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Litigation & Arbitration Group Client Alert: Is this the end of the 'Italian Torpedo'?

Last week, a prominent former ECJ judge, Mr. Melchior Wathelet, who now sits as one of nine Advocates General that issue opinions on matters before the ECJ, cast doubt on whether the decision in *West Tankers*[1] is an accurate interpretation of the Brussels I Regulation (44/2001) (the "**Regulation**").

By way of brief reminder, in 2009, the ECJ held in the *West Tankers* case that it would be inconsistent with the Regulation for the English courts (or, indeed, the Court of any Member State) to issue an anti-suit injunction staying court proceedings that had been started in another Member State (in *West Tankers*, the relevant jurisdiction was Italy), in breach of an agreement to refer all disputes between the parties to binding arbitration.

The decision was controversial because it had been commonly understood that arbitration was excluded from the scope of the Regulation's requirement on Member States to stay any proceedings that involve the same cause of action, and the same parties, if proceedings had already been initiated in another Member State. Therefore, the concern amongst the arbitration community was that the *West Tankers* decision would effectively legitimise, in the EU, the 'Italian Torpedo' tactic - stalling and frustrating arbitration proceedings by initiating proceedings in the Courts of another Member State, knowing that the Court in question may take a significant amount of time to decide the issue of which forum has jurisdiction.

The arbitration community in England and Wales has since sought to overcome this problem by a number of different means, including:

- seeking declaratory relief from the English courts,[2] or the Tribunal, at an early stage of the dispute;

1 West Tankers Inc v Allianz SpA (formerly RAS Riunione Adriatica di Sicurta) (Case – 185/07, [2009] 1 AC 1138

2 See, for example, the decision in Toyota Tsusho Sugar Trading Ltd v Prolat SRL [2014] EWHC 3649, where the English courts granted declaratory relief in support of an arbitration agreement, notwithstanding that proceedings had been started in the Italian courts.

- seeking an award of damages from the Tribunal for breach of the arbitration agreement (to the value of any adverse judgment and legal costs in the foreign proceedings); and/or

- pursuing the arbitration and seeking enforcement of any Arbitral Award, notwithstanding the ongoing foreign proceeding.

However, Mr. Wathelet's opinion appears to confirm that (i) a further option is currently available - requesting an anti-suit injunction from the Tribunal; and (ii) more significantly, that the Regulation was never intended to prohibit Courts from granting anti-suit injunctions in support of arbitral proceedings.

The opinion followed a request, from the Lithuanian Supreme Court to the ECJ, for clarification as to whether it should refuse to enforce an arbitral award containing an anti-suit injunction against proceedings that, in breach of an arbitration agreement, had been started in the Lithuanian courts.

Mr. Wathelet's view was that:

- the Regulation does not require Member States to refuse to recognise an anti-suit injunction issued by an arbitral tribunal; and

- the public policy grounds in the New York Convention (relating to the recognition and enforcement of arbitral awards) did not apply.

Mr. Wathelet reasoned that the recast Regulation, which is due to come into force on 10 January 2015, contains preamble which makes clear that neither the current nor the recast Regulation is intended to apply to an action or ancillary proceeding relating to an arbitration, including anti-suit injunctions issued by a tribunal in support of arbitration, and, more controversially, by national courts – thus implying that *West Tankers* had not been decided correctly.

What is the practical effect of this? If the ECJ does endorse Mr. Wathelet's opinion (and it is by no means bound to do so), then the days of the 'Italian Torpedo' may be numbered as arbitration would, once again, fall outside the scope of the Regulation. If that happens, from January 2015 (and, on Mr. Wathelet's wider interpretation, currently), parties should be able to restrain counterparties from starting proceedings in other Member States in breach of an arbitration agreement either by seeking an anti-suit injunction from the Tribunal or, in contrast to the *West Tankers* decision, from the national courts.

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