Case No: 2011 FOLIO 564

Neutral Citation Number: [2012] EWHC 854 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2012

Before :

THE HONOURABLE MR JUSTICE FLAUX

- -

Between :

WEST TANKERS INC

Claimant/ Appellant

- and -

(1) ALLIANZ SpA (formerly known as Riunione Adriatica Sicurta)
(2) GENERALI ASSICURAZIONI GENERALI SpA

Defendants/ Respondents

- -
- -

David Bailey QC, Marcus Mander and Elizabeth Lindesay (instructed by **Ince & Co LLP**) for the **Appellant**
Stephen Males QC and Sara Masters (instructed by **MFB Solicitors**) for the **Respondents**

Hearing dates: 26 March 2012

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Judgment

The Honourable Mr Justice Flaux:

Introduction and the issue of law

1. The Appellant appeals pursuant to section 69 of the Arbitration Act 1996 with the permission of David Steel J from the Final Partial Award on Issues 8 and 9 of a majority of the arbitration tribunal (Sir Brian Neill and Professor Alberto Santa Maria, Michael Baker-Harber dissenting) dated 14 April 2011.

2. Issues 8 and 9 were as follows:

> "Issue 8: Are [the Respondents] liable to [the Appellant] in damages in respect of the legal fees and expenses reasonably incurred in connection with the Italian proceedings?
>
> Issue 9: Are [the Respondents] liable to indemnify [the Appellant] against an award made against Owners in the Italian proceedings which is greater than the liability of [the Appellant] as established in the arbitration?"

3. The majority of the tribunal answered both those issues in the negative. The issue of law on which the Appellant was given permission to appeal was as follows:

> "whether the arbitral tribunal is deprived of jurisdiction to award damages for breach of an arbitration agreement by reason of EU law?"

However, Mr David Bailey QC, who appeared for the Appellant accepted at the hearing of the appeal that the issue should be re-formulated as:

> "whether the arbitral tribunal is deprived of jurisdiction to award equitable damages for breach of an obligation to arbitrate by reason of EU law?"

The background to the proceedings

4. The dispute between the parties arises out of a collision on 8 August 2000 between the Appellant's vessel "Front Comor" and a pier in Sicily belonging to Erg Petroli S.p.A. ("Erg"), who had chartered the vessel from the Appellant. The charterparty contained an arbitration clause which provided for any and all disputes to be referred to London arbitration, with English law to apply. Erg asserted claims against the Appellant for its losses arising out of the collision, and obtained security in the form of a letter of undertaking from the Appellant's P&I insurer. The dispute was referred by Erg to arbitration in London pursuant to the arbitration clause. The Appellant denied liability and counterclaimed for a declaration that it was under no liability to Erg arising out of the collision.

5. Erg was insured against damage to its jetty and various consequential losses by the Respondent insurers pursuant to contracts of insurance which were governed by Italian law. The Respondents paid Erg up to the policy limits, more than 15 million

Euros. On 6 October 2003, the Respondents commenced judicial proceedings against the Appellant in the Tribunale di Siracusa in Sicily, seeking to recover the sums which they had paid to Erg from the Appellant in reliance on their rights of subrogation under the Italian Civil Code.

6. The Appellant sought an anti-suit injunction from the English Commercial Court to restrain the Respondents from pursuing their claim in Italy in breach of the arbitration agreement, which was granted by Colman J and made permanent on 21 March 2005 following a full hearing in which the Respondents participated. By paragraph 2 of his Order, Colman J also made declarations that (a) the Respondents were obliged to refer any and all disputes arising out of the Charterparty to arbitration in London in accordance with the terms of the charterparty and (b) the claims raised in the Italian proceedings were disputes arising out of the charterparty and accordingly were to be determined in London arbitration.

7. By his judgment, reported at [2005] 2 Lloyd's Rep 257, Colman J decided (1) that the issue whether by subrogation the Respondents became transferees of the bare right of Erg in delict or such right of action became enforceable only in accordance with the arbitration agreement was to be determined by English law as the law of the arbitration agreement and (2) under English law, the obligation to arbitrate the disputes was an inseparable component of the subject matter transferred to the Respondents by subrogation. On both those points the learned judge followed and applied the decision of the Court of Appeal in *The Jay Bola* [1997] 2 Lloyd's Rep 279 and specifically the judgment of Hobhouse LJ at 285-6.

8. There was a "leap frog" appeal by the Respondents from Colman J's decision to the House of Lords, the Respondents contending that Colman J. had no jurisdiction to grant an injunction restraining a person from commencing or prosecuting proceedings in a court of another member state where the court in question had jurisdiction to entertain the proceedings under the Council Regulation (EC) 44/2001 ("the Regulation"). On 21 February 2007, the House of Lords referred the question whether such an injunction was consistent with the Regulation to the European Court of Justice ("ECJ").

9. Whilst the matter was pending before the ECJ, the Appellant continued with the arbitration, obtaining an Order from the Commercial Court on 3 October 2007 that the Respondents be added as claimants and that a tribunal be constituted pursuant to section 18 of the Arbitration Act 1996, to hear the disputes between the parties, consisting of Mr Baker-Harber, the late Mr David Johnson QC and Sir Brian Neill ("the first tribunal"). In January 2008, that tribunal heard an application by the Appellant for declarations to the same effect as those made by Colman J and for an order restraining the Respondents from taking any further steps in the Italian proceedings. The Respondents took no part in that hearing. By a Final Partial Award ("the first Award") dated 14 May 2008, the first tribunal made the declarations and order sought.

10. Thereafter, the claim by Erg against the Appellant for damages came on for hearing before the first tribunal on 30 June 2008 and lasted 7 days. Both parties were represented by solicitors and counsel, but again the Respondents took no part in the hearing.

11. Whilst the first tribunal was considering the terms of its Award, the Opinion of the Advocate General Kokott was delivered on 4 September 2008. She concluded that the question referred should be answered that the Regulation did preclude the courts 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. I will consider her Opinion in more detail below.

