Antisuit Injunctions in support of arbitration proceedings and the Brussels Regulation – The approach to be expected from the ECJ

I. The reasons against anti-suit injunctions in support of court proceedings (Turner)

ECJ (Full court) Case C-159/02, Turner v. Grovit, [2004] ECR I-3565:

31. Consequently, the answer to be given to the national court must be that the Convention is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.

The reasons against anti-suit injunctions in Turner:

(1) Anti-suit injunctions undermine the foreign court’s jurisdiction to hear the dispute and limit the application of the jurisdiction rules of the Convention

27. However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court’s jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

29. Even if it were assumed, as has been contended, that an injunction could be regarded as a measure of a procedural nature intended to safeguard the integrity of the proceedings pending before the court which issues it, and therefore as being a matter of national law alone, it need merely be borne in mind that the application of national procedural rules may not impair the effectiveness of the Convention (Case C-365/88 Hagen [1990] ECR I-1845, paragraph 20). However, that result would follow from the grant of an injunction of the kind at issue which, as has been established in paragraph 27 of this judgment, has the effect of limiting the application of the rules on jurisdiction laid down by the Convention.

(2) The assessment of the appropriateness of foreign proceedings implied in an anti-suit injunction runs counter to the principle of mutual trust which prohibits a court from reviewing the jurisdiction of another Member State

28. Notwithstanding the explanations given by the referring court and contrary to the view put forward by Mr Turner and the United Kingdom Government, such interference cannot be justified by the fact that it is only indirect and is intended to prevent an abuse of process by the defendant in the proceedings in the forum State. In so far as the conduct for which the defendant is criticised consists in recourse to the jurisdiction of the court of another Member State, the judgment made as to the abusive nature of that conduct implies an assessment of the appropriateness of bringing proceedings before a court of another Member State. Such an assessment runs counter to the principle of mutual trust which, as pointed out in paragraphs 24 to 26 of this judgment, underpins the Convention and prohibits a court, except in special circumstances which are not applicable in this case, from reviewing the jurisdiction of the court of another Member State.

(3) Anti-suit injunctions render ineffective the lis alibi pendens provisions and may give rise to conflicts for which the Convention contains no rules

30. The argument that the grant of injunctions may contribute to attainment of the objective of the Convention, which is to minimise the risk of conflicting decisions and to avoid a multiplicity of proceedings, cannot be accepted. First, recourse to such measures renders ineffective the specific mechanisms provided for by the Convention for cases of lis alibi pendens and of related actions. Second, it is liable to give rise to situations involving conflicts for which the Convention contains no rules. The possibility cannot be excluded that, even if an injunction had been issued in one Contracting State, a decision might nevertheless be given by a court of another Contracting state. Similarly, the possibility cannot be excluded that the courts of two Contracting States that allowed such measures might issue contradictory injunctions.
II. Is the Turner jurisprudence to be applied to anti-suit injunctions to prevent the breach of an arbitration agreement, or does it make a difference that article 1(2)(d) of the Brussels Regulation excludes arbitration from its scope?

Three questions:

I. Do the proceedings to grant the anti-suit injunction in support of an arbitration agreement fall by virtue of art. 1(2)(d) outside the Brussels Convention/Regulation?

II. Do the court proceedings in the other Member State against which the anti-suit injunction is targeted fall by virtue of art. 1(2)(d) outside the Brussels Convention/Regulation?

III. If the answer to 1 or 2 is "yes", is the Turner jurisprudence to be applied to anti-suit injunctions in support of an arbitration agreement?

