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WEST TANKERS - ARBITRATION AT DUSK

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Abstract in original language
The alternative solutions of the possible dispute between the parties, being that the regular proceedings in front of the state courts and alternatively the arbitration proceedings, recently seems to enter a new phase in their mutual relationship. This cannot be considered for a future reference as a friendly one but rather hostile mainly due to the recent jurisprudence of the European Court of Justice in the West Tankers case.

Key words in original language
Arbitration proceedings; state court proceedings; control and auxiliary functions; concurring procedures; anti-suit injunction; scope of the application; case law of the European Court of Justice; Brussels I Regulation; jurisdiction; exclusions from the scope; practical solutions.

Abstract
Alternativní řešení možných sporů mezi stranami, na jedné straně tedy řešení soudní cestou a alternativně využití rozhodčího řízení, zdá se v současné době dospělo do nové fáze vzájemných vztahů. Tento již nelze do budoucna považovat za čistě přátelský, a to zejména díky současné rozhodovací praxi Evropského soudního dvora nastolené v případě West Tankers.

Key words
Rozhodčí řízení; řízení před soudy státními; kontrolní a pomocné funkce; sbíhající se řízení; předběžná opatření; předmět úpravy; rozhodnutí Evropského soudního dvora; nařízení Brusel I; pravomoc; vyloučení z rozsahu úpravy; praktická řešení.

The ultimate aim of this contribution in an introduction to the current state of play in the relationship between the arbitration proceedings and the regular state court proceedings. Prior to the below described decision this correlation was considered as more or less friendly while the state courts were providing the stable background for the arbitral proceedings especially in the terms of their control and auxiliary functions over the arbitration.[1] The decision in the case Allianz SpA (formerly Riunione Adriatica di

[1] Rozehnalová, N.: Rozhodčí řízení v mezinárodním a obchodním styku, Praha: ASPI, 2008, 386, 978-80-7357-324-9.

Sicurta SpA) v West Tankers Inc (C-185/2007)[2] seems to be modifying this relationship and is actually pushing both types of procedures to become more hostile to each other while without any doubts strengthening the position of the state court proceedings.[3]

Prior to this famous decision, the ECJ was already dealing with the respective problem or at least with the interconnected issues in number of the cases - Mark Rich (C-190/89), Van Uden (C-391/95), Mostaza Ciaro (consumer protection and arbitration), Andrew Owusu (C-281/02), Euro Food Case (C-168/05), Turner v Grant (C-159/02) and a famous Gasser case.[4]

What is the factual background of the above mentioned West Tankers milestone in the jurisprudence of the ECJ? In August 2000 a vessel owned by West Tanker and chartered by Erg Petroli SpA collided in Italy with a jetty owned by Erg Petroli SpA and caused damage. The charter party was governed by English law and contained a clause providing for arbitration in London. Erg Petroli SpA claimed compensation from its insurers being that Allianz SpA and Generali Assicurazioni Generali SpA up to the limit of its insurance coverage and then commenced arbitration proceedings (based on the arbitration clause included in the contract) in London against West Tankers for the excess of the damage. West Tankers denied the liability for this damage caused by the respective collision. Alianz SpA paid Erg Petroli SpA the compensation under the insurance policies for the loss and then commenced proceedings in the Italian courts against West Tankers to recover the sums they have paid to Erg Petroli SpA (based on Allianz´s statutory right of subrogation conferred on them by the Italian Civil Code). In parallel West Tankers brought proceedings (in September 2004) before the English High Court seeking a declaration that the dispute between itself and Allianz SpA was to be settled by arbitration as specified in the arbitration agreements and an injunctions restraining Allianz SpA from pursuing any proceedings other than the arbitration and requiring Allianz SpA to discontinue the Italian court proceedings.[5]

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[2] [2009] 1 All E.R. [Comm] 435. For the online symposium devoted to this particular case and further details see: http://conflictoflaws.net/2009/west-tankers-online-symposium/.

[3] This case was heavily criticised by the arbitration community which was afraid of this becoming a dangerous precedent "Italian torpedo" with detrimental effects for the arbitration.

[4] List of the cases taken from a brilliant and comprehensive presentation on this topic, prepared by Luc Demeyre, Partner in Allen and Overy in Belgium. Presentation "EU Regulation 44/2001 and Arbitration" was prepared for the Heidelberg Summer Academy held in June 20, 2009.

[5] Ibid.

The request for a preliminary ruling of the ECJ was as follows: "It is consistent with EU 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 proceeding is in breach of an arbitration agreement?"[6]

When the European Court of Justice (hereinafter the ECJ) delivered its judgment on February 10, 2009 it was crystal clear that this judgment will evoke certain emotions while again revising the intersections between the arbitration and scope of the Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (hereinafter the Brussels I Regulation)[7]. The whole context is even more interesting while taking the current revision process of the Brussels I Regulation into account.[8]

The ECJ basically held that any sort of injunctions (in our case being that anti-suit injunctions) which prevented the parties pursuing a regular state court proceedings are incompatible with the Brussels I Regulation. The ECJ based this conclusion on its reasoning in the steps: application of the Brussels I Regulation and exclusion of the anti-suit injunctions from its scope.

