The European Court of Justice ("ECJ") has today issued its judgment confirming the Advocate General's ("AG") Opinion of 4 September 2008 that anti-suit injunctions should not be brought to restrain court proceedings in another EU Member State even where they are brought apparently in breach of an arbitration agreement.

Summary and business impact

The Opinion of the AG in September 2008 followed a request from the House of Lords on 21 February 2007 for clarification on this point, which arose from the West Tankers case. Some five months later, the ECJ has now issued its judgment which, as was widely expected in the legal community, follows the AG's Opinion.

The effect of this judgment is that arbitration in England or any other Brussels Regulation jurisdiction will now have to wait until any proceedings brought in a foreign court in apparent breach of an arbitration agreement have been stayed or jurisdiction has been declined by that court. Potentially, this could be a protracted process, involving a full review and possible appeals, depending on the procedural rules of the court in question.

This undermines the concept of party autonomy as regards choice of seat, denying some of the benefit of 'arbitration-friendly' jurisdictions where courts limit any pre-award review to a minimum. It is also inconsistent with the concept of competence-competence; allowing arbitrators primarily to determine their jurisdiction. The underlying rationale of this decision, however, is that each State should respect the procedures of the courts of each other Member State, regardless of any issues relating to the effective resolution of disputes between parties, especially the commercial parties that often use arbitration.

The judgment and the Opinion follow the principle endorsed by cases such as Turner v Grovit in the context of proceedings being brought in apparent breach of exclusive jurisdiction clauses. It had been hoped, however, that a distinction would be made between exclusive jurisdiction clauses and arbitration agreements, given the specific exclusion of arbitration from the scope of Brussels Regulation 44/2001.

Factual background

The case arose from an incident where West Tanker’s vessel, chartered to Erg Petroli SpA ("Erg"), collided with Erg’s jetty. Erg claimed from its insurers, Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) and also commenced arbitration proceedings in London under the charterparty agreement against West Tankers. Some time later, Allianz SpA began proceedings against West Tankers in an Italian court seeking to recover the sum it had paid to Erg. West Tankers challenged the jurisdiction of the Italian court and applied to the English courts to...
issue an injunction restraining Allianz SpA from continuing the Italian proceedings, arguing that the dispute arose out of the charterparty and, therefore, Allianz SpA (which was claiming by right of subrogation) was bound by the arbitration clause in that agreement.

At first instance, Coleman J in the High Court agreed that the right of Allianz SpA to claim against West Tankers was subject to the arbitration clause in the charterparty, issuing a declaration to this effect and granting the requested injunction. During the proceedings, Allianz SpA questioned whether it would be consistent with the Brussels Regulation for an English court to grant an injunction restraining proceedings in another Member State. Leave was granted to appeal on this issue directly to the House of Lords.

On 21 February 2007, the House of Lords referred the question to the ECJ for final determination, concluding that there were varying views on the issue and that it was a matter of considerable importance. However, they suggested that granting an injunction in this case would not be inconsistent with the Regulation as the proceedings fell outside its scope.

ECJ's judgment

The operative part of the ECJ's judgment sets down that "It is incompatible with Council Regulation (EC) No 44/2001 … for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the court of another Member State on the ground that such proceedings would be contrary to an arbitration agreement."

In reaching this conclusion, the ECJ applied the following reasoning:

1. In order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings – that is, the nature of the rights which the proceedings in question serve to protect. It followed, therefore, that proceedings such as the arbitration between Erg and West Tankers could not come within the scope of the Regulation.

2. However, even proceedings which do not fall within the scope of the Regulation may have consequences which undermine its effectiveness. The unification of the rules of conflict of jurisdiction will be impeded if such proceedings are permitted to prevent a court of another Member State from exercising the jurisdiction conferred on it by the Regulation.

3. It was therefore appropriate to consider whether the Italian proceedings initiated by Allianz SpA fell within the scope of the Regulation. In this regard, the ECJ concurred with the AG's Opinion that, if such proceedings, because of their subject matter (in this case a claim for damages), fell within the scope of the Regulation, a preliminary question as to the applicability of an arbitration agreement also fell within that scope.

4. It followed that West Tankers' challenge to the jurisdiction of the Italian court was a matter exclusively to be determined by that court: a contrary decision would amount to stripping the Italian court of the power to rule on its own jurisdiction as conferred by the Regulation.

5. Moreover, an anti-suit injunction, such as that sought by West Tankers, which would effectively prevent the Italian court from determining the applicability of the Regulation, including in respect of the exclusion of arbitration at Article 1(2)(d), "would run counter to the trust which Member States accord to one another's legal systems".

Conclusions

This much-anticipated decision will no doubt continue to be a source of debate and opinion for some time to come. It is likely to attract continued criticism on the basis that it will be perceived to have reduced London's competitiveness as an arbitral seat. For instance, parties could choose to seat their arbitrations in other common law seats such as Singapore where anti-suit injunctions remain available. However, such fears may well prove unfounded, particularly if parties
seek proactively to mitigate the judgment's effects by the inclusion of clear and unequivocal drafting in their arbitration agreements.

2 Case C-185/07, Judgment of the Court (Grand Chamber) of 10 February 2009
3 Case C-159/02 Turner [2004] ECR I-3565.
4 Pursuant to article 1(2)(d)).

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