1. Scope of art. 1(2)(d)

a) The scope of the arbitration exception has been controversial since the accession of the UK and Ireland to the Brussels Convention: Schlosser-Report, OJ 1979, C 59, p. 92:

"61. Two divergent basic positions which it was not possible to reconcile emerged from the discussion on the interpretation of the relevant provisions of Article 1, second paragraph, point (4). The point of view expressed principally on behalf of the United Kingdom was that this provision covers all disputes which the parties had effectively agreed to be settled by arbitration, including any secondary disputes connected with the agreed arbitration. The other point of view, defended by the original Member States of the EEC, only regards proceedings before national courts as part of ‘arbitration’ if they refer to arbitration proceedings, whether concluded, in progress or to be started.

b) So far the ECJ has ruled on two occasions on the scope of art. 1(2)(d)\(^1\). What seems to emerge from these decisions is that the exception of art. 1(2)(d) is limited to cases in which the subject-matter of the dispute are court proceedings ancillary to arbitration proceedings (such as the appointment or dismissal of arbitrators, orders fixing the place of arbitration, judgments on the validity of arbitration agreements and corresponding orders not to continue arbitration proceedings, or proceedings concerning the revocation, amendment, recognition and enforcement of arbitral awards).

ECJ Case C-190/89 Rich v Società Italiana Impianti [1991] ECR I-3855:

26 (…) In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment or dismissal of arbitrators, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.

ECJ Case C-391/95, Van Uden Maritime v. KG in Firma Deco-Line [1998] ECR I-7091:

31 Under Article 1, second paragraph, point 4, of the Convention, arbitration is excluded from its scope. By that provision, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts (Case C-190/89 Rich v Società Italiana Impianti [1991] ECR I-3855, paragraph 18).

32 The experts' report drawn up on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention (OJ 1979 C 59, p. 71, at pp. 92-93) specifies that the Convention does not apply to judgments determining whether an arbitration agreement is valid or not or, because it is invalid, ordering the parties not to continue the arbitration proceedings, or to proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitration awards. Also excluded from the scope of the Convention are proceedings ancillary to arbitration proceedings, such as the appointment or dismissal of arbitrators, the fixing of the place of arbitration or the extension of the time-limit for making awards.

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However, if the subject matter of court proceedings are measures not ancillary but rather parallel to arbitration proceedings, the Convention/Regulation remains applicable if the subject-matter of the parallel proceedings falls within the scope of the Convention, i.e. civil and commercial matters (e.g. interim payment orders parallel to arbitration proceedings).

ECJ Case C-391/95, Van Uden Maritime v. KG in Firma Deco-Line, [1998] ECR I-7091:

33 However, it must be noted in that regard that provisional measures are not in principle ancillary to arbitration proceedings but are ordered in parallel to such proceedings and are intended as measures of support. They concern not arbitration as such but the protection of a wide variety of rights. Their place in the scope of the Convention is thus determined not by their own nature but by the nature of the rights which they serve to protect (see Case C-261/90 Reichert and Kockler v Dresdner Bank [1992] ECR I-2149, paragraph 32).

34 It must therefore be concluded that where, as in the case in the main proceedings, the subject-matter of an application for provisional measures relates to a question falling within the scope ratione materiae of the Convention, the Convention is applicable and Article 24 thereof may confer jurisdiction on the court hearing that application even where proceedings have already been, or may be, commenced on the substance of the case and even where those proceedings are to be conducted before arbitrators.

Court proceedings parallel and not ancillary to arbitration proceedings thus fall into the scope of the Convention/Regulation even if a valid arbitration agreements exists which ousts the jurisdiction of the Member States’ courts for the main proceedings. The fact that a preliminary issue relates to the existence or validity of an arbitration agreement does not affect the exclusion from the scope of the Convention/Regulation.


28 It follows that, in the case before the Court, the fact that a preliminary issue relates to the existence or validity of the arbitration agreement does not affect the exclusion from the scope of the Convention of a dispute concerning the appointment of an arbitrator.

ECJ Case C-391/95, Van Uden Maritime v. KG in Firma Deco-Line, [1998] ECR I-7091:

24 Where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention. Consequently, a party to such a contract is not in a position to make an application for provisional or protective measures to a court that would have jurisdiction under the Convention as to the substance of the case.

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2. Consequences for anti-suit injunctions in support of arbitration

Question I: Do the proceedings to grant the anti-suit injunction in support of an arbitration agreement fall by virtue of art. 1(2)(d) outside the Brussels Convention/Regulation?

