Arbitration agreements and jurisdiction in terms of the Judgments Regulation*

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Abstract

In order to determine whether a dispute falls within the scope of Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, it is necessary to clarify to which proceedings the scope of application of the Regulation is to be determined more specifically. In a recent judgment the European Court of Justice had to decide on the compatibility of anti-suit injunctions with the Regulation to give effect to an arbitration agreement. The court held that, if the subject-matter of the dispute falls within the scope of the Regulation, then a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also falls within the scope of the Regulation. This article is a detailed analysis and a critique of the ECJ judgment.

Introduction

On 10 February 2009, the European Court of Justice[1] delivered its judgment in the case of *Allianz SpA* (formerly Riunione Adriatica di Sicurtà SpA), *Generali Assicurazioni Generali SpA, v West Tankers Inc.*[2] The House of Lords had referred a question to the ECJ for a preliminary ruling as to whether anti-suit injunctions to give effect to arbitration agreements are compatible with Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[3] The facts underlying the case were as follows.

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1 Hereafter referred to as the ECJ.

2 Case C–185/07, which became known as the *West Tankers* case.

3 Hereafter referred to as the Judgments Regulation, which came into force on 1 March 2002; published in *Official Journal of the European Union* L12, 16/01/2001, 1.

In August 2000, the *Front Comor*, a vessel owned by West Tankers Inc and chartered to Erg Petroli SpA, collided with a jetty owned by Erg Petroli in Syracuse, Sicily, Italy and caused damage. The charter-party contained an arbitration agreement providing that all disputes arising from the contract were to be dealt with by an arbitral body in London, United Kingdom. Further it was agreed that English law was applicable to the contract. Riunione Adriatica di Sicurtà SpA (since 1 October 2007 Allianz SpA) and Generali Assicurazioni Generali[4] had insured Erg Petroli and paid compensation for the damage arising from the collision up to the limit of the insurance cover. Erg Petroli claimed damages against West Tankers for its uninsured losses in arbitration proceedings in London.

On 30 July 2003, Allianz and Others commenced proceedings against West Tankers before a court in Syracuse, Sicily to recover the amounts which they had paid to Erg Petroli under the insurance policies.[5]

In parallel, West Tankers commenced proceedings, on 10 September 2004, in the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court) against Allianz and Others, seeking a declaration that the dispute, which was the subject-matter of the proceedings in Syracuse, arose out of the charter-party and that Allianz and Others, whose actions were based on their statutory right of subrogation to Erg's claims in terms of the Italian Civil Code, were therefore bound by the arbitration agreement. West Tankers also applied for an injunction to restrain Allianz and Others from taking any further steps in relation to the dispute except by way of arbitration and, in particular, requiring them to discontinue the proceedings in Syracuse. The High Court granted the applications. By order of 21 February 2007, the House of Lords, before which an appeal against that decision was brought, referred the matter to the ECJ.

Different types of law are to be considered in this case.

International law

All the member states of the European Community are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral

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4 Hereafter referred to as Allianz and Others.

5 The issues of liability in the court proceedings in Italy were essentially the same as those in the arbitration proceedings. The main question in both cases was whether West Tankers can rely on a clause in the charter-party which excludes liability for navigation errors, or whether liability was excluded under the so-called Hague Rules.

Awards of 10 June 1958.[6] The Convention's scope of application is laid down in article I(1), in terms of which it applies to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. Article II(3) provides that the court of a contracting state which is seized of an action in a matter in respect of which the parties entered into an arbitration agreement, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the agreement is null and void, inoperative or incapable of being performed.

European Community law

Recital 25 in the preamble to the Judgments Regulation provides that respect for international commitments entered into by the member states means that the Regulation shall not affect conventions relating to specific matters to which the member states are parties. The subject-matter scope of the Judgments Regulation is laid down in its article 1, in terms of which it shall apply in civil and commercial matters, but it shall not extend to revenue, customs and administrative matters. Article 1(2)(d) specifically excludes the Regulation's application in arbitration matters. Historically, this exclusion is explained by the relationship between the 'Brussels regime' and the New York Arbitration Convention. When the Judgments Convention[7] was negotiated in the 1960s, there was a large consensus among the different states that the recognition of arbitral agreements and awards worked efficiently under the New York Convention and therefore arbitration should not be included in the European instrument.[8] At the same time, it had been hoped that there might be a separate European agreement for a uniform law of arbitration, which has, however, never materialised.[9] The special jurisdiction rule in article 5, which confers special jurisdiction over defendants who are domiciled in another member state, provides in sub-paragraph (3) that in matters relating to tort, delict or quasi-delict, the courts where the harmful event occurred or may occur shall have jurisdiction.