12. In the light of that Opinion, the first tribunal decided to stand over certain issues in the arbitration that arose only between the Appellant and the Respondents (namely what are now described as Issues 8 and 9) until after the ECJ had given its judgment. However, on 7 October 2008, the first tribunal published a further Partial Final Award ("the second Award") by which it held and declared that the Appellant was under no liability whatsoever (in contract, tort or otherwise) to Erg in respect of the collision. In the alternative, if it was wrong in finding no liability, the Appellant was entitled to limit its liability under the Convention on Limitation of Liability for Maritime Claims 1976.

13. On 14 October 2008, the Appellant applied to the first tribunal under section 57 of the Arbitration Act 1996 for further findings. The Appellant contended that, although it had agreed to Issues 8 and 9 being stood over, it had not agreed that all maters in dispute with the respondents should be stood over. That application was considered at an oral hearing on 3 November 2008, of which the Respondents had notice but did not attend. The first tribunal then made a further Partial Award ("the third Award") dated 12 November 2008 in which it made the same declarations as to non-liability, alternatively limited liability of the Appellant to the Respondents as it had of the Appellant to Erg in its Award of 7 October 2008.

14. The ECJ handed down its judgment on 10 February 2009. It reached the same conclusion as had the Advocate General in her Opinion, that for a court in a member state to grant an anti-suit injunction restraining a person from commencing or continuing proceedings before the courts of another member state on the ground that such proceedings would be contrary to an arbitration agreement was incompatible with the Regulation. I will consider the judgment in more detail below.

15. Following the judgment, the arbitration proceedings returned to the House of Lords. Written submissions were made by both parties as to what consequential orders should be made. The House of Lords made an Order allowing the appeal by the Respondents and discharging the anti-suit injunction made by Colman J on 21 March 2005. However, the Order continued:

> "Nothing in this Order affects the declarations contained in paragraph 2 of the Order of [Colman J] … of 21 March 2005 [namely the declarations referred to at paragraph 6 above] which remain binding and in full effect."

16. Thereafter on 15 November 2010, Simon J granted leave to enforce the third Award as a judgment under section 66 of the Arbitration Act 1996. The Respondents applied to set aside that Order. Field J refused to set aside the Order ([2011] 2 Lloyd's Rep 117) and the Court of Appeal has recently upheld his decision ([2012] EWCA Civ 27). The Appellant has also issued proceedings on 20 February 2009 in Trieste for the

recognition and enforcement of the third Award under the New York Convention. The Respondents are challenging those proceedings. Conversely, the jurisdiction of the Tribunale di Siracusa is being challenged by the Appellant. The Italian Court has yet to determine the issue of jurisdiction.

17. So far as the determination by an arbitral tribunal of Issues 8 and 9 is concerned, the Respondents challenged the jurisdiction of the first tribunal to make any Order in relation to those Issues, contending amongst other things that those Issues were not included in the Order appointing the first tribunal. A further Order was obtained from the Commercial Court appointing a fresh tribunal (Mr Baker-Harber, Professor Santa Maria and Sir Brian Neill) to determine Issues 8 and 9. An oral hearing took place on 31 January and 1 February 2011 at which both the Appellant and the Respondents were represented by solicitors and counsel.

18. On 14 April 2011, the tribunal published the Award by which the majority, as I have said, answered both Issues 8 and 9 in the negative. Before considering in more detail the reasoning of the arbitrators so far as relevant for the purposes of this appeal, I propose to set out in more detail the reasoning and conclusions of the Advocate General and the ECJ in order to provide the context in which the majority of the tribunal reached the conclusion it did that it lacked jurisdiction.

The Opinion of the Advocate General and the judgment of the ECJ

19. The Advocate General held that the right of a party to access to a national court having jurisdiction under the Regulation is a fundamental right under EU law and that to deny such access would be contrary to the principle of effective judicial protection which is a general principle of Community law and as she put it "one of the fundamental rights protected by the Community". Of particular relevance in this context are the following paragraphs in her Opinion:

> "34. Nor is it a prerequisite of infringement of the principle of mutual trust, on which the judgment in *Turner* was substantially based, that both the application for an anti-suit injunction and the proceedings which would be barred by that injunction should fall within the scope of the regulation. Rather, the principle of mutual trust can also be infringed by a decision of a court of a member state which does not fall within the scope of the regulation obstructing the court of another member state from exercising its competence under the Regulation.
>
> 35. The national authorities of a member state may not impair the practical effectiveness of Community law when they exercise a competence which, for its part, is not governed by Community law. That corresponds for instance to a consistent line of cases in which it has been held that national tax legislation must observe the fundamental freedoms, even though direct taxation falls within the competence of the member states.

36. In respect of the Brussels Convention the court has already confirmed, in its judgment in *Hagen*, that the application of national procedural rules, specifically the conditions governing the admissibility of an action, may not impair the effectiveness of the Convention. In that regard it is irrelevant that the provisions at issue in *Hagen* were of national origin and from the outset certainly did not fall within the scope of the Brussels Convention, whereas arbitration is merely excluded from the scope of application of the Regulation.

….

57. In its judgment in *Gasser* the court recognised that a court second seised should not anticipate the examination as to jurisdiction by the court first seised in respect of the same subject matter, even if it is claimed that there is an agreement conferring jurisdiction in favour of the court second seised. As the Commission correctly explains, from that may be deduced the general principle that every court is entitled to examine its own jurisdiction (doctrine of Kompetenz-Kompetenz). The claim that there is a derogating agreement between the parties, in that case an agreement conferring jurisdiction, here an arbitration agreement, cannot remove that entitlement from the court seised.

58. That includes the right to examine the validity and scope of the agreement put forward as a preliminary issue. If the court were barred from ruling on such preliminary issues, a party could avoid proceedings merely by claiming that there was an arbitration agreement. At the same time a claimant who has brought the matter before the court because he considers that the agreement is invalid or inapplicable would be denied access to the national court. That would be contrary to the principle of effective judicial protection which, according to settled case law, is a general principle of Community law and one of the fundamental rights protected in the Community. ...

