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"Damn the Torpedoes"

Protecting English arbitration after *The Front Comor*

Michael McParland[1]

Introduction: a long time coming

1. The decision of the ECJ in Case C-185/07 ***Allianz SpA v. West Tankers Inc*** (***The "Front Comor"***)[2] confirmed that English courts no longer have the power to grant anti-suit injunctions to restrain a party to an English arbitration agreement from litigating in EU / EEA courts.

2. The ECJ's ruling in ***The Front Comor*** should not have come as a surprise to anyone looking at the Brussels Convention and now the Judgments Regulation through the eyes of civilian lawyers.

3. I had previously argued that anti-suit injunctions were incompatible with the Brussels Convention in both arbitration and litigation proceedings in two cases heard in October 2000 by Mr Justice Aikens.[3] These cases are reported as:

   (a) ***The Ivan Zagubanski*** [2002] 1 Lloyds Rep. 106, (arbitration); and

   (b) ***The Kribi*** [2001] 1 Lloyd's Rep. 76 (jurisdiction).

4. In both cases, my arguments regarding the incompatibility of anti-suit injunctions with the Brussels Convention scheme failed and anti-suit injunctions were granted.

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[1] Barrister, Attorney-at-Law, State Bar of California, Barrister, the British Virgin Islands. A Member of the Chartered Institute of Arbitrators.

[2] [2009] 1 Lloyd's Rep. 413.

[3] As he then was.

5. The basis of ***The Kribi*** and ***The Ivan Zagubanski*** were effectively overruled by the subsequent ECJ decisions, C/116/02, ***Erich Gasser GmbH v. Misrat srl*** [2003] ECR I-4693; C/159/02 ***Turner v. Grovit*** [2004] ECR I-3565, and ***The Front Comor***. Both cases however, now represent clear examples of factual scenarios that are likely to be repeated in the light of those ECJ decisions.

6. In England, the judgments in ***The Ivan Zagubanski*** and ***The Kribi*** were greeted enthusiastically by commentators. However, after the ECJ's decisions in ***Gasser*** and ***Turner***, Sir Peter Gross, revisited ***The Ivan Zagubanksi*** in a lecture and article entitled "*Anti-suit injunctions and arbitration*".[4] His Lordship correctly anticipated the dangers for the anti-suit injunction in European cases, and noted that my rejected arguments in ***The Ivan Zagubanski*** were "*redolent of the reasoning subsequently found in Turner v. Grovit before the ECJ*". His Lordship correctly foretold that the issues raised in ***The Ivan Zagubanski*** would come back before English courts relating to arbitration agreements.

7. Indeed, they did, and the Court of Appeal fought a determined rear-guard action in ***Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No.1)***[5] approving the reasoning in ***The Ivan Zagubanski***. Furthermore, when ***The Front Comor*** came before the House of Lords, their Lordships took the unprecedented step of advising the ECJ on the best way to decide the point they were referring to them. The Lords were supported by Dicey, Morris & Collins (14th Ed), para. 16-093)[6] which argued that:

> "*... If the matter is referred to the European Court it is hoped that it will reach the same conclusion as the Court of Appeal in the* ***Through Transport*** *case.*"

8. ***The Front Comor*** put paid to those hopes.

9. The reason why ultimately that is the ECJ adopts an entirely different approach to jurisdictional questions. For English lawyers and judges, the grant of an anti-suit injunction was simply an issue of holding parties to their contractual bargains and not

4 Sir Peter Gross was giving an extra judicial lecture to the London Common Law and Commercial Bar Association on 19 May 2004, which was subsequently published in the LMCLQ [2005] p.10.

5 [2004] EWCA Civ 1598; [2005] 1 Lloyd's Rep. 67.

6 Chapter 16 is written jointly by Lord Collins of Mapesbury and Professor Campbell McLachlan.

an attempt to interfere with the functioning of another Member State's courts, or pre-empting their own decisions on its own jurisdiction. But for civilian lawyers and courts, it was the effect of such orders on the jurisdictional scheme created by the Brussels Convention / Regulation, rather than its effect on individual litigants, that was the real issue. The ECJ sees issues of jurisdiction in public law (rather than private law) terms, and questions of compliance with the jurisdictional schemes created are solely the responsibility of the national court whose jurisdiction has been invoked.[7]

10. It is has been rightly said that "... *civil lawyers are more concerned with the structure of the law, common lawyers with its operation*",[8] and this is never more evident than in the ***Gasser, Turner*** and ***The Front Comor*** decisions.

