CASE NOTE: Opinion Of Advocate General Kokott in *Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v West Tankers Inc*. (Case C-185/07 delivered on 4 September 2008) [*]

Introduction

By Judgment of 2 April 2007, the House of Lords (United Kingdom) referred to the European Court of Justice [the "Court"] a request for a preliminary ruling in respect of the following question under the *Brussels Regulation*:

> Is it consistent with the *Brussels Regulation* 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 September 4th, 2008, Advocate General Julianne Kokott of the Court delivered her Opinion on whether the *Brussels Regulation* prohibits a court of a Member State in the arbitral seat from issuing an Order restraining a person from commencing or continuing proceedings before the national courts of another Member State instead of before an arbitral body (anti-suit injunction).

The Disputes in the Main Proceedings

The *Front Comor*, a ship chartered by the Italian oil company Erg Petroli SpA ("Erg") struck a jetty at an oil refinery owned by Erg in Syracuse, Italy. Erg incurred costs in repairing the jetty, loss of use during the repairs and demurrage costs to third parties. Erg recovered their insured losses; and they claimed for their uninsured losses against the shipowners, West Tankers Inc. ("West Tankers") in an arbitration pursuant to the arbitration clause in the charterparty, which applied to:

> "*any and all difference and disputes of whatsoever nature arising out of this charter*."

When the Italian insurers, Ras Riunione Adriatica Di Sicurta SpA and Generali Assicurazioni Genarili SpA (collectively the "Italian insurers") had paid Erg's claims, the Italian insurers commenced an action in their own name in the Tribunale di Siracusa in Sicily, Italy seeking subrogated recovery from West Tankers for the amounts paid out to Erg. To avoid having to defend two claims in different fora, West Tankers obtained an interim anti-suit injunction granted by Gross J. on 20 September 2004 in the Commercial Court in London, restraining the Italian insurers from continuing with the Italian proceedings. The Italian court was informed of the injunction, but it declined to stay the proceeding and the Italian insurers applied to the Commercial Court in London to discharge the injunction.

Observations Submitted to the Court

The Italian insurers argued that their subrogated claim in the Italian court was a different claim because it based on a tort occurring in Italy, which they had a right to pursue under Italian law. [1] West Tankers countered that any subrogated right was subject to the arbitration clause, the effect of which was governed by English law. The Italian insurers also stated that it was inconsistent with the *Brussels Regulation (No 44/2001)* for the English court to grant an anti-suit injunction, particularly in light of the Court's decision in *Turner v. Grovit*.[2] West Tankers posited that arbitration clauses were beyond the scope of the *Brussels I Regulation,* to which the Italian insurers rejoined that even if this were so, the English court should exercise its discretion not to grant the anti-suit injunction because the Italian court would ignore the injunction, and

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[*] ***Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial*** *matters* (Official Journal L 012, 16/01/2001 P.) available online at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:HTML .

[1], *West Tankers Inc v Ras Riunione Adriatica Di Sicurta Spa & Anor* [2005] EWHC 454 (Comm) (21 March 2005) The Italian insurers relied on their rights of subrogation under Article 1916 of the Italian Civil Code (at ¶ 5 per Colman J.), available online at: http://www.bailii.org/ew/cases/EWHC/Comm/2005/454.html. ("*West Tankers-EWHC*").

[2] *ECJ Case C-159/02*, *Turner v. Grovit* (27 April 2004), ¶'s. 24-28.

because the Italian court would consider for itself any responsibility that it might have to stay the proceedings pursuant to the *New York Convention*.[3]

Colman, J. ruled that English law applied, that Erg was required to abide by the arbitration clause, and that the clause was broad enough to include the tortious claim for wharf damage (governed substantively by Italian law), [4] stating that:

> It is clear that the issues of liability which arise between the Insurers and the Owners in the Syracuse court proceedings are substantially the same as those which arise in the arbitration. The main issue is in both cases whether the Owners are protected by the errors of navigation exclusion in clause 19 of the charterparty or by Article IV rule 2(a) of the Hague Rules. *Although Erg's claim is confined to its uninsured losses, there is a complete overlap between the arbitration and the Syracuse proceedings in as much as the Owners counterclaim a declaration in the arbitration that they are under no liability for damage caused by the collision*. (emphasis added)[5]

