SHIPPING & TRADE LAW

A setback for arbitration

The English courts can no longer grant an anti-suit injunction to restrain a party from commencing or pursuing court proceedings in an EC member state or Lugano Contracting State. That they could not do so to restrain a breach of an exclusive English court jurisdiction agreement has been clear for some time as a result of the decisions of the European Court of Justice (ECJ) in Gasser v Misat, *Case C-116/02 [2003] ECR I-14693 and* Turner v Grovit, *Case C-159/02 [2004] ECR I-3565. The English court had, however, continued to grant such injunctions where the proceedings were in breach of an arbitration clause,[1] on the basis that arbitration proceedings fall outside the scope of the Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'EC Jurisdiction Regulation') as they are excluded by art 1(2)(d).[2] In* Allianz SpA (formerly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (The Front Comor), *Case C-185/07 the ECJ has held that such an injunction is not consistent with the EC Jurisdiction Regulation.*

The facts of *The Front Comor*

The *Front Comor* was chartered to Erg Petroli SpA. The charterparty provided for English law and London arbitration. The ship collided with the charterer's jetty at Syracuse in Italy and damaged it. The charterers claimed from their insurers up to the limit of their policy and claimed the balance from the owners of the *Front Comor* in London arbitration. The owners denied liability relying on the exception of navigational error under clause 19 of the charterparty or Art IV r2(a) of the Hague Rules. The insurers exercising their statutory rights of subrogation under Italian law commenced proceedings in the court of Syracuse in Italy. Those courts had jurisdiction under art 5(3) of the EC Jurisdiction Regulation as the claim for damage to the jetty was a claim in delict and the damage occurred in Italy, unless they were obliged to stay the proceedings in favour of arbitration. The owners commenced proceedings in the English court seeking a declaration that the arbitration clause in the charterparty was binding on the insurers.

At first instance, Mr Justice Colman granted the declaration and an anti-suit injunction to restrain the insurers from pursuing the Italian court proceedings – [2005] EWHC 454 (Comm); [2005] 2 Lloyd's Rep 257. His judgment considers the issue of which law is applicable to determine whether the subrogated insurers are bound by the arbitration clause. The insurers contended that their right to pursue the subrogated claim was a matter of Italian law, and that law must also determine whether the arbitration agreement was binding on the insurers. The owners, however, contended that whether the arbitration agreement was binding on the insurers fell to be determined by the law of the arbitration agreement itself ie, English law. Colman J concluded that, under Italian law, the insurers were entitled to enforce the insured charterer's right of action in delict against the owners. However, the issue of whether the scope of the arbitration agreement covered the claim in tort was to be determined by reference to the proper construction of the arbitration agreement in accordance with English law. Furthermore, by reference to English law, as the governing law of

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the arbitration agreement, the insurers' duty to refer their claim to arbitration was 'an inseparable component of the subject matter transferred to the insurers' (para 33). Colman J also found, after considering the expert evidence on Italian law, that if Italian law were applicable, the result would be the same.

Colman J certified the point for a leapfrog appeal to the House of Lords. Permission to appeal was granted. The House of Lords referred the issue of whether 'it is consistent with the [EC Jurisdiction Regulation] 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' to the ECJ – [2007] UKHL 4, [2007] 1 Lloyd's Rep 391. The House of Lords gave their view that it was consistent. Advocate General Kokott delivered an opinion on 4 September 2008 that it was not.

Advocate General Kokott considered the view favoured by the House of Lords that only the arbitration tribunal and the national court at the seat of arbitration have jurisdiction to examine the validity and scope of the arbitration clause. In contrast, the continental European approach looks at whether the claim for damages falls within the scope of the EC Jurisdiction Regulation and whether the Syracuse court has jurisdiction as the place in which the harmful event occurred in accordance with art 5(3). If the defendant invokes a valid arbitration clause the court would be obliged to refer the dispute to arbitration in accordance with art II(3) of the New York Convention. The Advocate General thought (at paras 53 and 54) that:

> *'the subject-matter is therefore a claim in tort (possibly also in contract) for damages, which falls within the scope of Regulation No 44/2001, and not arbitration.*
>
> *The existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seised must address when examining whether it has jurisdiction.'*

The Advocate General did not see why the issue as to the validity of the arbitration clause should be reserved to the arbitration tribunal alone, as its jurisdiction depends on the effectiveness and scope of the arbitration agreement in the same way as the jurisdiction of the court in the other member state.