Dealing with the new reality: know your enemy

11. The consequence of the determined defence of the principles set out in ***The Ivan Zagubanski*** and other cases has left English law and lawyers relatively unprepared for how to deal with the position after ***The Front Comor***. What do we face?

"The Italian Torpedo"

12. The ***Front Comor*** itself provides a good point of departure. At heart it is simply an example of the "torpedo" litigation strategy which originated in intellectual property actions, and has its spiritual home in Italy: see Franzosi, "*Worldwide Patent Litigation and the Italian Torpedo*".[9]

13. Snr Franzosi's article encouraged potential defendants in patent infringement cases to protect themselves by bringing proceedings for a declaration of non-liability in Italy, and thereby delay any claims by alleged victims. Since the ECJ had ruled[10] that the object of a request for a negative declaration is the same as an action for damages or for an order

[7] See Prof. A. Briggs, "*The Impact of Recent Judgments of the European Court on English Procedural Law and Practice*", Zeitschrift fur Schweizerisches Recht (2005) II 231-262, at 242.

[8] See T. Hartley, "*The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws*", 2005 (54) ICLR 813, 814.

[9] [1997] 7 E I P Rev 382.

[10] C-144/86, ***Gubisch v. Palumbo***, ECR 4905, 4917.

restraining the alleged infringement, any infringement proceedings that are brought in other European countries subsequent to the negative declaration action are stayed under what is now Article 27 of the Judgments Regulation. Only the court first seised can decide questions relating to its own jurisdiction.[11] Snr Franzosi called this stratagem, the "*Italian Torpedo*". Some people have also accorded Belgium a similar accolade.

14. The Torpedo has resulted in multiple negative declaration actions throughout Europe as a defensive measure in infringement cases: see e.g. The ***Boston Scientific v. Johnson & Johnson*** dispute.[12] It has produced some particularly brazen examples in Germany.

15. At its core, the Italian Torpedo depends for its effectiveness on the existence of endemic delay in Italian litigation. For an example of the delay in a classic Italian jurisdiction dispute arising out of an English law and jurisdiction clause in a bill of lading, see the decision of the ECJ in ***Trasporti Castelletti v. Hugo Trumpy***.[13] However, the scale of such unreasonable delay and the scope for unscrupulous litigants taking advantage of the same has not influenced the ECJ in its interpretation of the Brussels Convention or the Judgments Regulation: see ***Gasser GmbH v. Misat Sàrl***.

16. The effectiveness of the Italian torpedo in patent cases may have been reduced by subsequent cases before the ECJ[14] and in the Italian Supreme Court[15] and even in

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[11] Article 27 of the Judgments Regulation provides that:

"1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court".

[12] Discussed in detail in Matthias Zigann, "*Entscheidugen inländischer Gerichte über ausländische gewerbliche Schutzrechte und Urheberrechte*" (Munich, 2002), p. 13 ff. For the related English action see ***Palmaz's European Patents (U.K.)*** [1999] R.P.C. 47 (Pumfrey J.). In fact the two patents were held to be invalid and revoked.

[13] Case C-159/97, [1999] ECR I-1597 (ECJ).

[14] C-539/ 03, ***Roche Nederland BV v. Primus*** [2006] ECR I-6535; [2007] I.L. Pr. 9; [2007] F.S.R. 5.

[15] See ***BL Machine Automatiche v. Windmöller & Hölscher***, 19 December 2003; [2004] I.L. Pr. 19; Steinbrück (2007) 26 CJQ 358, 373 n 99.

Belgium.[16] But, as the Court of Appeal[17] noted in ***Research in Motion UK Ltd v. Visto Corporation,***[18]

> *"…the torpedo is not completely spent. It still has some possibilities (or thought to have some) in it… Much ingenuity is expended on all this elaborate game playing. Despite the temptation to do otherwise, it is not easy to criticize the parties or their lawyers for this. They have to take the current system as it is and are entitled (and can only be expected) to jockey for what they conceive to be the best position from their client's point of view… Again a party who fires an Italian torpedo may stand to gain much commercially from it. It would be wrong to say that he is "abusing" the system just because he fires the torpedo or tries to. Things may be different if he oversteps the line (e.g. abuses the process of a court) but he cannot and should not be condemned unless he has gone that far".*

17. Whatever the improvements in intellectual property litigation, the "torpedo" remains alive and well in other commercial litigation areas. When launched it can seriously disrupt litigation involving an English jurisdiction clause: see e.g. ***J.P. Morgan Europe Ltd v. Primacom AG*** [2005] EWHC 508 (Comm); [2005] 2 Lloyd's Rep. 65.

