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TANKING ARBITRATION OR BREAKING THE SYSTEM TO FIX IT? A SINK OR SWIM APPROACH TO UNIFYING EUROPEAN JUDICIAL SYSTEMS: THE ECJ IN *GASSER*, *TURNER*, AND *WEST TANKERS*

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I. INTRODUCTION

On February 10, 2009, the Grand Chamber of the European Court of Justice (ECJ) handed down its decision in *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc.*,¹ setting off a spirited debate between Continental and Common law scholars. The decision was prompted by a referral from the English House of Lords on whether it was compatible with Regulation 44/2001 (“Brussels I”)² for a national court to issue an anti-suit injunction in order to protect an arbitration agreement.³ The United Kingdom strongly recommended that such “anti-suit injunctions” be permitted, sounding a tocsin about the future of English arbitration.⁴

However, following its decisions in *Gasser GmbH v. MISAT Srl*⁵ and *Turner v. Grovit*,⁶ the ECJ was expected to strike down the anti-suit injunction. The case thereby pitted the supreme common law and civil law bodies in Europe against one another. The decision, according to Martin George, left “the common law . . . looking decidedly battered and bruised.”⁷

II. JURISPRUDENTIAL BACKGROUND

Under Brussels I, a court second seised in a civil or commercial matter must of “its own motion stay its proceedings until such times as the jurisdiction of the court first seised is established,” and “where the jurisdiction of the court first seised is established, any [other] court . . . shall decline

¹ Case C-185/07, *Allianz SpA & Generali Assicurazioni Generali SpA v West Tankers Inc.*, 2009 WL 303723, ¶ 18 (Feb. 10, 2009).

² Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 [hereinafter Brussels I].

³ *West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà SpA (The Front Comor)*, [2007] UKHL 4, ¶ 25 (“Is it consistent with EC Regulation 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?”).

⁴ Since England is the only member state that regularly issues anti-suit injunctions, its government was particularly apprehensive about the outcome of the referral.

⁵ Case C-116/02, *Erich Gasser GmbH v. MISAT Srl.*, 2003 E.C.R. I-14693.

⁶ Case C-159/02, *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd.*, 2004 E.C.R. I-3565.

⁷ Some others, however, may begin to wonder whether the European Union’s pursuit of the hallowed principle of “legal certainty” will end with the removal of any and all discretionary national court powers—indeed, the removal of common law private international law itself. The tension between common and civil law traditions is likely to continue as we proceed along the path to complete Europeanization of the conflict of laws; and at the moment, the common law is looking decidedly battered and bruised.

Martin George, *The AG’s Opinion in West Tankers*, CONFLICT OF LAWS .NET, Sept. 5, 2008, <http://conflictoflaws.net/2008/the-ag-opinion-in-west-tankers/>.

jurisdiction.”⁸ Since its ratification, potential defendants in commercial litigations have exploited Brussels I by pre-emptively seising Belgian and Italian courts, infamous for their overloaded dockets and lethargic deliberations, in order to paralyse or “torpedo” lawsuits for up to several years.⁹ In *Gasser vs. Misat*, the defendant seised an Italian court in a debt collection dispute despite a contractual clause conferring jurisdiction on an Austrian court. Before the ECJ, Mr. Gasser cited the “excessive and generalised slowness of legal proceedings” in Italy¹⁰ in an effort to return the case to the Austrian court and thereby carve an exception out of Brussels I.

In response, the ECJ rebutted any presumption that lengthy proceedings in the courts of one of the Member States could ever give rise to a derogation from Brussels I. Rather, it wrote, every court in every Member State merits the “mutual trust” of all the other courts:

It must be borne in mind that the Brussels Convention is necessarily based on the trust which the Contracting States accord to each other's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect.¹¹

If there is a choice-of-jurisdiction clause, the Austrian court must therefore “trust” the Italian court to respect it, even if this intermediary step delays the actual trial for several years.

