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WEST TANKERS, THE HEIDELBERG REPORT AND THE PRINCIPLE OF COMPETENCE-COMPETENCE

The West Tankers case of the European Court of Justice has already been extensively discussed in connection with the feasibility of English anti-suit injunction. The importance of the judgment however goes much further. By condemning the English court's anti-suit injunction, it strikes a blow on the fine tuned relationship between arbitral tribunals and the courts and puts a finger on a soaring wound. The Heidelberg Report, which was issued before West Tankers was decided by the ECJ, touches on the same issue. It vigorously ignores the principle of competence-competence. But it may nevertheless contain a solution to the problem which West Tankers made obvious. The article deals with the question whether or not the solution proposed by the Heidelberg Report would be an advancement and would further and promote arbitration as the primary tool for the resolution of international commercial disputes within the European Union.

Key words: *Competence-competence – Anti-suit injunctions – Heidelberg Report – West Tankers – Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*

1. INTRODUCTION

The West Tankers case[1] has been extensively discussed in connection with the English anti-suit injunction, the issuance of which gave rise to that case. Much more can be found in West Tankers though. By condemning the English court's anti-suit injunction, it strikes a blow on the fine tuned relationship between arbitral tribunals and the courts and puts a finger on a soaring wound. The Heidelberg Report, which was issued before West

[1] ECJ, Allianz SpA and another v. West Tankers Inc., Case C–185/07 (2009).

Tankers was decided by the ECJ[2], touches on the same issue. Vigorously ignoring the principle of competence-competence, it may nevertheless contain a solution to the problem which West Tankers made so obvious.

2. WEST TANKERS

In August 2000 a meanwhile notoriously well-known vessel, the *Front Comor*, collided with a jetty in Siracusa, Italy. The owner of that vessel was West Tankers Incorporated. The jetty which, obviously, was seriously damaged, was owned by ERG Petroli SpA which, by coincidence, was not only the owner of the jetty but had also chartered the Front Comor.

The Charter Party contained an arbitration clause with the place of arbitration in London.

A part of ERG's loss was covered by insurance and, seeking recovery of the rest, ERG initiated arbitration proceedings in London based on the arbitration clause in the Charter Party. The insurance companies which had covered a part of ERG's loss also sought redress from West Tankers. However, in ignorance of the arbitration clause in the Charter Party, they seized an Italian court in Siracusa where they initiated litigation against West Tankers. And this is where the problem began.

West Tankers clearly preferred English arbitration to Italian courts and, in reliance on the arbitration clause, applied for an interim injunction from an English court against the insurers which would order them to stop the Italian litigation and to initiate arbitration proceedings instead, should they wish to enforce their purported claims.

The case was finally brought before the ECJ which found that decisions on the existence and validity of arbitration agreements fall within the scope of Regulation 44/2001 and, consequently, that related anti-suit injunctions are not permissible within the European Union.

None of this was very surprising. The judgment of the ECJ nevertheless caused great consternation, particularly in the UK but also outside the United Kingdom.

Why is that so? Although the West Tankers decision may well have been seen as an outrage by English lawyers, the abolition of anti-suit injunctions alone hardly seems to be that important for the rest of the world. Much more important, however, the ECJ's West Tankers Judgment put the finger on a soaring wound. It put the finger on an issue which – although of greatest importance – has never been resolved entirely or adequately.

[2] European Court of Justice.

3. THE ISSUE AT HAND

It is important to remember that – based on the West Tankers Judgment – the Italian court was free to proceed and to decide on the validity of an arbitration agreement which itself called for arbitration in London. From the perspective of West Tankers – and from the perspective of the arbitration community – this is indeed far less than ideal. In fact, it should not happen that way.

West Tankers and ERG had agreed on arbitration in London and, let us at least assume this for a moment, the insurers were bound by that clause. Therefore, in the first place, it should be an arbitral tribunal which decides on the validity of that arbitration clause.

Secondly, maybe the decision of the arbitral tribunal should be controlled by the courts. But these should be the courts at the place of arbitration. Never should an Italian court decide on the validity of an arbitration agreement which designates London as the place of arbitration.

