

Arbitration Alert

Dear Clients & Friends

European Court of Justice holds EU courts may not issue anti-suit injunctions in favour of arbitration against another EU court

The European Court of Justice in *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* (C-185/07) has held that it would be incompatible for a European Union (“EU”) court to grant an anti-suit injunction supporting arbitration against another EU court. In the light of this decision, parties to an arbitration agreement, particularly where one of them is based in the EU, should choose their arbitral seat wisely.

Facts of the case

In August 2000, the *Front Conor*, a vessel owned by West Tankers Inc (“**West Tankers**”) and chartered by Erg Petroli SpA (“**Erg**”), collided in Italy with a jetty owned by Erg thereby damaging the jetty. The charterparty was governed by English law and contained a clause providing for arbitration in London. Erg claimed compensation from its insurers Allianz SpA (“**Allianz**”) and Generali Assicurazioni Generali SpA (“**Generali**”) up to the limit of its insurance cover.

The collision spawned three sets of proceedings:

- (a) Erg brought arbitration proceedings in London against West Tankers for the amount not recovered under the insurance covers;
- (b) Allianz and Generali commenced civil proceedings based on their rights in subrogation against West Tankers in the Tribunale di Siracusa (Italy); and
- (c) West Tankers applied to the English High Court for:
 - (i) a declaration that the dispute between itself, Allianz and Generali should be settled by arbitration pursuant to the charterparty; and
 - (ii) an anti-suit injunction restraining Allianz and Generali from pursuing any proceedings other than the London arbitration proceedings thereby requiring the discontinuation of the Italian proceedings (the “**Anti-Suit Injunction**”).

The English High Court granted West Tankers the Anti-Suit Injunction. Allianz and Generali appealed against this decision to the UK House of Lords arguing that the Anti-Suit Injunction was incompatible with Council Regulation (EC) No 44/2001 (the “**EC Regulation**”) on jurisdiction, recognition and enforcement of judgments in civil and commercial matters.

The EC Regulation facilitates the free movement of decisions by providing a complete set of uniform rules on the allocation of jurisdiction between the courts of the EU states, which must trust each other to apply those rules correctly.

While acknowledging that EU courts adopting the anti-suit injunction in support of arbitration would make the “*European Community more competitive vis-à-vis international arbitration centres such as New York, Bermuda and Singapore*”, the House of Lords stayed the proceedings before them and referred to the European Court of Justice (the “**ECJ**”) the question whether the Anti-Suit Injunction granted by the English High Court was compatible with the EC Regulation.

ECJ decision

The ECJ noted that the objective of the EC Regulation is the unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions. The ECJ was of the view that the use of an anti-suit injunction to prevent a EU court from resolving a dispute amounted to stripping that court of the power to rule on its own jurisdiction. In its opinion, the EC Regulation did not authorise the jurisdiction of a EU court to be reviewed in another EU state. Hence, it would be incompatible with the EC Regulation for a EU court to grant an order to restrain a person from commencing or continuing proceedings before the courts of another EU state on the ground that such proceedings would be contrary to an arbitration agreement.

Effect of the ECJ decision

By declaring that the national courts in the EU had no power to grant an anti-suit injunction against court proceedings commenced in another EU state in breach of an arbitration agreement, the ECJ effectively took away one of the chief weapons by which parties could enforce their arbitration agreements.

Hence, parties to an arbitration agreement (where one or more of the parties are from a EU state), have to be mindful about the choice of the seat of arbitration. The parties may wish to choose to seat the arbitration in a non-EU State, as the courts of a non-EU State would not be bound by the EC Regulation and restrained from granting an anti-suit injunction. However, the remedies available for the enforcement of arbitration agreements vary from jurisdiction to jurisdiction. The anti-suit injunction may not be available in the chosen jurisdiction and it would be prudent for a party to obtain legal advice from the chosen jurisdiction.

Illustration

The following example illustrates the importance of the location of the seat of arbitration.

Party A is from Italy. Party B is from Spain. They enter into an arbitration agreement for any disputes arising between them to be resolved by arbitration in London under the International Chamber of Commerce (the “**ICC**”) Arbitration Rules of Arbitration. A dispute arises between them. In breach of the arbitration agreement, Party B commences court proceedings in Italy, seeking an injunction to freeze the assets of Party A.

Party A takes steps to commence an arbitration in London pursuant to the arbitration agreement. Party A also applies to the English courts (which would have jurisdiction over the matter since the arbitration is seated in England) to enforce the arbitration agreement. By reason of the ECJ’s ruling, the English courts will not be able to grant an injunction ordering Party B to cease the court proceedings in Italy.

