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Recent developments in international arbitration

Gary B Born
Wilmer Cutler Pickering Hale and Dorr
London

The past year has had its challenges for international arbitration, as for other things, on both sides of the Atlantic. From the opinion of the European Court of Justice in the *West Tankers* case and proposed amendments to the Brussels Regulation, to the proposed introduction of changes to the Federal Arbitration Act in the US, international arbitration has faced a variety of detractors. Fortunately, these challenges are not as daunting as they initially might appear, and there is little doubt that arbitration remains – and will continue to be – the best and most efficient forum in which to resolve the majority of international commercial disputes.

In one of the most widely reported developments in international arbitration this year, the European Court of Justice determined in February, in the case of *Allianz SpA v West Tankers* (Case C-185/07, ECJ, February 10 2009), that anti-suit injunctions granted to restrain proceedings in the courts of another Member State brought in breach of an arbitration agreement are incompatible with the Brussels Regulation. The rationale for this ruling is that such injunctions constitute an unwarranted interference in the jurisdiction of the national courts of Member States seized of an action. This decision has caused widespread condemnation and concern in the international arbitration community in Europe, and concerns about Europe's continued desirability as a seat for international arbitrations.

Another notable development to come out of Brussels this past year is the proposal to amend certain aspects of the Council Regulation No 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the Brussels Regulation). Notwithstanding the Green Paper's recognition that the "1958 New York Convention is generally perceived to operate satisfactorily and is appreciated among practitioners," it nevertheless suggests that "a partial deletion of the exclusion of arbitration from the scope of the Regulation might improve the interface of the latter with court proceedings." This also has caused concern among arbitration practitioners.

In a not completely dissimilar vein on the other side of the Atlantic, the United States House of Representatives recently introduced the Arbitration Fairness Act of 2009 (HR 1020) and the Consumer Fairness Act of 2009 (HR 991). These bills, which are similar to unsuccessful legislation introduced in the past, would limit the ability to arbitrate certain consumer, employment, and franchise disputes, as well as disputes arising under statutes designed to protect civil rights. Other provisions would alter long-standing US treatment of issues of separability and competence-competence.

A final area of concern to parties involved in arbitrations that has received much attention this year is how one party's insolvency may affect the arbitral proceedings and what law governs this question. In Europe, the answer can be found in Article 15 of the Council Regulation on Insolvency Proceedings (No 1346/2000), which provides that the effects of insolvency on one party to "*a lawsuit pending*" (which would include an arbitration) are to be determined by the laws of the Member State in which that proceeding is sited. This year, the English Court of Appeal, in the case of *Syska (acting as the administrator of Elektrim SA (in bankruptcy)) and another v Vivendi Universal SA and Others* [2009] EWCA Civ 677, confirmed that Article 15 is not in conflict with Article 4 (which provides that the effects of a company's insolvency are to be determined by the law of the Member State in which the insolvency proceedings are opened), as Article 4(2) expressly exempts from that provision "*lawsuits pending.*" As a result, if a party to an arbitration becomes insolvent during the course of the arbitration, the effect of that insolvency will be determined by the law of the seat of the arbitration.

Do the developments described above pose a challenge to the future of international arbitration? Although predictions are risky, the answer is likely not.

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While the decision in *West Tankers* rightly has been the cause for some concern, it does not herald the end of anti-suit injunctions altogether, much less irreparable damage to Europe as an arbitral seat. For example, where court proceedings are commenced outside the EU, anti-suit injunctions remain available as ever, as demonstrated by the English Commercial Court in *Shashoua & Others v Sharma* [2009] EWHC 957 (Comm), which granted an injunction to restrain proceedings commenced in a Delhi court in breach of an arbitration agreement.

Likewise, courts in Europe have confirmed that arbitration agreements are to be given the recognition and primacy to which they are entitled under the New York Convention, notwithstanding the decision in *West Tankers*. In *National Navigation Co v Endesa Generacion SA* [2009] EWHC 196 (Comm), for example, an English court held that it was not bound by the judgment of a Spanish court and upheld an agreement to arbitrate. In a case involving complex facts, the Spanish court had found that an agreement to arbitrate was not enforceable and went on to consider the substantive issues in dispute (issues that therefore fell within the Brussels Regulation). The English court – asked to consider the enforceability of the same arbitration agreement – determined that the question of the enforceability of an arbitration agreement fell outside the scope of the Brussels Regulation (under Article 1(2)(d)) and that it therefore was not bound to follow the judgment of the Spanish court. The English court also went further, suggesting that even if it was wrong as to the obligation to recognise the Spanish court judgment, it would still be bound to uphold and enforce the arbitration agreement in accordance with the New York Convention and, therefore, as a matter of public policy.

The English court's decision in *National Navigation Co* is in line with an American decision from this year, *Genesis of Kentucky, v Creation Ministries Int'l Ltd* 556 F3d 459 (6TH Cir 2009). In this case, the US Court of Appeals of the Sixth Circuit confirmed its power to compel arbitrations under Chapter 2 of the Federal Arbitration Act, notwithstanding prior proceedings brought in relation to the same matter in Australia. The court also posed an interesting question for future courts as to whether it ever would be appropriate for a US court to refuse to compel arbitration given the mandatory language regarding arbitration in the New York Convention. As can be seen from this decision, national courts on both sides of the Atlantic, therefore, remain committed to their obligations under the New York Convention.

A further chink in the apparent armour of *West Tankers* – and a distinct advantage of arbitration over court proceedings – is that a Tribunal is not obliged to stay arbitral proceedings, even if there is a competing court action that arose first in time. In such an instance, the Tribunal may proceed to make its award, which may include an award of damages for breach of the arbitration agreement caused by bringing the court proceedings (see in this regard *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm)). The issue then becomes one of enforcement, and it remains to be seen whether national courts or the ECJ will close off that avenue as well.

That said, *West Tankers* does appear, for the time being, to prevent anti-suit injunctions against proceedings in other EU jurisdictions, including when those proceedings are brought in violation of valid international arbitration agreements. That prohibition will not encourage, but instead likely have some incremental deterrent effect, on the selection of European arbitral seats. The real answer to what lies ahead for arbitration in Europe following *West Tankers* lies in the outcome of the consultation on the proposed amendments to the Brussels Regulation. While the Green Paper contains a worrisome indication of an intention to further limit the scope of arbitration, the consultation on those proposals has elicited many authoritative and detailed responses from leading members of the arbitration community, and it is to be hoped that their knowledge and understanding of arbitration and its importance as the dispute resolution mechanism of choice for most leading international corporations will win the day. Only when that process is completed, however, will it be clear whether and how EU regulation will affect the hitherto privileged position of international arbitration in Europe.

Similarly, in the US, the proposed amendments to the Federal Arbitration Act stand a better chance now than ever before of passing, as President Obama co-sponsored as a senator several pieces of anti-arbitration legislation and the Democrats now control both the executive and legislative branches of the US government. However, this legislation does not cover traditional disputes between sophisticated commercial parties, and the language of this legislation may be altered to reduce its potential impact on the separability and competence-competence doctrines. More importantly, it appears very likely that any legislation will exclude international commercial arbitration subject to the New York and Inter-American Conventions.

We can return to our original question: Do the challenges presented by the decisions and developments of the past year pose a serious threat to international arbitration as a preferred means of resolving international commercial disputes? Although there are no grounds for complacency, the answer for now appears not.