HOUSE OF LORDS SESSION 2006–07
[2007] UKHL 4

on appeal from: [2005] EWHC 454 (Comm)

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

West Tankers Inc (Respondents)
v.
RAS Riunione Adriatica di Sicurta SpA and others (Appellants)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Steyn
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Mance

Counsel

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree that, for the reasons he gives, a question should be referred to the European Court of Justice in the terms proposed by him.

LORD STEYN

My Lords,

2. I have read the judgment prepared by my noble and learned friend Lord Hoffmann. I agree with it. In particular I agree with the opinion which Lord Hoffmann expressed on the question referred.

LORD HOFFMANN

My Lords,

Introduction

1. The main question in this appeal is whether a court of a Member State may grant an injunction against a person bound by an arbitration agreement to restrain him from commencing or prosecuting proceedings in breach of the agreement in a court of another Member State which has jurisdiction to entertain the proceedings under EC Regulation 44/2001 ("the Regulation"). After hearing the arguments of counsel, I am of opinion that an answer to this question is not obvious and is necessary to enable the House to give judgment. It is therefore the duty of the House to refer the question to the Court of Justice under article 234.

The Facts

2. In August 2000 the *Front Comor*, a vessel owned by West Tankers Inc ("Tankers") and chartered to Erg Petroli SpA ("Erg") collided with a jetty owned by Erg at Syracuse and caused damage. The charterparty was expressed to be governed by English law and contained a clause providing for arbitration in London. Erg claimed upon its insurers, Ras Riunione Adriatica di Sicurtà SpA and Generali Assicurazioni Generali SpA ("the insurers") up to the limit of its insurance cover and commenced arbitration proceedings against Tankers in London for the excess. Tankers counterclaimed that it was not liable for any of the damage caused by the collision. The pleadings in the arbitration are complete.

3. On 30 July 2003 the insurers commenced proceedings against Tankers before the Tribunale di Siracusa to recover the amounts which it had paid Erg under the policies. It brought a delictual claim by virtue of its statutory right of subrogation to Erg's claims under Article 1916 of the Italian Civil Code. Subject to any application for a stay pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which Italy is a party, the Italian courts have jurisdiction under article 5(3) of the Regulation.

The English proceedings

4. On 10 September 2004 Tankers commenced these proceedings against the insurers, claiming declarations that the dispute which was the subject of the proceedings in Syracuse arose out of the charterparty and that the insurers claiming by right of subrogation were therefore bound by the agreement to refer it to arbitration in London. Tankers also claimed an injunction to restrain the insurers from taking any further steps in relation to the dispute except by way of arbitration and in particular requiring them to discontinue the proceedings in Syracuse.

5. Colman J gave a judgment on 21 March 2005. He decided that both in English and Italian law the right to the delictual claim which had been transferred to the insurers by subrogation was subject to the arbitration clause in the charterparty. He therefore made the declarations claimed by Tankers. On the question of whether it would be consistent with the Regulation to grant an injunction to restrain further prosecution of the proceedings in Syracuse, he said that he was bound by the decision of the Court of Appeal in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67 to hold that it was. He therefore granted the injunction.

6. Colman J certified that, as the question of whether an injunction could be granted had been previously decided by the Court of Appeal, the case was suitable for appeal directly to the House of Lords under section 12 of the Administration of Justice Act 1969. He also certified two other issues which do not raise questions of European law, namely, whether the grant of the injunction was inconsistent with the New York Convention and whether as a matter of discretion an English court should refuse to restrain proceedings in another Member State. In my opinion the judge was right to give negative answers to both these questions and it is unnecessary to enlarge upon the reasons which he gave.

The Community Legal Provisions

7. The jurisdictions of the Courts of Member States are governed by the Regulation. But article 1(2)(d) of the Regulation provides that it is not to apply to arbitration.

The National Legal Provisions

8. By section 37(1) of the Supreme Court Act 1981 the High Court has jurisdiction to grant an injunction (whether interlocutory or final) "in all cases in which it appears to the court to be just and convenient to do so." The English courts have regularly exercised this power to grant injunctions to restrain parties to an arbitration agreement from instituting or continuing proceedings in the courts of other countries: see *The Angelic Grace* [1995] 1 Lloyd's Rep 87. In addition, by section 44(1) and (2)(e) of the Arbitration Act 1996 the court has power to grant an interim injunction "for the purposes of and in relation to arbitral proceedings".

Observations

9. In case it should be of any assistance to the Court of Justice, I shall state my own opinion on the question referred. For convenience I shall refer only to the Regulation and its articles, even though some of the cases were decided under the equivalent articles of the Brussels Convention.

