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ANTI-SUIT INJUNCTIONS: THE FUTURE

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1 JURISDICTION AND CONDITIONS FOR GRANT

If jurisdiction over the defendant is established, the English court has the power to grant a *permanent* anti-suit injunction to support any arbitration, irrespective of seat, only under Supreme Court Act 1981, s 37

If jurisdiction over the defendant is established, but the arbitration is not pending, then the English court has jurisdiction to grant an anti-suit injunction to support any anticipated arbitration, irrespective of seat, only under Supreme Court Act 1981, s 37

If jurisdiction over the defendant is established, the English court has jurisdiction to grant a *temporary* anti-suit injunction to support any arbitration, irrespective of seat, under Supreme Court Act 1981, s 37 and/or Arbitration Act 1996, s 44

Arbitrators themselves do not have default power to grant anti-suit relief under Arbitration Act 1996, s 39: such a power exists only if expressly conferred

There is no power to grant relief in support of an arbitration under Civil Jurisdiction and Judgments Act 1982, s 25, as that power applies only to court proceedings: *ETI Euro Telecom International NV v Republic of Bolivia* [2008] 2 Lloyd's Rep 421

In all cases the usual requirements for the grant of injunctive relief must be satisfied, although these are readily satisfied where breach of an arbitration clause can be demonstrated because damages are not regarded as an adequate remedy (although damages are available, representing the indemnity costs of fighting off a foreign action). The only real bar to relief is delay: *The Angelic Grace* [1994] 1 Lloyd's Rep 168. However, if the court can achieve the effect of an injunction by the grant of a declaration which will be recognised by a foreign court, then it will do so: *Noble Assurance v Gerling-Konzern* [2008] Lloyd's Rep IR 1

In the case of a temporary injunction, the conditions of s 44 must be satisfied whether the claim is brought under the 1981 Act or under the 1966 Act (see *Starlight Shipping Co v Tai Ping Insurance Co* [2008] 1 Lloyd's Rep 230). Those conditions, which have no application to permanent relief, are that either the arbitrators must be unable to act (eg, because they have not been appointed or any order they make would be ineffectual – as in *Sheffield United Football Club Ltd v West Ham United Football Club plc* [2008] EWHC 2855 (Comm)) or the matter must be one of urgency.

2 WEST TANKERS: BACKGROUND AND FACTS

Case C-185/07 *Allianz SpA v West Tankers Inc*, 10 February 2009 has precluded the grant of an anti-suit injunction if judicial proceedings are before another EU or EFTA court. The ECJ affirmed the ruling of A-G Kokott, but with far less analysis

In August 2000 the Front Comor was chartered by West tankers to Erg Petroli. The charterparty was governed by English law and provided that any disputes were to be resolved by arbitration in London. The vessel collided with a jetty owned by Erg in Syracuse, causing damage to the jetty. Erg's insurers, including Allianz, paid to Erg the full sums due under the policy in respect of the damage to the jetty, but the insurance did not cover the entire amount of the loss and Erg accordingly commenced arbitration in London against West Tankers for the uninsured sum. However, the insurers, having paid Erg, sought to exercise subrogation rights against West Tankers and duly commenced proceedings in Italy. The outcome was that West Tankers faced liability claims in arbitration in London and in judicial proceedings in Italy. In both sets of proceedings the issues were identical, the only difference being the amount sought. West Tankers' defence was immunity for navigation errors under the Hague Rules.

West Tankers applied to the High Court for a declaration that the dispute fell within the arbitration clause, and for an injunction to restrain the subrogation proceedings in Italy. The relief sought was granted by Colman J, relying on the decision of the Court of Appeal in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67 to the effect that anti-suit relief was available to restrain proceedings in another court within the EU or EFTA. That ruling was appealed to the House of Lords, Their Lordships, [2007] UKHL 4, refused to decide the point but instead referred the following question to the European Court of Justice:

'Is it consistent with Regulation (EC) No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?'