The Advocate General was not swayed by practical considerations that commercial parties wish to avoid becoming bogged down in lengthy court proceedings and if an effective remedy of an anti-suit injunction is not available to prevent them, this would affect London's attractiveness as a seat of arbitration and make it less able to compete with other centres of arbitration such as New York, Bermuda and Singapore.

The judgment of the ECJ

The ECJ agreed with the House of Lords that the issues before the English court fell outside the scope of the EC Jurisdiction Regulation as art 1(2)(d) excludes arbitration. Nevertheless, it concluded that even where proceedings do not come within the scope of the Regulation, they may have consequences that undermine its effectiveness, as was the case where such proceedings prevented the court of another member state from exercising the jurisdiction conferred on it by the Regulation. The court considered that the claim before the Italian court did fall within the scope of the Regulation, despite the fact that the owners contested the jurisdiction on the ground of the London arbitration clause. The claim before the Italian court was the claim for damages and the decision as to whether there was an arbitration clause binding on the subrogated insurers was a 'preliminary issue' or 'incidental question' that also fell within the scope of the main claim so that the whole fell within the scope of the Regulation. It was therefore exclusively for the Italian court to rule on its own jurisdiction. An anti-suit injunction 'necessarily amounts to stripping that court of the power to rule on its own jurisdiction' under the Regulation and runs counter to the principle of mutual trust which all member states must accord to each other.

If this were not the case a party could deprive the court of an EC member state of jurisdiction merely by alleging that there is an arbitration clause even though the court would have found that it was invalid.

The consequences of the decision

As a result of the decision of the ECJ in *The Front Comor,* and its earlier decisions in *Turner v Grovit* and *Gasser v Misat*, an English court can no longer grant an anti-suit injunction to restrain a party from pursuing proceedings in the courts of another EC member state or Lugano Contracting State, even if those proceedings are in breach of an exclusive English court jurisdiction clause or a London arbitration clause.

The English court still does have a discretion to grant an injunction to restrain court proceedings in a court of a state that is neither an EC member state nor Lugano Contracting State where those proceedings are in breach of an exclusive English court jurisdiction clause[3] or a London arbitration clause.[4] So, for example, in *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2008] 1 Lloyd's Rep 230 the owner's vessel, *Alexandros T,* was lost with her cargo. The insurers of the cargo obtained security in China and brought court proceedings in China against the owners, the managers and the head charterers. The head charterparty contained an English law and London arbitration clause. The cargo owners and insurers then commenced London arbitration proceedings and appointed an arbitrator without prejudice to their right to contest the jurisdiction of the arbitration tribunal. The owners

and managers applied for an anti-suit injunction to restrain the defendants from taking any steps in the Chinese proceedings. The application was made under the general jurisdiction conferred by s37 of the Supreme Court Act 1981 and under the more limited jurisdiction conferred by s44 of the Arbitration Act 1996. Mr Justice Cooke granted an interim anti-suit injunction. There was no strong reason not to grant an injunction. Section 37 of the Supreme Court Act 1981 remained open to the court whether or not s44 of the Arbitration Act 1996 could also be brought into play. In exercising his discretion under s37, Cooke J had regard to the matters that would arise under s44.

The legal issues in *The Front Comor* are genuinely complex due to the fact that the claim was brought by subrogated insurers and the scope of the arbitration clause was in issue as this was a claim in tort (or delict under Italian law). There are differences between the laws of the EC member states as to whether third parties are bound by jurisdiction or arbitration clauses. However, the decision applies equally to a very straightforward case where there is an arbitration agreement in a contract between two parties and one of those original parties commences proceedings in the court of another EC member state. This plays into the hands of a recalcitrant debtor who deliberately commences proceedings in the courts of a member state that may be slower than the tribunal agreed (the so-called Italian torpedo), to gain a tactical advantage and put off the evil hour when a judgment is finally given, as amply illustrated in *JP Morgan Europe Ltd v Primacom AG* [2005] 2 Lloyd's Rep 665, or an arbitration award is finally made by the tribunal chosen by the parties. In *The Front Comor* it was not in the interests of the insurers to delay as they were the claimants. However, they may have preferred the Italian court's interpretation of the exception of navigational error.