61. It is also not obvious why such examination [of the scope and effectiveness of the arbitration agreement] should be reserved to the arbitral body alone, as its jurisdiction depends on the effectiveness and scope of the arbitration agreement in just the same way as the jurisdiction of the court in the other member state. The fact that the law of the arbitral seat has been chosen as the law applicable to the contract cannot confer on the arbitral body an exclusive right to examine the arbitration clause. The court in the other member state here the court in Syracuse is in principle in a position to apply foreign law, which is indeed often the case under private international law."

20. The Advocate General went on to discuss the fact that, because arbitration is excluded from the scope of the Regulation and thus the concept of an arbitration agreement is not an autonomous concept in European law, there is a risk that the arbitration tribunal or the national court at the seat of arbitration on the one hand and the court of another member state which has jurisdiction under the Regulation in respect of the subject matter of the proceedings might reach conflicting decisions on the scope of the arbitration agreement or indeed on the overall merits of the dispute:

> "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 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."

21. The judgment of the ECJ adopted the reasoning and conclusion of the Advocate General, albeit in a more succinct fashion. Of particular relevance for present purposes are the following passages in the judgment:

"23. Proceedings, such as those in the main proceedings, which lead to the making of an anti-suit injunction, cannot, therefore, come within the scope of Regulation No 44/2001.

24. However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another member state from exercising the jurisdiction conferred on it by Regulation No 44/2001.

….

27. It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.

28. Accordingly, the use of an anti-suit injunction to prevent a court of a member state, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.

29. It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see, to that effect, *Gasser*, paragraphs 48 and 49). It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a member state to be reviewed by a court in another member state (Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I-3317, paragraph 24, and *Turner*, paragraph 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one member state in a better position to determine whether the

> court of another member state has jurisdiction (*Overseas Union Insurance and Others*, paragraph 23, and *Gasser*, paragraph 48).
>
> 30. Further, in obstructing the court of another member state in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the member states accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based (see, to that effect, *Turner*, paragraph 24).
>
> 31. Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled."

The Award

22. Having set out the history of the dispute and dealt with issues not in play for the purposes of this appeal, the Award then deals at paragraphs 53 to 66 with the Respondents' contention that the principle of effectiveness or effective judicial protection was a free-standing right as a matter of European law. The tribunal rejected that contention, concluding at paragraphs 63 and 66 that the principle of effectiveness was not applied in the abstract but only applied to protect some other right of European law, here the right in Article 5(3) of the Regulation to sue a tortfeasor in the courts of the place where the harmful event occurred.

23. In view of the way in which the argument developed at the hearing before me, it seems to me important to set out the reasoning of the tribunal, which was as follows:

> "63. In support of the argument that insurers' right to effective judicial protection is not derived from the Regulation but is a wider right than that, we were referred to paragraph 58 of the Opinion of the Advocate General and paragraph 31 of the judgment of the European Court.
>
> [The tribunal then quoted the last sentence of paragraph 58 of the Opinion of the Advocate General and paragraph 31 of the judgment of the ECJ, both of which I have set out above, and continued]

> 65. If one reads these passages together it is apparent that the "fundamental right" to which the Advocate general was referring in paragraph 58 of her Opinion was the right to judicial protection of some other right that has been conferred by Community law. The principle of effectiveness cannot be applied in the abstract or in the absence of some other conferred right. So one turns to identify the right to be protected.
>
> 66. We have already discussed the right. In simple terms the right to be protected is the right enshrined in Article 5.3 of Regulation No 44/2001 to sue a tortfeasor in the courts of the place where the harmful event occurred. Moreover, this conclusion accords with paragraph 31 of the judgment of the European Court…"

24. That conclusion that the principle of effectiveness or effective judicial protection was not a free-standing right was originally challenged by the Respondents by way of a Respondent's Notice but that has not been pursued at the hearing before me, so I proceed on the basis that the tribunal's conclusion on that issue was correct.

25. The tribunal then went on to consider the critical question whether the principle of effectiveness or effective judicial protection protecting the Respondents' right to sue the Appellant in Italy under Article 5(3) was one which bound the tribunal so as to prescribe its jurisdiction to grant damages for breach of the obligation to arbitrate or an indemnity. At paragraphs 68 to 78 of the Award, the majority concluded that its jurisdiction was so circumscribed in these terms:

> 68. So one comes to consider the nature of the protection and against whom and against what the protective shield can be used. This is a crucial question in the present case.
>
> 69. We have already referred to the fact that in her Opinion the Advocate General set out some of the Recitals in the preamble to Regulation No 44/2001. One of these Recitals was Recital 14:
>
> *"The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation."*
>
> 70. It is clear from this Recital, that has to be read together with Recital 15 (set out in paragraph 12 above), that the Regulation is directed to the jurisdiction of national courts and to the allocation of jurisdiction between national courts. One then finds a specific provision in Article 1 of the Regulation stating that the Regulation does not apply to arbitration. Furthermore, as we have already noted, in the anti-suit proceedings before the European Court the existence of the arbitration proceedings and the possibility of conflicting decisions indicate that the

parallel jurisdiction of the arbitral tribunal was fully recognised.

71. It can therefore be strongly argued that an arbitral tribunal is free of any of the restraints that would bind a national court and can exercise a jurisdiction to award damages for breach of an arbitration agreement in the same way as it would be able to do if no question of Community law was involved. Moreover, this jurisdiction is reinforced by the unappealed declarations made by the Commercial Court and affirmed by the House of Lords.

72. In the present case, however, we have to take account at every stage of the Opinion of the Advocate General and the judgment of the European Court of Justice.