The result of the chain of events which started with the collision of the *Front Comor* with the Italian jetty is so much contrary to the most fundamental principles of international arbitration that one might wonder whether the *Fromt Comor* sank only a jetty or even the whole system of international arbitration in Europe. Well, that system might not immediately sink but there is imminent danger of lasting and severe damage.

Clearly, this is neither the fault of the ECJ nor the fault of the Advocate General who was so heavily criticised for her Opinion which she delivered on 4 September 2008.[3] This criticism just does not hold water.

4. THE ADVOCATE GENERAL'S OPINION

The Advocate General rightly referred to Art II(3)[4] of the New York Convention which requires national courts to refer the parties to arbitration only where the court seized finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The Advocate General thus rightly found that,

> *" ... it is consistent with the New York Convention for a court which has jurisdiction over the subject-matter of the proceedings under Regulation No 44/2001 to examine the preliminary issue of the existence and scope of the arbitration clause itself. Article II(3) of the New York Convention re-*

[3] *See* the Opinion of Advocate General Kokott in ECJ, case C–185/07 *West Tankers* (2009).

[4] *See* Art II(3) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York" Convention).

quires national courts to refer the parties to arbitration only under three conditions:

- *the subject-matter of the dispute is actually capable of settlement by arbitration. If that is not the case, under Article II(1) of the New York Convention the Contracting State (and its courts) are not required to recognise the arbitration agreement;*
- *the court of a Contracting State is seized of an action in a matter in respect of which the parties have made an agreement within the meaning of that article;*
- *the court seized does not find that that agreement is null and void, inoperative or incapable of being performed."*

And further,

"Every court seized is therefore entitled, under the New York Convention, before referring the parties to arbitration to examine those three conditions. It cannot be inferred from the Convention that that entitlement is reserved solely to the arbitral body or the national courts at its seat. As the exclusion of arbitration from the scope of Regulation No 44/2001 serves the purpose of not impairing the application of the New York Convention, the limitation on the scope of the Regulation also need not go beyond what is provided for under that Convention."[5]

What could be held against that? Although heavily criticized, the reasoning of the Advocate General does not appear to be beside the point. The problem which we face here has not been created by the West Tankers judgment. The ECJ just made it visible in a particularly disenchanting way.

5. THE EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION AND THE UNCITRAL MODEL LAW

As so often if confronted with seemingly hopeless situations, one would be tempted to turn to the European Convention on International Commercial Arbitration for help. But not even the European Convention can be of much assistance here.

The Convention deals with a situation where arbitration proceedings are initiated before a state court is seized: In that case, the arbitrator whose jurisdiction is called in question is entitled to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement subject – only – to subsequent judicial control provided for under the lex fori. The court seized after arbitration proceedings have

[5] *See* the Opinion of Advocate General Kokott in ECJ, case C–185/07 *West Tankers* (2009) at paras. 55, 56.

been initiated shall stay its ruling on the arbitrator's jurisdiction until the arbitral award is made – unless it has good and substantial reasons to the contrary.[6]

So far, so good. At least this situation can be remedied by applying the European Convention.

However, even according to the European Convention, as long as one of the parties seizes a national court before arbitration proceedings are initiated, the court is free to decide on the existence and the validity of the arbitration agreement.

Not even the UNCITRAL Model Law, where it is incorporated, provides a remedy in such a case: According to its Article 8(1), a court before which an action is brought which is subject of an arbitration agreement shall refer the parties to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Again, it is in the competence of the court to decide on the validity of the arbitration agreement. Most importantly, court here means any court rightly seized according to its domestic law; not just the court at the place of arbitration.

Of course, this result cannot be applauded. It is not what the international arbitration community wants and it is also not what the parties want; at least before one of them starts seeking for possibilities to derail the process because it fears that it might lose the case. So why do we arrive at such an unpleasant and unwelcome result?