In *obiter*, Mr. Justice Colman also concluded that Italian law would have reached the same result. Having decided the "ordinary arbitrability question" in favour of arbitration, Colman J. enjoined Erg from continuing with the Italian proceeding. Although the English court noted that the Italian court might well object to the English anti-suit injunction and refuse to enforce it, none of the litigants claimed that Italian public policy was involved in any way or that the subject matter was non-arbitrable in Italy. In March 2005 Colman J. granted West Tankers' application and certified the ensuing appeal, "leapfrogging" the appeal directly to the House of Lords.

The House of Lords made several observations supporting the view that it is consistent with the *Brussels Regulation* for a Member State court to make an order restraining proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement. Lord Hoffman emphasized the court's supervisory role in the arbitral seat as follows:

> 20. Whether the parties should submit themselves to such a jurisdiction by choosing this country as the seat of their arbitration is, in my opinion, entirely a matter for them. The courts are there to serve the business community rather than the other way round. No one is obliged to choose London. The existence of the jurisdiction to restrain proceedings in breach of an arbitration agreement clearly does not deter parties to commercial agreements. On the contrary, it may be regarded as one of the advantages which the chosen seat of arbitration has to offer...*in cases concerning arbitration, falling outside the Regulation, it is in my opinion equally necessary that Member States should trust the arbitrators (under the doctrine of Kompetenz-Kompetenz) or the court exercising supervisory jurisdiction to decide whether the arbitration clause is binding and then to enforce that decision by orders which require the parties to arbitrate and not litigate*.(emphasis added) [6]

The Advocate General's Opinion highlights a "*conflit de conventions*": arbitration vs. litigation and economic globalism vs. economic regionalism. This begs the normative question of whether the Court *may* or *should* impose a hierarchy of conflict rules involving two different dispute resolution paradigms. It will require the Court to navigate between the *Scylla* of the *New York Convention* (harmonization *via* arbitration) and the *Charybdis* of the *Brussels Regulation* (unification *via* the reciprocal enforcement of judgments). No court is an island; but, in the Advocate General's view, the Court is required to search for a

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[3] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, concluded at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html. [the "New York Convention"]

[4] In *West Tankers, EWCJ*, Colman J. at ¶ 10 held that he was bound by the English Court of Appeal decision in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67.

[5] *Id*. at ¶. 6.

[6] *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA & OrsWest Tankers* [2007] UKHL 04, [2007] ILPr 20, [2007] UKHL 4, [2007] 1 LLR 391, [2007] 1 Lloyd's Rep 391, [2007] 1 All ER (Comm) 794 (HL) ("West Tankers, JL") at ¶ 20 per Lord Hoffman; see also the opinion of Lord Mance at ¶'s 26-30, available online: http://www.bailii.org/uk/cases/UKHL/2007/4.html.

safe harbour towards harmonization of competing international instruments and the overall goal of unification of international trade law. [7] [8] [9]

Advocate General Kokott frames the issue as follows:

> B – Compatibility with Regulation No 44/2001 of anti-suit injunctions to give effect to an arbitration agreement
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> 27. The crucial question in the present case is whether the principles set out in Turner can be applied to anti-suit injunctions in support of arbitration proceedings.
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> 28. The fact that the basis of the judgment in Turner was the Brussels Convention, whereas Regulation No 44/2001 is applicable, ratione temporis, to the present case, is no hindrance. The regulation is intended to update the Convention, while adhering to its structure and basic principles and ensuring its continuity. The provisions characteristic of the system's arrangements and the principle of mutual trust on which that system is based therefore remain essentially the same.
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> …
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> 30. It is specifically because of the exclusion of arbitration from the scope of Regulation No 44/2001 in Article 1(2)(d) that the House of Lords takes the view that the Turner case-law cannot be applied to the present case. In that case the Court expressly related the principle of mutual trust to proceedings within the scope of the Convention. Arbitration includes not only arbitration proceedings themselves and the recognition and enforcement of arbitral awards but also all national court proceedings in which the subject-matter is arbitration. As anti-suit injunctions support the conduct of arbitration proceedings, it argues that proceedings seeking the issue of such injunctions are covered by the exception in Article 1(2)(d) of Regulation No 44/2001." [citations omitted]

