

Client Advisory | February 2009

No Restraint: ECJ Ruling Spells the End of Anti-suit Injunctions

The recent Judgment of the European Court of Justice (ECJ) in *Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc.* (Case C-185/07) means that English courts are now unable to restrain court proceedings commenced in other EU Member States in breach of an arbitration clause.



Alexandra Radcliffe
Solicitor

Anti-suit Injunctions

The power of English courts to stop competing European proceedings through the issuing of anti-suit injunctions had already been curtailed by the ECJ in *Turner v Grovit* (Case C-159/02). In that case, a party to proceedings pending before an English court was restrained from commencing or continuing proceedings before the courts of another Member State because of an exclusive jurisdiction clause. However, the ECJ held that the Brussels Convention, which governs jurisdiction within the EU, precludes anti-suit injunctions against the court of another European Member State. The courts first seised of the matter had jurisdiction to determine the appropriate jurisdiction.

Nonetheless, English courts were still willing to issue anti-suit injunctions in support of arbitration in London on the ground that under Article 1(2)(d) of EC Regulation 44/2001 (the Brussels Regulation), the Brussels Regulation did not apply to arbitration.

The Facts

The litigation in *West Tankers* arose out of the collision of a vessel, owned by West Tankers Inc. and chartered to Erg Petroli SpA, with a jetty owned by Erg Petroli in Syracuse, Italy. The charterparty was governed by English law and contained an arbitration agreement providing that all disputes arising from the contract were to be dealt with by arbitration in London.

Erg Petroli made claims on various insurances and then commenced arbitration in London against West Tankers. In 2003, Erg Petroli's insurers, exercising rights of

subrogation, commenced proceedings in a tort against West Tankers in Syracuse for reimbursement of the amounts they had paid out. The Italian courts had jurisdiction for that claim under Article 5(3) of the Brussels Regulation, as proceedings in tort may be brought in the courts of the Member State where the harmful event occurred.

In September 2004, West Tankers applied for an injunction from the English court to restrain the insurers from taking any further steps in the Italian proceedings on the grounds that they were in breach of the arbitration agreement. The injunction was granted by the High Court which confirmed that, by claiming a right of subrogation under the contract, the insurers were also bound by the arbitration clause. On appeal by the insurers, the case was sent directly to the House of Lords. The Lords, in turn, referred the following question to the ECJ:

"Is it consistent with Regulation (EC) 44/2001 for a court of a member state to make an order to restrain a person from commencing or continuing proceedings in another member state on the ground that such proceedings are in breach of an arbitration agreement?"

Lord Hoffmann, in order 'to assist' the ECJ, gave the opinion that anti-suit injunctions should be permitted. He relied on Article 1(2)(d) of the Brussels Regulation (which provides that the Brussels Regulation does not apply to arbitration) and argued that this exception extended to proceedings which have arbitration as their subject-matter. He said anti-suit injunctions were to

protect the contractual right to have a dispute determined by arbitration, and therefore fell outside the Brussels Regulation and could not be inconsistent with its provisions. He added that London could be placed at a disadvantage when compared to other international seats of arbitration were it no longer able to issue anti-suit injunctions.

The ECJ received observations on the matter from both parties to the main proceedings, the French and UK Governments and the EC Commission.

Ruling of the ECJ

The Judgment handed down by the ECJ supported Advocate General Juliane Kokott's interpretation of the issue. The ECJ stated that the key point when trying to establish the application of the Brussels Regulation was to make "reference ... solely to the subject-matter of the proceedings." Applying this principle to the current proceedings, the ECJ determined that the subject matter was the tort claim and such a claim came within the scope of the Brussels Regulation.

The ECJ stated that anti-suit injunctions were contrary to the general rule, established by ECJ case law relating to the Brussels Regulation, that every court, once seised, should have the opportunity to determine its own jurisdiction. The ECJ continued that the Brussels Regulation did not permit any

court in a Member State to review the jurisdiction of another court. It also ruled that an attempt to initiate an anti-suit injunction undermined the trust that Member States had for one another's legal systems and judicial institutions.