However, if the parties had chosen to seat the arbitration in a non-EU jurisdiction, (such as Singapore), the curial court is not bound by the EC Regulation or the ruling of the ECJ, and would be free grant an anti-suit injunction against the court proceedings in Italy.

ECJ decision considered by English High Court in National Navigation Co v Endesa Generacion SA

The effect of the ECJ’s ruling was recently confirmed in the English High Court decision of *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm). In that case, a Spanish company, Endesea Generacion SA (“**Endesea**”) arrested a vessel in Spain owned by an Egyptian company, National Navigation Co (“**NNC**”) for an alleged breach of the terms of a bill of lading. Endesea also commenced substantive proceedings in Spain. NNC commenced court proceedings in England first, and then arbitration in London pursuant to an arbitration clause incorporated by reference into the

bill of lading. NNC applied to the English High Court for an anti-suit injunction against the proceedings in Spain, but before the matter could be resolved, the ECJ released its ruling in *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc* (C-185/07). In the light of the ECJ decision, NCC accepted that its application for the anti-suit application had to fail and Justice Gloster noted that this concession was correct. However, Justice Gloster went on to find that the arbitration clause had been validly incorporated into the bill of lading and made a declaration that the arbitration clause was binding on the parties. Justice Gloster held that the English courts had the jurisdiction to make such a declaration, although it would conflict with the judgment of the Spanish courts.

However, the decision of the English High Court begs the question of how NCC would effectively enforce the declaration - a breach of the declaration would (presumably) not amount to a contempt of the English court, unlike the breach of an anti-suit injunction. If the breach were compensable by damages, there would be the tricky question of whether the Spanish courts would allow NCC to enforce the damages award in Spain (where Endesea was domiciled), when the damages arose out of a declaration which was incompatible with the decisions of a Spanish court.

Arbitration in Singapore - Supportive pro-arbitration system

Singapore's status as an international arbitration hub has grown tremendously in recent years. In 2005, Singapore was the most frequently selected city in Asia for ICC administered arbitration and sixth most frequently selected in the world (behind Paris, Geneva, London, Zurich, New York, in that order). Parties seeking to seat their arbitration in a non-EU State may therefore wish to consider seating the arbitration in Singapore.

The legal framework in Singapore is firmly pro-arbitration. Where it is shown that an international arbitration agreement exists and that the dispute before the courts is covered by the arbitration agreement, it is mandatory under section 6(2) of the Singapore International Arbitration Act for the Singapore courts to grant a stay of those court proceedings. The court also has a duty to direct the parties to proceed to arbitration. The sole burdensome ground upon which a stay application may be resisted is if it can be shown that the arbitration agreement itself is "null and void, inoperative or incapable of being performed".

The Singapore courts are also ready and willing to grant anti-suit injunctions against proceedings commenced in the courts of other jurisdictions where it is clearly established that an arbitration agreement existed and that those proceedings in the foreign court were instituted in breach of the arbitration agreement.

A case that demonstrates the supportive stance of the Singapore courts towards international arbitration in Singapore is the Singapore High Court decision of *WSG Nimbus Pte Ltd v Board Of Control for Cricket in Sri Lanka* [2002] 3 SLR 603. In that case, the Singapore High Court granted an anti-suit injunction against court proceedings commenced in Sri Lanka in breach of an arbitration agreement. In arriving at its decision, the court observed that one major purpose of the Singapore International Arbitration Act is to promote Singapore as an international centre for arbitration by facilitating arbitrations that are held here.

For further information about Singapore as a venue for arbitration, please [click here](#) to read an article entitled "*Uniquely Singapore: The Development of an International Arbitration Hub*", which is also available on the Allen & Gledhill LLP website www.allenandgledhill.com

Should you have any queries as to how this may affect your business, please do not hesitate to get in touch with your usual contact at Allen & Gledhill LLP or any of the following:

Dinesh Dhillon
Tel: +65 6890 7822
E-mail: dinesh.dhillon@allenandgledhill.com

Edwin Tong
Tel: +65 6890 7867
E-mail: edwin.tong@allenandgledhill.com

Andrew Yeo
Tel: +65 6890 7850
E-mail: andrew.yeo@allenandgledhill.com

Yours faithfully
Allen & Gledhill LLP
Singapore

Allen & Gledhill LLP
T +65 6890 7188 | F +65 6327 3800 | publications@allenandgledhill.com
One Marina Boulevard #28-00 Singapore 018989 | www.allenandgledhill.com

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