The Front Comor has been applied by the Court of Appeal in *Youell v La Reunion Aerienne* [2009] EWCA Civ 175. French market insurers commenced an arbitration in Paris against London market insurers. London market insurers appointed an arbitrator under protest. There was evidence that French law would regard the arbitration clause in the French policy as incorporated into the English policy, although there were no specific words of incorporation in the French arbitration clause. Subsequently, the English market insurers brought a claim in England against the French market insurers domiciled in France, for a declaration of non-liability under a contract, the existence of which the French market insurers asserted but the English market insurers denied. The latter claimed jurisdiction under art 5(1) on the ground that the place of performance of the obligation in question was England. The French market insurers contended that the contract on which they relied contained a French arbitration clause and therefore that the English market insurers' claim was covered by the exclusion in art 1(2)(d) of the Regulation. The Court of Appeal dismissed an appeal from the decision of Tomlinson J that the English court had jurisdiction under the EC Jurisdiction Regulation. The critical question was the substance of the claim even if there was an argument that it was subject to arbitration. The substance of the claim in England was that the English market insurers denied that they were liable to contribute to a settlement as the claims settled were not risks covered by the policy and the French market had no authority to bind the English market insurers to that settlement. The principal claim by the French insurers was a debt claim based on an indemnity arising from an alleged mandate given by the London market to the French market and could not be said to be a claim covered by the arbitration exclusion. Lord Justice Lawrence Collins, giving the judgment of the court, commented that the remedy for the party which claims that the proceedings are brought in breach of the arbitration agreement is to seek a stay under s9 of the Arbitration Act 1996 or the equivalent provision in other countries.

The decision of the ECJ has paved the way for arbitration proceedings to run in parallel to the court proceedings in a member state with the potential for conflicting decisions both as to whether there is a binding arbitration clause and on the substance of the dispute. The problem here is that the issue of whether the arbitration agreement is binding on a party should only be determined by one tribunal. The EC Jurisdiction Regulation fails to address the issue of which tribunal this should be. It fails to deal with the issue explicitly as regards court jurisdiction agreements. The ECJ has however resolved this issue in *Gasser v Misat* in favour of the court first seised applying the *lis pendens* provisions in art 27 of the EC Jurisdiction Regulation. Article 27 does not apply to arbitration proceedings. Thus, it is perfectly possible for the arbitration tribunal or the English court to make a decision that there is an arbitration clause which binds a party, but for the court of another member state to consider the same issue and to reach a different conclusion with the result that there may ultimately be an arbitration award and a judgment. This may lead to considerable difficulties for the party that wishes to enforce the arbitration clause. Should it proceed with the arbitration proceedings and contest the jurisdiction of the court in the other EC member state? If it does so, it must be careful not to submit to the jurisdiction of that court within art 24 of the EC Jurisdiction Regulation. Contesting jurisdiction of the court may be lengthy and costly, involving expenditure that it was the whole purpose of the arbitration agreement to avoid. If the jurisdiction of the court is successfully contested, the party can pursue the arbitration. If on the other hand, the decision of the court, or of any appeal court, is that the arbitration clause is not binding and that it has jurisdiction, the party may decide either to put in a

defence in the court proceedings or simply pursue the arbitration proceedings or both.

The dangers of failing to contest the jurisdiction of the court proceedings are illustrated in *DHL GBS (UK) Ltd v Fallimento Finmatica SpA* [2009] EWHC 291 (Comm). There, DHL entered into a software contract with Finmatica which provided for English law and London arbitration. The Bankruptcy Receiver of Finmatica brought proceedings in the Italian court for services rendered to DHL. The Italian court decided that Finmatica's Bankruptcy Receiver was not bound by the arbitration agreement (a point that was not contested as DHL did not take part in the Italian litigation) and that it had jurisdiction. It gave judgment against DHL and the English court registered that judgment. DHL sought to set aside the registration of the judgment: first, as the judgment was outside the scope of the EC Jurisdiction Regulation as it fell within art 1(2)(d), and second, because it would be manifestly contrary to public policy to register the judgment as it was obtained in breach of an arbitration agreement. DHL appealed against the decision of the Italian court but it was not clear whether the appeal court would decline to deal with the question whether the arbitration clause binds the bankruptcy receiver or its own jurisdiction as the points were not contested in the lower court. DHL then sought a stay of its own appeal against the registration of the judgment in England pending the resolution by the Court of Appeal in Italy (which was likely to take between two and three years). In light of the decision in *The Front Comor,* Tomlinson J stated that it would be difficult for DHL to maintain its argument that the judgment of the Italian court should be regarded as falling outside the scope of the EC Jurisdiction Regulation. Furthermore, he could see little scope in the context of DHL's English appeal for examination of the question whether the Italian court had correctly applied its own law either so far as concerned its own jurisdiction or in determining that the Bankruptcy Receiver was not bound by the arbitration clause. On the assumption that the court enjoyed a discretion to stay DHL's appeal against the registration order, Tomlinson J therefore concluded that it would not be appropriate to do so.