6. THE PRINCIPLE OF COMPETENCE-COMPETENCE

The doctrine of competence-competence should not allow for such an outcome:

> *"[It] ... provides, in general terms, that international arbitral tribunals have the power to consider and to decide disputes concerning their own jurisdiction*."[7]
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> *"[It is] ... the power of the arbitral tribunal to decide upon its own jurisdiction*."[8]
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> *"[It is] ... t]he fact that arbitrators have jurisdiction to determine their own jurisdiction*."[9]

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[6] *See* Art V(3) European Convention on International Commercial Arbitration.

[7] G. B. Born, International Commercial Arbitration, 2009, 853.

[8] A. Redfern, M. Hunter, Law and Practice of International Commercial Arbitration, 2004[4], 252.

[9] E. Gaillard, J. Savage, Fouchard, Gaillard, Goldman On International Commercial Arbitration, 1999, 395.

And it is recognized by all developed national legal systems. But, as Borne put it,

> *"[d]espite this broad international acceptance of the competence-competence doctrine, there is almost equally broad disagreement and uncertainty concerning the doctrine's precise scope and consequences. With remarkable and unusual diversity, leading legal systems take substantially differing approaches to the arbitral tribunal's competence-competence and to the related allocation of jurisdictional competence between arbitrators and national courts*."[10]

Hence unfortunately, the doctrine of competence-competence is not always, and, in fact, very rarely what it appears to be at first sight. It is not only one of the most important, it is also one of the most contentious rules of international arbitration.

To borrow from Gaillard and Savage,

> *"[i]t has given rise to much controversy and misunderstanding, and behind the appearance of unanimity – most laws now recognize the principle in some form – it continues to be the subject of considerable divergence between different legal systems*."[11]

If we take a closer look, we can see that (at least) in most jurisdictions, it is not the arbitrators who ultimately decide on their jurisdiction. At best, they decide first and subject to further judicial control. Not even in Germany, which gave the name *Kompetenz Kompetenz* to the principle at hand, the arbitral tribunals have ever had the last word.[12] Rather, the tribunals have the first say and the courts will control afterwards. This is how it is understood in most places.

So what happens if one of the parties addresses a court, perhaps purporting that the arbitration clause in the contract is invalid. In that case, we have to distinguish:

Where arbitration proceedings are initiated first and later on one of the parties seizes a court, the European Convention, where applicable, comes to help: The court, in principle, will have to stay its proceedings. But where one of the parties manages to initiate court proceedings before the other party could file for arbitration, in most cases, it will be the courts, in the first place, to decide on the validity of the arbitration agreement. And even worse, it will be any court that has jurisdiction based on its domestic law or – in Europe – based on Regulation No 44/2001. This is where the principle of competence-competence, as it is understood in many jurisdictions, is not of great help. Regardless of that principle, a

[10] G. B. Born, 853.

[11] E. Gaillard, J. Savage, 395.

[12] For the German principle of *Kompetenz Kompetenz cf., e.g.,* R. A. Schütze, *Schiedsgericht und Schiedsverfahren*, 2007[4], 75,at nos.136 *etc*.

court will decide first; and the parties cannot even know in advance which court that will be. This is where help is most needed.

7. THE HEIDELBERG REPORT

The Heidelberg Report[13], delivered by Professor Hess, Pfeiffer and Schlosser in September 2007, perhaps, could point into the right direction. It depends on whether one prefers to see the glass half full or half empty.

The report suggests the elimination of the arbitration exception from Regulation 44 so that

> *"... accordingly, a (declaratory) judgment on the validity of an arbitration agreement could be recognized under Article 32 JR. The danger of conflicting decisions on the effectiveness of arbitration agreements would be diminished*."[14]

And further,

> *"... the position of a party relying on the validity of ... [an arbitration clause] would be reinforced, in cases where the decision of a civil court confirmed the validity of the agreement because such a decision would be recognised under Articles 32 et seq. JR in all Member States and prevent the courts in other member States from hearing the case on the merits*."[15]

It suggests that the courts of the place of arbitration should be the ones to decide on the validity of the arbitration agreement. As the rapporteurs put it,