10. *Gasser GmbH v MISAT Srl (Case C-116/02)* [2003] ECR I-14693 (which decides that a court of a Member State on which exclusive jurisdiction has been conferred pursuant to article 23 cannot issue an injunction to restrain a party from prosecuting proceedings before a court of another Member State if that court was first seised of the dispute) and *Turner v Grovit (Case C-159/02)* [2004] ECR I - 3565 (which decides that a court of a Member State may not issue an injunction to restrain a party from commencing or prosecuting proceedings in another Member State which has jurisdiction under the Regulation, on the ground that those proceedings have been commenced in bad faith) are both based upon the proposition that the Regulation provides a complete set of uniform rules for the allocation of jurisdiction between Member States and that the courts of each Member State have to trust the courts of other Member States to apply those rules correctly.

11. Thus in *Gasser GmbH v MISAT Srl (Case C-116/02)* [2003] ECR I-14693, article 27 required the court of exclusive jurisdiction to stay proceedings until the court first seised had applied article 23 and refused jurisdiction. In *Turner v Grovit (Case C-159/02)* [2004] ECR I - 3565 the one court had to trust the other to dismiss the proceedings on

the ground that they had been brought in bad faith. In each case, the court which had granted the injunction had been purporting to act pursuant to a jurisdiction within the scope of the Regulation.

12. Arbitration, however, is altogether excluded from the scope of the Regulation by article 1(2)(d). The basic principles by which the Regulation allocates jurisdiction, giving priority (subject to exceptions) to the domicile of the defendant, are entirely unsuited to arbitration, in which the situs and governing law are generally chosen by the parties on grounds of neutrality, availability of legal services and the unobtrusive effectiveness of the supervisory jurisdiction. There is no set of uniform Community rules which Member States can or must trust each other to apply. While it is true that all Member States adhere to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which article 71 of the Regulation declares to be unaffected) the Convention is not a Community instrument and does not create a system for the allocation of jurisdiction comparable with the Regulation.

13. It is settled by the decision of the Court of Justice in *Marc Rich & Co AG v Società Italiana Impianti PA* [1991] ECR I-3855 ("the *Atlantic Emperor*") that the exclusion applies not only to arbitration proceedings as such but also to Court proceedings in which the subject-matter is arbitration. In *Van Uden Maritime BV v Deco-Line* [1998] ECR I-7091 the Court decided that the subject-matter is arbitration if the proceedings serve to protect the right to have the dispute determined by arbitration. The question in that case was whether a Dutch court had jurisdiction under article 31 to make an interlocutory order for a provisional payment against a German debtor when the substantive dispute was being heard by arbitrators in the Netherlands. The Court decided (in paragraph 33) that jurisdiction existed because, despite the existence of an arbitration, the subject matter of provisional measures was not arbitration:

> " … it must be noted…that provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect …"

14. The proceedings now before the House are entirely to protect the contractual right to have the dispute determined by arbitration. Accordingly, they fall outside the Regulation and cannot be inconsistent with its provisions. The arbitration agreement lies outside the system of allocation of court jurisdictions which the Regulation creates. There is no dispute that, under the Regulation, the Tribunale di Siracusa has jurisdiction to try the delictual claim. But the arbitration clause is an agreement not to *invoke* that jurisdiction and it is that agreement which the order of Colman J requires to be performed. As Professor Dr Peter Schlosser points out in an illuminating article (*Anti-suit injunctions zur Unterstützung von internationalen Schiedsverfahren* (2006) RIW 486-492), an exclusive jurisdiction clause is in this respect quite different. It takes effect within the Regulation under article 23 and its enforcement must therefore be in accordance with the terms of the Regulation; in particular, article 21. But an arbitration clause takes effect outside the Regulation and its enforcement is not subject to its terms.

15. The contrary argument is that any court order in any proceedings (whether falling within the scope of the Regulation or not), which restrains a party from invoking a jurisdiction available under the Regulation, conflicts with the Regulation because it amounts to an indirect interference with that jurisdiction. Professor Schlosser describes this argument as divorced from reality (*lebensfremd*) and I agree with him. In extending the application of the Regulation to orders made in proceedings to which the Regulation does not apply, it goes far beyond the reasoning in *Gasser* and *Turner v Grovit* and ignores the practical realities of commerce.

16. I mention in passing that such an extension would apply not only to arbitration proceedings but also to orders made in other excluded proceedings such as those concerning matrimonial property (paragraph a) and insolvency (paragraph b). So, for example, in *SA Banque Worms c/Épx Brachot* Cass 1ère civ 19 November 2002, the French Cour de Cassation decided that a court exercising jurisdiction in a French bankruptcy could make an order restraining a creditor from taking execution proceedings against the debtor's land in Ibiza, although the Spanish court would plainly have had exclusive jurisdiction under the Regulation to entertain such an application. Orders of this kind (described by Sandrine Chaillé de Néré in her Note on the case as "[*une idée*] *audacieuse*" and "*très efficace*") have been made by English courts for over a century: see *Re Oriental Inland Steam Company* (1874) LR 9 Ch App 557. I am not surprised that it did not occur to the Cour de Cassation that such an order, made in proceedings excluded from the Regulation, might nevertheless conflict with it.

17. 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.

