

# Arbitration Law Monthly

• essential analysis of global arbitration decisions •

## Interim relief

### The availability of declaratory relief

*In spite of the unequivocal decision of the ECJ in The Front Comor [2009] 1 Lloyd's Rep 413 that anti-suit injunctions are incompatible with the Regulation and fundamentally, the principle of mutual trust, the Court of Appeal in National Navigation Co v Endesa [2009] EWCA Civ has controversially opined that declarations of validity may be used as grounds for non-recognition of a foreign judgment where the declaration is given prior to the foreign court's decision. This reading however is unlikely to be favourable in Europe, as declarations may now be seen as having the same adverse effect as anti-suit injunctions. The case is discussed by Jennifer Lavelle of the Institute of Maritime Law, University of Southampton.*

#### **Endesa: the background facts**

The matter before the Court of Appeal arose out of a dispute between National Navigation Co (NNC), Egyptian shipowners of the vessel the 'Wadi Sudr', and a Spanish electrical generating company, Endesa. Carboex, a sub-charterer of the vessel, agreed to supply coal to Endesa. NNC issued a bill of lading for the goods, incorporating the law and arbitration clauses from the charterparty. The coal was discharged at Carboneras, Spain, instead of the contractually agreed delivery place of Ferrol, and Endesa, as consignees under the bill, claimed damages against NNC.

On 23 January 2008, Endesa made an application for arrest of the *Wadi Sudr* to the Almeria Mercantile Court in Spain. The same day, NNC issued a claim form in the Commercial Court in London for a declaration of non-liability and to assert that London was the contractually agreed place of jurisdiction. On 25 January 2008, the vessel was arrested in Spain by Endesa, and shortly after, Endesa served its substantive claim in the Almeria court. Jurisdictional challenges were made by both parties, and an application to stay the Spanish proceedings on the ground that the English court was first seised was made by NNC. Arbitration in London was also commenced by NNC, along with an application before the Commercial Court for disclosure of the voyage charter, a declaration that the arbitration clause was valid and binding on Endesa, and an anti-suit injunction to restrain the Spanish proceedings.

Subsequently, the Almeria court ruled that the arbitration clause had not been incorporated into the bill of lading under Spanish Law, and, even if incorrect, that NNC, by commencing an action in the Commercial Court in London, had waived any reliance on the clause. The Spanish court however stayed its proceedings pending the decision of the Commercial Court in London regarding its jurisdiction. The English hearing consequently took place in front of Gloster J, and a final judgment was handed down on 1 April 2009.

#### **The High Court judgment**

Gloster J dismissed the substantive action before the Commercial Court for lack of jurisdiction under the Regulation given the exception in art 1(2)(d), as, under

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English Law, the arbitration agreement was found to be validly incorporated into the bill of lading. The application for an anti-suit injunction was rightly rejected following the decision in *The Front Comor*.

Even so, Gloster J controversially held that the Court retained jurisdiction to grant a declaration of validity, as the English court was not required to recognise the judgments of the Almeria court. Gloster J decided that, even though the Spanish judgments were judgments within the scope of the Regulation, they were not required to be recognised, pursuant to art 33(1) of the Regulation, in proceedings which were not themselves within the Regulation. Alternatively, the learned Judge opined that, were the Almeria judgments required to be recognised by the Regulation, it would be manifestly contrary to public policy of the United Kingdom to recognise the Spanish judgments, as they were obtained in breach of an arbitration agreement that was found to be valid by its proper law.

Gloster J further held that English Law, as the proper law of the bill of lading, should be used for determination of issues of incorporation and waiver. Accordingly, NNC had not waived its right to rely on the arbitration agreement by issuing the Commercial Court action. Finally, even after *The Front Comor*, Gloster J did not believe that the declaration sought in the arbitration proceedings would be incompatible with the Regulation, and it was held that negative declaratory relief could be granted, even though anti-suit relief could not.