> "*The proposition ... presupposes that a device could be developed for the purpose of discouraging, obstructing or frustrating litigation. This device should be as effective as an English anti-suit injunction or the French doctrine of the negative effect of the competence-competence. An international arbitration agreement protects both parties from being sued in any ordinary jurisdiction. Proper performance of such an agreement can only be enforced by safeguarding that a party of an arbitration agreement is not in fact compelled to defend a lawsuit in an ordinary court, particularly in a "foreign" one. The aim could be realized by protecting arbitration agreements in a similar way as proposed here in view of jurisdiction agreements. Court proceedings are to be stayed once proceedings for declaratory relief regarding the binding effect of an alleged arbitration*

[13] B. Hess et al, The Brussels I Regulation 44/2001 Application and Enforcement in the EU, 2008, (the "Heidelberg Report").

[14] *Ibid.* at no. 122.

[15] *Ibid.* This, as it looks, will not even require an amendment of the Regulation; West Tanker has already clarified the issue.

agreement are instituted in the country of the place of the arbitration in due time (to be decided by the court seized)."[16]

Any other court seized by one of the parties shall stay the proceedings once the court at the place of arbitration is seized for a declaratory relief in respect of the existence, the validity, and/or scope of the arbitration agreement (No 123, 134).

The authors were quite aware of the ramifications of their proposal. As they state,

"*the proposed formulation would also entail the so-called competence-competence of the arbitral tribunal ... a concept which is differently applied in the Member States. Last, but not least, ... [it] would entail that arbitration directly became a matter of Community law and replaced the autonomous concepts in the Member States. Accordingly, harmonisation of international arbitration might be considered as a severe intrusion into the procedural culture of the Member States*."[17]

And indeed it was.[18]

It is true that the Heidelberg Report seems to ignore the principle of competence-competence. But at least it clearly gives the last word to the court at the place of arbitration; which is already a lot. In combination with the respective provisions of the European Convention, this could be a big step forward.

As the Green Paper of the European Commission claims,

"... a (partial) deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings. As a result of such a deletion, court proceedings in support of arbitration might come within the scope of the Regulation. A special rule allocating jurisdiction in such proceedings would enhance legal certainty. For instance, it has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the Member State of the place of arbitration, possibly subject to an agreement between the parties.

...

Next, a deletion of the exception might allow the recognition of judgments deciding on the validity of an arbitration agreement and clarify the recognition and enforcement of judgments merging an arbitration award. It might also ensure the recognition of a judgment setting aside an arbitral award. This may prevent parallel proceedings between courts and arbitral tribunals where the agreement is held invalid in one Member State and valid in another.

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16 *Ibid.* at no. 123.

17 *Ibid.* at no. 126.

18 E.g., see the discussion at *http://conflictoflaws.net/2009/brussels-i-review-interface-with-arbitration/*

More generally, the coordination between proceedings concerning the validity of an arbitration agreement before a court and an arbitral tribunal might be addressed. One could, for instance, give priority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement. This might again be combined with a strengthened cooperation between the courts seized, including time limits for the party which contests the validity of the agreement. A uniform conflict rule concerning the validity of arbitration agreements, connecting, for instance, to the law of the State of the place of arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another. This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II(3) New York Convention. "

Whether or not one is inclined to welcome this proposal will very much depend on the starting point of the critic. Departing from the proposition that the competence-competence principle (in its most pure form) shall be upheld (or rather one would have to say, introduced, since it does not seem to apply anywhere), the proposals of the Commission must be considered a most unwelcome setback. But, if that is the case, the introduction of competence-competence (again, in its purest form) is something to for with or without West Tankers, and with or without the propositions brought forward in the Heidelberg Report. If, on the other hand, one would prefer to see the glass half full, than the Heidelberg Report may well be seen as a step in the right direction. In other words: Starting from what we have now, it seems to be fair to say that the Heidelberg Report's proposal would be an improvement. It would probably not lead to a perfect world. But then again, who could ever expect to live in a perfect world?