when considering the arbitration exception, stating that

Even if it is assumed that... an injunction may be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention.<sup>42</sup>

As such, any national court within the EU would have to consider the wider issue of whether its actions could impair the working of the Convention, as opposed to the much simpler issue of whether they would impair the working of the Convention. Naturally, this broader approach would have the possibility of affecting the delicate balance of power between national courts and the arbitral tribunal. Although *Turner* did not, of itself, concern arbitration, it did send a very clear message: the Convention takes precedence over national law and measures, regardless of the purpose of the measure. It is no surprise, therefore, that the '*Front Comor*' focused solely on the effect that anti-suit injunctions would have on the working of the Regulation as opposed to the broader question of the effect that EU law would have on the working of arbitration. What is needed, it seems, is a revision of the arbitration exception found in the Regulation to restore the balance that was originally envisioned by the ECJ in the '*Atlantic Emperor*'.

## VII. POSSIBLE SOLUTIONS

### A. *The Commission Green Paper*

As a result of the various problems with the functioning of the Regulation, the European Commission, under article 73 of the Regulation, is to 'present to the European Parliament, the Council and the Economic and Social Committee a report on the application of [the] Regulation'. As the report is to be 'accompanied... by proposals for adaptations to [the] Regulation', the Commission has released a Green Paper, open to comment by the arbitral community, on the reform of Regulation 44/2001<sup>43</sup> and, unsurprisingly, one of the areas that is being concerned is the arbitration exception. In the opinion of the Commission, the appropriate course for the EU is to interfere with arbitration as little as possible; however, this '...should not prevent... addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings'.<sup>44</sup> The Commission suggests that this can

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<sup>41</sup> *Ibid.*, at [29].

<sup>42</sup> Commission of the European Communities Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, EU: COM(2009) 175.

<sup>43</sup> *Ibid.*, at p. 8.

<sup>44</sup> On this point, see the judgment of Lord Hoffmann in *West Tankers Inc v Ras Riunione Adriatica di Sicurtà SpA (The 'Front*

be achieved through a partial deletion of the exclusion of arbitration from the scope of the Regulation while at the same time inserting a special rule effectively disapplying the 'first seised' rule and replacing it with one granting exclusive jurisdiction to the court at the seat where arbitration is concerned. This will, broadly, have the following results. Firstly, the question of whether arbitral proceedings fall within the Regulation or not will no longer be an issue. They would fall within the Regulation, but would be subject to the jurisdiction of one court – that at the seat.

Secondly, the issue of validity of the arbitration agreement would become an 'EU-wide' issue. By restricting the jurisdictional issues that may arise to one court, the arbitral proceedings cannot be delayed by parties who wish to begin court proceedings in multiple jurisdictions. Furthermore, the recognition by Member State courts of a judgment setting aside an arbitral award on the grounds of the invalidity of the arbitration agreement across the EU would necessarily '...reduce the risk that the agreement is considered valid in one Member State and invalid in another'.

Finally, such a change to the Regulation would allow for the existence of 'EU-wide' awards as the court at the seat would not only have the exclusive jurisdiction to decide upon the validity of the arbitration agreement, but also to decide upon the wider issue of the enforceability of the award. In this manner, an award rendered in England and found to be enforceable by the English Commercial Court, for example, would be enforceable automatically against a French Respondent in France without further debate in the French courts which would certainly contribute to the swift resolution of disputes, that being a principal aim of arbitration.

### B. Commentary

The proposals of the Commission seem, on the whole, sensible and address the key concerns of arbitral practice following *The Front Comor*. As such, each of the three points above will be assessed here in some detail, considering in particular the result of such changes on English arbitral law.

#### 1. Exclusive jurisdiction of the court at the seat and reversal of the 'first seised' rule

This relatively large change to the working of the Regulation seems, perhaps, the most necessary of all the proposals made by the Commission. Leaving the court at the seat of arbitration to deal with issues ancillary to arbitration not only protects the contractual bargain of the party through the medium of the Regulation but also emphasises a central concern in the relationship between national courts and arbitral tribunals: that of trust. Although 'mutual trust' as between courts is one of the underlying concerns of the Regulation, as was emphasised in the *Front Comor*, trusting the arbitral tribunal is also of central importance.<sup>45</sup> Indeed, by placing the emphasis on the court at the seat, the national courts of Member States would be required directly by the Regulation to place their trust in that court with the indirect effect of restoring the freedom of the arbitral tribunal to govern itself as the court at the seat, through the operation of the Kompetenz-Kompetenz principle, will defer jurisdictional issues to the

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*Comor*) [2007] UKHL 4, [2007] 1 Lloyd's Rep. 391 at [22].