73. It is clear from the Opinion of the Advocate General, with whom the European Court did not disagree, that it is recognised that the possibility exists of conflicting decisions by an arbitral tribunal on the one hand and a national court on the other. These conflicts can extend to decisions on the merits because the tribunal and the court operate in separate though parallel spheres. But it is the duty of both the national court and the tribunal to apply Community law.

74. It is at this stage that we find that the jurisdiction that we would otherwise have had to award damages is circumscribed. Thus, in applying Community law we have to give full effect to the decision of the European Court and what we believe to be its underlying philosophy.

75. It is true that by a specific provision the Regulation does not apply to arbitration. Indeed it could be argued that the principle of effectiveness and the consequential judicial protection should be applied to this exclusion so as to make it of equal importance to the right to bring proceedings in a national court. It is also true that the Regulation is concerned with allocating jurisdiction between national courts.

76. But the underlying theme of the judgment is the importance, indeed the pre-eminence, of the right to bring proceedings in the appropriate national court. It is this right that, in the eyes of the European Court, is entitled to effective judicial protection.

77. The ruling by the European Court means that insurers have the right under European law to bring proceedings in Syracuse. Accordingly it seems to us that a decision by this tribunal that insurers did not have that right would be impossible to sustain if the matter were tested again before the European Court. A competition between the right upheld by the European court

> and the right to damages would, in the present state of Community law, result in a victory for the former. And this is so despite the specific provision in Article 1(2)(d).
>
> 78. Accordingly, we are driven to the conclusion that Community law would not allow an arbitral tribunal, although exercising a parallel jurisdiction, to cross the divide and in effect "punish" a party for pursuing a course that the European Court itself had approved."

26. It is clear from this section of the Award that the majority of the tribunal reached this conclusion with considerable reluctance, recognising the force of Mr Bailey's submission that an arbitral tribunal is free from the constraints which would bind the court because of the exclusivity provisions of the Regulation which regulate the position between national courts of member states.

The Appellant's submissions

27. Mr Bailey QC advanced three principal submissions (as set out in paragraph 25 of his Skeleton Argument and expanded in oral argument) as to why the majority of the tribunal had fallen into an error or errors of law in reaching this conclusion:

    (1) The tribunal correctly concluded that the principle of EU law of effectiveness and effective judicial protection were not free-standing (as the Respondents had argued) but existed to protect rights under EU law, in this case the right of the Respondents under Article 5(3) of the Regulation to commence court proceedings against an alleged tortfeasor in the courts of the place where the harmful event occurred. However, the tribunal was wrong to conclude that its jurisdiction was circumscribed by that right in circumstances where by virtue of Article 1(2)(d) the Regulation has no application to arbitration.

    (2) Even if the majority of the tribunal was right to conclude that its jurisdiction was capable of being circumscribed by the Regulation, it was wrong to find that an award of damages or an indemnity would interfere with the Respondents' rights under EU law. The tribunal wrongly transposed the reasoning of the ECJ in relation to anti-suit injunctions to an award of equitable damages for breach of the obligation to arbitrate.

    (3) Even if the majority of the tribunal was correct to find that it had no jurisdiction to award damages or an indemnity while the Italian proceedings were pending, it should not have dismissed the Appellant's claim for damages, given that the Italian court has yet to determine its own jurisdiction. If the Italian court determines it has no jurisdiction, there can be no question of an award of damages interfering with the Respondent's right of access to the Italian court.

28. In support of his first principal submission, Mr Bailey advanced a number of points. First he submitted that the majority of the tribunal failed to appreciate the significance of the fact that, as the Advocate General acknowledged, the arbitration tribunal has jurisdiction to determine not just the merits of the dispute, but also the scope and

effectiveness of the agreement to arbitrate, and to do so in a manner which is potentially inconsistent with any decision of the Italian court on that issue. In support of that submission, he relied in particular upon the passages at paragraphs 70 to 73 of the Opinion which I have quoted above.

29. Second he submitted that because, as both the Advocate General and the ECJ acknowledge, arbitration is outside the scope of the Regulation by virtue of Article 1(2)(d), the Regulation does not purport to control the interface between the jurisdiction of arbitral tribunals and the jurisdiction of the courts of member states, a point that the Advocate General recognises in terms in the last sentence of paragraph 71. Whilst the arbitration proceedings in which the English court granted an anti-suit injunction were outside the Regulation (as the ECJ recognised in paragraph 22 of the judgment) the English court was nonetheless obliged to give effect to the right of the Italian court as court first seised to determine the issue of jurisdiction under Article 5(3) of the Regulation and the principle of effective judicial protection which upheld that right for the reasons given by the ECJ in paragraphs 27 to 31 of its judgment.

30. Mr Bailey submitted that, in contrast, because the arbitral tribunal is not a national court and arbitration falls outside the Regulation, the exclusivity principle (i.e. that the Court first seised determines the issue of jurisdiction) under the Regulation which the ECJ has confirmed by its decision has no application to the tribunal. That principle only excludes interference by other courts of member states, not interference by arbitral tribunals and there was nothing in the reasoning of the ECJ at paragraphs 27 to 31 of its judgment which could apply to arbitral tribunals.

31. Third, Mr Bailey submitted that there was no question here of an arbitral tribunal which recognised its jurisdiction to award damages for breach of the duty to arbitrate ignoring or not applying European law. It was important to have in mind that, as the tribunal rightly held at paragraph 65 of the Award, the principle of effectiveness or effective judicial protection was not free-standing (as Mr Males had argued before the tribunal) but only arose in support of some other right under European law, here the Respondents' right to access to the Italian court under Article 5(3).

32. However, the arbitral tribunal would only have to apply the principle of effective judicial protection if it were engaged in this case before the tribunal, which it was not, because Article 1(2)(d) does not apply to arbitration at all and because, as paragraph 35 of the Opinion of the Advocate General recognised, the obligation to give effect to the principle of effectiveness in the context of the Regulation was only placed on "national authorities" which obviously included national courts but did not include private arbitral tribunals.

