Anti-suit Injunctions after West Tankers Case: Job not Justifiable

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Abstract

European Court of Justice's (ECJ) decision in the West Tankers case, although not unexpected, is disappointing for the discipline of arbitration. This decision seems to have been given in apparent disregard of ECJ's old jurisprudence laid down on arbitration exception in the Brussels I Regulation and more specifically the issuance of an anti-suit injunction in relation to arbitration that in fact falls in the exception of the Brussels I Regulation. This paper explores the judgements decided by ECJ to demonstrate the lacunas in its decision in the West Tankers case and also proposes the way outs in this predicament.

Key words: Arbitration, anti-suit injunctions, West Tankers, Brussels I Regulations, New York Convention

Introduction

Initially, English courts were hesitant in issuing anti-suit injunctions because they feared that it might amount to a usurpation of a foreign court's jurisdiction.[1] But later the Angelic Grace Principle[2] was established to issue anti-suit injunctions,[3] which says that where a party has covenanted in a valid contract to initiate all proceedings, relating to a specified matter, before the English courts or arbitral tribunal with its seat in England, and then originates, or likely to start proceedings concerning that issue in forum of another country, the English courts will normally use their powers to grant anti-suit injunctions to restrict the person in breach of contract from initiating or carrying on those proceedings, unless the

injunction defendant can prove that there are 'strong reasons', why anti-suit injunction should not be awarded.[4] This discretionary power[5] which is actually rooted in the principle of "parties consent"[6] is codified in the section 37 (1) of Supreme Court Act 1981. Circumstances[7] in which these powers have been used can be assorted into two categories: firstly, when litigation in a foreign court has been initiated unconscionably,[8] for instance, oppressively or vexatiously;[9] and, secondly, when one party commenced proceeding in a foreign court in breach of legal or equitable right of other party,[10] for example when a person has a right, legal or equitable, not to be prosecuted in foreign courts.[11] Party can come into the possession of this kind of rights either through arbitration agreement or through jurisdictional agreement. English courts have been willing to issue these injunctions if applicant did not commit any delay in praying for that remedy.[12]

Civil law regimes detest this controversial[13] remedy at the disposal of English Courts by rejecting the explicit assertion of English Courts that these injunctions are not directed at the foreign court but operate in personum only to enforce arbitration agreement.[14] Civil law approach regarding anti-suit injunctions is different from that of common law, and this divergence is based on the difference in assumption as to the role of the legal system and the values to which it should give primacy.

About the dispute resolution, the dominant consideration in civil law system is the doctrinal principle that receiving court's authority to determine what litigation may be brought before it, should be unquestioned by courts of any other country. Compared to this principle of sovereignty, the private rights and obligations of the parties and the practical consequences of upholding the principle of sovereignty, are relatively of little importance.

In contrast, in common law, with regard to jurisdictional conflicts, the question of primary significance, as a matter of justice, is where a dispute should be resolved in order to do practical justice between the parties according to their private law rights. Public law considerations of the sovereignty of foreign courts, and relations between courts, encapsulated in the concept of comity, are second-order constraints, to be deployed sparingly where they conflict with private justice.[15]

Both, the New York Convention[16] and Brussels I Regulations (Regulations)[17] adopted the approach supported by the Civil Law system that when a matter is brought in any of the member states' courts, any court other than first seised shall not be permitted to adjudicate that matter until such time the court first seised decrees,[18] even if the proceedings first seised have been brought in breach of jurisdiction agreement[19] or arbitration agreement.[20] New York Convention also does not give any explicit authority to the courts of member states to issue anti-suit injunctions to restrain the proceedings in breach of agreement, initiated in the courts of another Member State. It confers the power on the court first seised of the dispute to refer the dispute to arbitration if the arbitration agreement is not 'null and void, inoperative or incapable of being performed'.[21] This approach was further elaborated and supported by the European Court of Justice (ECJ) in two cases, namely Gasser v MISAT [22] and Turner v. Grovit.[23] In the former case, anti-suit injunctions to restrain the proceedings commenced in breach of an exclusive jurisdiction clause, was dismissed, while in the latter case, the injunction granted to restrain the proceedings initiated with mala fide intentions were held to be incompatible with Regulation. English courts construed[24] Gasser v MISAT and Turner v Grovit as they had not deprived English courts of their power to issue anti-suit injunctions in aid of arbitration agreement, for arbitration is included in Regulations as an exception[25] and is outside the scope of Regulations.[26] On the basis of this interpretation, anti-suit injunctions were granted in West Tankers Case.[27]

Facts of case and court's decision:

The *Front Comor*, owned by West Tankers and chartered by Erg Petroli SpA ('Erg'), collided with a jetty in Syracuse, owned by Erg and caused damage. The charterparty was governed by English law and contained a clause providing for arbitration in London. Erg claimed compensation from its insurers Allianz and Generali ("insurers") up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability for the damage caused by the collision. Having paid Erg compensation under the insurance policies for the loss it had suffered, insurers brought proceedings against West Tankers in Italy in order to recover the sums they had paid to Erg.[28]

In parallel, West Tankers brought proceedings before the High Court seeking a declaration that the dispute between itself, on the one hand, and insurers, on the other, was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining insurers from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced in Italy. High Court granted anti-suit injunctions by rejecting the argument that the issuance of anti-suit injunctions would be in contradiction with the Brussels I Regulation.[29] Insurers appealed to the House of Lords.

When this case was with the House of Lords, it referred this case to ECJ for answering the following question:

> "Is it consistent with the Regulations 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?"

On February 10, 2009, ECJ ruled that, though the English court's proceedings are outside the scope of Regulation, the anti-suit injunctions issued in these proceedings come under Regulation and so are against the Regulation.

ECJ held that as the main subject matter of the case comes within the scope of Regulation, the preliminary matter of determination of applicability and validity of arbitration agreement also comes within the scope of Regulation. So, the English court will strip the powers of the Italian court which assumed jurisdiction under Article 5(3) of Regulation, if the former court prevents the latter court from ruling on the matter which comes under Article 1(2) (d).

Criticism:

Article 1(2) (d) reinforced with ECJ judgement in Marc Rich cedes a principle approach that "contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national Courts".[30] This legal rule, which may be said to have guided the English courts to decide on the relation between Regulation and anti-suit injunctions, was pretermitted by ECJ in West Tankers. Indifferent behaviour of "Grand Chamber"[31] in their decision that the court proceedings are outside the scope of Regulation but the injunctions issued in those proceedings are

within the scope of those proceedings,[32] is evident from the brevity of their arguments. This is perfectly an unsurprising verdict[33] which is in complete contradiction with the past legal precedents of ECJ has been severely belaboured by scholars.[34]

In Hoffman v Krieg,[35] German court rendered a judgement ordering a Dutch husband to pay maintenance to his German wife. This judgement was enforceable in Germany. When this judgement came to the Dutch court for enforcement, the Dutch court reviewed the substance of the judgement by applying its own law of status and found that the judgement was inconsistent with the decision which Dutch court would have delivered, had the matter been brought to it. ECJ permitted the Dutch court to apply its own law of status[36] on the judgement because this matter is excluded from the Convention, though the application of this law resulted in the refusal of recognition of judgement and the recognition and enforcement of judgement is a matter within the purview of Convention. Professor Briggs[37] convincingly analogised this case to West Tankers case by asserting that situation is similar to the West Tankers that Brussels I Regulation will not override the state's right and duty to employ its own law regarding the matter, which is an exception in Regulation, if both come in contradiction with each other.

Owens Bank v Bracco[38] also instantiates the same situation, where the plaintiff commenced proceedings in Italy and one year after also initiated proceedings in English court to get the judgement enforced in both the countries, which was actually rendered by St. Vincent court. The defendant was contesting in both the courts that the judgement was obtained by fraud and forgery. So both the courts were going to adjudicate the same issue between the same parties at the same time. For that reason, the defendant also repugned that the English court should stop its proceedings until the Italian court gives its decision on the issue. The matter before both the courts was of commercial nature i.e. payment of money (nine million Swiss Francs) and was within the scope of the Brussels Convention. This question was begotten by the greater issue of enforcement of a judgement delivered by a court outside the Brussels regime and that was a subject outside the scope of the Convention. So the enforcement proceedings of the judgement, rendered outside the Brussels regime, were outside the scope of the Convention but parallel litigation comes under the ambit of the

Convention i.e. the court first seised would have the right to try the issue and the other courts will be under obligation to stop the proceedings until the court first seised decrees in the case. House of Lords interpellated ECJ on whether or not it should stop the proceedings[39] to look forward to the outcome of the Italian proceedings. ECJ fielded the question in negative.

To adjudicate cases like West Tankers, ECJ can be said to have established in Hoffman v Krieg[40] and Owens Bank v Bracco[41] a guiding principle that the court seised of the matter, which is outside the scope of Convention, can apply its own law and can issue orders even if these orders are in contradiction to the principles laid down in Convention. Application of the principles established in these cases could have led to a secure analysis of the problem, but neither Attorney General nor ECJ referred to these case laws in their arguments to make the final determination in West Tankers, which is very regretful. As they resorted to Turner v. Grovit,[42] though wrongly, they should also have referred to these previous decisions in order to avoid a controversial and contradictory judgement because in West Tankers Case,[43] ECJ confronted a state of affairs similar to the situations faced in Hoffman v Krieg and Owens Bank v Bracco, but disappointedly came out with contradictory outcome.

