


ROWAN PLANTEROSE

**Protection of the
Arbitration Clause**

**The West Tankers
Case and its Implications**


DAVIES ARNOLD COOPER



Domestic Arbitration has been out of fashion since HGRCA 1996.

International Arbitration in England has, however, grown and thrived.

Is it too now under threat?




Many countries have signed up to the New York Convention on the Recognition and enforcement of Foreign Arbitral Awards June 1958

The Convention provides: “The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article [shall], 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”.



Enshrined in English law at Section 9 of the Arbitration Act

- (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
- (2) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.




Stringently applied by the English courts, so that “won’t pay” (even though there is no apparent basis for a refusal) creates a dispute which is referable to arbitration: Halki Shipping Corporation v. Sopex Oils Ltd (1998)



S.9 applies to litigation started in breach of an arbitration agreement in an English Court.

What happens if that litigation is begun in a foreign court?

Enter the Anti-Suit (or Anti-Litigation) Injunction!



Where the English Court can exercise jurisdiction over the Claimant party, it has been the practice of the English Court to issue an anti suit injunction to prevent court proceedings in breach of an arbitration agreement started in a foreign country where the seat of the arbitration would otherwise be England.


But .. (regarded with suspicion abroad and) ...



West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA

Concerned the collision of a vessel owned by West Tankers and chartered to Erg Petroli SpA with a jetty owned by Erg in Syracuse. The charterparty between West Tankers and Erg was governed by English law and provided for arbitration in London.

Erg was insured by Allianz SpA, which paid the claim made by Erg, and commenced subrogated proceedings against West Tankers before an Italian court to recoup the monies they had paid.



West Tankers commenced proceedings in England seeking a Declaration that the insurers were bound by the arbitration clause and an injunction requiring them to discontinue the Italian proceedings.

Granted in March 2005. Appealed on basis anti suit injunction incompatible with European Law and ultimately referred to ECJ.



English law basis is


- (i) S.37(1) of the Supreme Court Act 1981:
“The High Court may by order (whether interlocutory or final) grant an injunction... in all cases in which it appears to the court to be just and convenient to do so.”

- (ii) Section 44 of the Arbitration Act 1996, entitled “Court powers exercisable in support of arbitral proceedings”:
“(1) Unless otherwise agreed by the parties, the Court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.
(2) Those matters are:
...
(e) the granting of an interim injunction...”



Question for ECJ

“Is it consistent with European Commission Regulation 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?”



EC Regulation 44/2001 effectively provides for the recognition and enforcement of judicial decisions between EC member states. It specifically excludes arbitration.



Regulation 44 Article 5


“A person domiciled in a Member State may, in another Member State, be sued:

...

3. In matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur

Regulation 44 Article 27

“Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.”




Had been rigidly applied by ECJ in respect of litigation even where there was an exclusive right to litigate in a particular country



Thus (previous ECJ decisions)

Gasser GmbH v. MISIT Srl : a court of an EC member state on which exclusive jurisdiction has been conferred by agreement must nevertheless stay its own proceedings if the court of another member state has first been seised of the matter.

Turner v. Grovit (2004) : A court of a member state cannot issue an injunction restraining a party from pursuing proceedings in a court of another member state even where those proceedings have been commenced in bad faith.



Despite the exclusion of arbitration from Regulation 44/2001 the ECJ has answered the question: No, anti-suit injunctions in support of an arbitration clause are not compatible with the regulation.

Rationale – the courts of member states must trust the courts of other member states to apply jurisdictional rules correctly. In any event the question is not so much if the arbitration/English proceedings fall outside the Regulation, but whether the foreign proceedings fall within it.




Why were such injunctions liked?


The Injunction was a speedy pre-emptive remedy – prevented disputes being delayed in a foreign court where the contract clearly provided for arbitration in England.

Avoided need to have two sets of legal advisors as the arbitration would be in England and allowed one set of English speaking advisors to have control.

Reduced risk of tactical commencement of proceedings in other jurisdictions.



But perhaps the most important consideration is the practical reality of arbitration as a method of resolving commercial disputes. 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. Nor is it only a matter of procedure. The choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as *amiables compositeurs*, apply broad equitable considerations, even a *lex mercatoria* which does not wholly reflect any national system of law. The principle of autonomy of the parties should allow them these choices.



Finally, it should be noted that the European Community is engaged not only with regulating commerce between Member States but also in competing with the rest of the world. If the Member States of the European Community are unable to offer a seat of arbitration capable of making orders restraining parties from acting in breach of the arbitration agreement, there is no shortage of other states which will. For example, New York, Bermuda and Singapore are also leading centres of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community handicap itself by denying its courts the right to exercise the same jurisdiction.




Now

Parties may be able to disrupt smooth/speedy proceedings by commencing proceedings in another state. May be an increase in tactical litigation in known breach of arbitration clauses. Leads to a jurisdiction battle in a foreign court. Also certain foreign courts – such as Italy, are known to be notoriously slow to deal with matters, thus holding up proceedings months, if not years.

There is a loss of certainty of result.

There may need to be two sets of advisors.



Risk that New York, Hong Kong, Bermuda or Singapore may become more popular seats if those courts continue to issue anti-suit injunctions to protect arbitrations with those seats. (Affects whole EC, so may impact on Paris too, although there is no civil court practice of issuing anti-suit injunctions). Bad for EC business.

(These points had been made in HL judgment, including suggestion that other jurisdictions might issue such injunctions. But ECJ unimpressed. Commercial considerations not relevant and not sensible to open jurisdiction wider so that courts compete).



Bad news too for our insurance market that may face litigation in unfamiliar jurisdictions.

Reduces value of arbitration over court proceedings.

May be exaggerated. Do parties in fact choose their seat on the basis of the ability to issue an anti-suit injunction? Factors likely to be location, neutrality, language, support of local courts, procedural law. (Note present popularity of Swiss locations, Stockholm or Paris where anti-suit injunctions not available).

In any event ruling applies only within EC and Lugano Convention countries (Switzerland, Iceland and Norway).