Italian Torpedoes in arbitration proceedings?

18. Italian Torpedoes do not stop arbitration proceedings. There is nothing in the Regulation,[19] or indeed within ***The Front Comor*** or other ECJ decisions, which requires the arbitrators to *stay* the arbitration until a foreign court first seised of any dispute decides any question of jurisdiction or any jurisdictional challenge based on the arbitration agreement or the applicability of the agreement itself.

19. The arbitrators retain their rights under s. 30 of the Arbitration Act 1996 to determine their jurisdiction. They will be probably be asked by the party who is bringing the

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16 ***Roche v. The Wellcome Foundation***, February 20, 2001.

17 Mann, Mummery, Jacob L.J.J., who gave a single judgment.

18 [2008] EWCA Civ 153; [2008] I.L.Pr. 34, at paragraph [14]-[16].

19 Subject only to the possible application of a *res judicata* / issue estoppel issue discussed below.

foreign proceedings to stay the arbitration. If the tribunal refuses, they are entitled to proceed with the arbitration, unaffected by the terms of the Regulation: see e.g. ***Marc Rich & Co AG* v. *Societa Italiana Impianti PA,*** (*"The Atlantic Emperor "*) [1992] 1 Lloyd's Rep. 624.

A damp squib?

19. Indeed, in arbitration cases, depending on the country involved, in terms of causing delay some attempted torpedoes might end up producing a very damp squib.

20. For example, the current French practice is to stay proceedings in civil courts until the arbitral tribunal has decided on its competence (which is an example of so-called "*negative competence-competence*"): C. Cass., 6/26/2001, *Revue de l'arbitrage* 2001, 529; 11/16/2004, *Revue de l'arbitrage* 2005, 115; Bolléé, *Revue de l'arbitrage* 2007, 87.

21. Furthermore, French Courts have refused to make orders that might cause arbitrations to be stayed. The Tribunal De Grande Instance ("TGI"), for Paris had previously ruled that *"in no circumstance"*, and *"whatever the legal grounds invoked, has the court any power to order an arbitral tribunal to stay its proceedings*: TGI Paris, 24.6.2004, *LV Finance Group*, Rev. Arb. 2005, p. 103. In two cases in 2010 the same court has refused to grant orders restraining arbitrators from pursuing proceedings under article 809 of the French Code of Civil Procedure: see TGI, Paris, 6/1/2010, *S.A. Elf Aquitaine and Total v. Mattei, Lai. Kamara and Reiner*; and TGI, Paris, 29/3/ 2010, *Republic of Equatorial Guinea v Fitzpatrick Equatorial Guinea, de Ly, Owen and Leboulanger*.

22. The real danger, in France and elsewhere (particularly in shipping cases) is that an arbitration clause might not be held binding on a person to whom a bill of lading had been indorsed of transferred. There have been repeated problems with French decisions in this regard relating to jurisdiction disputes in respect of Article 23/ jurisdiction agreements: see e.g. Insurance Co of ***North America v. Soc Intramar*** [1999] ILPr 315; ***Hapag Lloyd Container Line GmBH v. La Réunion Européenne*** [2003] ILPr 779.

The real problem foreign court's rulings: issue estoppel / res judicata?

23. Thus, far more dangerous than any likely delay is if the court where the torpedo has been launched actually makes a declaratory ruling on the validity of the arbitration clause that undermines the English arbitration. This is particularly when this is a judgment that falls within the provisions of the Judgments Regulation.

24. The initial belief post ***The Front Comor*** among many commentators was that:

    (a) "[t]*he arbitrators will pay no attention to anything"*[20] which may be happening in the foreign court, and that

    (b) any judgment rendered by that court concerning the validity of the arbitration agreement would not be a Regulation judgment entitled to the benefit of recognition under the Regulation.[21]

25. These beliefs were misplaced. The Court of Appeal has now ruled that judgments of the foreign court first seised, in proceedings where the main subject thereof was within the Judgments Regulation, but which also involves a preliminary ruling as to the existence and the applicability of an arbitration clause, was itself to be categorised as Regulation judgment, and thus recognised under the provisions of Articles 32 following of the Regulation: see ***National Navigation Co v. Endesa Generaction SA*** ("***The "Wadi Sudr"***) [2009] EWCA Civ 1397 [2010] 1 Lloyd's Rep. 193.