West Tankers is the extension of ECJ's intentions about anti-suit injunctions[44] expressed in Turner v Grovit,[45] in which ECJ held that Regulation prohibits a court from issuing an injunction against defendant who is suing in a court of another member state if the those injunctions interfere in the powers of that other court to decide its own jurisdiction. But application of this principle in West Tankers case is absurd because in the present case defendant is litigating in the court of another member state in breach of the arbitration agreement and the Regulation does not extend to arbitration.

The decision of the court seems to encourage the parties that they are free to deviate from their contractual obligations.[46] ECJ's reasoned in invalidating the anti-suit injunction that

> "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."[47]

This disregards the legitimate interests of the party wishing to effectuate the arbitration agreement by asserting that the arbitration agreement is valid and gives predilection to the interests of the party who might initiate the court litigation in a non-designated member state, perhaps in a bad faith.[48] This is bad approach because access to justice does not mean access to justice wherever a plaintiff desires.[49] It is against the parties' expectations which they engross in their minds as well as on paper at the time of conclusion of the contract that the court of the seat of arbitration will determine any issue regarding arbitration or arbitration agreement. Despite the arbitration agreement, compelling a party to litigate in a foreign court is also detrimental to the arbitration from the perspective of time, money and unfamiliarity with the foreign laws.

ECJ held that if the subject matter of the dispute (like the claim for damages) falls within the scope of Regulation, the preliminary issue concerning the applicability of the arbitration agreement, including in particular its validity, also comes within the purview of its application.[50] It is irony that the issue of the validity of the arbitration agreement was laughed out as a preliminary issue that cannot affect the character of commercial or civil proceedings in a foreign court. This may embolden the parties, who want to deviate from the agreement, to start the litigation on the merits in a court from where they are certain to acquire the verdict invalidating the arbitration agreement. Regulation will be applicable to this judgment and the judgement creditor will be in a position to convince the courts of other member state in general and the court of seat of arbitration in particular to recognise this judgement and to refuse the arbitration agreement or award. In the light of this discourse it becomes imperative to suggest some alternatives to rescue arbitration and parties from the harmful consequences of this judgement

Alternative available to party upholding Arbitration Agreement:

English legal system is an abundantly and comprehensively evolved legal system. It endows with solutions for the problems likely to be created in the aftermath of this judgement. Under English law, arbitrators are not in need to bring to a halt the arbitral proceedings if a party commenced court proceedings whether at the seat of arbitration or in court of another member state.[51] Tribunal can proceed to decide the validity of the

arbitration agreement and also on its own jurisdiction under the principle of Competence-Competence.[52] Due to the speedy process of arbitration, the award is expected to be rendered before any outcome of the court proceedings and this award will be enforced under New York Convention because grounds for refusal of recognition and enforcement of award as given in Article V do not include litigation pending in any other jurisdiction. If before the award is declared, judgement is given in disregard of the award, can this judgement be refused recognition? Even if judgement invalidating the arbitration agreement comes from a foreign court before arbitral award, this judgement cannot be a reason for any state to refuse recognition of the award.[53] English court, as a court of seat of arbitration, can refuse to recognise and enforce a judgement given in disregard of arbitration agreement due to section 32 of Civil Jurisdiction and Judgement Act 1982[54] as well as on the base of public policy principle.[55] French Court decision[56] that such judgement does not come within arbitration exception and so should be recognised under Brussels I Regulation has now become difficult to follow after ECJ decision in Van Uden case where arbitration exception has been interpreted so broadly to encompass the proceedings and judgements on the arbitration agreement. It is also pertinent to mention here that the enforcement proceedings should not be stopped when proceedings on the validity of the arbitration agreement are also pending. Because here the lis pendens rule of Brussels I regulation (Article 27) does not apply and proceeding to enforce the arbitral award does not come under the Regulation.

But the situation seems to become a bit complicated when this award will have to be presented for recognition and enforcement in the court of member state seised with the matter which is also a signatory of the New York Convention. Brussels I Regulation does not provide any principle requiring a court so seised to stay proceeding when faced with the arbitral award but Article 71 of Regulation which upholds the sanctity of international conventions provides a ray of hope for the recognition and enforcement of the award in such state.