The ECJ also emphasised the risk that an anti-suit injunction would prevent a proper inspection by the court first seised of a claim that the relevant arbitration agreement was void, inoperative or incapable of being performed. Without a court examining such preliminary issues, a party might lose its judicial protection.

In relation to the application of the New York Convention, the ECJ decided that Article II(3) supported its ruling. This Article states that the court of a contracting state, once seised of an action where the parties have an arbitration agreement, shall, at the request of one of the parties, refer the parties to arbitration unless the agreement is void, inoperative or incapable of being performed.

Conclusion

The ECJ ruling means that London has lost a useful weapon in its arbitral armoury. The ability to avoid these sorts of jurisdictional issues by obtaining anti-suit injunctions was promoted as one of the perks of choosing arbitration. English courts will now be unable

to stop a party from intentionally creating delay by issuing court proceedings in another Member State in breach of an arbitration agreement. However, English courts will still be able to grant anti-suit injunctions to restrain proceedings outside the EU and Lugano countries (Switzerland, Iceland and Norway). Although other factors, not least location, language and neutrality, might usually be more important considerations when parties are deciding on an arbitration venue, the local courts' ability to issue anti-suit injunctions was certainly a factor to take into account.

The impact of the ruling, however, may not be as severe as it may first appear. It does not mean that court proceedings in other Member States cannot be stopped, but that it will be for that Member State's courts to consider the validity of the arbitration agreement in question. In those circumstances, it would be advisable for any party to a contract with an arbitration clause stipulating a seat of arbitration in Europe to review the validity of that arbitration agreement under the laws of each of the (possibly many) European jurisdictions connected to that contract.

This briefing note is an update of an article written by Antony Woodhouse and Stephen Ixer of our Insurance & Reinsurance Department.

BOSTON MA | FT. LAUDERDALE FL | HARTFORD CT | MADISON NJ | NEW YORK NY | PROVIDENCE RI | STAMFORD CT
WASHINGTON DC | WEST PALM BEACH FL | WILMINGTON DE | LONDON UK | HONG KONG (ASSOCIATED OFFICE)

This advisory is for guidance only and is not intended to be a substitute for specific legal advice. If you would like any further information please contact:

Kevin Perry, Partner

+44 (0) 20 7556 4454

kperry@eapdlaw.com

Alexandra Radcliffe, Solicitor

+44 (0) 20 7556 4593

aradcliffe@eapdlaw.com

This advisory is published by Edwards Angell Palmer & Dodge for the benefit of clients, friends and fellow professionals on matters of interest. The information contained herein is not to be construed as legal advice or opinion. We provide such advice or opinion only after being engaged to do so with respect to particular facts and circumstances. The firm is not authorized under the U.K. Financial Services and Markets Act 2000 to offer UK investment services to clients. In certain circumstances, as members of the U.K. Law Society, we are able to provide these investment services if they are an incidental part of the professional services we have been engaged to provide.

Please note that your contact details, which may have been used to provide this bulletin to you, will be used for communications with you only. If you would prefer to discontinue receiving information from the firm, or wish that we not contact you for any purpose other than to receive future issues of this bulletin, please contact us at contactus@eapdlaw.com.

© 2009 Edwards Angell Palmer & Dodge LLP a Delaware limited liability partnership including professional corporations and Edwards Angell Palmer & Dodge UK LLP a limited liability partnership registered in England (registered number OC333092) and regulated by the Solicitors Regulation Authority.

Disclosure required under U.S. Circular 230: Edwards Angell Palmer & Dodge LLP informs you that any tax advice contained in this communication, including any attachments, was not intended or written to be used, and cannot be used, for the purpose of avoiding federal tax related penalties, or promoting, marketing or recommending to another party any transaction or matter addressed herein.

ATTORNEY ADVERTISING: This publication may be considered "advertising material" under the rules of professional conduct governing attorneys in some states. The hiring of an attorney is an important decision that should not be based solely on advertisements. Prior results do not guarantee similar outcomes.

**EDWARDS
ANGELL
PALMER &
DODGE**

One Fetter Lane
London, EC4A 1JB
Tel +44 (0) 20 7583 4055
Fax +44 (0) 20 7353 7377
eapdlaw.com