33. If he was wrong in his submission that the majority of the tribunal was wrong to conclude that it was bound to apply the principle of effectiveness or effective judicial protection, Mr Bailey's second principal submission was that the majority erred in concluding that the award of damages or an indemnity would interfere with the Respondents' rights under EU law.

34. In support of that overall submission, Mr Bailey referred again to the recognition by the Advocate General that, since arbitration is outside the Regulation and there is no mechanism to coordinate the jurisdiction of an arbitral tribunal with the jurisdiction of the national courts of the member states, there is an inevitable risk of divergent and

inconsistent decisions on the scope of an agreement to arbitrate or on the overall merits. He submitted that, given that recognition that an arbitral tribunal might reach a decision inconsistent with that of the court first seised, here the Italian court, there was no principled or legitimate distinction which the Respondents could seek to draw between an inconsistent award on the merits and an award of damages for breach of an obligation to arbitrate.

35. The logic of the Respondents' argument that an award of damages for breach of the obligation to arbitrate was an illegitimate interference with the Respondents' right to bring proceedings in Italy under Article 5(3) was that any ruling the tribunal made, such as the declarations made in the second and third Awards, was such an interference. On that basis the tribunal should have done nothing and stayed the arbitration process until the Italian proceedings had concluded. Mr Bailey submitted that that logic could not be correct, not only because the Advocate General had expressly recognised that the tribunal was free to issue an Award as to its own jurisdiction and as to the merits which was or might be inconsistent with the decision of the Italian court, but it would effectively negate the right to arbitrate.

36. Mr Bailey submitted that, in so far as a distinction was to be drawn, it was between an anti-suit injunction granted by the English court which barred the Italian court and so goes to the very substance of the rights guaranteed and other remedies or relief sought from the tribunal, including damages for breach of the obligation to arbitrate, which do not constitute illegitimate interference with the right of the Respondents to bring proceedings in the Italian court.

37. Before the tribunal (and indeed before me) the Respondents relied upon a dictum of Lewison J (as he then was) in *Research in Motion v Visto Corporation* [2007] EWHC 900 (Ch) at [28]:

> "Mr Dicker also relies on the decision of the European Court of Justice in *Turner v Grovit* [2005] 1 A.C. 101 as indicating that this court should not purport to tell a court in another member state directly or indirectly how to exercise its own jurisdiction. To award damages against a party for having improperly invoked the process of a foreign court is an indirect interference with that foreign court. I accept his submission, which provides another reason why the Italian court should decide questions arising under Article 96."

38. Mr Bailey submits that this dictum should not be followed because it is unreasoned, which seems to me somewhat unfair. His better point is that the dictum does not touch upon the position of arbitral tribunals because it is concerned with the position of a court second seised, the whole basis of the decision in *Turner v Grovit* being that the court second seised has to defer to the court first seised on the basis of the principle of mutual trust, the same point as the ECJ made in the present case at [30] of its judgment.

39. Mr Bailey's third principal submission was that even if the tribunal was correct in accepting the Respondents' arguments as matters presently stood, it had erred in law in dismissing the claim for damages (Issue 8). It should either have held that in the event that the Italian court concluded in due course that it did not have jurisdiction

and the Respondents were obliged to arbitrate, the Appellant would have a claim for damages or adjourned that Issue pending the determination by the Italian court as to its jurisdiction. Mr Bailey submits that if the Italian court rules that it has no jurisdiction, then it necessarily follows that the Respondents had no right to invoke the jurisdiction and there is no question of an award of damages interfering with any right enjoyed by the Respondents under the Regulation.

The Respondents' submissions

40. In response to Mr Bailey's first principal submission, Mr Males submitted that far from being even arguably wrong, the tribunal's Award was entirely correct. The principle of effectiveness or effective judicial protection is a general principle of European law and even though the Regulation has no application to arbitration, an arbitral tribunal is as bound by European law as an English court would be.

41. In support of the proposition that arbitrators are bound to apply European law, Mr Males relied upon the decision of the European court in the *Nordsee* case [1982] ECR 1095. At [14], the ECJ discussed the role of Community law in arbitration:

> "As the court has confirmed in its judgment of 6 October 1981 *Broekmeulen* , (case 246/80 [1981] ECR 2311), Community law must be observed in its entirety throughout the territory of all the member states; parties to a contract are not , therefore , free to create exceptions to it. In that context attention must be drawn to the fact that if questions of Community law are raised in an arbitration resorted to by agreement the ordinary courts may be called upon to examine them either in the context of their collaboration with arbitration tribunals , in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award - which may be more or less extensive depending on the circumstances - and which they may be required to effect in case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation."

42. It was no answer to say that arbitration was outside the Regulation. The ECJ had recognised in the present case that the arbitration proceedings before this court in which the anti-suit injunction was granted were outside the scope of the Regulation, yet nonetheless this court was bound to give effect to the principle of effectiveness or effective judicial protection ([23]-[24] and [27]-[31] of the judgment).

43. Even if the first two points in [29] and [30], the "court first seised" and "mutual trust" points did not apply to arbitrators, the third point in [31] that the effect of an anti-suit injunction would be to deprive the Respondents of the judicial protection under Article 5(3) from the Italian court was recognising that the Respondents had a fundamental right in European law. It was the duty of the arbitrators as much as it was of the English court to recognise and uphold that right. To that extent the conclusion of the tribunal at [73] that: "it is the duty of both the national court and the tribunal to apply Community law" was clearly correct.

44. Once it is recognised that the tribunal, like the English court was bound by the principle of effective judicial protection not to interfere with or deprive the Respondents of that right in European law, Mr Males submitted that all the Appellant's arguments fail. That is because of the fundamental point that if the Respondents have a right under EU law, then their exercise of that right cannot at the same time be wrongful as a matter of English law, yet had the tribunal granted the relief sought, it would necessarily have had to find that the Respondents' conduct was wrongful. It was this that drove the tribunal to its conclusion at [76]-[78] which was entirely correct and unanswerable.