In *Turner v. Grovit*, a corollary case decided under Brussels I, the ECJ extended the doctrine of “mutual trust” yet further. There, an English court had issued an anti-suit injunction restraining a party from pursuing proceedings in a Spanish court that had been commenced in “bad faith with a view to frustrating the existing proceedings.”¹² The ECJ wrote:

Such an injunction constitutes interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention. That interference cannot be justified by the fact that it . . . is intended to prevent an abuse of process by the party concerned, because the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State, which runs counter to the principle of mutual trust which underpins the Convention.¹³

Yet again, despite the inevitable delay it entailed, the English court was asked to “trust” that the Spanish Court would recognize the bad faith nature of the proceedings brought before it and decline jurisdiction.

III. *WEST TANKERS VS. ALLIANZ*

⁸ Brussels I, *supra* note 2, art. 27.

⁹ Pierre Véron, *ECJ Restores Torpedo Power*, 35 INT’L REV. INTELL. PROP. & COMPETITION L. 638 (2004).
¹⁰ *Id.* at 641.

¹¹ *Gasser*, 2003 E.C.R. I-14693, ¶ 72.

¹² *Turner*, 2004 E.C.R. I-3565, ¶ 19. In this case a company, Chequepoint, initiated proceedings before a Spanish court in order to vex Mr. Turner in the pursuit of his application before the English Employment Tribunal for unfair dismissal.

¹³ *Id.* ¶¶ 24–28.

In August 2000, a vessel owned by West Tankers and chartered by Erg Petroli collided with a jetty in the port of Syracuse, Italy. Erg's insurers, Allianz and Generali, compensated Erg and then filed an action for subrogation against West Tankers before Tribunale di Siracusa. The Italian court claimed jurisdiction under Article 5(3) of Brussels I,¹⁴ which covers civil and commercial cases involving tort liability. However, West Tankers and Erg had previously signed a charter-party, governed by English law and providing that all disputes would be referred to arbitration in London. West Tankers therefore obtained an anti-suit injunction from the English High Court restraining the insurers from pursuing any proceedings other than arbitration in London. Upon appeal, the House of Lords, which along with the British government vocally supported the anti-suit injunction, was required by community law¹⁵ to refer the question of the injunction's compatibility with Regulation 44/2001 to the ECJ.¹⁶

Given the precedents before it, the ECJ appeared to have an open-and-shut case. Yet, Article 1(2)(d) of Brussels I carves out a general exclusion for matters involving arbitration,¹⁷ and it looked as if the Regulation would not in fact apply to the *West Tankers* dispute. Indeed, the ECJ admitted as much, at least in regards to the main proceedings (between West Tankers and Erg) brought before the London arbitral body.¹⁸ Nonetheless, it held that the Syracuse court was correct in finding jurisdiction under Article 5(3) of Brussels I. As a result, only half of the dispute came under the purview of Brussels I. Consequently it seemed logical for the ECJ to limit its decision on the compatibility of an anti-suit injunction with Regulation 44/2001 only to the part of the proceedings actually covered by the Regulation.¹⁹

Instead, the ECJ issued a ruling as convoluted in its logic as it was ambitious in its aims. The ruling begins by announcing its concern with no less than "the unification of rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters."²⁰ Having set such an impressive goal, the Court goes on to claw back the arbitral dispute, and moreover the anti-suit injunction arising from it, under Brussels I. To do so, the ECJ argues that "even though the proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness."²¹ This, it concludes, is reason enough to bring the anti-suit injunction under Brussels I's sway, even despite the arbitration exception.

¹⁴ Brussels I, *supra note 2*, art. 5(3) ("A person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.").

¹⁵ Treaty Establishing the European Community, art. 234, Dec. 24, 2002, 2002 O.J. (C 325) 33.

¹⁶ *West Tankers*, [2007] UKHL 4, ¶ 1.

¹⁷ Brussels I, *supra note 2*, art. 1(2)(d) ("the Regulation shall not apply to . . . arbitration.").

¹⁸ *West Tankers*, 2009 WL 303723, ¶ 23.

