

Anti-suit Injunctions Granted by Court in Support of Arbitration Or How *West Tankers* is Shaking Up English Court Practice and European Jurisdiction Harmonisation

Presentation Handout by

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1. Before *West Tankers* English courts would routinely grant anti-suit injunctions in favour of arbitration agreements compelling parties to proceed with their arbitration.
2. The decision of the European Court of Justice (ECJ) in Case C-185/07, *Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, changed this practice and caused certain tidal waves in English court practice and in the European harmonization of jurisdictional rules in civil and commercial matters. See paras 26-31, 33-34, operative part:

“It is incompatible with Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

If, because of the subject-matter of the dispute, [...], those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application.

It follows that the objection of lack of jurisdiction raised on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for the court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.

Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in

accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under that regulation.

It follows, first, that *an anti-suit injunction is contrary to the general principle that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it.* [...]

Secondly, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such *an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions* and on which the system of jurisdiction under Regulation No 44/2001 is based.

Lastly, if, by means of an anti-suit injunction, the national court were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.

This finding is supported by Article II(3) of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [...], according to which it is the court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an arbitration agreement, that will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

3. *West Tankers* has been celebrated and criticised at the same time by many key players in European international arbitration and private international lawyers. These will be discussed at length at the published paper. One thing is clear: neither the ECJ nor its Advocate General have understood anti-suit injunction as understood in English law.
4. English law has identified following general principles relating to anti-suit injunctions:
 - It is not possible to prohibit a foreign court from hearing an action
 - An English court may restrain a party, subject to its jurisdiction from starting or continuing proceedings in a foreign court

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