45. Mr Males submitted that the test as to whether the principle of effectiveness is infringed is a practical one, that the national rules must not make the exercise of rights under EU law "practically impossible or excessively difficult", citing by way of example the decision of the ECJ in *Unibet (London) Ltd v. Justitiekanslern* (Case C-432/05) [2007] ECR I-2271 where at [43] the Court said:

> "In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) ... "

46. Mr Males submitted that just as the Advocate General in the present case at [35] had recognised that national tax legislation has to observe the principle of effectiveness even though taxation falls within the competence of member states, so any English statute or rule of equity or law has also to be consistent with the principles of European law. Mr Males cited the decision of the ECJ in *R v. Secretary of State for Transport, ex p Factortame* (Case C 213/89) [1991] 1 AC 603 at 643-4, where at [20] the Court said:

> "The Court has also held that any provision of a national legal system and any legislative administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law."

47. In answering Mr Bailey's second principal submission, Mr Males submitted that a claim for damages for breach of the obligation to arbitrate was just as much an illegitimate interference with the Italian proceedings as was the grant of an anti-suit injunction by the English court and that in just the same way it would make it practically impossible or excessively difficult for the Respondents to exercise the right under European law which the ECJ had recognised that they had. The claim for damages or an indemnity was designed to dissuade the Respondents from exercising their rights by making continuing with the proceedings in Italy academic.

48. Mr Males relied upon the dictum of Lewison J in *Research in Motion*. Whilst accepting that the claim which was being sought to be brought in England in that case was different from the relief which the Appellant had been seeking in arbitration her, in that the defendant was seeking to counterclaim that the Italian proceedings there were an abuse of process, he submitted that both were nonetheless illegitimate for the same reason. In both the other party was seeking to characterise as wrongful or improper the invocation of the jurisdiction of the courts of another member state which was permitted in European law.

49. In answer to Mr Bailey's submission that there was no principled or legitimate distinction which the Respondents could seek to draw between an inconsistent award on the merits and an award of damages for breach of an obligation to arbitrate, Mr Males submitted that there was a line between what was acceptable relief to seek from the arbitral tribunal and what was unacceptable. If the substantive remedy would only be granted on the basis that the Respondents' conduct was wrongful, as would be the case with equitable damages for breach of the obligation to arbitrate, then that was unacceptable. In contrast, a declaration of non-liability on the merits such as the first tribunal had granted would not involve any determination that the Respondents' conduct was wrongful and so did not cross the line and was acceptable.

50. Mr Males' first response to Mr Bailey's third principal submission is that there was not an error of law by the tribunal in dismissing the Appellant's claim for damages rather than adjourning it, as that was in effect a case management decision. If that was wrong, he submitted that the ECJ had recognised that the invocation of the Italian jurisdiction was a fundamental right and the mere fact that the Italian court might in fact decline jurisdiction did not make the Respondents' conduct in commencing the proceedings in Italy wrongful.

Analysis and conclusions

51. The initial issue is whether, as the majority of the tribunal concluded, its jurisdiction was circumscribed by the right of the Respondents to bring proceedings under Article 5(3) before the Italian courts. It is clear from the relevant section of the Award that, although the majority of the tribunal considered Mr Bailey's submissions that the tribunal was free from the constraints imposed on the courts were strongly arguable, they were driven to the conclusion they reached that their jurisdiction was circumscribed because, as they put it in paragraph 74 of the Award: "we have to give full effect to the decision of the European Court and what we believe to be its underlying philosophy".

52. The tribunal does not vouchsafe what it believed to be the "underlying philosophy" of the decision of the ECJ, but it goes on in paragraph 76 to talk of the "pre-eminence of the right to bring proceedings in the appropriate national court." It is tolerably clear from those two passages read together that what the tribunal considered was the "philosophy" of the ECJ was that the right to bring proceedings in the court first seised under the Regulation (here the Italian court) should take precedence, not only over any proceedings in another national court, including arbitration proceedings which fall outside the Regulation (which was the direct question the ECJ was deciding), but also over any proceedings before an arbitral tribunal. This was so even though, as Mr Baker-Harber, the dissenting arbitrator, pointed out, as between the

Italian court and the London arbitral tribunal, the latter was "first seised" of the dispute.

53. The validity of this analysis by the tribunal as to the underlying philosophy of the ECJ depends, as I see it, on whether the reasoning of the Advocate General and of the ECJ precludes an arbitral tribunal, as opposed to a national court of a member state, from making decisions or rulings which are inconsistent with the decisions or rulings of the court which is first seised for the purposes of the exclusivity regime of the Regulation as between national courts of member states.

54. So far as the reasoning of the Advocate General is concerned, given that she recognises that one effect of her Opinion would be that an arbitral tribunal could reach a different decision from that of the court "first seised", both as to the scope and effectiveness of the agreement to arbitrate and as to the overall merits, it seems to me impossible for the Respondents to contend that her "philosophy" was that the arbitral tribunal would be circumscribed in the jurisdiction it could exercise by the provisions of the Regulation.

55. Furthermore, as I see it, there is no qualitative difference between a decision by an arbitral tribunal on the merits, which is inconsistent with the approach that the Italian court might adopt in due course as to the merits, and a decision by the arbitral tribunal to grant a declaration that the Respondents should indemnify the Appellant in respect of any liability the Italian court, having considered the merits, might in due course conclude the Appellant was under. Such a declaration would be no more than a reflection of a decision on the merits by the tribunal (namely that the Appellant is under no liability or at most a limited liability to the Respondents) which is potentially inconsistent with any decision on the merits the Italian court might reach and the Advocate General recognises the risk of such inconsistent decisions occurring.

56. It is also the case that, to the extent that any claim for damages for breach of the obligation to arbitrate would include a claim to be put in the same position as if the Italian court had not ruled against the Appellant on the merits (which it might do in due course), if the arbitral tribunal reached a different decision both on the obligation to arbitrate (which the tribunal has already decided against the Respondents) and on the merits, from that of the Italian court, the entitlement to such damages would follow from the tribunal's inconsistent decision and would not be precluded by the Advocate General's reasoning.