Answer: Not quite clear. Such proceedings are not in a strict sense ancillary to arbitration proceedings because they do not support the arbitration proceedings in London (which could take place without the anti-suit injunction) but rather suppress competing court proceedings in another Member State. As the basis of anti-suit injunctions is the arbitration agreement and the ECJ has extended art. 1(2)(d) to orders not to continue arbitration proceedings because of invalidity of the
arbitration agreement, there might be an argument by analogy that orders not to continue court proceedings because of the validity of the arbitration agreement fall under art. 1(2)(d)².

**Question II:** Do the court proceedings in the other Member State against which the anti-suit injunction is targeted fall by virtue of art. 1(2)(d) outside the Brussels Convention/Regulation?

**Answer:** No. The subject matter of the foreign proceedings is the decision on the merits. The fact that a preliminary issue in these proceedings relates to the existence or validity of an arbitration agreement does not affect the (non-)exclusion from the scope of the Convention/Regulation (see above, ECJ Case C-190/89, Marc Rich, [1990] ECR I-3855 para. 28).

**Question III:** If the answer to 1 or 2 is “yes”, is the Turner jurisprudence to be applied to anti-suit injunctions in support of an arbitration agreement?

**Answer:** Probably yes. Even if it were assumed that the proceedings to grant an anti-suit injunction could be regarded as falling under art. 1(2)(d) and thus being a matter of national procedural law alone, the application of national procedural rules may still not impair the effectiveness of the Convention/Regulation³. It could be argued in support of anti-suit injunctions that the effectiveness of the Brussels jurisdiction rules is not impaired because where the parties have validly excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Convention/Regulation⁴: In arbitration there is indeed no set of uniform Community rules which Member States can or must trust each other to apply⁵.

However, this position can be challenged on two grounds. Firstly, it is in this situation (unlike in the van Uden decision) by no means clear that a valid arbitration agreement exists which excludes jurisdiction under the Brussels rules. While from the English court’s perspective there might be a valid arbitration agreement and thus no jurisdiction under the Brussels rules, the foreign court might come to a different result and accept jurisdiction under the regulation (which would be undermined by an anti-suit injunction). Secondly, the ban on anti-suit injunctions in Turner was justified not only because anti-suit injunctions undermine the foreign court’s jurisdiction to hear the dispute and limit the application of the jurisdiction rules of the Convention. Further arguments were (1) that the assessment of the appropriateness of foreign proceedings implied in an anti-suit injunction runs counter to the principle of mutual trust which prohibits a court from reviewing the jurisdiction of another Member State and (2) that anti-suit injunctions may give rise to conflicts for which the Convention contains no rules. At least these considerations seem to apply even if no jurisdiction under the Brussels rules can be invoked. The principle of mutual trust is related not primarily to the unification of the jurisdiction rules, but rather to the liberal rules for recognition and enforcement (see recitals 16 and 17 of the Brussels regulation) which apply independently from the unified jurisdiction rules⁶. And a risk of conflicting decisions exists in the arbitration setting as in the litigation setting because the Italian courts might render a decision on the merits in spite of an English anti-suit injunction. Under art. 32 Brussels regulation the English courts would have to recognise the Italian decision, and it is in light of art. 35(3) Brussels regulation quite doubtful that the breach of the anti-suit injunction would justify a public policy exception.

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² This is the opinion of the House of Lords, see West Tankers Inc. v. RAS Riunione Adriatica di Sicurta Spa [2007] UKHL 4 para. 14.
⁵ West Tankers Inc. v. RAS Riunione Adriatica di Sicurta Spa [2007] UKHL 4 para. 12.
⁶ It is quite unclear where the principle of mutual trust comes from. Starting with Gasser, it has been mentioned in a number of recent ECJ decisions (ECJ Case C-116/02, Gasser, [2003] ECR I-14693 para. 72; ECJ Case C-159/02, Turner, [2004] ECR 3565 para. 24; ECJ Case C-341/04, Eurofood, [2006] I-3813 para. 39 seq). The earliest reference in relation to the Brussels Convention seems to be the opinion of AG Darmon in ECJ Case C-172/91, Sonntag [1993] I-1963 para. 71. In the EC regulation 1346/2000 on insolvency proceedings, the principle of mutual trust is also linked to the rules on recognition and enforcement of foreign insolvency proceedings (recital 22).