<sup>45</sup> For a contrary interpretation of this area of the Commission's Green Paper, see Mourre and Vagenheim, 'The arbitration exclusion' in Regulation 44/2001 after *West Tankers* Int. A.L.R. 2009 12(5), 75-83 at pp. 82-83 in particular.

tribunal only interfering where this is necessary.<sup>46</sup> A working example will perhaps help to illustrate the point. If a party, in breach of a London arbitration agreement, began proceedings in Germany with the intention of having the issue of the jurisdiction of the tribunal decided in that court, under the Regulation as proposed to be changed, the German court would have to defer to the court at the seat (i.e. the English Commercial Court). The English court would, in turn, defer to the tribunal on the issue under section 30 of the Act, unless either the parties had excluded the effect of section 30 or had made a valid application, with the permission of the tribunal, for the court to decide the issue under section 32. Thus the decision would be placed, once more, firmly in the hands of the tribunal.

This is not to say, however, that such an approach would be flawless. One key issue is the fact that the parties do not always choose the seat of arbitration, a point recognised by both the ICC Rules<sup>47</sup> and the LCIA Rules.<sup>48</sup> As such, the question arises as to whether it is fair to restrict the parties to the jurisdiction of one national court within the EU based upon a decision that the parties did not make themselves. The obvious answer in such a case is to state that under the institutional rules cited, the default position seems to be that the institution itself chooses the seat of arbitration. However, this position can be varied by the agreement of the parties if they so wish. Although, therefore, the Court of the ICC or LCIA may choose the seat, this is only because the parties to the arbitration agreement have let them. A more troubling issue arises in the situation where either the arbitration clause does not clearly designate a seat, for example where an arbitration clause states that 'the seat is to be Country X or Country Y' or the arbitration is ad hoc and a referral body is not chosen to designate the seat where the parties fail to. In the first case, if both countries are within the EU, then the question arises as to which court will be left to decide the issue. In other words, who will have the exclusive jurisdiction to decide upon exclusive jurisdiction? In the second case, it would be necessary, as suggested by Pullen, to specifically legislate for a neutral third party (i.e. without any substantive connection to the parties to the contract) to decide upon the seat in the arbitration.<sup>49</sup>

## *2. The validity of the arbitration agreement as an 'EU-wide' issue*

One of the central concerns of the Commission is to ensure that validity of the arbitration agreement becomes an EU-wide issue as opposed to one that can be argued before multiple courts within the EU. Indeed, this seems to be a sensible proposal and in line with the Kompetenz-Kompetenz principle as laid out above. By restricting jurisdiction to the court at the seat, the proposals of the Commission ensure that the validity of the arbitration agreement is argued a maximum of two times: firstly, before the arbitration tribunal which will have the power to decide upon the issue conclusively or, alternatively, by the court at the seat where a referral is made by the tribunal; and, secondly, before the court at the seat as a formal challenge to the award. Although, to some, this may seem excessive, it is preferable to the two possible alternatives of either a plethora of challenges before every state court where the issue of jurisdiction is raised or a conclusive decision by a court whose jurisdiction exists only because one of the

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<sup>46</sup> ICC Rules of Arbitration, Article 14(1).

<sup>47</sup> LCIA Arbitration Rules, Article 16(1).

<sup>48</sup> 'The future of international arbitration in Europe: West Tankers and the EU green paper', *Int. A.L.R.* 2009, 12(4), 56-61 at p. 60.

<sup>49</sup> There is, of course, a third possible challenge: that of raising the issue of jurisdiction at the point of enforcement. However, as will be seen below, it is possible to bring this under the second point of challenge.

parties has breached the arbitration agreement and not because that court was chosen by the parties in their arbitration agreement.<sup>50</sup> By using the Regulation to state clearly the relationship between the seat court and the remaining EU national courts, it is possible not only to enforce the contractual obligations entered into by the party who then attempts to escape them, but also ensures that an arbitration agreement that is declared valid at the *seat* is considered valid *throughout Europe*.

### 3. Enforcement

The proposals of the Commission also address the wider issue of enforcement under the NYC. The suggestion that the court of the seat can decide conclusively within the EU whether the award is enforceable seems supportive of the purpose of the NYC and, in particular, Article V looked at as a whole. Under Article V(1), for example, one of the reasons open to a national court for refusing enforcement is that ‘the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made’.<sup>51</sup> Similarly, under Article VI, ‘[i]f an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon, if it considers it proper, adjourn the decision on the enforcement of the award...’. Read together, these Articles show one of the principal concerns of the NYC: to *limit* the amount of court intervention by restricting such intervention to the seat of arbitration – in this case by allowing it to decide upon the enforceability of the award.<sup>52</sup>

An obvious objection to this approach could be drawn from Article V(2), in particular Article V(2)(b), under which recognition or enforcement of an award can be refused where it would be contrary to public policy to do otherwise. It could be suggested that public policy is an issue reserved for the state and not one that can be decided by one national court for another. However, the English courts, as well as various other European countries,<sup>53</sup> have taken a more ‘international’ approach.