### The issues before the Court of Appeal

The main point for the Court to consider was whether a judgment of another Member State, ie the Spanish judgment, which ruled against a stay of proceedings on the basis that it found an arbitration clause had not been incorporated into the bill of lading, could be relied on as creating an issue estoppel, consequently preventing the English court from deciding the matter differently. This required reconsideration of the following issues: were the judgments of the Almeria court judgments within the Regulation; were Regulation judgments binding in proceedings outside the Regulation; and what was the extent of the public policy exception. Consequently, characterisation of a declaration of validity and its potential interference with another court's jurisdiction arose; the fundamental outcome of which would determine whether an English court could still grant declaratory relief in the face of *The Front Comor* decision.

### Regulation judgments and declaratory relief

It is clear following the Advocate General's Opinion and the ECJ ruling in *The Front Comor* that it is the subject matter of proceedings which determine whether or not they fall within the Regulation's scope. On that basis, the Court of Appeal correctly agreed with Gloster J that the Almeria judgments were

judgments within the Regulation, and as such, were to be recognised according to its regime – a preliminary question as to the incorporation of an arbitration clause in proceedings in which the main subject matter falls within the Regulation's scope, should be classed as within the Regulation also.

On ancillary measures, the ECJ admitted themselves that the proceedings which lead to the making of an anti-suit injunction in *The Front Comor* did not come within the scope of the Regulation. Therefore, proceedings concerning an application for a declaration of validity of an arbitration agreement are most definitely outside the scope of the Regulation; their subject matter being arbitration, and arbitration being excluded. Nor is it the case that proceedings concerning such declarations confer jurisdiction under the Regulation on the court seised. As a result of the arbitral exclusion, the *lis pendens* provisions do not prohibit another court from dealing with substantive matters in dispute. That is why, in *The Front Comor*, the Italian court was not precluded from hearing the claim, even though the English court had already handed down a declaration.

Further, anti-suit injunctions were regarded by the ECJ as stripping another court of its power to rule on its own jurisdiction, as non-compliance resulted in contempt of court and potential penalties. Declarations of validity however, do not have the same effect; they are neither binding nor persuasive, and their practical result is seen much later (see below). For the above reasons, it was the erroneous opinion of Gloster J that declaratory relief, in contrast to injunctive relief, could still be granted by an English court even though a court of another member state had given judgment. A review of the Advocate General's Opinion conversely led Lord Justice Waller to come to the conclusion that it was not an interference with the jurisdiction of a member state for one court at the seat of arbitration to grant a declaration 'as had occurred [in *The Front Comor*]'; that is, before another court was seised of the matter. The Judge continued to note that, as soon as a preliminary ruling is given by a member state court, other member states will be bound by that decision. The unsatisfactory result that ensues from this conclusion is the likelihood of inconsistent judgments between member states, yet it is definitely correct that foreign judgments are binding and declarations are not. Gloster J was therefore extremely mistaken in her ability to grant a declaration.

Accordingly the court dealt with the question of recognition. Submissions as to the severability of the Spanish judgment under art 48 of the Regulation for such purposes were rejected on the basis that they were contrary to *The Front Comor* ruling and to s32 of the Civil Jurisdiction and Judgments Act ('CJJA') 1982. The Judge held that decisions on the incorporation of arbitration agreements were so 'very closely tied up' with the merits of a contractual dispute, that it was necessary for a court to determine what the contractual terms are. A judgment on

incorporation therefore, is one to which art 33 of the Regulation applies, and s32(4) of the CJA applies to the entire judgment.

### Recognition of a judgment in arbitral proceedings

The Court of Appeal correctly rejected Gloster J's conclusion that because the arbitration proceedings were proceedings outside the Regulation, a Regulation judgment, ie the Almeria judgment, did not need to be recognised. Lord Justice Waller rejected the analogy drawn with the questionable decision of Burton J in *CMA v Hyundai* [2008] EWHC 2791 (Comm), holding that, even if arbitrators were not obliged to recognise Regulation judgments, a court providing ancillary measures via s32 of the Arbitration Act 1996 continued to be bound. Further, Gloster J's ruling was found to be contrary to the decision in *The Front Comor*, the Court of Appeal finding that a Regulation judgment could give rise to an issue estoppel in 'proceedings excluded from the Regulation as in any other proceedings in an English court.' For that reason, Gloster J's reliance on *The Hari Bhum* [2004] EWCA Civ 1598 was deemed to be excessive.

