

CMLA Seminar
Halifax, 3 June 2010

**“Choice of Forum, Anti-Suit
Injunctions, *Forum Conveniens* &
Related Agonies – an update”**

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DOES THE ENGLISH COURT HAVE JURISDICTION?

The present system:

- English common law
- The EU Regulations
 - Brussels Convention 1968
 - Lugano Convention 1988
 - Judgments Regulation (Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters)
 - Lugano Convention 2007

ENGLISH COMMON LAW

- Applies to the extent that the European conventions do not
- Principles have been developed in relation to the service of proceedings on defendants outside the jurisdiction
- **Need to demonstrate to the Court:**
 - that the grounds in the Civil Procedure Rules for granting permission to serve out of the jurisdiction apply
 - the claim has reasonable prospects of success
 - why an English court is the most appropriate forum

ENGLISH COMMON LAW (cont...)

Common grounds for permission

- **Claims in relation to a contract where:**
 - the contract was made within the jurisdiction (in England); or
 - the contract is governed by English law; or
 - the contract contains an English jurisdiction clause; or
 - the breach of contract occurred within the jurisdiction

- **Claims in tort where:**
 - damage was sustained within the jurisdiction; or
 - damage has resulted from an act committed within the jurisdiction

ENGLISH COMMON LAW (cont...2)

Is England the most appropriate forum?

- Consider the principles in *Spiliada Maritime Corp v Consulex* [1987] AC 460:
 - is England the forum where the case may most suitably be tried for the interests of all parties and the ends of justice?
 - which is the most natural forum?
 - even if England is not the most appropriate forum, Court can still assume jurisdiction if justice requires it
 - e.g. cogent evidence that the claimant will not obtain justice in the foreign jurisdiction?

THE “JUDGMENTS REGULATION”

- Part of the European regime
- Largely supersedes the 1968 Brussels Convention
- The Judgments Regulation applies to:
 - defendants domiciled in a Member State
 - where Articles 22 (cases of exclusive jurisdiction) or 23 (jurisdiction agreements if either party is domiciled in a Member State) apply
 - where the defendant “enters an appearance”
- No room for *forum non conveniens*: *Owusu v Jackson* Case C-281/02 [2005] ECR I-1383; *Catalyst Investment Group Ltd v Lewinsohn & Others* [2009] EWHC 1964 (Ch)

THE “JUDGMENTS REGULATION” (cont...)

- **General rule – defendant to be sued where they are domiciled (art. 2)**
- **Exceptions, e.g.:**
 - place of performance of a contractual obligation or where tort committed (art. 5)
 - insurance, consumer contracts, employment contracts (arts. 8 – 21)
 - cases of exclusive jurisdiction, regardless of domicile (art. 22)
 - jurisdiction clause in the contract (art. 23)

ANTI-SUIT INJUNCTIONS

- Restrains a *party* from commencing or continuing with court proceedings in another country in breach of a jurisdiction clause in favour of the English courts:
 - *British Airways Board v Laker Airways* [1985] AC 58 HL
- Agreement on the seat of arbitration is treated as if it were an exclusive jurisdiction clause

WHEN TO APPLY FOR AN ASI?

- **When are they granted?**
 - Ends of justice require it
 - Order is directed at the party, not the court
 - English court must have jurisdiction over that party
 - e.g. a contract which contains a clause which refer disputes to the English courts or arbitration in London
 - Exercise with caution

POWER OF THE COURT

- **In relation to Court proceedings:**

s.37(1) Senior Courts Act 1981 states:

“ The High Court may by order (whether interlocutory or final) grant an injunction...in all cases in which it appears to the court to be just and convenient to do so. ”

POWER OF THE COURT (cont...)

- **In relation to Arbitration proceedings:**

s.44 Arbitration Act 1996 states:

“(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are:

...

(e) the granting of an interim injunction...”

WHEN ARE ASIs AVAILABLE?

A. Court proceedings

- The European Court of Justice (“ECJ”) has severely restricted the power of the English courts:
 - see *Gasser GmbH v MISAT srl* (Case C-116/02) [2003] ECR I-14693 and *Turner v Grovit* (Case C-159/02) [2004] ECR I-3565
- No longer available where proceedings have been commenced in another EU country, even in bad faith
- Inconsistent with the principles of mutual trust which underpin the Judgments Regulation

WHEN ARE ASIs AVAILABLE? (cont...)