¹⁹ This solution was proposed by Professor Pfeiffer of the Institute for Comparative Law at Heidelberg University. Veronika Gaertner, *Pfeiffer on West Tankers*, CONFLICT OF LAWS .NET, Feb. 12, 2009, <http://conflictoflaws.net/2009/pfeiffer-on-west-tankers/>. Jonathan Harris, Professor of International Commercial Law at the University of Birmingham (U.K.), similarly expresses wonderment that the argument that "the proceedings in Syracuse fall partly within and partly outside the Regulation has been rejected." Martin George, *Harris on West Tankers*, CONFLICT OF LAWS .NET, Feb. 12, 2009, <http://conflictoflaws.net/2009/harris-on-west-tankers/>.

²⁰ *West Tankers*, 2009 WL 303723, ¶ 24.

²¹ *Id.* ¶ 24.

The result of such reasoning is a lopsided doctrine by which, as Professor Rafael Arenas writes, “Every proceeding that could affect a proceeding within the scope of Regulation 44/2001 must be examined in order to determine if it is compatible with the Regulation.”²² Since all anti-suit injunctions in civil or commercial matters necessarily violate the doctrine of “mutual trust,”²³ they could all theoretically affect a proceeding within the scope of Regulation 44/2001. “This,” Arenas goes on to write, “is new and shocking.”²⁴

It is no wonder then that Professor Jonathan Harris harangues the ECJ for its logic:

It is difficult to conceive of a more thinly reasoned or incomplete judgment. It fails sufficiently to examine the central question as to the meaning and scope of the arbitration exclusion. In this respect, the question arises as to whether the validity of the arbitration clause can be so easily dismissed as a preliminary issue in foreign litigation that does not alter the civil and commercial character of those foreign proceedings.²⁵

Whatever the value of Harris’ reprimand, it is clear that the ECJ is fastidiously avoiding any serious discussion of the scope of the arbitration exclusion. Rather, the Court’s singular goal is to limit it. Once both proceedings are absorbed under Brussels I, following *Gasser* and *Turner*, an anti-suit injunction is clearly impermissible, since it breaches the doctrine of “mutual trust.” The ECJ’s fixation on the unification of the rules of conflict jurisdiction shows itself to be so tantamount that it outweighs even its dedication to preserving the “*effet utile*” of Article 1(2)(d).

IV. CONCLUSION

The ECJ’s decision in *West Tankers* signals an alarming incompatibility between the Court’s expanding jurisprudence in conflict of laws and the growing tendency of commercial parties to contract into arbitration. Companies traditionally subscribe to arbitral agreements in order to avoid the costs, and most of all, the excessive delays associated with national judicial systems. However, in *Gasser* and *Turner* the ECJ attacked precisely this sort of maneuver. Rather than encouraging parties to seek out more efficient courts, it expressed its impatience with efforts aimed at evading certain “problematic” national judicial systems, such as those found in Italy and Belgium (*Gasser*). The ECJ’s unwavering dedication to the practical harmonizing of all European Courts thereafter led it to refuse to allow an exception to Brussels I even in cases in which the proceedings brought in certain troubled jurisdictions had been initiated in bad faith and in order to “torpedo” or paralyze a legitimate lawsuit (*Turner*).

The ECJ’s project, as expressed through all three of these rulings, is a perfecting of the national judicial systems and through them, the harmonization and unification of European conflict of laws. Brussels I, and its doctrine of “mutual trust,” is the flagship in this enterprise, for it treats every national jurisdiction the same. If the courts in Italy and Belgium are broken, then European

²² Marta Requejo, *Rafael Arenas on West Tankers*, CONFLICT OF LAWS .NET, Feb. 13, 2009, <http://conflictoflaws.net/2009/rafael-arenas-on-west-tankers/>.

²³ *West Tankers*, 2009 WL 303723, ¶ 30.

²⁴ Requejo, *supra* note 23.

²⁵ George, *supra* note 19.

wide efforts have to be made to bring their judicial systems up to European standards, not to contract away from their jurisdictions via choice of jurisdiction clauses that provide for adjudication in efficient Austria, or even worse, that contract out of the judicial system altogether by providing for arbitration. This leads to a perverse situation where the ECJ actively promotes a broken system in which arbitration clauses or worthy claims can be paralyzed for years in sluggish national courts by bad faith motions. Yet, the Court seems to have fallen prey to the positivist belief that if you rule enough times that reality is a certain way, it will become so.