26. The Spanish court judgment in ***The Wadi Sudr*** was held to be not "*manifestly contrary to public policy*" within the meaning of article 34(1) of the Regulation. If Endesa was entitled to challenge the incorporation of the arbitration clause into the bill of lading in the Spanish court and if the English court was bound to recognise the decision of the Spanish court there was not room for any argument that public policy was being infringed. The English court was precluded from examining itself whether the clause was incorporated. It was not contrary to public policy to recognise a judgment of a foreign court of competent jurisdiction simply on the grounds that an English court would have come to a different decision: ***The Wadi Sudr*** [62] & [125].

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[20] A. Briggs "*Fear and Loathing in Syracuse and Luxembourg- The Front Comor*" [2009] L.M.C.L.Q. 161, 165.

[21] See e.g. paragraph 7.08 of Briggs & Rees, "*Civil Jurisdiction and Judgments*" (5th Ed, (2009); and the third Supplement to Dicey, Morris & Collins (at paras 16-089-093),

27. To my mind, it is unfortunate that in the proceedings in ***The Wadi Sudr***, the English courts do not appear to have been referred to decisions in other European Countries on these matters. Certainly, in France, foreign declaratory judgments on the validity of an arbitration clause are not recognised under Article 32 ff of the Regulation, due to the French approach to the exclusion of arbitration from the Regulation: See e.g. C.A. Paris, 6/15/2006, Rev. Arb. 2007, 87 (annotation by Bollée). In Germany, a judgment declaring an arbitral award void or ineffective has been held to be not capable of recognition under the Regulation: See OLG, Stuttgart, 12/22/1986, RIW 1988, 480.

Issue estoppel

28. However, and perhaps even more dangerously, ***The Wadi Sudr*** emphasised that such rulings regarding the arbitration clause could create issue estoppels that were binding on the parties (and indeed courts) and which arbitrators, applying English law, would have to consider when they were determining their own jurisdiction: see "***The Wadi Sudr***" (supra), para. [59], [118]-[121].

29. As Lord Justice Moore-Bick observed (at [118] :

> *"... It is quite true that the Regulation itself does not apply to arbitral tribunals and that arbitrators are not therefore bound by the Regulation themselves to recognise judgments of the courts of member states of the EU, but it does not follow that foreign judgments, whether of the courts of member states or other countries, can be disregarded in arbitration proceedings. A judgment of a foreign court which is regarded under English conflicts of laws rules as having jurisdiction and which is final and conclusive on the merits is entitled to recognition at common law: see Dicey, Morris & Collins on the Conflict of Laws, 14th Edition, paras. 14-027 to 14-029. It follows, therefore, that arbitrators applying English law are bound to give effect to that rule. There is nothing new in this; it has long been recognised that a judgment of a foreign court can give rise to estoppels by res judicata—see, for example,* **The Sennar (No 2)** *[1985] 1 Lloyd's Rep 521—and the principle is routinely applied in arbitration proceedings*".

30. Thus, in accordance with traditional English law, even ruling that an English court would regard as erroneous rulings by the foreign court may give rise to binding res judicata / issue estoppels in arbitral proceedings.

31. Accordingly, the crucial thing that must be done now in the light of ***The Front Comor*** is that the arbitral tribunal must be appointed and a ruling on their jurisdiction made as quickly as possible. Even if you think the position should be obvious to the foreign court.

Obtaining release of vessels?

32. Often attached to anti-suit injunction orders in shipping cases are orders requiring vessels to be released and / or anti-re-arrest orders in cases where, despite London arbitration clauses, vessels have been arrested as security in support of foreign substantive proceedings.

33. Traditionally, where a respondent goes beyond seeking reasonable security for the arbitration proceedings, there is a breach of the arbitration clause which the English court will restrain by anti-suit injunction: See ***The Kallang (No 2)*** [2008] EWHC 2671 (Comm), [2009] 1 Lloyd's Rep. 124, at pages 139-140, paragraphs [75]-[78].