English courts have always upheld arbitration agreements to be autonomous from the main contract and the breach of the arbitration agreement was taken by English courts to be the breach of the main contract.[57] This led English Courts to allow the innocent party abiding by

the arbitration agreement to be indemnified. So if such a party also defends the case in a foreign court, he can demand for and arbitral tribunal can grant damages for litigation in breach of the arbitration agreement[58] because Arbitrators have the discretion to award damages to the party upholding the sanctity of the arbitration agreement for the expenses incurred due to following the litigation in foreign court, even if lost the case in foreign court.[59]

Conclusion

West Tankers decision in favour the party wishing to avoid arbitration by initiating proceedings in foreign court. On the base of this decision ECJ can be alleged to put basic canons of arbitration into question which may ultimately undermine arbitration as dispute resolution process. These fears created in the aftermath of this decision are not necessarily to be materialised due to the alternatives available to the party in for of arbitration as articulated above because

> "there is more to London as an arbitral seat than just anti-suit injunctions and, it is premature to start writing the obituary of London as a leading arbitral seat".[60]

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2 Aggeliki Charis Compania Maritima S.A. v Pagnan S.P.A.(The "Angelic Grace")[1995] 1 Lloyd's Rep 87(CA), 96

3 Pena Copper Mine Ltd v Rio Tinto Co Ltd (1911) 105 LT 846, is said to be the first case in which anti-suit injunction was issued. See also, Jean-François and others, Comparative Law of International Arbitration (Sweet & Maxwell Ltd, London 2007) p 916

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5 Donohue v Armco Inc. and Others [2002] C.L.C. 440 (HL),24

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77 Continental Bank NA v Aekos Compania Naviera SA [1994] 1 Lloyd's Rep.505 (CA); Aggeliki Charis Compania Maritima S.A. v Pagnan S.P.A(The Angelic Grace) [1995] 1 Lloyd's Rep 87(CA);Bankers Trust International plc v RCS Editori SPA [1996] CLC 899;Schiffahrtsgesellschaft Detlev Von Appen G.M.B.H. v Voest Alpine Intertrading G.M.B.H [1997] CLC 993; Banque Cantonale Vaudoise v Waterlily Maritime Inc. and Others [1997] 2 Lloyds Rep 347; Toepfer International G.m.b.H. v. Société Cargill France [1997] 2 Lloyds Rep 98; The Charterers Mutual Assurance Association Limited v British & Foreign and T.M.M. Transcap [1998] ILPr 838; Shell International Petroleum Co. Ltd. v Coral Oil Co. Ltd. [1999] 1 Lloyd's Rep. 72; Bankers Trust Co. And Another v P.T. Jakarta International Hotels & Development [1999] 1 Lloyd's Rep. 910; OT Africa Line Ltd v Hijazy & Anor [2001] CLC 148; XL Insurance Ltd v Owens Corning [2001] C.L.C. 914; Navigation Maritime Bulgare v Rustal Trading Ltd. and Others [2002] 1 loyd's Rep. 106; Donohue v Armco Inc & ors. [2002] C.L.C. 440 (HL);Through Transport Mutual Insurance Association (Eurasia) Ltd. v New India Assurance Co. Ltd. [2004] 1 C.L.C. 794; Through Transport Mutual Insurance Association (Eurasia) Ltd. v New India Assurance Co. Ltd [2004] 2 C.L.C. 1189 (CA); West Tankers Inc v RAS Riunione Adriatica Sicurta SpA, Generali Assicurazioni Generali SpA [2005] 2 Lloyd's Rep

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36 This matter is in exception of the Convention because Article 1(1) says "1. the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession" which is now Article 1(2)(a) of Brussels Regulation
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51 CMA CGM SA v Hyundai MIPO Dockyard Co Ltd [2009] 1 Lloyd's Rep. 213 (Comm)
52 Section 30, 67 of Arbitration Act 1996

53 Grounds to refuse recognition and enforcement of arbitral award are give in Article V of New York Convention, and this Article does not include judgement given in disregard of arbitration agreement to be a ground to refuse recognition.

54 Section 32.— Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes.

"(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if—

(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and

(b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and

(c) that person did not counter claim in the proceedings or otherwise submit to the jurisdiction of that court.

(2) Subsection (1) does not apply where the agreement referred to in paragraph (a) of the subsection was illegal, void or unenforceable or was incapable of being performed for reasons not attributable to the fault of the party bringing the proceedings in which the judgment was given.

(3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2)."

55 Article 5(2)(b) of New York Convention; Adrian Briggs, "Fear and Loathing in Syracuse and Luxembourg, Front Comor" Lloyd's and Maritime Law Quarterly 2009, 2(May), 161-166

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