B. Arbitration proceedings

- Until recently, this principle did not apply to arbitrations
- ASIs were available to restrain parties from pursuing court proceedings in Member States in breach of an arbitration agreement
- Commencement of foreign proceedings amounts to a breach of contract (see *The Angelic Grace* [1995] 1 Lloyd's Rep 87)
- But no longer available where Court proceedings are commenced in another Member State: *Allianz S.p.A v West Tankers Inc (The Front Comor)* [2009] Case C-185/07

THE *WEST TANKERS* DECISION

Facts

- West Tankers owned the mv “FRONT COMOR”; chartered by Erg Petroli
- Vessel collided with a jetty owned by Erg in Syracuse, Italy
- The Erg/West Tankers charter governed by English law, called for London arbitration
- Erg claimed compensation from their insurers (Allianz and Generali) up to the insurance limit
- Erg commenced arbitration in London against West Tankers to recover the excess

THE *WEST TANKERS* DECISION (cont...)

- Insurers paid Erg and commenced recovery proceedings against West Tankers in the Syracuse courts
- West Tankers said the Syracuse courts lacked jurisdiction because of the arbitration agreement
- West Tankers also applied to the High Court in London for an ASI against the insurers
- High Court granted the ASI; the insurers appeal directly to the House of Lords
- Insurers argued that it contravened the Judgments Regulation

THE *WEST TANKERS* DECISION

- Case concerned the scope of the “arbitration exception” in art. 1(2)(d) of the Judgments Regulation, i.e.

“1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. This Regulation shall not apply to:

...

(d) arbitration.”

THE WEST TANKERS DECISION (cont...)

- The HoL said that the decisions in Gasser and Turner did not apply to arbitration, which was excluded from the Judgments Regulation

- The HoL referred 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?”

- The ECJ said **“No”**

THE *WEST TANKERS* DECISION (cont... 2)

The ECJ's decision:

- It followed the Opinion of the Advocate General
- Focused on whether the Regulation applied to substance of the dispute against which the ASI was directed i.e. the Syracuse action
- The claim before the Syracuse court was in tort for damages under Art. 5(3) of the Regulation
- Thus, a preliminary issue concerning the applicability and validity of the arbitration agreement also fell within the scope of the Regulation

THE *WEST TANKERS* DECISION (cont... 3)

- It was for the Syracuse courts to rule on its own jurisdiction
- Every court seised must itself determine whether it has jurisdiction – even if in breach of a jurisdiction clause (*Gasser*)
- Incompatible with the Judgments Regulation for the court of one Member State to grant injunctions brought in another
- It offended the principles of mutual trust and recognition
- “Economic” arguments were rejected

THE WEST TANKERS DECISION (cont... 4)

- This was consistent with the 1958 New York Convention, Art. II(3):

“The court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

- Thus, the Member State court would have to refer the parties to arbitration unless the exception applied.

THE WEST TANKERS DECISION (cont... 5)

- *West Tankers* extends the principle in the *Turner* and *Gasser* cases.
- *West Tankers* since affirmed by the Court of Appeal:
 - *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397 – the English court was bound by a judgment obtained in a Spanish court in breach of an agreement to arbitrate in London
 - *Youell & Others v La Réunion Aérienne & Others* [2009] EWCA Civ 175

POSSIBLE STRATEGY FOLLOWING *WEST TANKERS*?

- Note the problem of issue estoppel and the failure of the public policy argument in *The Wadi Sudr*
- Commence arbitration proceedings at an early stage
- Be prepared to contest jurisdiction before the foreign court – consult with local counsel

PROCEEDINGS OUTSIDE THE EU

- ASIs remain available in relation to proceedings outside the EU:
 - *Shashoua v Sharma* [2009] EWHC 957 (Comm) (India)
 - *Midgulf International Ltd v Groupe Chimique Tunisien* [2010] EWCA Civ 66, C.A. (Tunisia)

- To uphold jurisdiction agreements if proceedings are commenced in a jurisdiction other than the one agreed: *OT Africa Line Ltd v Magic Sportswear Corporation & Ors* [2005] EWCA Civ 710

- Court has jurisdiction even if there is no proposed or intended arbitration: *AES UST-Kamengorsk Hydropower Plant LLP v UST-Kamengorsk Hydropower Plant* [2010] EWHC 772 (Comm)

THE FUTURE OF THE “ARBITRATION EXCEPTION”

- The cases highlight the need for reform
- EC Green Paper published in April 2009. Suggested reforms include:
 - i. Deletion of the “arbitration exception”
 - ii. Exclusive jurisdiction for the courts of the Member State of the seat of arbitration over questions of the validity, scope or existence of an arbitration clause
 - iii. New criteria to assist defining the place of arbitration

THE FUTURE OF THE “ARBITRATION EXCEPTION” (cont...)

- **Draft report published in April 2010 by the Committee on Legal Affairs:**
 - Strongly opposes the abolition of the arbitration exclusion
 - Suggests a thorough review of the relationship between arbitral and court proceedings before the exclusive jurisdiction is granted
 - Clarify the scope of the arbitration exception e.g. judgments given in breach of arbitration clauses fall outside the Regulation
- **Text of the proposed revised wording not expected until 2011**

THANK YOU

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