Recent case law supports arbitration even though a court of a member state has decided that there is no binding arbitration clause. In *CMA CGM v Hyundai MIPO Dockyard Co Ltd* [2009] 1 Lloyd's Rep 213, Mr Justice Burton dismissed an appeal from a London arbitration award for damages for the sums paid under a French court judgment obtained in breach of a London arbitration award. CMA brought proceedings in France for damages for breach of four shipbuilding contracts by the shipyard. The shipyard entered an appearance under protest. It did not submit to the jurisdiction of the French court. The French court held that it had jurisdiction and held that the shipyard was liable. The shipyard paid the judgment sum and appealed. London arbitrators made an award that they were entitled to decide the dispute and that the shipyard was not liable and that the loss and damage caused by the breach of the arbitration clause by CMA in continuing the French proceedings was the sum which had been paid for the French judgment. They concluded that the EC Jurisdiction Regulation did not apply so as to render them bound to recognise the French judgment. However they went on to doubt why any question of recognising the French judgment arose at all as, had there been no breach of the arbitration agreement, there never would have been a French judgment and no question of recognition would have arisen. Burton J held that: 'This is not a question of not recognising a judgment but concluding that, as the parties were obliged to go to arbitration, it is only the outcome of the arbitration which is of any relevance.' (para 40). Furthermore, without deciding the point, Burton J indicated that he was not persuaded the arbitrators were wrong that they were not bound by the EC Jurisdiction Regulation, and were not therefore bound to recognise the French judgment. It was therefore not necessary to decide the question whether if the EC Jurisdiction Regulation did apply, the arbitrators could decide that the French judgment should not be recognised within art 34 of the Regulation as it is 'manifestly contrary to public policy'.

Mrs Justice Gloster considered this latter issue in relation to a Spanish court judgment on an arbitration clause in *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196. The case concerned a bill of lading dispute. The owners of the *Wadi Sudr* carried coal from Indonesia for delivery in Ferrol in Spain. The vessel sustained damage to her rudder and it was necessary to discharge the cargo short of destination at Carboneras in south-east Spain. The bill of lading was in the Congenbill form, which incorporates the 'Law and Arbitration clause' of the charterparty. Despite requests, the charterparty was not disclosed. Cargo interests arrested the vessel in Spain. The same day, the owners commenced proceedings in the English court for a declaration of non-liability. Subsequently, cargo interests served their substantive claim in the Spanish action. Owners challenged the jurisdiction of the Spanish court. The reason that cargo interests preferred the jurisdiction of the Spanish courts was that if Spanish law applied, the owners would not be able to raise a defence based on due diligence under the Hague-Visby Rules, because Spanish law imposed absolute liability on the carrier, except for acts of God and *force majeure*. The Spanish court held that no arbitration clause was incorporated into the bill of lading and that the owners had waived their right to rely on the arbitration clause by commencing the English court proceedings. Gloster J held that the judgments of the Spanish court were not required to be recognised pursuant to art 33(3) of the EC Jurisdiction Regulation in the arbitration action in the English court, since

the latter proceedings were outside the scope of the Regulation, by reason of the arbitration exception contained in art 1(2)(d). Furthermore, it would be manifestly contrary to the public policy of the UK to recognise the Spanish court's judgments in relation to the non-incorporation of the arbitration agreement and the alleged waiver of any agreement. English law was the proper law to decide the issue of incorporation and Gloster J concluded that the bill of lading was subject to a London arbitration clause and had not been repudiated by the owners. She granted a declaration that the arbitration clause was binding on cargo interests.

The future

It has been argued that the anti-suit injunction should be adopted by other EC member states as an effective means of ensuring that party choice is not disregarded.[5] The EC Jurisdiction Regulation has recently been reviewed[6] and the European Commission hopes to produce a revised Regulation by October 2009.