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6 *United Nations Treaty Series* vol 330, 3, hereafter referred to as the New York Convention.

7 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (commonly known as the Brussels Convention), which came into effect on 1 January 1973, which was replaced by the Judgments Regulation.

8 B Hess, T Pfeiffer & P Schlosser *The Brussels I-Regulation (EC) No 44/2001* (2008) 31 no 105.

9 P Rogerson in: U Magnus &P Mankowski (eds) *Brussels I Regulation* (2007), 63.

The relevant English law

Under section 37(1) of the English Supreme Court Act 1981, the High Court has jurisdiction to grant a final or an interim injunction[10] where the court is satisfied that it is just and convenient to do so. Regarding anti-suit injunctions in support of arbitration agreements, section 44(1) and (2)(e) of the Arbitration Act 1996 provides that the English courts have the same power to make orders as they have in ordinary court proceedings. Anti-suit injunctions are directed against actual or potential claimants in proceedings abroad. Such parties are restrained from commencing or continuing proceedings before the foreign court. Non-compliance with an anti-suit injunction amounts to contempt of court, for which serious penalties can be imposed, including imprisonment or seizure of assets situated in the United Kingdom. In addition, there is a risk that the courts in the United Kingdom will not recognise and enforce judgments delivered abroad in breach of an anti-suit injunction.[11]

The question referred to the ECJ

As mentioned above, the House of Lords decided to stay its proceedings and refer the following question to the ECJ:

> Is it consistent with Regulation No. 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another member State on the ground that such proceedings are in breach of an arbitration agreement?

In essence, the question posed is whether it is incompatible with the Judgments Regulation for a court of a member state to make an order to restrain 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, even though article 1(2)(d) of the Regulation excludes arbitration from its scope of application.

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[10] The Civil Procedure Rules 1998 (Statutory Instrument 1998 No 3132 L 17) define an injunction as 'a court order prohibiting a person from doing something or requiring a person to do something'. An injunction to restrain foreign proceedings is probably the most powerful remedy available in an English court dealing with a jurisdictional dispute. The English courts' jurisdiction to restrain proceedings has a long history, finding its origin in the early nineteenth century when the Court of Chancery would grant an injunction to restrain proceedings at common law. See C Ambrose 'Can anti-suit injunctions survive European Community law?' (2003) 52 *ICLQ*, 401–424 at 401, 404.

[11] See *Toepfer International GmbH v Molino Boschi* [1996] 1 Lloyd's Rep (QB) 510.

In the *Turner* case,[12] the ECJ held in 2004 that the Brussels Convention precluded the imposition of an anti-suit injunction in connection with proceedings before the court of another member state, even where the proceedings abroad are brought by a party in bad faith with a view to frustrating the existing proceedings. The ECJ found that the Brussels Convention was necessarily based on the trust which the contracting states accord one another's legal systems and judicial institutions. This mutual trust resulted in a compulsory system of jurisdiction being established, which all the courts of the contracting states were required to respect and so to waive the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of the simplified mechanism of the Convention.[13] The crucial question in the *West Tankers* case was whether the principles set out in *Turner* could be applied to anti-suit injunctions in support of arbitration proceedings. The fact that the judgment in the *Turner* case was based on the Brussels Convention, whereas in *West Tankers*, the court had to deal with the Judgments Regulation, is irrelevant in that the Regulation merely updated the Convention.[14] Further, both the Convention and the Judgments Regulation exclude arbitration matters from their respective scope of application.[15]

How this exclusion is to be interpreted, was decided by the ECJ in 1991 in *Marc Rich*[16] where the court held that, by excluding arbitration from the scope of the Brussels Convention on the ground that it was already covered by international conventions, the contracting parties intended to exclude arbitration in its entirety, including proceedings brought before national courts. It is clear from that judgment that the ECJ adopts the view that article 1(2)(d) of the Judgments Regulation must be interpreted broadly, and that the exclusion applies not only to arbitration proceedings as such, but also to legal proceedings where the subject-matter is arbitration. And in the *Van Uden* case, the court held in 1998 that where the subject-matter of an application

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12 *Gregory Paul Turner v Felix Fareed Ismail Grovit and Others* case C–159/02 [2004] ECR I–3565 at 3590 par 31. P Stone *EU Private international law harmonization of laws* (2006) hailed the decision as 'entirely welcome' and pointed out 'the undesirability of anti-suit injunctions in any circumstances' when taking into account the likely reaction from the foreign court whose proceedings are effected by the injunction; at 195–196.