34. In such circumstances, it has proved possible to obtain orders (even without notice orders) requiring the discontinuance of the foreign proceedings and the release of a vessel from arrest upon provision of the Club LOU in support of the arbitration: see. e.g. ***The Kallang (No 2)*** [2008] EWHC 2671 (Comm), [2009] 1 Lloyd's Rep. 124, 130, [25]-[26]; and ***The Duden***" [2008] EWHC 2762 (Comm) [2009] 1 Lloyd's Rep. 145, 150 [23]-[25], (which both involved Senegal). I have obtained such orders in respect of Nigerian proceedings. However, in the light of ***The Front Comor***, although it is has not yet been formally decided, such powers will not be available in EU / EEA cases.

Conclusion on dangers of the Torpedo

35. Accordingly, the greatest danger that the Italian (or other European) Torpedoes poses to English arbitration, is that they might create a situation where a foreign court renders a judgment which English arbitrators determining their own jurisdiction might be required to take cognizance of as a matter of traditional English law on issue estoppel.

36. What can be done?

After *The Front Comor*

Non EU/ EEA Courts

37. If the foreign court where proceedings are issued is not within the E.U. and the E.E.A, then the traditional English arbitration anti-suit law practices are unaffected, even if the foreign country is a party to the New York Convention.

38. Arguments based on international comity in its various form in the aftermath of ***Turner v. Grovit*** that I raised in ***OT Africa Line Ltd v. Magic Sportswear Corp*** [2007] 1 Lloyd's Rep 85 (C.A.), were rejected in an English jurisdiction clause concept.

39. Subject to any successful appeal to the Supreme Court, in ***Midgulf International Ltd v. Groupe Chimique Tunisien*** [2010] EWCA Civ 66,[22] the Court of Appeal subsequently rejected the argument that ***The Front Comor*** has brought about a sea-change in arbitration cases, and as should an English court should refrain from granting anti-suit injunctions, at least if, the foreign country concerned is a party to the New York Convention.[23]

40. This remains the position even if the proceedings in the foreign court are of the declaratory kind, i.e. brought to seek a declaration challenging the validity of the arbitration agreement. In ***Midgulf International Ltd v.*** in proceedings in Tunisia in breach of an English arbitration clause, the defendant sought a declaration that a contract between the parties was not governed by an arbitration agreement, and subsequently also issued proceedings for damages for breach of the underlying contract. The Court of Appeal confirmed [at paragraph 52 of the judgment] that:

- Where there is a valid English arbitration agreement, it is repudiatory conduct for one of the parties to declare that there is no such agreement;

- Even if the declaratory action did not technically amount to a breach of the English contract, under English law the court may restrain a defendant over whom it has personal jurisdiction from instituting or continuing proceedings in a foreign court

[22] At paragraphs 67-69 of the judgment.

[23] See also the rejection of the New York Convention arguments by Cooke J. in ***Shashoua & Others v. Sharma*** [2009] EWHC 957 (Comm) [2009] 2 Lloyd's Rep. 376, (at paragraphs 35-39).

when it was necessary in the interests of justice to do so. A foreign declaratory action whose purpose was to undermine the efficacy of an English arbitration agreement, either by paving the way for preventing the enforcement of an arbitral award or by paying the way for continuing a damages claim or both, was regarded as an attempt "to bypass or derail" the arbitration agreement.

41. The relief sought will be under either s. 37 of the Senior Courts Act 1981 and / or s. 44 of the Arbitration Act: See ***Starlight Shipping Co v. Tai Ping Insurance Co Ltd*** [2007] EWHC 1893 (Comm) [2008] 1 Lloyd's Rep. 230.

42. When appropriate such orders can be made to prevent reference to foreign arbitral bodies, such as CAS: see e.g. ***Sheffield United Football Club Ltd v. West Ham United Football Club plc*** [2008] EWHC 2855 (Comm) [2008] 2 C.L.C. 741 (Teare J.).

43. Therefore for non EU / EEA Courts (and indeed arbitral tribunals), it is "*business as usual*". In my opinion, English courts are unlikely to allow any further in-roads into the position.

EU / EEA Court Proceedings

Using a third country to obtain an anti-suit injunction?

