Vinson&Elkins

International Dispute Resolution

Another Nail in the Coffin of Anti-suit Injunctions in Europe

By V&E lawyers Samantha Tite and Emily Barlass

MARCH 17, 2009

© 2009 VINSON & ELKINS LLP. ALL RIGHTS RESERVED.
PLEASE CONTACT STEPHANIE SCHWAUSCH AT SSCHWAUSCH@VELAW.COM FOR ADDITIONAL

Another Nail in the Coffin of Anti-suit Injunctions in Europe

By V&E lawyers Samantha Tite and Emily Barlass

The dust has not yet settled on the ECJ's ground-breaking decision in *Allianz SpA v. West Tankers Inc* (Case C -185/07) and it has already been applied by the English High Court in *DHL GBS (UK) Ltd Fallimento Finmatica SpA* [2009] EWHC 291. Arbitration experts and practitioners alike have been left in little doubt as to the message that these two decisions convey; namely the death of anti-suit injunctions within Europe.

Although there had been various movements in recent years towards limiting the circumstances in which anti-suit relief was available, the courts of Member States had, until the ECJ's decision in *West Tankers*, nevertheless retained the power to grant an anti-suit injunction to restrain litigation commenced in another Member State in breach of an arbitration clause pursuant to the "arbitration exception" contained in EC Regulation 44/2001.

The *West Tankers* decision

In the *West Tankers* case, the ECJ held — following a reference from the English House of Lords — that, although the EC Regulation on its face excludes arbitration from its scope of application, an anti-suit injunction in support of arbitration proceedings was nevertheless incompatible with EU law since a foreign court has the power to rule on its jurisdiction without interference from another foreign court. To strip that court of such power through the imposition of an anti-suit injunction would be contrary to the EC Regulation 44/2001 and general principles of international comity.

The underlying dispute in the *West Tankers* case arose following the collision of a vessel chartered by West Tankers to Erg Petroli SpA (Erg). Erg commenced arbitration proceedings against West Tankers in London under the charterparty agreement. Erg's insurers later commenced court proceedings against West Tankers in Italy (where the collision occurred) seeking to recover the insurance sum it had paid to Erg. West Tankers applied to the English High Court for an anti-suit injunction arguing that the dispute arose out of the charterparty and was therefore subject to the London arbitration agreement contained in the charterparty. The High Court agreed and granted an anti-suit injunction. On appeal, the House of Lords took a similar view but referred to the ECJ the question as to whether it was consistent with the EC Regulation 44/2001 for a Member State court 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.

The ECJ held that proceedings which raise a preliminary or incidental issue concerning the applicability of an arbitration agreement do not fall within the "arbitration exception"

of EC Regulation 44/2001. Following the well known decision in *Grovit v. Turner* [2004] ECR I-3565, the ECJ held that the subject matter of the foreign proceedings is the decisive factor in determining whether or not the matter is placed outside the scope of the EC Regulation. The ECJ found that since the subject matter of the Italian proceedings was a claim for damages (which fell within the EC Regulation), the Italian court had jurisdiction to determine whether it could hear the issue. Accordingly, it was not for the English court to usurp that function by granting an anti-suit injunction restraining the Italian proceedings.

The rationale for the ECJ's decision is plain: it brings the EU position regarding anti-suit injunctions in support of arbitrations in line with the EU rules on anti-suit injunctions to restrain proceedings brought in breach of an exclusive jurisdiction clause.

The *DHL GBS* decision

The facts of *DHL GBS* differ somewhat from *West Tankers*. Having concluded a software license agreement containing a London arbitration clause, Fallimento Finmatica SpA (acting through its Italian receiver) commenced proceedings against DHL in the Italian courts claiming sums due under the license agreement. The Italian court decided it had jurisdiction to hear the claims by virtue of the EC Insolvency Regulation and, having determined the merits, gave judgment in Fallimento's favor. Having not participated in the Italian proceedings, DHL immediately lodged an appeal against the judgment. In the meantime, Fallimento registered the judgment in the English court. DHL lodged an appeal in the English court against the registration of the judgment arguing, *inter alia*, that the Italian proceedings had been brought in breach of an arbitration agreement and therefore fell within the "arbitration exception" and that it would therefore be contrary to public policy to register such judgment. DHL also made a separate application to the English court for a stay of its own appeal pending resolution of the Italian appeal. Fallimento argued that the English court lacked jurisdiction to grant such a stay.