### Public policy

Gloster J, relying on *Bamberger* [1997] IL Pr 73, alternatively concluded (obiter) that the Almeria judgments need not be recognised under art 34(1) of the Regulation, on the grounds that they were 'manifestly contrary to public policy'. This view was rejected on the basis that, as the English courts were bound to recognise the decision of the Almeria court, there was 'simply no room for any argument that in some way public policy [was] being infringed.' It was not for the English court to re-examine whether or not the arbitration clause had been incorporated. This view follows that of Tomlinson J in *DHL GBS (UK) Ltd v Fallimento Finmatica SPA* [2009] EWHC 291 (Comm). Accordingly, the arbitration proceedings were dismissed and the decision of the Commercial Court reversed.

### Non-recognition of a foreign judgment

It is only at para 63 of his judgment that Waller LJ deals with the actual effect of a declaration of validity. The Judge tentatively observed that foreign judgments given in breach of an arbitration agreement may not have to be recognised pursuant to art 33(1), where a court of the country in which the judgment is trying to be enforced, has already adjudicated on the matter (see art 34(3)). On that reading, had a declaration of validity been given in the instant case prior to the Spanish ruling and a judgment obtained in arbitration proceedings, the English court could refuse recognition of the ruling. Although a triumphant pro-arbitration reading,

the judgment is clearly wrong in light of *The Front Comor* decision. The ECJ held that anti-suit injunctions could not be granted to prevent a person 'commencing or continuing' proceedings before another court, effectively holding that anti-suit injunctions could not be granted at any time, which in consequence presumably includes pre-emptive anti-suit injunctions (those granted before another court is seised). For that reason, it is difficult to accept that a declaration of validity, which may have an equivalent adverse effect, can be granted so long as another court is not yet seised. Moreover, applications for declarations after a court is seised although prior to its pronouncement, should definitely not be allowed. Even though not binding or persuasive, declarations may be seen as a way of influencing a foreign court's judgment. More importantly, there is no difference between injunctions that restrain litigants in foreign proceedings and declarations that allow foreign judgments to be denied recognition, which is what Lord Justice Waller has stated the effect of a declaration would be. If declarations of validity are seen as a mechanism for the English courts to refuse recognition of contrary foreign judgments, the ECJ are almost certainly going to tarnish declarations with the same brush as anti-suit injunctions, namely, that they undermine the effectiveness of the Regulation and inevitably, the principle of mutual trust.

Alternatively, is a declaration of validity simply not a 'judgment' under the Regulation? Proceedings which grant declarations of validity clearly fall outside the Regulation's scope and, unlike anti-suit injunctions, they theoretically do not undermine the effectiveness of the Regulation, as they are not binding on the foreign court. If so, on a narrow reading of art 32 of the Regulation and a *CMA v Hyundai*-esque interpretation, it is difficult to see how such declarations can be regarded as 'judgments' for the purposes of art 34(3), and accordingly, how an English court can refuse to recognise the foreign judgment. In that regard, what purpose, if any, do declarations of validity now serve?

Strategies aimed at minimising the effect of *The Front Comor* decision are likely to continue as lawyers attempt to find mechanisms for holding parties to their original agreement. It will not prove fruitful however, to try and side-step the ECJ decision. *The Front Comor*, even if unsatisfactory for common law lawyers, reinforces the fundamental principle that courts in other member states are to be trusted to uphold exclusive jurisdiction agreements and seemingly arbitration agreements, without the 'help' of other courts. The battle to preserve the arbitration agreement to what it once was will not be won in court; it is necessary to legislate, and in that respect, until the European Commission publishes the reviewed Regulation, tactical devices to enforce agreements in spite of a foreign court being seised will simply be in vain.