44. In serious circumstances, where only an anti-suit injunction might preserve the arbitral process, all hope of obtaining one may not be lost. If personal jurisdiction in a third country can be established over a recalcitrant party to an arbitration agreement, it might be possible to obtain an anti-suit injunction there which could achieve the same result. For example, in ***IPOC International Growth Fund Ltd v OAO CT Mobile*** [2007] Bermuda LR 43, the Court of Appeal for Bermuda upheld a decision to grant an anti-suit injunction in a dispute between parties whose contracts contained arbitration agreements for Sweden and Switzerland. In breach of those agreements, one of the parties, a Bermudan entity, brought proceedings before the Russian courts, which proceedings were designed to frustrate the outcome of the arbitration. The other parties sought and obtained anti-suit injunction.

45. Personal jurisdiction could be obtained on the basis of incorporation / domicile, over a large number of offshore companies in places like the BVI, the Channel Islands, the

Cayman Islands etc, who might be amenable to the exercise of such jurisdiction. It has even been argued that jurisdiction could be effectively conferred on a country in the original contract for the limited purpose of issuing anti-suit injunctions to support the arbitration award.[24]

46. How effective such third country orders prove to be will have to be seen.

Obtaining an anti-suit injunction from the arbitrator?

47. In theory, an arbitral tribunal might have power to grant an anti-suit injunction.

48. Under s. 48(5) (a) of the Arbitration Act 1996, one of the remedies available to an arbitral tribunal (irrespective of parties agreement) is that "[t]*he Tribunal has the same powers as the court—(a) to order a party to do or refrain from doing anything*". Unfortunately, despite the broad wording of s. 48(5) most commentators agree that s. 48 should be confined to final awards and to substantive remedies on the merits: see the discussion by Rix L.J. in ***Kastner v. Jason*** [2005] 1 Lloyd's Rep 397, 401, paragraph [16]. If correct, this will be mean that such orders might usefully be sought as party of the substantive remedies in the final award, and perhaps presented as a way to protect the award itself. However, that does not provide an interim remedy.

49. As regards interim orders, the parties might confer jurisdiction on the tribunal to issue anti-suit injunctions by way of provisional awards under section 38 (1)[25] and 39[26] of the 1996 Act either under the arbitration agreement or any institutional rules selected by the agreement.

50. If the correct circumstances, an anti-suit order might be made, perhaps requiring the recalcitrant party to stay the foreign proceedings pending the determination by the arbitrators of their own jurisdiction. This might be regarded as less offensive than the traditional English anti-suit injunction issued from an English court.

[24] See Stephen Balthasar "***Saving the anti-suit injunction: the Channel Islands stratagem***", ICCLR 2009, p. 255.

[25] Section 38 (1) provides that "[t]*he parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings*".

[26] Section 39(1) provides that "[t]he parties are free to agree that the tribunal shall have power to order on a provisional basis any relief which it would have power to grant in a final award".

51. However, the problem is one of enforcement. A European Court would almost certainly not directly recognise or enforce such any such provisional order under the New York Convention. This is because the best view among commentators is that there is no mechanism for enforcing abroad a tribunal's provisional or conservatory measures under the New York Convention.

52. If a peremptory order is made by the Tribunal under s. 41(5) for compliance, which the other party failed to comply with, then any application to the English Court under s. 42(1) of the 1996 Act would be difficulties under the ***The Front Comor***. For once the English court is engaged in any arbitral process, it is still subject to basic principles enshrined in the Regulation. See e.g. the comments in "***The "Wadi Sudr"*** [2009] EWCA Civ 1397 [2010] 1 Lloyd's Rep. 193.

53. It is hard to see a final award (which contained an order requiring the enforcing court to desist from continuing its own proceedings) would be enforced directly under the Convention.

Bringing substantive proceedings in England and Wales?

54. Perhaps counter-intuitively, one way to protect the client's contractual right to arbitrate is to bring substantive proceedings in the English courts.

55. In ***Youell v. La Reunion Aerienne*** [2009] EWCA Civ 175 [2009] 1 Lloyd's Rep. 586, the Court of Appeal re-emphasised that the mere fact that a claim was the subject of an arbitration agreement did not deprive a court, which could otherwise determine the substance of the claim, of its jurisdiction under the Judgments Regulation. The remedy for the party who claimed that the proceedings were brought in breach of the arbitration agreement was to seek a stay under s. 9 of the Arbitration Act or in other countries, the appropriate remedy under the New York Convention or legislation implementing it [paragraph 34].