Solutions recommended in the Review include, first, the deletion of art 1(2)(d) of the Regulation. This would bring arbitration within the scope of the Regulation. Such an amendment was suggested by Advocate General Kokott in her opinion in *The Front Comor*. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards would prevail over the Regulation as a result of art 71 of the Regulation. This would mean that if the English court has been requested to declare, or has already given a judgment, that an arbitration clause is valid and binds the subrogated insurer, and it was the court first seised, the court second seised would be obliged to stay its proceedings under art 27 of the Regulation. Alternatively, if the English court had already given a judgment that the arbitration clause was valid and binding, that judgment would have to be recognised and enforced in any other EC member state.

A second solution would be to insert new provisions in the Regulation to deal with the interface between arbitration and the Regulation including specific provisions: first that the courts of the member state in which the arbitration takes place have exclusive jurisdiction in relation to ancillary proceedings in support of the arbitration; second, requiring a court of a member state to stay its proceedings if its jurisdiction is contested due to an arbitration clause where the court of the member state designated in the arbitration agreement is seised in relation to the binding nature of the arbitration agreement and third, a new recital recognising the parties' choice as to the place of arbitration, but providing default provisions if no such choice is made (see clause 6 of the LMAA Rules).

It is now a matter of urgency that a revised Regulation be finalised so that a party who chooses London arbitration can rely on its disputes being determined by the arbitrators supported by the English court but will not land up in the courts of a completely different country. This is not just a matter of protecting London arbitration, but arbitration in any chosen EC member state. Although the Advocate General and the ECJ were not swayed in their decision by commercial practicalities, arbitration anywhere in the EU will be under pressure as a result of competition from other centres of arbitration such as New York, Bermuda and Singapore, and must consider how best to maintain their competitive edge.

1 *The Angelic Grace* [1995] 1 Lloyd's Rep 87, but not eg, in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67 where the cargo insurers exercising their subrogated rights sought recovery for cargo loss from the ship's P&I Club by way of direct action granted by statute.

2 *Marc Rich & Co AG v Societa Italiana PA (The Atlantic Emperor)*, Case C-190/89 [1992] 1 Lloyd's Rep 342; *The Heidberg* [1994] 2 Lloyd's Rep 287 at pp 298–303; *Toepfer International GmbH v Societe Cargill France* [1998] 1 Lloyd's Rep 379; *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line*, Case C-391/95 [1999] All ER (EC) 258 ECJ; *Navigation Maritime Bulgare v Rustal Trading Ltd (The Ivan Zagubanski)* [2002] 1 Lloyd's Rep 106 and *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67; *A v B* [2007] 1 Lloyd's Rep 237.

3 *Donohue v Armco* [2001] UKHL 64; [2002] 1 Lloyd's Rep 425; *OT Africa Line Ltd v Magic Sportswear Corp* [2005] 2 Lloyd's Rep 170.

4 *Kallang Shipping SA v Axa Assurances Senegal (The Kallang)* [2007] 1 Lloyd's Rep 160 (Senegal); *Noble Assurance Co v Gerling-Konzern General Insurance Co* [2007] 1 CLC 85; *C v D* [2007] 2 All ER (Comm) 557; *Markel International Co Ltd v Craft (The Norseman)* [2007] Lloyd's Rep IR 403; *Starlight Shipping Co v Tai Ping Insurance Co Ltd* [2008] 1 Lloyd's Rep 230 (China).

5 *West Tankers Inc v RAS Riunione Adriatica Di Sicurta (The Front Comor)* [2007] 1 Lloyd's Rep 391 paras 22 and 23; B Dohmann and A Briggs, 'Learning to learn from others in Europe in commercial Litigation', Grenzuberschreitungen, Festschrift Schlosser 161 at p168. N Sifakis, 'Anti-suit injunctions in the European Union: a necessary mechanism in resolving jurisdictional conflicts?' JIML 2007, 13(2), 100–111, and the UK before the ECJ in *The Front Comor*.

6 B Hess, T Pfeiffer and P Schlosser, The Brussels I – Regulation (EC) No 44/2001 The Heidelberg Report on the Application of Regulation Brussels I in 25 Member States (Study JLS/C4/2005/03), C H Beck, Hart, Nomos, 2008, paras 697 to 699.

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