The Advocate General also notes that the *Brussels Convention* and the *Brussels Regulation* must be interpreted in light of its fundamental interpretative principles,[10] contained in its Preamble, its text and Official Report.[11]:

> 29. In particular, however, nothing has changed regarding the exclusion of arbitration from the scope of application of the Brussels Convention or the Regulation. In defining 'arbitration', reference may therefore be made to the travaux préparatoires for the Convention, as well as to the case-law of the Court in that regard. [citations omitted]

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[7] For the conceptual distinction between harmonization and unification, see Bruno Zeller, CISG AND THE UNIFICATION OF INTERNATIONAL TRADE LAW (Abingdon, Oxon [England]; New York, NY : Routledge-Cavendish, 2007).

[8] In particular, notwithstanding the overall success of the Brussels Regulation among Member States, some legislative drafting issues, including, inter alia, the arbitration exclusion under Art. 1.(2)(d) merit further legislative action by the EC Member States: See, Prof. Dr. Burkhard Hess, Prof. Dr. Thomas Pfeiffer and Prof. Dr. Peter Schlosser, REPORT ON THE APPLICATION OF REGULATION BRUSSELS I IN THE MEMBER STATES, Study JLS/C4/2005/03, Ruprecht-Karls-Universität Heidelberg, Institut Für Ausländisches Und Internationales Privat- Und Wirtschaftsrecht (Final Version September 2007), available online: http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf.

[9] See, Dominique T. Hascher, "Recognition and Enforcement of Judgments on the Existence and Validity of an Arbitration Clause under the Brussels Convention", *Arbitration International*, Vol. 13 No. 1 (1997), pp. 33 – 62 at 59 where the author notes: :The New York Convention is not in the list of conventions on particular matters which is set out in Annex II of the Report on the 1978 Accession Convention."

[10] See also Adrian Briggs & Peter Rees (eds.), CIVIL JURISDICTION AND JUDGMENTS (4th Ed.) (Lloyd's of London Press, 2005) at pp. 25-30; Peter North & James J. Fawcett, CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW (13th Ed.) (London: Butterworths, 1999) at pp. 184-186 ["North & Fawcett"].

[11] Jenard, 'Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' in OJ No. C 59, 5.379 at p.13 ["Jenard Report"]

As noted by the Court in *Kalfelis v. Schröder*[12] based upon the primacy of the *actor sequitur* doctrine, all exceptions to the general rule that the defendant must be sued in the state of his domicile are to be narrowly construed. Any special jurisdiction conferred under Article 5[13] or the exclusive jurisdiction under Article 23 are to be restrictively applied to preserve the general right of the defendant to be sued in its home jurisdiction. Secondly, based upon the principles of harmonization, uniformity and legal certainty, Member State courts must ignore domestic concepts and interpretations in applying the Regulation.[14] [15]

Since the *Brussels Convention and the Brussels Regulation* is primarily concerned with the automatic enforcement of judgments, it must be interpreted with this goal in mind. The Advocate General's view is that any interpretation which promotes parallel proceedings or increases the likelihood of irreconcilable judgments is anathema to the overall legislative scheme.[16]

Equally important, in the Advocate General's view, is the related principle of mutual trust. The Court has emphasized that since the *Brussels Regulation* is founded on mutual trust between member states, a national court may not interpret the *Brussels Regulation* in a manner which calls into question the competence of another Member State court.[17] This principle broadens the scope of the *lis pendens* doctrine and precludes a Member State court from circumventing or ignoring the jurisdiction of another Member State court. [18]