57. The question remains whether there is anything in the reasoning of the ECJ which requires the jurisdiction of the arbitrators (as opposed to this court which is subject to the Regulation) to be circumscribed by the Regulation, as the tribunal found it was. In paragraphs 29 to 31 of its judgment, the ECJ set out the conclusions which followed from its determination at paragraph 28 that the grant of an anti-suit injunction by the English court necessarily deprived the Italian court of its power to rule on its own jurisdiction under the Regulation.

58. The first conclusion, in paragraph 29, corresponds with paragraph 57 of the Opinion of the Advocate General and concerns the internal Convention or Regulation principle that the court in another member state cannot review the decision of the court first seised. Whilst, as between courts of the member states, that is an important principle, it is not one which prescribes the jurisdiction of the arbitral tribunal, which is not

subject to that internal Regulation regime. As the Advocate General recognised, that could lead to the arbitral tribunal reaching a different conclusion from that of the court first seised.

59. The second conclusion, in paragraph 30, makes the point, which corresponds with paragraph 36 of the Advocate General's Opinion, that the grant by the English court of the anti-suit injunction is contrary to the mutual trust which member states accord to one another's legal systems. However, the Respondents can point to no wider principle of European law which requires a private arbitral tribunal in one member state to repose mutual trust in any system of law other than that of the national court which supervises and protects the arbitral process in the jurisdiction where the arbitration takes place. Certainly there is nothing in the reasoning of the ECJ which would require an arbitral tribunal to recognise some principle of mutual trust beyond that extending to its own supervising court, in the case of this arbitral tribunal, the English Commercial Court.

60. The third conclusion, in paragraph 31, is the one on which the Respondents place particular reliance. That is the point that the Italian court should not be deprived of its jurisdiction to consider the validity of the arbitration agreement, merely because the Appellant relied upon the arbitration agreement, otherwise a party would only have to assert the existence of an arbitration agreement to thwart the jurisdiction of the court first seised to determine its jurisdiction. Despite the fact that, on its literal wording, that reasoning might be said to encompass not just a court "second seised" seeking to challenge the jurisdiction of the court first seised, but also an arbitral tribunal reaching a different conclusion from that of the court first seised, in my judgment there is nothing in the judgment to suggest that the ECJ intended this analysis to have the far-reaching consequence of applying to arbitral tribunals.

61. In any event, it is clear from the Opinion of the Advocate General that she considered the Regulation did not apply to the decisions of arbitral tribunals which might reach decisions as to the scope of the agreement to arbitrate and as to the merits inconsistent with the decision of the Italian court without falling foul of any principle enshrined in the Regulation.

62. A related issue is whether European law required the arbitral tribunal in this case to decline jurisdiction to grant damages or an indemnity, as the majority of the tribunal considered it should. In my judgment, the tribunal erred in reaching that conclusion. I accept Mr Bailey's submission that whilst the tribunal was bound to apply European law as part of English law, the tribunal would only have to apply the principle of effective judicial protection if it were engaged, which it was not, for the reasons he gave.

63. Of course Mr Males relied on authorities such as *Unibet* which establish that the principle of effectiveness means that the "national rules" must not make the exercise of rights under EU law "practically impossible or excessively difficult". He submitted that in this context "national rules" would include the rules of equity and any statutory power under section 50 of the Senior Courts Act 1981 to award equitable damages. It seems to me that since, as Mr Males has to accept, the principle of effectiveness is not free-standing, that argument only works if the right which the principle of effectiveness is being invoked to protect (here the right of access to the Italian courts under Article 5(3)) is engaged.

64. As I have already determined, that right under European law is only engaged before courts of the member states, not before arbitral tribunals. If the tribunal does not have to give effect to the right under Article 5(3), then there is no reason why the tribunal does not have jurisdiction to grant equitable damages or an indemnity. Any contrary argument at that stage that those "national rules" had to give way to the principle of effectiveness or effective judicial protection would be circular and would elevate that into a free-standing principle, which the tribunal correctly decided that it was not.

65. Furthermore, I agree with Mr Bailey that there is nothing in the decision of the Court of Appeal in *National Navigation Co v Endesa ("The Wadi Sudr")* [2009] EWCA Civ 1397; [2010] 1 Lloyd's Rep 193 which assists the Respondents on this point. The issue which arose there was whether a judgment of the Spanish court to the effect that a London arbitration clause had not been incorporated in a bill of lading was binding in the London arbitration proceedings. The Court of Appeal held that although the arbitration proceedings fell outside the Regulation by virtue of Article 1(2)(d), a Regulation judgment could give rise to an issue estoppel in the same way in arbitration proceedings excluded from the Regulation as in any other proceedings.

66. Moore-Bick LJ dealt with this point at [118] in these terms:

> "It is quite true that the Regulation itself does not apply to arbitral tribunals and that arbitrators are not therefore bound *by the Regulations themselves* to recognise judgments of the courts of member states of the EU, but it does not follow that foreign judgments, whether of the courts of member states or other countries, can be disregarded in arbitration proceedings. A judgment of a foreign court which is regarded under English of conflicts of laws rules as having jurisdiction and which is final and conclusive on the merits is entitled to recognition at common law: see *Dicey and Morris and Collins, The Conflict of Laws*, 14th ed. paragraphs 14-027 - 14-029. It follows, therefore, that arbitrators applying English law are bound to give effect to that rule. There is nothing new in this; it has long been recognised that a judgment of a foreign court can give rise to estoppel by res judicata – see, for example, *The Sennar (No. 2)* [1985] 1 W.L.R. 490 – and the principle is routinely applied in arbitration proceedings."

