EU DEVELOPMENTS – *THE FRONT COMOR*

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INTRODUCTION

One of the most reported cases in recent years has been the European Court of Justice (ECJ) decision in Allianz SpA. v. West Tankers Inc. (*The Front Comor*). In this case, the ECJ, in practical terms, abolished anti-suit injunctions (or restraining orders) issued in support of arbitration agreements within the European Union (EU).

FACTS AND ENGLISH PROCEEDINGS

The Front Comor hit a jetty at a Syracuse oil terminal. The ship was chartered to Erg, which was also the jetty owner. The charter was subject to English law and contained a London arbitration agreement. The jetty owners claimed against their Italian insurers. That policy was limited and Erg started London arbitration proceedings against the owner for the balance of its losses. Erg's insurers then started proceedings in Italy against the owners in order to recover the payments they had made to Erg. The owners' lawyers successfully obtained an anti-suit injunction against the insurers in the English High Court, restraining these Italian proceedings. They argued that the dispute arose from the charter, which contained an arbitration agreement. Therefore, they said, the insurers were bound by that agreement. The English courts, including the House of Lords, agreed. It was not disputed that the Italian courts had jurisdiction to hear the insurer's claim. The owners argued that that action should be discontinued in favour of proceeding under the charter's provisions.

THE ECJ APPROACH

The ECJ found that the Italian proceedings were a claim for damages governed by the Brussels Convention and, as such, the applicability of the charter's arbitration agreement came within the scope of the Brussels Convention. Thus, the Italian court alone had the ability to rule upon any jurisdictional objections made to it in relation to the arbitration agreement (including its applicability and validity). The ECJ ruled that such anti-suit injunctions were counter to the mutual trust that the courts in various EU member states enjoyed and were in breach of EU Regulation 44/2001, which provides a set of uniform rules governing civil and commercial disputes within the EU (the Regulation).

PRACTICAL IMPLICATIONS AND FURTHER DEVELOPMENTS

A common complaint following *The Front Comor* decision was that it would have the practical effect, in the future, of there being conflicting decisions in parallel proceedings in the EU. It was feared that the *Front Comor* decision would render London arbitrations vulnerable to 'torpedo' actions and, in effect, render London arbitration agreements worthless. The European Parliament and the European Commission have acknowledged this, and in December 2010, the Commission published proposals for reform of the Regulation.

These proposals are aimed at improving judicial co-operation within the EU and enhancing the autonomy of the arbitration tribunal. It is proposed that the arbitration exclusion with the Regulation be retained and expanded upon such that a court in the EU **shall** stay court proceedings once the court of the member state where the seat of the arbitration is located (or the arbitration tribunal itself) has been 'seized' to consider the question of arbitral jurisdiction. The draft proposals also make clear that an arbitration tribunal will be seized when a party has nominated an arbitrator or requested the support of an institution, authority or a court for the tribunal's constitution.

These proposals are still to pass through the European Parliament, but if they do it could prove to be an effective solution to the current parallel proceedings problem and, if implemented, will improve the effectiveness of arbitrations in the EU. The ECJ's judgment does not affect the ability of parties to seek injunctive relief to uphold arbitration agreements where, say, competing proceedings are issued outside the EU.

COMMENTARY

English injunctions against proceedings being pursued in other EU jurisdictions may be seen as high-handed. However, they have been a useful tool for any party to enforce a contractually agreed dispute resolution process. If such a process is not binding then the parties may enter a race to establish the hearing of their dispute in their favoured jurisdiction. Neutral jurisdictions may be ignored in favour of potential, partial or claimant-friendly jurisdictions. Additional legal costs would be incurred and parties would be discouraged from addressing early settlement of their disputes. Also, there is a risk that arbitration could proceed in one jurisdiction but that, say, subrogated insurers could pursue their claim in another jurisdiction, opening the real possibility that conflicting decisions could result. The *Front Comor* decision is important as its ramifications may drive changes to EU law that, eventually, may support party autonomy and assist those who wish to rely on contractually agreed provisions.