With respect to the arbitration exclusion under Article 1(2)(d), the Court previously confirmed in *Marc Rich* [19] that the *Brussels Convention* did not apply to proceedings for the appointment of an arbitrator, even where there was a dispute as to the existence or validity of the arbitration clause. The Court further indicated that in order to safeguard existing international conventions regarding arbitration, arbitration should be regarded as "excluded in its entirety, including proceedings brought before national courts".[20] Also, in *Van Uden Africa Line v Kommanditgesellschaft In Firma Deco-Line*[21], the Court ruled that in a case where the substantive dispute is referred to arbitration, court proceedings for provisional measures do not fall within the arbitration exception.[22] Such provisional measures are not ancillary to arbitration proceedings but rather parallel to the protection of a wide range of rights. However, the Court also identified an exception, enabling the parties to seek provisional or protective measures pursuant to Article 31 (previously Article 24). [23]

The Advocate General's Opinion acknowledges that Art. II (3) of the *New York Convention* imposes a positive obligation on the courts of signatory states to enforce agreements to arbitrate by refusing to accept any proceedings in the national court and instead referring the parties to arbitration.[24] The apparent conflicts between the *Brussels Regulation* and the *New York Convention* are not irreconcilable, insofar as

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[12] ECJ Case 189/87, *Kalfelis v. Schröder* [1988] ECR 5565, ¶ 19; also ECJ Case C25/76, *Segoura v. Bonakdarian* [1976] ECR 1851, ¶ 6; also ECJ Case C-26/91, *Handte* [1992] ECR I-3697, ¶ 14.
[13] Article 5(3) specifies special jurisdiction for "matters relating to tort, delict or quasi-delict" and provides that in such matters the plaintiff may sue "in the courts for the place where the harmful event occurred or may occur".
[14] See ECJ Case C-281/02, *Owusu v. Jackson* (1 March 2005) at ¶ 43. See also, ECJ Case 29/76*, LTU v. Eurocontrol* [1976] ECR 1541 at ¶ 3.
[15] See ECJ Case C281/02*, Owusu v. Jackson* (1 March 2005) at ¶'s 39 - 41; ECJ Case C-190/89, Marc Rich [1991] ECR I-3855 at ¶ 27.
[16] See ECJ Case C-351/89*, Overseas Union Insurance* [1991] ECR I-3317,at ¶'s 15 –16;
[17] ECJ Case C-159/02, *Turner v. Grovit* (27 April 2004),at ¶'s 24-28.
[18] *Advocate General's Opinion,* at ¶'s 15 and 25.
[19] ECJ Case C-190/89, *Marc Rich* [1991] ECR I-3855.
[20] Id. at ¶ 18.
[21] ECJ Case C-391/95, *Van Uden Africa Line v Kommanditgesellschaft In Firma Deco-Line* [1998] ECR I-7091.
[22] Id at ¶ 24 and ¶ 32.
[23] Id. at ¶'s 33-34.
[24] The New York Convention, Art II(3), states: "The court of a Contracting State, when seized of an action, in a matter in respect of which the parties have made an agreement with 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." See also, Art. 8 of the UNCITRAL Model Law.

both international instruments were created to foster harmonization of international trade. For example, both the conventions adopt the "first seized rule".[25] The timing of the commencement of the English arbitration in August 2000 and the Italian court action in October 6 2003 is relevant, albeit not determinative. [26] In any event, the Italian insurers were not a formal party to the arbitration agreement, either under English or Italian law. Accordingly, they could not be in breach of the arbitration agreement by suing in Italy.[27] [28]

The House of Lords concluded that the insurers were bound by the arbitration clause for any non-subrogated claims arising under the insurance contract, concluding that the arbitration clause encompassed both the insurance contract claims and tort claims (*i.e.* "Any and all differences and disputes..."). The Italian court arrived at an opposite conclusion. Should, then, the Italian insurers be enjoined from proceeding in the Italian courts? The Advocate General concludes that they should not.