18. Of course arbitration cannot be self-sustaining. It needs the support of the courts; but, for the reasons eloquently stated by Advocate General Darmon in *The Atlantic Emperor*, it is important for the commercial interests of the European Community that it should give such support. Different national systems give support in different ways and an important aspect of the autonomy of the parties is the right to choose the governing law and seat of the arbitration according to what they consider will best serve their interests.

19. The Courts of the United Kingdom have for many years exercised the jurisdiction to restrain foreign court proceedings as Colman J did in this case: see *Pena Copper Mines Ltd v Rio Tinto Co Ltd* (1911) 105 LT 846. It is generally regarded as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. As Professor Schlosser also observes, it saves a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between so much involvement as will amount to a submission to the jurisdiction (which was what eventually happened to the buyers in *The Atlantic Emperor*: see [1992] 1 Lloyd's Rep 624) and so little as to lead to a default judgment. That is just the kind of thing that the parties meant to avoid by having an arbitration agreement.

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. Professor Schlosser rightly comments that if other Member States wish to attract arbitration business, they might do well to offer similar remedies. In proceedings falling within the Regulation it is right, as the Court of Justice said in *Gasser* and *Turner v Grovit*, that courts of Member States should trust each other to apply the Regulation. But 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.

21. 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.

Reasons for the reference

22. The question referred is one of very considerable practical importance on which different views have been expressed by national judges and writers.

Question referred

23. Is it consistent with EC 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?

Conclusion

24. If counsel have any comments on the form of the reference or question referred, they are invited to submit them in writing within 14 days.

LORD RODGER OF EARLSFERRY

25. I have had the advantage of considering the speech of my noble and learned friend Lord Hoffmann, in draft. I agree with it and would make the reference to the European Court as he proposes.

LORD MANCE

My Lords,

26. I agree with the judgment given by my noble and learned friend Lord Hoffmann and the reference he proposes.

27. The issue is whether the approach established by the European Court of Justice in *Gasser v. MISAT* (Case C-116/02) and *Turner v. Grovit* (Case C-159/02) extends to the present arbitral context. Current English authority is against the view that it does. European academic opinion exists both for and against extension[1].

[1] See e.g: - **for extension**:- Kropholler, Europäisches Zivilprozessrecht (8th ed.) para. 20 (in passing); Dutta & Heinze, Prozessführungsverbote im englischen und europäischen Zivilverfahrensrecht, page 40; Carrier, Anti-suit Injonction: Le CJCE met fin à un anachronisme (2004) 56 Le Droit Maritime Français ("DMF") 403, 411-2;
against extension:- Schlosser, Anti-Suit Injunctions zur Unterstützung von internationalen Schiedsverfahren (2006) RIW 486, cited by Lord Hoffmann;
Krause, *Turner/Grovit – Der EuGH erklärt Prozessführungs-verbote für unvereinbar mit dem EuGVÜ* (2004) RIW 533, 540-1; Muir Watt, commentary on *Turner v. Grovit* (2004) Rev. Crit. DIP, 93(3), 654, 662; Cachard, *Portée d'une demande d'anti-suit injunction devant le juge français*, (2006) DMF 856, 876; and Clavel, *Anti-suit Injunctions et Arbitrage*, (2001) Revue de l'Arbitrage 669, 684.
See also:- Gaudemet-Tallon, *Compétence et Exécution des Jugements en Europe*, para. 48 (**neutral)**; and compare paras. 31d and 17b in Rauscher, *Europäisches Zivilprozessrecht Kommentar* (2nd ed.).

28. Like Lord Hoffmann and Lord Steyn, I find the views advanced against its extension to the arbitral context powerful. It would be a major step, affecting the choice of venue and efficacy of international arbitration generally. The Brussels regime does not regulate relations between litigation and arbitration. Advocate General Darmon in *Marc Rich and Co. AG v. Società Italiana Impianti PA* (Case C-190/89) highlighted the "fundamental importance" of modern arbitration, its essential, deliberate independence of litigation and the role of major international arbitration centres like London. All are potentially affected.

29. The purpose of arbitration (enshrined in most modern arbitration legislation) is that disputes should be resolved by a consensual mechanism outside any court structure, subject to no more than limited supervision by the courts of the place of arbitration. Experience as a commercial judge shows that, once a dispute has arisen within the scope of an arbitration clause, it is not uncommon for persons bound by the clause to seek to avoid its application. Anti-suit injunctions issued by the courts of the place of arbitration represent a carefully developed - and, I would emphasise, carefully applied - tool which has proved a highly efficient means to give speedy effect to clearly applicable arbitration agreements.

30. It is in practice no or little comfort or use for a person entitled to the benefit of a London arbitration clause to be told that (where a binding arbitration clause is being - however clearly - disregarded) the only remedy is to become engaged in the foreign litigation pursued in disregard of the clause. Engagement in the foreign litigation is precisely what the person pursuing such litigation wishes to draw the other party into, but is precisely what the latter party aimed and bargained to avoid.

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