67. Mr Males relied upon the first sentence of this passage as demonstrating or explaining what he described as "the limited impact of Article 1(2)(d)", but in my judgment it demonstrates nothing of the kind. I agree with Mr Bailey that what it in fact demonstrates is that the Regulation simply does not apply to arbitration or arbitral tribunals. The reason why the arbitrators were bound to recognise the Spanish judgment was nothing to do with any principle of European law derived from the Regulation but because of the English common law doctrine of *res judicata*.

68. In my judgment, arbitration falls outside the Regulation and an arbitral tribunal is not bound to give effect to the principle of effective judicial protection. It follows that the tribunal was wrong to conclude that it did not have jurisdiction to make an award of damages for breach of the obligation to arbitrate or for an indemnity.

69. Given that conclusion, it is not necessary to deal in detail with Mr Bailey's submission, based on the decision of the ECJ in *Rosalba v Telecom Italia* (Cases C-317/08 to C320/08) (2010) that the principle of effectiveness is not absolute but must yield when other principles and considerations come into play. However, I agree with Mr Males that that case is not authority for such a proposition. The Court concluded the principle of effectiveness was not infringed, not that if it was infringed it could then be outweighed by competing considerations. Where the principle of effectiveness does apply (which I have concluded it does not in this case) and it is infringed, that is an end of the matter.

70. Furthermore, it is not strictly necessary to consider Mr Bailey's second and third principal submissions but since the points were fully argued, I will deal with them, not least because this case is likely to go further.

71. If, contrary to my primary conclusion, the tribunal was obliged to give effect to the principle of effectiveness or effective judicial protection, the question still arises whether an Award of damages or an indemnity constitutes illegitimate interference with the proceedings in the Italian court. The difficulty with the Respondents' case is, as I indicated above when considering the rival submissions on this point, that logically if such an Award is illegitimate interference with the foreign court, so would be a declaration as to non-liability of the Appellant such as the first tribunal made in the third Award and yet the Advocate General has recognised that the arbitral tribunal is free to make an inconsistent Award on the merits.

72. I was unimpressed with Mr Males' attempt to draw a distinction between remedies sought from the tribunal which involved the tribunal concluding that the Respondents were acting wrongfully or improperly in invoking the jurisdiction of the Italian courts (which an award of equitable damages would entail) and other remedies which he contended would not involve finding the Respondents had acted wrongfully or improperly. In particular it seems to me difficult to draw a distinction between the relief already granted by the first tribunal in the third Award of declarations against the Respondents that the Appellant is under no liability or limited liability to them and the indemnity which the Appellant was seeking from the second tribunal. In a very real sense, the indemnity is a logical consequence of the declarations made in the third Award.

73. It is important to keep in mind also that the backdrop to all the relief sought is the declaration of the Commercial Court (subsequently endorsed by the House of Lords) made after a hearing before Colman J in which the Respondents participated fully, that the Respondents are under an obligation to arbitrate the disputes which they are seeking to litigate in Italy. To that extent, so far as the English courts and arbitral tribunals are concerned, the Respondents' actions in litigating in Italy (although permitted to do so by the Regulation in line with the decision of the ECJ) can be described as "wrongful" not, as Mr Bailey put it, in any universal sense, but because they are infringing the Appellant's private law right to have the disputes decided in London arbitration, a right which has been recognised and endorsed by this Court.

74. Furthermore, I agree with Mr Bailey that there is no principled basis for any distinction between the relief already granted by the first tribunal and the relief sought by the Appellant from the second tribunal of equitable damages and an indemnity. If (which is the hypothesis on which this second principal submission is being

considered) the arbitral tribunal is under a duty to ensure the effectiveness of Article 5(3), then it must follow that the arbitral tribunal should have desisted from exercising jurisdiction altogether, until the Italian court had ruled on its jurisdiction since, as Mr Bailey candidly accepts, the purpose of all the relief against the Respondents which the Appellant has sought from the arbitrators is to render the Italian proceedings nugatory. Accordingly, all such relief does seek to make the Respondents' resort to the Italian court "practically impossible or excessively difficult", the test for infringement of the principle of effectiveness.

75. However neither the Advocate General nor the ECJ contemplated that the arbitral tribunal in London should decline jurisdiction altogether until the Italian court had ruled. On the contrary the Advocate General expressly contemplated that the tribunal might well reach a decision either as to its own jurisdiction or on the merits which was inconsistent with the eventual decision of the Italian court. It seems to me that the fact that the relief sought in the present case was, on analysis, a determination as to the merits and/or jurisdiction, together with the impossibility of drawing any principled distinction as to relief which is permitted and indeed contemplated by the Advocate General's Opinion and relief which is impermissible because it interferes with the Italian court, points very strongly to the correct conclusion being that the jurisdiction of the arbitral tribunal is not circumscribed or limited by the principle of effectiveness or effective judicial protection at all, arbitration simply being outside the scope of the Regulation.

76. So far as Mr Bailey's third principal submission is concerned, I agree with him that by dismissing the claim for damages, the tribunal did err in law in not at the very least deferring a decision on that claim. This is because by dismissing the claim, the tribunal has shut out what might well be a strongly arguable claim in the future.

77. In the event that the Italian court decided in due course that it did not have jurisdiction and that the Respondents were obliged to arbitrate in London, then it seems to me there would be a strong case for awarding damages for breach of the duty to arbitrate. Mr Males submitted that, in that event, the Italian court would award costs (or at least a proportion of costs) to the Appellant and it would be quite wrong for the tribunal to award damages which gave the Appellant more by way of costs than the Italian court was prepared to award. However, if the tribunal concluded that the Respondents by pursuing an unsuccessful challenge in Italy had caused the Appellant loss which the Appellant had not been able to recover in the Italian proceedings, I can see nothing objectionable in the tribunal awarding damages covering that loss.

Conclusion

78. For all these reasons I consider that the answer to the question of law is that the tribunal was not deprived, by reason of European law, of the jurisdiction to award equitable damages for breach of the obligation to arbitrate and that the appeal should be allowed. I will hear counsel on the form of Order and on consequential matters.