56. Obviously, the efficacy of this tactic depends on the English court actually having jurisdiction and upon making the English court the first seised over the substance of the dispute. In ***Youell,*** the foreign proceedings initiated first were French arbitration proceedings.

57. The factual circumstances where jurisdiction might arise are necessarily limited: see e.g. ***The Front Comor*** itself (where jurisdiction in Sicily was obtained in tort / delict under Article 5(3) of the Judgments Regulation). Domicile under Article 2, or contractual jurisdiction under Article 5(1) would be other examples. But in cases where jurisdiction could be established under the Regulation, then this substantive proceedings route is something that ought to be considered. The downside, of course, is that once proceedings are brought, then an application under s. 9 of the 1996 cannot be made by the claimant.

Making an arbitration claim in English courts?

58. Traditionally, a claimant would (in addition to making an application for an anti-suit injunction) might make an application to the English court for declaratory relief. This relief could include declarations that:

    (a) the parties had agreed to submit to English arbitration any dispute arising out of their relationship, and thus the arbitration clause was a valid one;

    (b) English law (if appropriate) governed the dispute; and / or

    (c) any proceedings brought elsewhere that in English arbitration would be a breach of contract by the offending party, entitling the innocent party to compensation by way of damages or other relief.

59. An advantage of a declaration by an English court is that it will preclude the recognition and enforcement of a foreign judgment given in breach of the arbitration clause under s. 32 of the Civil Jurisdiction and Judgments Act 1982.

60. Before ***The Front Comor***, English courts had ruled that declarations could be granted in Brussels Convention cases, even if a European Court was first seised.

61. In ***The Lake Avery*** [1997] 1 Lloyd's Rep. 540, Clarke J. (as he then was) held, in the light of ***The Atlantic Emperor***, that a claim for a declaration as to the validity of an arbitration clause fell within the arbitration exception to the Convention. In ***The Lake Avery***, the claimant salvors sought a declaration that they had rendered salvage services to the defendants under the Lloyds Open Form (LOF 95) which contained an English arbitration clause, and were thus entitled to arbitration to determine their remuneration. The defendants had earlier commenced proceedings against the claimants in the

Netherlands in the same matter, and thus claimed the Dutch courts were first seised. As such, the defendants argued that the English court had to stay its proceedings under what is now Article 27 of the Judgments Regulation. The salvors succeeded. Clarke J. held the correct test was "*whether the relief sought in the action can fairly be said to be ancillary to, or perhaps, an integral part of the arbitration process*". If so, it fell within the arbitration exception and the English courts were entitled to proceed with their claim.

62. However, whether or not such declarations can withstand ***The Front Comor*** is difficult and uncertain. Such applications clearly remain arbitral proceedings within the "arbitration" exception. But do they, like anti-suit injunctions, offend against the "sanctity" of the Regulation structure by purporting to determine the first seised court's jurisdiction? Furthermore, even if they can be obtained, can they be enforced as Regulation judgments in European countries?

63. In the context of jurisdiction agreements, a "*final possibility*" raised by Professor Briggs[27], where a foreign court was first seised, was to ask the English court to render a declaratory judgment "*the quicker the better*", on the basis that this would not offend Article 27 "*because proceedings brought to obtain a declaratory judgment on a jurisdictional point do not have the same cause of action as the proceedings on the merits before the courts of another Member State*". If a judgment was obtained, he argues recognition of the same should be sought in the other Member State. Such an argument is probably doomed to failure in the jurisdictional context because of the ECJ's broad interpretation of the same cause of action under Article 27 and the ECJ's approach in ***Gasser*** and ***Turner*** to orders that interferes with the court first seised's ability to decide its own jurisdiction.[28]

64. In arbitration cases, where such proceedings probably fall within the arbitration exception and are thus not subject to the first seised rule, there appears to be nothing to stop the courts of two countries making parallel and differing judgments. The Advocate-General in ***The Front Comor***, appeared to recognise (in [71] of her opinion), that "*irreconcilable decisions in two Member States*", will probably arise. Whether or not a European court will recognize or enforce such declarations remains open.

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27 A. Briggs "*Agreements on Jurisdiction and Choice of Law*" (2008), p. 337-338.

28 P. Bříza "*Choice of Court Agreements*" (JPIL 2009), p.537, at 553.

65. In any event, timing of any declaration on the validity of the arbitration agreement will be of crucial importance: see ***The Wadi Sudr***.