In *Westacre Investments Inc. v Jugoinport-SPDR Holding Co. Ltd*<sup>54</sup> Waller LJ held that ‘...there is nothing which offends English public policy if an arbitral tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view’,<sup>55</sup> thus emphasising the point that where public policy is in consideration, the English court will not interfere with a decision made by the tribunal as to public policy and will not take into account purely domestic considerations unless the contract is to be performed in England. This point was further highlighted in *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd*<sup>56</sup> which concerned a finding by an arbitrator under a Swiss arbitration clause that contracts for the sale of personal influence, although contrary to the law of the country

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<sup>50</sup> Article V(1)(e) of the NYC.

<sup>51</sup> The upshot of Article V(1)(e) in particular is that a jurisdictional challenge raised at the seat in response to an award rendered by the tribunal can be decided by that court with the authority to bind all other European Member States as opposed to allowing the same challenge to be raised in every (European) country where the claimant seeks to enforce the award.

<sup>52</sup> See for example: Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, 2004), paras. 10-51 – 10-54.

<sup>53</sup> [1999] 2 Lloyd’s Rep. 65.

<sup>54</sup> *Ibid.*, at p. 75.

<sup>55</sup> [1992] 2 Lloyd’s Rep. 222.

<sup>56</sup> *Ibid.*, at p. 224.

in which the agreement was made (Algeria) was not contrary to the law of the contract (Swiss law). An application for enforcement was made to the English courts, which was challenged as contrary to public policy. Walker J rejected the challenge stating:

But I am not adjudicating upon the underlying contract. I am deciding whether or not an arbitration award should be enforced in England. In this context it seems to me that (absent a finding of fact of corrupt practices which would give rise to obvious public policy considerations) the fact that English law would or might have arrived at a different result is nothing to the point. Indeed, the reason for the different result is that Swiss law is different from English law, and the parties chose Swiss law and Swiss arbitration. If anything, this consideration dictates (as a matter of policy of the upholding of international arbitral awards) that the award should be enforced.

To the English courts, therefore, where public policy is concerned it is the law of the place of performance that is crucial to the international arbitration process and not the domestic law.

It seems, therefore, that the proposals of the Commission appear in line with this view: by allowing the court at the seat to decide conclusively on the issue of enforcement, it is not possible for purely domestic considerations at each enforcement court to come into play. Indeed, even in the area of public policy, which is traditionally a domestic concern, it is possible for the court at the seat to adjudicate on the matter as it will place the interests and concerns of the parties, as dictated by their contractual agreement, before the strict interests of the state.

#### VIII. CONCLUSION

The ECJ ruling in *West Tankers* has the scope to change the face of arbitration, and not in a way that will prove beneficial to it. The Opinion of Advocate General Kokott, which the ECJ followed, displayed a clear misunderstanding of the working of international commercial arbitration and the requirement that, for it to remain a popular method of settling disputes, the arbitral tribunal must remain largely independent of the state in which it is situated and must be given the freedom to act in accordance with the wishes of the parties. By focusing on the underlying principles of the Regulation, in particular mutual trust, as opposed to the nature of arbitration, the decision of the ECJ shifts the focus of the arbitration exception away from respecting arbitral practice and towards controlling it. If, as has been argued, arbitral tribunals are no longer permitted to rule upon their own jurisdiction but must instead submit to the court of a national state in order to produce a viable award, this will certainly have an impact on the independence of the tribunal which will be bound not only by the decisions of the court at the seat, but also by any European court who, in breach of the arbitration agreement, rules upon the validity of the arbitration agreement or any of the substantive issues in dispute.

The source of this problem is not, so much, the ECJ itself but the drafting of the arbitration exception found in the Regulation. By limiting the exception to a single word ('arbitration') without any further explanation as to its scope and purpose, the ECJ has been left to 'fill in the gaps' and has done so in the manner outlined above. This highlights a need for legislative action in relation to the Regulation. It is reassuring, therefore, that the Commission has released a Green Paper on the issue of reform to the Regulation which concerns, *inter alia*, the arbitration exception. By suggesting a partial deletion of the exception in combination with an exception to the first seised rule, the Green Paper brings the

focus back to where it should be: on the national court at the seat of arbitration and, indirectly, the arbitral tribunal. Where the rule of the national court at the seat is minimal interference, the arbitral tribunal would be protected by the Regulation as altered, as opposed to hindered by it. One can only hope, therefore, that such a change does come about – and that it comes about quickly before respect for Europe as a place of arbitration is damaged or lost.