Judgment in the *DHL GBS* case was deferred pending the decision of the ECJ in *West Tankers*. Shortly thereafter, Tomlinson J declined to grant a stay of the appeal on the grounds that, following *West Tankers*, it would be difficult for DHL to establish that the Italian judgment fell outside the scope of the EC Regulation by virtue of the Italian proceedings having been commenced in breach of an arbitration agreement.

The Future Post — *West Tankers*?

The decision in *West Tankers* (and, to a lesser extent, in *DHL GBS*) has already attracted significant criticism. The likely impact of the decision is that an innocent party may no longer be able to obtain an anti-suit injunction from a Member State court to prevent its counterparty from commencing or continuing proceedings in another Member State court in breach of an agreement to arbitrate. This is likely to have the undesirable consequence of forcing parties to participate against their will in time-consuming and costly litigation in a foreign court in circumstances where they had previously agreed to arbitrate. It may also have the undesirable consequence of forcing up the price of cross-border commercial contracts where one of the contracting parties is concerned that his counterparty may seek

to delay the resolution of any dispute by attempting to litigate the matter other than in the contractually agreed forum, possibly in a European court not famed for its efficiency.

Innocent parties should not, however, despair. There are a number of tactical weapons which can be deployed to reduce the impact of the *West Tankers* decision. For example, Article 2 of the New York Convention 1958 obliges a national court to stay proceedings before it which are covered by an arbitration agreement. Since all Member States have adopted the New York Convention, it is anticipated that in most circumstances a national court will stay its proceedings on this basis. Employing Article 2 may be less useful, however, in those European jurisdictions which deal with jurisdictional challenges at the merits hearing stage rather than earlier on in the proceedings. Alternatively, in situations where an arbitration is already up and running, the *lis pendens* provisions of the EC Regulation will not apply thus leaving an innocent party free to push ahead with the arbitration in the hope of obtaining a final award before any final determination is made in the foreign proceedings. Arguably, there may also be scope for getting around *West Tankers* by requesting that the appointed tribunal grant anti-suit relief (assuming it is within its powers to do so) and then asking the English court to back it up and/or impose sanctions to ensure compliance in accordance with its powers under sections 42 and 44 of the Arbitration Act 1996. Since a tribunal falls outside the scope of the Regulation, there is no reason why it could not grant anti-suit relief.

Finally, speculation exists as to whether the *West Tankers* decision will make London appear less attractive as a seat of international arbitration. While *West Tankers* may mean that the English court is no longer able to offer judicial protection in the form of anti-suit injunctions to the relatively limited subset of anti-suit applications within Europe, the English court's ability to offer anti-suit relief in all other cases remains unchanged. Furthermore, there are a plethora of reasons why parties choose London as their preferred seat of arbitration (including accessibility, the existence of specialized venues, the developed arbitration law, and neutrality), and these factors are not affected by the *West Tankers* decision.

For further information on this topic, please contact V&E lawyers James L. Loftis or Samantha Tite. Visit our website to learn more about Vinson & Elkins' International Dispute Resolution practice.

This paper is intended for educational and informational purposes only and does not constitute legal advice or services. If legal advice is required, the services of a competent professional should be sought. These materials represent the views of and summaries of the author, and do not necessarily reflect the opinions or views of Vinson & Elkins LLP or of any of its other attorneys or clients. It is not guaranteed to be correct, complete, or current, and it is not intended to imply or establish standards of care applicable to any attorney in any particular circumstance. Prior results do not guarantee a similar outcome.