Almost uniquely, the House of Lords did not content itself with referring the question. Their Lordships gave the clearest possible steer to the ECJ, pointing out that considerable harm could be done to arbitration within Europe if the English courts lost their power to grant anti-suit relief.

The point arose in this way. Council Regulation 44/2001 regulates jurisdiction between courts within the European Union where the defendant is domiciled in an EU member state. Its principles are replicated within EFTA by the Lugano Convention 1989 (replaced by a revised version in 2008, due to come into force in 2009). The Regulation (and Convention) sets out various heads of jurisdiction, and in article 27 lays down the "first seised" rule, whereby the EU court first seised of a dispute has exclusive jurisdiction over that dispute, so if there is an issue as to the jurisdiction of the court then that court alone can resolve the matter (see Case C-351/89 *Overseas Union Insurance* [1991] ECR I-3317). It has since been held that if the defendant is domiciled in the member state where the court first seised is situated, the court cannot decline jurisdiction even if it takes the view that the action would be more appropriately brought elsewhere (Case C-281/02 *Owusu v Jackson* [2005] 1 Lloyd's Rep 452). However, the Brussels Regulation excludes from its ambit "arbitration" (article 1(2)(d)).

At this point an obvious conflict arose between the first seised rule and (principally, within the EU) the English power to grant anti-suit relief to restrain proceedings brought in a foreign court where those proceedings are in breach of an agreement or are otherwise oppressive or vexatious. The matter was considered by the ECJ in two cases in which the English courts sought to restrain a defendant in England from suing elsewhere even though those actions were brought before the application to the English courts. In Case C-159/02 *Turner v Grovit* [2004] 2 Lloyd's Rep 169 the ECJ ruled that an anti-suit injunction could not issue to restrain the defendant from maintaining proceedings in Spain which were plainly designed to stifle what would otherwise have been a straightforward claim in England. More

damagingly, in Case C-116/02 *Erich Gasser GmbH v Misat Srl*[2004] 1 Lloyd's Rep 222, the ECJ held that the prohibition on anti-suit injunctions extended to the enforcement of exclusive jurisdiction clauses. Accordingly, if proceedings are brought in another EU court in breach of an exclusive jurisdiction clause nominating England, that court alone is to determine its jurisdiction and the English court cannot act. Those cases were based on the need for mutual trust between the courts within the EU.

Those cases raised squarely the question whether the English courts retained any power to grant an anti-suit injunction to prevent judicial proceedings elsewhere in the EU in breach of an arbitration clause. If that power is to be retained, it depends upon the proper interpretation of the exception for "arbitration". The English view, adopted in *Through Transport* and confirmed by the House of Lords in *West Tankers*, is that an arbitration clause is an undertaking quite distinct from the substantive agreement to which it relates, and that an anti-suit injunction restrains breach of the arbitration clause alone.

The scope of the arbitration exception is somewhat problematic. The matter had, prior to *West Tankers*, been considered on two occasions by the ECJ. In Case C-190/89 *Marc Rich & Co AG v Societa Italiana Impianti, The Atlantic Emperor*[1994] 2 Lloyd's Rep 287 the ECJ ruled that an application to the English court for the appointment of an arbitrator was not precluded by the fact that earlier proceedings on the substantive dispute had been commenced in Italy, the basis of the decision being that the English application was purely about "arbitration" and fell within the exception. The ECJ ruled that:

'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 of an arbitrator, 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.'

Subsequently, in Case C-391/95 *Van Uden Maritime BV v Deco-Line KG*[1999] All ER (EC) 259, the ECJ ruled that article 31 of the Brussels Regulation authorises a court other than the court first seised to exercise supportive interim powers to support an arbitration.

The English courts have considered these rulings in a number of cases. The cases are far from easy to reconcile, but the general test applied by them in determining whether they can act in a case where another EU court is seised of the proceedings is whether arbitration forms the essential subject matter of the English action. On this basis it has been held that the English courts can grant a declaration as to the existence of an arbitration clause (*Union de Remorquage et de Sauvetage SA v Lake Avery Inc* [1997] 1 Lloyd's Rep 540, although this case may be open to doubt as a matter of both EU and English law – see below) but not as to a substantive issue arising in the arbitration (*Qingdao Ocean Shipping Co v Grace Shipping Establishment* [1995] 2 Lloyd's Rep 15).