It is widely understood the English courts acknowledge that an anti-suit injunction is only effective against the enjoined party, if that party is otherwise subject to the local court's authority (i.e. if it is an English company with assets in England or an English citizen or resident) since a non-resident would simply ignore the anti-suit injunction. In *Erich Gasser GmbH v MISAT Srl* [29], the Court ruled that where an exclusive jurisdiction clause is alleged to govern, it is for the court within the European system before which proceedings are first brought ("the Court first seized") to decide whether there is a binding agreement to submit the case to some other court within the European system. The other court is restrained from asserting that it has jurisdiction based upon its own interpretation of the jurisdiction clause, before the court first seized has decided the question. This eliminates within the EU the ability of courts from Member States to issue anti-suit injunctions based on a jurisdiction clause. In *Turner v Grovit* [30] the Court also made it clear that the use of anti-suit injunctions within the EU to prevent abuse is precluded. In *Owusu v. Jackson* [31] the Court later held that the *forum non conveniens* doctrine is inapplicable under Art. 2 based upon the "first seized rule" and the primary goal of "mutual trust".

The position, in the Advocate General's view, is no different where a party starts an action in the court of another Member State in breach of a London arbitration clause. In *Kalfelis*[32] cited above, the Court ruled that "the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to

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[25] *Brussels Regulation*, Art. 27; *Cf. New York Convention,* Art. II(3).

[26] It is noteworthy that other international drafting initiatives discourage the use of anti-suit injunctions: e.g., Principle 7.1-7.3 (Injunctions in relation to Foreign Proceedings) in the International Law Association's *Third Interim Report on Declining & Referring Jurisdiction in International Litigation*- commonly referred to as the *Leuven/London Principles,* presented at the ILA's 69th Biennial Conference in London in July 2000 by the International Law Association Committee on International Civil and Commercial Litigation.

[27] See, Bernard Hanotiau, "Problems Raised by Complex Arbitrations Involving Multiple Contracts–Parties–Issues – An Analysis" *Journal of International Arbitration*, Vol. 18 No. 3 (2001), pp. 253 – 360 where the author notes:

> "In the Import-Export case [351 F.2d 503, 505-506 (2d Cir. 1965)], the Court of Appeals for the 2nd Circuit indeed refused to compel arbitration on the basis of a charter party clause that provided for arbitration of disputes "between the Disponent Owners and the Charterers", even though the charterparty had been incorporated by reference into a bill of lading. *The court reasoned that it would be unduly stretching the language of the arbitration clause to say that a non-party was one of the "Disponent Owners or Charterers*" [Id. at 506.] [emphasis added]

[28] In this context, the attempt to bind a non-signatory to arbitration may have been challenged on the basis of the *New York Convention* 'agreement in writing' requirement and that the agreement be 'signed by the parties or contained in an exchange of letters or telegrams'. See, *New York Convention*, Art. II(2), *supra.*

[29] *ECJ Case C-116/02, Erich Gasser GmbH v MISAT Srl* [2004] 1 Lloyd's Rep 222.

[30] *Supra*, note 17.

[31] *Case C281/02, Owusu v. Jackson* (1 March 2005).

[32] *Supra*, note 12.

establish the liability of a *defendant* and which are not related to a 'contract' within the meaning of Article 5(1)".[33] The Advocate General observes:

> "62. Finally it should be emphasised that a legal relationship does not fall outside the scope of Regulation No 44/2001 simply because the parties have entered into an arbitration agreement. Rather the Regulation becomes applicable if the substantive subject-matter is covered by it. The preliminary issue to be addressed by the court seised as to whether it lacks jurisdiction because of an arbitration clause and must refer the dispute to arbitration in application of the New York Convention is a separate issue. An anti-suit injunction which restrains a party in that situation from commencing or continuing proceedings before the national court of a Member State interferes with proceedings which fall within the scope of the Regulation.:

In this commentator's view, the issue of arbitrability of the contract and tort claims arising under the insurance contract is one of characterization under the applicable conflict of laws rules. The arbitrability of a dispute is not always self-evident. This is not the simple case of a party to an arbitration agreement resorting to courts in open breach and complete disregard of the arbitration agreement. In the present case, the parties take contrary positions on whether their underlying dispute is in fact "arbitrable" in terms of the existence, validity, and scope of the arbitration agreement. The determination of the *lex arbitri* or the *lex fori* by different legal systems may result in different answers arising from the same constellation of facts. Thus, in this case, the English court applying its own choice-of-law rules, has decided that English law governs and that under that law, both the contract and tort actions are arbitrable. But the Italian court, applying its own different choice of law rules, has decided that the Italian law of subrogation applies to the tort claims, ostensibly concluding that the tort action is not arbitrable. The court first seized will necessarily have recourse to Article 28 [34] of the *Brussels Regulation* in these circumstances.

With respect to the issue of contractual privity, the Court in *Drouot v.CMI* [35] held that in determining whether the parties are the same, it is permissible to look beyond the strict formal identities of the persons involved.[36] The Court indicated that an insurer and the insured must be considered to be one and the same party where the insurer takes action by way of its right of subrogation.[37] Where, however, the interests of the parties diverge, the parties may not be regarded as one and the same for the purposes of Article 27.[38] It does not appear as though lower court or the House of Lords dispute that the proper law of the insurance contract (the l*ex loci contractus*) is Italian law and that the event constituting the tort occurred in Italy (the *lex loci delicti commissi*).[39] Moreover, it also appears that Colman J. declined the Italian insurers the opportunity to make further arguments in respect of the effect of the Italian law of subrogation. [40] Based upon "mutual trust", the Advocate General's Opinion posits that the Italian court was entitled to make its own decision without having its judicial function usurped or impeded by the English court. If the Italian court is wrong, then the Italian insurers will have to consider the implications of any alleged dilatory tactics

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[33] Id. at ¶ 17.

[34] *Brussels Convention*, Art. 28 reads:

Article 28

1. Where related actions are pending in the courts of different Member States, *any* court other than the court first seized *may* stay its proceedings.

2. Where these actions are pending at first instance, *any* court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question *and its law permits the consolidation thereof.*

3. For the purposes of this Article, actions are deemed to be related where they are *so closely connected* that it is *expedient* to hear and determine them together to *avoid the risk of irreconcilable judgments* resulting from separate proceedings.(emphasis added)

[35] *Case C-351/96, Drouot Assurances SA v Consolidated Metallurgical Industries (CMI Industrial Sites), Protea Assurance and Groupement d'Intérêt Économique (GIE) Réunion Européenne* [1998] ECR I-3075, at ¶'s 20 and 25.

[36] North & Fawcett, *supra* note 10, at p. 253.

[37] *Drouot,* supra note 35, at ¶ 19.

[38] *Id*., at ¶ 20.

[39] In this respect, the English Court of Appeal decision in *Schifforhortsgesellschaft Detler v. Appen v. Voest Alpine Intertrading, The Jay Bola* [1997] 2 Lloyd's Rep 279 is distinguishable on the facts.

[40] *West Tankers*, *EWHC,* at ¶ 75 per Colman, J.

(including, for want of a more neutral phrase, the "Italian torpedo") at the enforcement stage under Articles 34(3) or (4).[41] [42]

In the penultimate section of the Opinion, the Advocate General squarely addresses the House of Lords' policy-based arguments favouring the retention of the inherent jurisdiction of the English court to issue anti-suit injunctions to protect arbitral proceedings based upon 1) the practical reality of arbitration proceedings; (2) party autonomy and (3) competitive disadvantage, stating as follows:

> "66. To begin with it must be stated that aims of a purely economic nature cannot justify infringements of Community law. On the other hand, in the interpretation of the Regulation account can be had to the observance of the principle of autonomy, as the Court has stressed in connection with agreements conferring jurisdiction and as recital 14 in the preamble to the Regulation emphasises in that context. Even if arbitration – unlike agreements conferring jurisdiction – does not fall within the scope of the Regulation, the background to the provision shows, nevertheless, that the international rules on arbitration should not be interfered with by Regulation No 44/2001.
> 67. The interpretation advanced here respects individual autonomy, however, and also does not call into question the operation of arbitration. Proceedings before a national court outside the place of arbitration will result only if the parties disagree as to whether the arbitration clause is valid and applicable to the dispute in question. In that situation it is thus in fact unclear whether there is consensus between the parties to submit a specific dispute to arbitration.
> 68. If it follows from the national court's examination that the arbitration clause is valid and applicable to the dispute, the New York Convention requires a reference to arbitration. There is therefore no risk of circumvention of arbitration. It is true that the seising of the national court is an additional step in the proceedings. For the reasons set out above, however, a party which takes the view that it is not bound by the arbitration clause cannot be barred from having access to the courts having jurisdiction under Regulation No 44/2001.
> 69. Were the national courts which may have jurisdiction not to be seised, owing to the anti-suit injunction, there is also the risk that those courts might later refuse to recognise and enforce the arbitral award in reliance on Article V of the New York Convention. Also from the point of view of procedural economy, an anti-suit injunction may therefore lead to unsatisfactory results.
> 70. It is true that the arbitral body or the national courts at its seat, on the one hand, and the courts in another Member State which have jurisdiction under the Regulation in respect of the subject-matter of the proceedings, on the other, may reach divergent decisions regarding the scope of the arbitration clause. If both the arbitral body and the national court declare that they have jurisdiction, conflicting decisions on the merits could result, as pointed out by the House of Lords.
> 71. Within the scope of application of the Regulation irreconcilable decisions in two Member States should be avoided as far as possible. In cases of conflict of jurisdiction between the national courts of two Member States, Articles 27 and 28 of Regulation No 44/2001 ensure that there is coordination, as particularly noted by the French Government. However, since arbitration does not come within the scope of the Regulation, at present there is no mechanism to coordinate its jurisdiction with the jurisdiction of the national courts.
> 72. A unilateral anti-suit injunction is not, however, a suitable measure to rectify that situation. In particular, if other Member States were to follow the English example and also introduce anti-suit injunctions, reciprocal injunctions would ensue. Ultimately the jurisdiction which could impose higher penalties for failure to comply with the injunction would prevail.
> 73. Instead of a solution by way of such coercive measures, a solution by way of law is called for. In that respect only the inclusion of arbitration in the scheme of Regulation No 44/2001 could remedy the situation. Until then, if necessary, divergent decisions must be accepted. However it should once more

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[41] *Brussels Regulation*, Article 34 reads in part:

> **Article 34**
> A judgment shall not be recognized:
> ...
> 3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
> 4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

[42] *Cf., Partenreederei M/S Heidberg v Grosvenor Grain & Feed Co Ltd (The Heidberg) (No.2),* [1994] 2 Lloyd's Rep. 287 (QBD (Comm Ct)) where the English court concluded that the violation of an arbitration agreement was not a valid defence under the *Brussels Convention* to refuse recognition and enforcement.

> be pointed out that these cases are exceptions. If an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts have no reason not to refer the parties to the arbitral body appointed in accordance with the New York Convention.

The Advocate General's Opinion concludes:

> "74. On the basis of the above considerations, I propose that the question referred by the House of Lords should be answered as follows:
> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters precludes a court of a Member State from making an order restraining a person from commencing or continuing proceedings before the courts of another Member State because, in the opinion of the court, such proceedings are in breach of an arbitration agreement."

Future Implications

It is highly likely that the Court will adopt the Advocate General's Opinion, resigning anti-suit injunctions (at least in terms of litigation or arbitration between parties from Member States) to the jurisprudential dustbin of history. Yet, as Alexander Graham Bell once said: "When one door closes, another opens; but we often look so long and so regretfully upon the closed door that we do not see the one which has opened for us." Creative counsel will likely need to refine their bad faith or abuse of process arguments. Given that *West Tankers* involved a dubious negative declaratory action in the Syracuse court (the infamous 'Italian torpedo'), another potential counter-measure is a positive declaratory action in the local court of the arbitral seat. If all else fails, one could try arguing the public policy exception under the *Model Law* or *New York Convention* at the recognition and enforcement stage.

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