13 *Gregory Paul Turner v Felix Fareed Ismail Grovit and Others* n 12 above at par 24 with ref to *Erich Gasser GmbH v MISAT Srl* Case C–116/02 [2003] ECR I–14693 pars 71, 72.

14 This is expressed in recital 19 of the Preamble to the Judgments Regulation: 'Continuity between the Brussels Convention and this Regulation should be ensured …'.

15 Art 1 of the Convention: 'The Convention shall not apply to: … 4. Arbitration. Article 1(2) of the Regulation: 'The Regulation shall not apply to: … (d) arbitration.'

16 Case C–190/89 *Marc Rich and Co AG v Societatà Italiana Impianti PA* [1991] ECR I–3855 at 3900 par 18, 26.

for provisional measures relates to a question falling within the scope *ratione materiae* of the Brussels Convention, the Convention is applicable and may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case, and even where those proceedings serve to protect the right to determine the dispute by arbitration.[17]

The compatibility of anti-suit injunctions with the Judgments Regulation to give effect to an arbitration agreement

In order to determine whether a dispute falls within the scope of the Judgments Regulation, it is necessary to clarify in relation to which proceedings the scope of application of the Regulation is to be determined more specifically. The question is not whether the application for an anti-suit injunction (in this case the proceedings before the English court) falls within the scope of application of the Regulation, but whether the proceedings against which the anti-suit injunction is directed (the proceedings before the court in Syracuse) do so. As Advocate-General Kokott pointed out in her opinion in *West Tankers*,[18] it has always been a matter of dispute between the Anglo-Saxon and continental-European schools of law whether the exclusion should be understood in a broad sense that, where the parties have contractually agreed to settle all disputes (including any secondary disputes connected with the agreed arbitration) arising from a contract exclusively by arbitration, that legal relationship is completely removed from the national courts (apart from the courts at the arbitral seat).[19] The House of Lords in its decision in *West Tankers*[20] emphasises that since all arbitration matters fall outside the scope of the Regulation, an injunction addressed to Allianz and Generali restraining them from having proceedings other than arbitration and from continuing proceedings before the Syracuse court, cannot infringe the Regulation. Furthermore, the courts in the United Kingdom have for many years used anti-suit injunctions and that practice is, in the view of the House of Lords,

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17 Case C–391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another* [1998] ECR I–7091 at 7133 paras 31, 33.

18 Which was delivered to the ECJ on 4 Sept. 2008; available at http://curia.europa.eu/juris (visited on 2009–08–07), paras 38–39.

19 This was also raised in the opinion of Advocate-General Léger in *Van Uden* n 17 above at par 40.

20 *West Tankers Inc (Respondents) v RAS Riunione Adriatica di Sicurtà SpA and Others (Appellants)* [2007] UKHL 4 par 14.

> a valuable weapon in the hands of a court exercising supervisory jurisdiction over the arbitration. It promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court...'.[21]

The adoption of that practice by the courts in other European Community member states would, in the opinion of the House of Lords, make the European Community more competitive *vis-à-vis* other leading arbitration centres such as New York, Bermuda and Singapore.[22] If this view were correct, an anti-suit injunction which has an impact on national court proceedings could not be assessed under the criteria of the Regulation. The dominant view adopted by the English courts is that, if one starts from the premise that an injunction to prevent breach of an agreement to arbitrate has arbitration as a whole as its subject-matter,[23] then the judicial proceedings to obtain it fall outside the material scope of the Regulation. If, for example, the parties' claim is for a declaration that a valid arbitration agreement exists between the parties, then the 'principal focus' or 'essential subject-matter'[24] of that claim clearly concerns arbitration and thus falls within the arbitration exception and outside the Regulation (Convention).[25] The continental-European view is narrower in that only proceedings before national courts are regarded as part of arbitration if they in fact refer to arbitration proceedings, whether concluded, ongoing, or to be started.[26]

In terms of the first view favoured by the House of Lords in *West Tankers*, only the arbitral body itself and the national courts at the seat of arbitration have jurisdiction to answer the question of who has jurisdiction to examine

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21 [2007] UKHL 4 par 19.

