The certainty of misery or the misery of uncertainty? EU law, anti-suit injunctions and arbitration

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The topic

• The EU family: arbitration and anti-suit injunctions strain relations between common and civil law cousins

• Two CJEU Grand Chamber decisions:
  – *Allianz SpA & ors v. West Tankers Inc* (the *Front Comor*) C-185/07, [2009] ECR I-663
  – *Gazprom OAO v. Lietuvos Respublika* C-536/13, 13.5.15

• Is *West Tankers* really a source of misery? If so, has *Gazprom* relieved it? Could the cure be worse than the disease?
Running order

- Background: arbitration, anti-suit injunctions and the EU civil jurisdiction rules
- *West Tankers* – AG Opinion, judgment, fallout
- *Gazprom OAO* – AG Opinion, judgment
- Where does it leave us?
- Practical advice to parties arbitrating in the EU
The background (1): Arbitration and the courts

- Parties to valid arbitration clause have agreed to resolve their dispute privately
- But state courts retain a role:
  - Court at seat: supervision and support of arbitration (Model Law)
  - Court elsewhere: enforcement (NY Convention)
- What happens where party to arbitration agreement seeks to litigate?
  - Determination of validity/effectiveness (NY Conv.)
  - Stay; anti-suit injunction
The background (2)

Anti-suit injunctions

• Potent weapon for litigator

• Nature and effect:
  – Order by court in State A prohibiting party from litigating in State B, punishable by sanctions
  – *In personam* but raises issues of judicial comity

• Uses:
  – Arbitration agreement, exclusive jurisdiction agreement, *forum non conveniens*
  – Rare outside common law world

• But suppose A and B jurisdiction rules clash?...
The background (3): EU civil jurisdiction regime

• Common jurisdictional rules with precedence over national rules

• Brief history:
  – Brussels Convention 1968 (6 members!)
  – Lugano Convention EU/EFTA States 1988
  – Brussels I Regulation (EC) No. 44/2001
  – Heidelberg Report 2007
  – Brussels I Regulation (Recast) (EU) No. 1215/2012
The background (4): Brussels I

- Free movement of judgments: mutual enforcement
- Ascertaining jurisdiction:
  - Basic rule: D’s domicile
  - Additional bases: various kinds of link to subject-matter
  - Exceptions for consumers/employees/policyholders
  - Choice of jurisdiction agreements
- Related actions/\textit{lis pendens} – Art. 27:
  - “Court first seised”: Italian torpedo!
- Scope: “civil and commercial matters”. But Art 1(2)
  - “The Regulation shall not apply to... (d) arbitration”
West Tankers: setting the scene

- **Turner v. Grovit C-159/02 [2004] ECR I-3565:**
  - Anti-suit injunction against proceedings within scope of Brussels regime incompatible because interferes with court’s exercise of jurisdiction contrary to principle of mutual trust, and impairs effectiveness of regime.
  - That is so even if proceedings brought in bad faith to frustrate proceedings elsewhere: court in one Member State must not review jurisdiction of court in another.

- But English courts continued to grant in support of arbitration on basis of Art. 1(2)(d) exclusion.

- So: for purpose of Brussels I, how does EU law characterise court proceedings connected with arbitration?
West Tankers: the facts

- The *Front Comor*, owned by West, collided with the charterer’s jetty insured by Allianz SpA, who paid the charterer’s claim for damage. Charterparty contained London arbitration clause.
- Charterer brought London arbitration against West. Allianz brought subrogated damages claim in Syracuse civil court, which on a preliminary issue accepted jurisdiction.
- West obtained anti-suit injunction from English High Court (on basis arb clause binding on Allianz).
- House of Lords (HL) thought injunction compatible with Brussels I because exclusion of “arbitration” also excluded English injunction proceedings in support of arbitration. But referred question of compatibility to CJEU.
First question is which set of proceedings must fall within the scope of Brussels I: those in the court issuing the injunction, or those in the court affected?

- HL assumption that only the proceedings in the court issuing the injunction relevant was inconsistent with *Turner*.
- What counts is status of proceedings affected by the injunction
- No need for both sets of proceedings to be in scope.

To determine whether Syracusa proceedings in scope, must resolve whether “arbitration” understood in narrow or broad sense, which has:

“always been a matter of dispute between the Anglo-Saxon and the continental schools of law” clash of legal cultures:
A-G Kokott (2)

• “Broad” common law view:
  – As soon as a party claims the protection of the arbitration clause, the proceedings are excluded because court must determine a question linked to arbitration.

• “Narrow” continental view:
  – Subject-matter of proceedings decisive – claim for damages is “civil” or “commercial” matter.

• Narrow view preferred:
  – Once subject-matter within scope, proceedings not caught by Art 1(2)(d) merely because court forced to determine whether it has jurisdiction over merits, ie. whether arb. agreement “null and void, inoperative or incapable of being performed” (NYC Art. II(3)).
  – On contrary, that is exercise of court’s jurisdiction, and party arguing against effectiveness of arbitration clause has a right to the court’s determination of that question.
A-G Kokott (3)

- Only where court determines the NYC issue in favour of arbitration does the exclusion bite.
- Until that point, anti-suit injunction interferes with court’s jurisdiction over proceedings within scope, and impairs effective exercise of party rights.