Thus, an anti-suit injunction in arbitration proceedings is not acceptable under the European law. However the proceeding excluded from the scope of the Brussels I Regulation may have consequences that undermine the effectiveness of the respective Regulation (being that one of the key stones of European Private International law together with so called Rome I and Rome II Regulations) - this will be always the case where such proceedings prevent a court of another Member State from exercising its jurisdiction in line with rules included in Brussels I Regulation.

The reasoning developed in this case by the ECJ can be easily described as so called "subject-matter test". In order to determine whether the dispute falls within the scope of the Brussels I Regulation reference must be made

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[6] See www.curia.eu for all the jurisprudence of the ECJ and additional information.

[7] For the text of the Regulation see: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:HTML.

[8] For more details and specific issues that are currently discussed (the abolition of intermediate measures to recognise and enforce foreign judgments (exequatur) (Question 1); the operation of the Regulation in the international legal order (Question 2); choice of court agreements (Question 3); industrial property (Question 4); lis pendens and related actions (Question 5); provisional measures (Question 6); the interface between the Regulation and arbitration (Question 7); and other issues (Question 8)) see: http://conflictoflaws.net/2009/brussels-i-review-online-focus-group/.

solely to the subject-matter of the proceedings (being that in our case claim for damages and the preliminary issue concerning the applicability of arbitration agreement, including its validity - those issues comes according to the ECJ within the scope of the Brussels I Regulation).[9]

ECJ continued in this reasoning while emphasizing that the objection of lack of jurisdiction on the basis if the existence of arbitral agreement (including the question of the validity of such agreement) comes within the scope of the Brussels I Regulation, and it is therefore exclusively for that court to rule on that objection and on its own jurisdiction pursuant to Articles 1(2)(d) and 5(3) of this Regulation. Apart from limited exceptions included in Brussels I Regulation the Regulation itself does not authorize the jurisdiction of a court of a Member State to be reviewed by a different court in another Member State.

One should not forget about the international instruments regulation the law of arbitration, namely the New York Convention of Recognition and Enforcement of Foreign Arbitral Awards. This was also used by the ECJ, precisely while using the reference to the Article II(3) of the above mentioned convention. According to this Article "a court of the contracting state, when seized of an action in a matter in respect of which the parties have made arbitration agreement, that will, 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".

Based on these main arguments used by the ECJ, the court declared that: "is is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 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".[10]

To provide a complete analysis and sort of final conclusion of the described case, this also requires a proposals as to the practical solutions how to enforce the arbitration clauses for the future reference under the impression

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[9] For the details see the Report on accession of the Hellenic Republic to the Brussels Convention (a direct predecessor of the recent Brussels I Regulation).

[10] Despite of criticism which has been brought against this decision I do agree that the ECJ was comprehensively following its own reasoning in the previous cases (nevertheless, some in more and some in less convincing way) emphasizing and relying on the "effet utile" of the Brussels I Regulation and its main object: unification of the rules of conflict jurisdictions in civil and commercial matters and free movement of the court decisions within the Europe.

and bearing the mind the described attitude of the ECJ. These solutions can be divided into two main categories: preventive and responsive.[11]

Under the influence of this case there will be always a "guilty party" (the one violating the agreed arbitration agreement bringing the claims in front of the state courts) and the "innocent one" (which shall always wait for the final decision of this state court, determining its jurisdiction of the basis of the Brussels I Regulation, as to the validity and binding character of the respective arbitration agreement). The question naturally arising is to how the "innocent party" can be protected against such behavior of it's counterparty?

Separate undertakings of the parties not to initiate the court proceedings in contrary to existing arbitration agreements seems to be a relatively satisfactory preventive solution presuming that this will be supported by the existence of appropriate indemnity and/or liquidation damages clause incorporated in such an agreement to ensure maximum recovery of losses which will of course follow (at least from the time management perspective of the dispute).[12]

Among the responsive solutions one might find a very easy one: in case that the "innocent party" reasonably believes that its counterparty is about to commence the proceedings in front of a state court simply take an advantage of the Article 27 of the Brussels I Regulation and initiate the proceedings in one of the EU jurisdiction according to its own choice. This solution is a tricky one since firstly, the initially "innocent party" in fact becomes the "guilty" one and secondly, this goes directly against the intention of the European legislator in respect of predictability and legal certainty within the EU.[13]

Hopefully, the current revision process of the Brusselss I Regulation will make the relationship between state court proceedings and arbitration clearer and not even more complicated. At least it is an unique chance to do so!

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[11] Byford, N., Sarwar, A.: Arbitration Clauses After West Tankers: The Unanswerable Conudrum? Practical Solutions for Enforcing Arbitration Clauses. In: International Arbitration Law Review 3/2009, p. 29 et seq., Thomson Reuters (Legal) Limited.

[12] Ibid, p. 30.

[13] Ibid, p. 31.

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