22 Paragraph 21.

23 Which includes proceedings concerning the validity or existence of an arbitration agreement; the appointment of arbitrators; ancillary assistance to arbitration proceedings and the recognition and enforcement of awards; *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd ("The Hari Bhum")* [2005] 1 Lloyd's Rep (CA) 67 at 80 par 44.

24 As D Joseph *Jurisdiction and arbitration agreements and their enforcement* (2005) 344 par 12.64 points out, there is no difference between the test of the 'principal focus' and that of the 'principal subject-matter', and both tests are consistent with the approach of the ECJ in its decision in *Steenbergen v Luc Baten* Case C271/00 [2002] ECR I–10489 par 31.

25 J Aikens in *Navigation Martime Bulgare v Rustal Trading Ltd ('The Ivan Zagubanski')*, [2002] 1 Lloyd's Rep (QB) 107 at 122 par 100, adopting the view of J Rix in *Qingdao Ocean Shipping Co v Grace Shipping Establishment Transatlantic Schiffahrtskontor Gmg H Klaus Ode and Heath Chartering (UK) Ltd ('The Xing Su Hai')*, [1995] 2 Lloyd's Rep (QB) 15 at 21.

26 Opinion of Advocate-General Darmon in *Rich* n 16 above at par 23; Opinion of Advocate-General Léger in *Van Uden* n 17 above at paras 40–41.

the effectiveness and the scope of the arbitration clause. In terms of the second view, it depends on whether the claim for damages falls in principle within the scope of the Judgments Regulation and whether the Syracuse court – subject to the arbitration plea – has jurisdiction as the place in which the harmful event occurred in accordance with article 5(3) of the Regulation. If the defendant legitimately invokes the arbitration clause in those proceedings, the court would be obliged in principle under article II(3) of the New York Convention, to refer the dispute to arbitration. In other words, the crucial difference between the two approaches is that the arbitration exception is broadly understood in the first (Anglo-Saxon) view: as soon as one party claims that there is an arbitration agreement in place, all disputes arising from the legal relationship are subject exclusively to arbitration, irrespective of the substantive subject-matter. The opposite (continental-European) view takes account, first and foremost, of the substantive subject-matter. If that subject-matter falls within the perimeters of the Judgments Regulation, a court which in principle has jurisdiction thereunder, is entitled to examine whether the exception of article 1(2)(d)[27] applies and, according to its own assessment of the effectiveness and applicability of the arbitration clause in the contractual agreement, either to refer the case to arbitration, or to adjudicate on the matter itself.[28]

Unfortunately, the term 'arbitration' in article 1(2)(d) does not yield a convincing answer as to which interpretation should be preferred. Therefore, as Briggs correctly points out,[29] everything turns on the question whether the essential subject-matter is seen as a civil or commercial matter,[30] or as the setting-up and running of an arbitration, when it can actually be both. In its judgment in the *Rich* case,[31] the ECJ concentrated on the principles underlying the Brussels Convention. In that specific case, the defendant had contended that the preliminary issue as to whether a valid arbitration agreement exists was decisive. The court expressed the view that it is contrary to the principle of legal certainty, which is one of the objectives pursued by the Convention,[32] for the applicability of the exclusion of

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27 The Regulation shall not apply to arbitration.

28 The ECJ established already in *Owens Bank plc v Bracco* Case C–129/92, [1994] ECR I–117 the principle that, if the subject-matter of the proceedings is outside the material scope of the Regulation, incidental procedures or questions which arise within it cannot be within the material scope (par 36).