- In answer to HL’s views:
  - Fact that NYC exercise undertaken as preliminary issue is matter of form, not substance, so irrelevant: Rich C-190/89 et al
  - Competitive disadvantage for London: “aims of a purely economic nature cannot justify infringements of EU law”
  - Risk of conflicting judgment of court and arbitral tribunal (+courts at seat) on merits flows from exclusion of arbitration from Brussels I. Remedy is not “coercive measures” of “unilateral anti-suit injunctions” but “a solution by way of law” – ie. amendment of Brussels I (A-G Kokott favoured inclusion of arbitration).
The Judgment

• 12.12.2013 – Grand Chamber followed A-G Kokott:
  – “If, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of [Brussels I], a preliminary issue concerning the applicability of an arbitration agreement, in particular its validity, also comes within its scope…” [26].
  – “an anti-suit injunction... is contrary to the general principle... that every court seised itself determines... whether it has jurisdiction to resolve the dispute before it...”[29]
  – “obstructing” the court of another Member State in exercising its power to determine on basis of Article 1(2)(d) etc. whether Brussels I applies “runs counter” to mutual trust. [30]
The fallout

• A-G Opinion/judgment criticised in common law arbitration community:
  – Inadequate analysis of scope of Art 1(2)(d).
  – “Arbitration unfriendly”: CJEU undermined arbitration and the Brussels I scheme by defying the exclusion.

• Accelerated reform of Brussels I
  – 2007 Heidelberg Report (pre- *West Tankers*) considered in 2009 Green Paper
  – Brussels I (Recast) adopted 12.12.2002:
    – No amendment of Art. 1(2)(d) but new recital 12: court seised of an action not prevented from examining validity etc. of arb agreement. Where it decides against validity, its judgment on merits must be recognised. But Regulation should not apply to ancillary, enforcement, annulment proceedings etc.
    – New Art 73(2) – “shall not affect the application of the NYC”
Gazprom OAO: the facts

• Complex, but in short:
  – Gazprom 37% shareholder in Lithuanian joint venture co for distribution of gas supplied by Gazprom. Lithuanian government owned 18%. Shareholder agreement contained Stockholm arbitration clause.
  – Dispute about gas pricing led to parallel proceedings: Lithuanian govt brought court proceedings to remove Russian directors for “improper actions”; Gazprom commenced Stockholm arbitration.
  – Arbitral tribunal rendered final award ordering government to withdraw part of its suit.
  – Court opened “improper actions” investigation and declined to recognise arbitral award.
  – Court referred question whether “anti-suit injunction issued by arbitral tribunal” is compatible with Brussels I.
A-G Wathelet (1)

• Anti-suit award “closely resembles” anti-suit injunction. Can be approached on same basis.

• Strenuous critique of West Tankers. Far from the decision being logically based on earlier decisions of the Court, it was in conflict with them:
  – Hoffmann C-145/86: non-recognition of maintenance order to give effect to exclusion of civil status decisions from Brussels regime
  – Rich C-190/89, Van Uden C-391/95: “subject matter of proceedings” focused on the fact the proceedings were in support of arbitration, not on the underlying subject-matter of the claim
A-G Wathelet (2)

• Court should take into account Recast Regulation:
  – New recital 12 and Article 73(2) together indicate legislative intention that “the verification, as an incidental question, of the validity of an arbitration agreement is excluded from the scope of Brussels I (Recast)”. Hence the legislature “intended to correct the boundary which the Court had traced [in West Tankers]”.
  – Proper analysis of West Tankers facts was that the Syracusa court would only be “seised” in the Brussels I sense once it had ruled against the arbitration agreement and accepted jurisdiction
  – That does not prevent the court from deciding for itself whether it has jurisdiction

• Arbitral tribunal not bound by Brussels I:
  – Arbitration excluded; arbitral awards not recognised under the Regulation, nor is the tribunal bound by mutual trust. So no incompatibility.
The Judgment

• 13.05.2015 – Followed A-G, but only on narrow basis that the Brussels I restriction on anti-suit injunctions applies to state courts, not to arbitral tribunals.

• No analysis of *West Tankers*, but reasoning assumes that it reflects present state of EU law:

  “The Court has held that obstructing, by [anti-suit] injunction, the exercise by a court of the powers conferred on it by [Brussels I] runs counter to... mutual trust... and is liable to bar an applicant who considers that an arbitration agreement is void... From access to the court before which he nevertheless brought proceedings. See [*West Tankers*].” [34]

• Proceedings for recognition of the award would, however, be excluded from Brussels I.
Where does it leave us?

• Hopes among (some) common lawyers that Court would adopt A-G Wathelet’s critique of West Tankers dashed

• Does Gazprom perpetuate the certainty of misery?
  – West Tankers misunderstood: A-G and court not “anti-arbitration” but upholding principles of effectiveness and supremacy of EU law, via “teleological” approach to interpretation.
  – A-G Kokott correct that if there’s a problem, it flows from the blunt instrument of the exclusion, not the Court’s approach to it.
  – A-G Wathelet’s opinion itself not immune from critique.

• But West Tankers dented by Wathelet opinion, and not clear that Brussels I (Recast) resolves the scope of the arbitration exclusion for the future. Misery of uncertainty?