Obtaining the assistance of the English Court relating to the arbitral proceedings?

66. There is no doubt that the English Court is still able to render assistance to provide support for arbitrations, irrespective whether a foreign court is first seised. This can include the appointment of an arbitrator (under s. 18), and relief under s. 44 of the 1996 Act.

67. This was the position before **The Front Comor**, and remains unchanged by that decision. In ***The Atlantic Emperor***, in the face of already initiated Italian proceedings, the claimant, Marc Rich, applied to the English court, for the appointment of an arbitrator under what is now s.18 of the 1996 Act. The Italian proceedings were the first seised within the terms of the Brussels Convention. The ECJ ruled (at paragraph 29 of their judgment) that the "arbitration exception" applied to "*litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation*". The English court was therefore entitled to proceed with the application and exercise their powers of appointing an arbitrator.[29] These powers can still be invoked before there is a binding judgment from an EU / EEA Court: see ***The Wadi Sudr***.

Bringing claims for damages for breach of the arbitration agreement

68. This is an area that requires a detailed lecture in its own right. The following are just some initial thoughts.

69. The possibility of such claims for breach of an arbitration agreement was mooted in ***Mantovani v Carapelli SpA*** [1980] 1 Lloyd's Rep. 375 CA, and predates the authorities usually relied on for such claims for damages for breach of jurisdiction agreements: see ***Union Discount Co v Zoller*** [2001] EWCA Civ 1755; [2002] 1 W.L.R. 1517; ***Donohue v Armco Inc*** [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425).

[29] But events conspired against Marc Rich: by the time the ECJ had ruled and the case had returned to England, they were subsequently held by the English courts to have submitted to the jurisdiction of the Italian Court: ***The Atlantic Emperor (No 2)*** [1992] 1 Lloyd's Rep. 624.

70. But the use of the anti-suit injunction has caused the jurisprudence to be entirely undeveloped. Therefore, we do not know yet:

    (a) The scale or measure of any recoverable damages;

    (b) Whether the claims are limited to those situations where the foreign court has subsequently declined jurisdiction;

    (c) The potential *res judicata* affect of a foreign court's rulings, either to accept jurisdiction and / or in relation to any costs claims made in any jurisdictional challenge.

71. Much more work is actually needed on developing the remedies available to the arbitrators and courts. These are all battles to be fought when they arise, and may give particular emphasis to drafting amendments to typical arbitration agreements.

Longer term: amending agreements

72. In the longer term, much work needs to be given (where possible) to amend agreements to try and create contractual arrangements that make it harder for a party who wishes to act in breach to do so.

73. Examples might include:

    (a) Specifically agreeing to compensate in damages for the costs of proceedings otherwise than in the chosen arbitral forum. These damages could include consequential damages, e.g. arising from the delay or the exercise of default clauses in loan agreements. ***The Heidelberg Report*** on the operation of the Judgments Regulation has cautiously suggested (at paragraph 407) that such collateral agreements might provide some assistance.

    > *"The judgment of the ECJ in **Turner,** excluding anti-suit injunctions issued by a court purporting to avoid "abusive" proceedings does not seem to directly exclude the possibility of such collateral undertakings between the parties and their enforcement by the courts. However, the issue appears not to be fully explored".*

    Clauses could be drafted which permits, payment on demand, in respect of any loss caused or costs incurred by bringing the proceedings.

(b) Specifically agreeing irrevocable personal undertakings:

(i) not to issue proceedings in any forum other than the chosen arbitral forum;

(ii) waiving any and every objection to arbitration in the chosen forum;

(iii) agreeing that any award made is binding and conclusive, etc.

(iv) not to seek to challenge or appeal the award other than in accordance with the Arbitration Act 1996 and / or before the English courts;

74. One possible alternative I have considered is to create a hybrid arbitration / jurisdiction agreement, whereby in the event that a party seeks to issue any court proceedings (whether substantive or arbitral) then exclusive jurisdiction is granted to the English courts to determine the issues raised.

75. This effectively confers an exclusive jurisdiction agreement to the court of the seat of the arbitration.

Longer term (2): The proposals to amend the Judgments Regulation

76. These issues are the subject of proposals to amend the Judgments Regulation, particularly in the light of ***The Front Comor***.

Michael McParland

Quadrant Chambers

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