29 A Briggs *Agreements on jurisdiction and choice of law* (2008), 517 par 12.81.

30 In terms of art 1(1) of the Judgments Regulation, in which case it falls within the Regulation's scope.

31 Note 16 above.

32 See Case C–38/81 *Effer v Kantner* [1982] ECR 825 at 834 par 6.

arbitration (in terms of article 1(4)) to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties.[33] Therefore the court confirmed in *Van Uden* that the question whether or not proceedings fall within the scope of the Convention (and the same applies with regard to the Regulation) must be determined from the substantive subject-matter of the dispute.[34]

The judgment of the European Court of Justice

The court had to consider whether the proceedings brought by Allianz and Others against West Tankers before the court in Syracuse come within the scope of the Judgments Regulation, and what effects an anti-suit injunction would have on those proceedings. In its judgment, the court adopted the view of the Advocate-General[35] that, if the subject-matter of the dispute – that is the nature of the rights to be protected in proceedings, such as a claim for damages – falls within the scope of the Judgments Regulation, then a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also falls within the scope of the Regulation. Consequently, the objection of lack of jurisdiction raised by West Tankers before the Court of Syracuse on the basis of the existence of an arbitration agreement (including the question of the validity of that agreement) comes within the scope of the Regulation and therefore it is exclusively for the Syracuse court to rule on that objection and on its own jurisdiction, pursuant to articles 1(2)(d) and 5(3) of the Judgments Regulation.[36] The court held further that 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),[37] from ruling because it is an arbitration matter, 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. It follows ... 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 seized itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it... 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

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33 *Rich* n 16 above at par 27 of the judgment.

34 *Van Uden* n 17 above at paras 33–34.

35 Opinion of Advocate-General Kokott n 18 above.

36 See paras 26–27 of the ECJ judgment.

37 In matters relating to tort, delict or quasi-delict, the court for the place where the harmful event occurred or may occur has jurisdiction.

> proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State.[38]

The court used the further argument that in obstructing the court of another member state in the exercise of its powers in terms of the Judgments Regulation, namely to decide, on the basis of the rules defining the material scope of the Regulation, including its article 1(2)(d), whether the Regulation is applicable, such an anti-suit injunction also runs against the trust which the member states accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under the Regulation is based.[39] If, by means of an anti-suit injunction, the court in Syracuse, were prevented from examining the preliminary issue of the validity or applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that arbitration agreement, and the applicant, which considers the agreement to be void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought a claim in tort for damages and would therefore be deprived of a form of judicial protection to which it is entitled.[40] The ECJ concluded that an anti-suit injunction, such as that in the main proceedings, was not compatible with the Judgments Regulation,[41] and that this finding was supported by article II(3) of the New York Convention.[42]

A critique of the judgment of the European Court of Justice

The judgment has not been well received and has been labelled 'narrow-minded','a missed occasion'[43]; 'unconvincing'[44]; 'profoundly unsatisfying', 'alarmingly insecure', and 'troubling'.[45] I would also call it clumsy and impractical.

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38 Pargraphs 28–29 of the ECJ judgment.

39 See the judgment in *Turner* n 12 above at par 24.

40 Paragraph 31 of the ECJ judgment.

41 Paragraphs 32–33 of the judgment.

42 Which was discussed above on page 2.

43 C Kessedjian on West Tankers, http://conflictoflaws net/2009/kessedjian-on-west-tankers/ (Last accessed on 2009–02–19).

44 Dickinson on West Tankers: another one bites the dust at: http://conflictoflaws net/2009/dickinson-on-west-tankers-another-one-bites-the-dust/ (last accessed on 2009–02–27, who even uses the following example: 'Reading the decision of the Court of Justice in the *West Tankers* case is a little like watching a sub-standard James Bond movie.'

45 R Fentiman 'Arbitration and antisuit injunctions in Europe' 2009 *The Cambridge Law Journal* 278–281.

The judges set off on the wrong foot so-to-speak, by conflating the existence of an arbitration agreement with the subject-matter of the case. The wording of article 1(2)(d) of the Judgments Regulation is clear in that it explicitly excludes arbitration from its scope of application. As Kessedjian[46] points out, as soon as there is prima facie evidence that an arbitration agreement exists, there is a presumption that the parties wanted their dispute to be resolved outside the judicial system and thus deprived the national courts of the power to decide on their dispute. Therefore, the question of whether a court has jurisdiction over a matter does not arise if the parties have decided to exclude the entire judicial system from resolving any disputes between them. The case before the ECJ should have ended right there, but it did not. The judges of the ECJ correctly summarised that both the plaintiff, West Tankers, and the United Kingdom government had submitted in the proceedings before the court that an anti-suit injunction, which is aimed at 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, is not incompatible with the Judgments Regulation because its article 1(2)(d) excludes arbitration from its focus. Again, this could have been the final paragraph of the judgment. Instead, the judges – obviously enticed by the elaborate opinion of the Advocate-General – ventured into new territory by shifting their focus to the subject-matter of the proceedings and to the consequences for the Regulation:

> 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 …
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> However, even though proceedings do not come within the scope of [the Judgments Regulation], 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.[47]

This train of thought is not only somewhat unexpected, but, with respect, it is also illogical. It seems that the court made a last desperate attempt somehow to force the matter into the parameters of its own jurisdictional domain, in order to be able to dispose of it. There was no doubt whatsoever that the subject-matter of the dispute between the parties (a delictual claim) was covered by the special jurisdiction clause of article 5(3) of the

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46 Kessedjian n 43 above at par 1.

47 In paras 23–24.

Regulation. But to mention the exclusionary rule in article 1(2)(d) in the same breath as article 5(3), is ill-founded. As Kessedjian points out,[48] the argument that the scope of the Judgments Regulation is only to be interpreted as far as the merits of a case are concerned, may be correct with regard to the other exclusions in article 1 of the Regulation,[49] but not with regard to arbitration. Otherwise the exclusion of article 1(2)(d) would be emptied of its significance[50] because every single matter referred to arbitration is also capable of being arbitrated. The validity of the arbitration agreement goes hand-in-hand with the power to arbitrate, and the correct procedure for the ECJ would have been to refer to article II(3) of the New York Convention, in terms of which it is for the arbitral tribunal to decide on the validity of the arbitration agreement, unless that agreement is null and void, inoperative or incapable of being performed. Since both the New York Convention and the Judgments Regulation are silent as to which court has the power to decide whether the arbitration agreement is valid and capable of being performed, the matter would have fallen under national law. Instead, the ECJ ruled that any court in the European Union which could have had jurisdiction (if it were not for the arbitration agreement) has jurisdiction to review the validity of the arbitral agreement.

It seems that the ECJ pursued as its ultimate goal 'the unification of rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters'[51] with brute force and disregarded the fine nuances contained in the Regulation as regards its subject-matter scope. In the process, the court did not let the chance go by also to take a swipe at one of the oldest procedural instruments in English law. How can it otherwise be explained that the court also brought the English procedural weapon of an anti-suit injunction forcefully under its sway with the feeble argument that the injunction's consequences – namely to stop court proceedings in Syracuse because the parties were bound to refer the dispute to arbitration – would undermine effectiveness of the Judgment

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48 Note 43 above at par 2.

49 For example, the scope does not extend to matters of status or legal capacity of natural persons; rights in property arising out of a matrimonial relationship; wills and succession; bankruptcy, to name but a few.

50 And the significance of it can be reduced to 'a simple rule of thumb: what lays outside, stays outside". A Briggs "Fear and Loathing in Syracuse and Luxembourg' 2009 *Llyod's Maritime and Commercial Law Quarterly* 161–166.

51 See par 24 of the judgment.

Regulation?[52] An anti-suit injunction not only promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court, but

> it also saves a party to an arbitration agreement from having to keep a watchful eye upon parallel court proceedings in another jurisdiction, trying to steer a course between so much involvement as will amount to a submission to the jurisdiction ... and so little as to lead to a default judgment. This is just the kind of thing that the parties meant to avoid by having an arbitration agreement. [53]

The Court's approach is not only 'lopsided' and 'shocking',[54] it also shows disregard for the growing tendency, and possibly even of a commercial practice, for commercial parties to contract into arbitration. Companies worldwide subscribe to arbitration agreements in order to avoid the costs, the excessive delays, and also the risk of encountering insufficiently competent national judges associated with national judicial systems. The member states of the European Union would do better to carry their zest for unifying the laws and regulations forward by introducing an arbitration convention that could finally tie up the loose ends in article 1(2)(d). So long overdue an initiative could restore Europe's credibility as a good and reliable arbitration forum.

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52 Is it maybe, as Briggs (n 29 above) mentions, because the anti-suit injunction is so foreign to European-trained lawyers that they suffer 'an allergic reaction' when they encounter it?

53 See judgment of the House of Lords n 20 above at par 19.

54 S Wolff 'Tanking arbitration or breaking the system to fix it? A sink or swim approach to unifying judicial systems: the ECJ in '*Gasser, Turner,* and *West Tankers*' 2009 *The Columbia Journal of European Law Online* 65–69.