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LEGAL FOCUS

Anti-suit injunctions ECJ incompatible

THE ADVOCATE-GENERAL (AG) of the European Court of Justice (ECJ) has released her long-awaited opinion that anti-suit injunctions issued by national courts of member states of the European Union (EU), in support of arbitration agreements, are precluded by Council Regulation (EC) No 44/2001 of December 22, 2000.

ECJ tends to follow AG opinion

Matthew Coleman, an international arbitration partner at Steptoe & Johnson, reports that although the AG's opinions are not binding on the ECJ, they are followed more often than not.

The brief facts are that a vessel owned by West Tankers (Tankers) and chartered to Erg Petroli (Erg) collided with and damaged a jetty owned by Erg at Syracuse. The charterparty was expressly governed by English law and provided for arbitration in London. Erg claimed on its insurers (now Allianz and others) up to the limit of its insurance cover and also commenced arbitration proceedings against Tankers in London for the excess. Subsequently, the insurers commenced proceedings

by way of subrogation against Tankers in the courts of Syracuse, Italy, to recover the amounts they had paid Erg under the policies.

Subject to the Syracuse court's obligation under the New York Convention to refer to arbitration, at the request of a party, matters subject to a valid arbitration agreement, the Syracuse courts had jurisdiction under the regulation.

Thereafter, Tankers began proceedings in the English High Court against the insurers, seeking, among other things, relief from an injunction to require the insurers to discontinue the Syracuse proceedings because the dispute in those proceedings arose out of the charterparty and therefore the insurers were bound by the arbitration clause. The High Court held that the insurers claim in the Syracuse proceedings was subject to the arbitration clause and therefore issued the injunction requested by Tankers. Permission to appeal directly to the House of Lords was granted.

The House of Lords referred the question of the compatibility of anti-suit injunctions in support of arbitration agreements with the

regulation to the ECJ (*West Tankers Inc v RAS Riunione Adriatica di Sicurtà SpA* [2007]).

ECJ precludes anti-suit

The AG noted that in the earlier case of *Turner* the ECJ had ruled that the predecessor to the regulation (the Brussels Convention) precluded anti-suit injunctions being issued by the courts of one member state in order to stop proceedings in another member state.

However, she also noted that the English courts have since ruled the *Turner* decision continued to issue anti-suit injunctions in support of arbitration agreements where the arbitration was seated in England and when a party to such an agreement brought proceedings in the courts of another member state in breach of the arbitration agreement.

The reason for the English courts following such an approach was because the Brussels Convention and the regulation state that they shall not apply to arbitration.

However, the AG took a different approach. While accepting that arbitration was excluded from the regulation, the question in the

AG's opinion was not whether the anti-suit injunction proceedings in England fall within the scope of the regulation but whether the proceedings against which the anti-suit injunction proceedings are directed do so (in this case, the Syracuse proceedings). Furthermore, the AG stated, in determining whether the proceedings against which the anti-suit injunction proceedings are directed fall within the scope of the regulation that the substantive subject matter of the dispute must be considered.

In answering this, the AG considered the subject matter of the

claim in the Syracuse proceedings was a claim in tort and possibly also in contract, which falls within the scope of the regulation and is not arbitration. The existence of the arbitration clause was merely a preliminary issue the Syracuse court must address when examining whether it had jurisdiction.

Anti-suit injunction interferes

Therefore, in the AG's opinion an anti-suit injunction restraining a party from continuing or issuing proceedings before the national court of a member state (in this case the Syracuse proceedings)

interferes with proceedings that fall within the regulation and is not permitted even if done in support of an arbitration agreement.

The opinion of the AG has not been well received by arbitration practitioners in England. It had long been thought that the issue of the jurisdiction of an arbitral tribunal was a matter for the tribunal itself and in some instances the court where the arbitration is seated. The concern is that if the ECJ accepts the AG's opinion arbitrations may now be the subject of tactical court proceedings in other jurisdictions in Europe which are issued for the sole purpose of expanding the dispute and disrupting the arbitration; surprisingly, the AG played down these concerns and was reassured in the hope that courts will decline jurisdiction in such proceedings if there is a valid arbitration clause.

Steptoe & Johnson insurance and reinsurance partner, Angus Rodger, adds: "One of the advantages that England has over other arbitration centres is the willingness of its courts to issue anti-suit injunctions in support of arbitration agreements. This will be lost if the ECJ follows the AG's opinion and the loss of this competitive advantage was anticipated by the House of Lords in its judgment."



House of Lords: referred anti-suit question to the ECJ

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