3 THE ADVOCATE-GENERAL'S ANALYSIS

In *West Tankers* there is lengthy consideration of the purpose of the arbitration exception. A-G Kokott in her opinion identified the two conflicting views. The common law approach is that the arbitration exception covers all disputes covered by an arbitration clause, including secondary disputes connected with the arbitration. The civil law approach is to confine "arbitration" to arbitration proceedings before national courts. Applied to the case of an anti-suit injunction, the English view is that the existence and scope of an arbitration clause, and its enforcement, are matters only for the arbitrators and for the courts of the seat of the arbitration. The continental approach focuses on the question whether the substantive claim falls within the scope of the Brussels Regulation: if it does then the courts with jurisdiction over the substantive dispute (in this case, the Italian courts) are to decide on the question of the validity of the

arbitration clause and, if the arbitration clause is valid, then to stay their proceedings. A-G Kokott described the difference in approach in the following way:

The crucial difference between the two approaches is therefore that the arbitration exception is understood broadly in the first view: as soon as it is claimed that there is an arbitration agreement, all disputes arising from the legal relationship are subject exclusively to arbitration, irrespective of the substantive subject-matter. Only the arbitral body and the courts at the seat of arbitration are entitled to examine jurisdiction.

The opposite view takes account first and foremost of the substantive subject-matter. If that subject-matter falls within Regulation No 44/2001, a court which in principle has jurisdiction thereunder is entitled to examine whether the exception under Article 1(2)(d) applies and, according to its assessment of the effectiveness and applicability of the arbitration clause, to refer the case to the arbitral body or adjudicate on the matter itself.

A-G Kokott conceded that the arbitration exception was ambiguous, and resorted to the preparatory background material on the Brussels Regulation and its predecessor. She derived from that material the proposition that the exception was confined to arbitration proceedings themselves and also related or preliminary proceedings before the national court, eg, the appointment or dismissal of arbitrators, the fixing of the place of arbitration, the extension of the time-limit for making awards, the stay of proceedings and the recognition and enforcement of awards. The purpose of the exception was primarily to comply with the New York Convention, requiring a court to stay its proceedings where there is a valid arbitration clause, but related arbitration proceedings were also within the term.

A-G Kokott's conclusion was that the jurisdiction rules in the Brussels Regulation were applicable when the substantive dispute fell within the scope of the Regulation. In the present case the substantive dispute was a claim for damage which occurred in Italy. Under the Brussels Regulation the Italian court possessed jurisdiction over that dispute. The Italian court was first seised, and the arbitration exception did not allow any other court to become involved but merely confirmed that the Italian court was required to stay its proceedings in accordance with the New York Convention. The existence and scope of the arbitration clause were preliminary issues for the Italian court. A-G Kokott, referring to the principle in the New York Convention that a court is required to stay its proceedings unless the arbitration clause is null and void, inoperative or incapable of being performed, added as follows:

Every court seised 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.

It is also not obvious why such examination should be reserved to the arbitral body alone, as its jurisdiction depends on the effectiveness and scope of the arbitration agreement in just the same way as the jurisdiction of the court in the other Member State. The fact that the law of the arbitral seat has been chosen as the law applicable to the contract cannot confer on the arbitral body an exclusive right to examine the arbitration clause.

Legal analysis aside, A-G Kokott gave a number of reasons why the prohibition on anti-suit injunctions was correct in principle. (1) If the court first seised was precluded from ruling as a preliminary issue on its own jurisdiction, those proceedings could be avoided simply by a party asserting that there was an arbitration clause, and the other would be deprived of his right to go to that court. (2) The concept of restraining a party from maintaining proceedings before another court offends the principle of mutual trust between courts. (3) The priority was not to diminish the effectiveness of the Brussels Regulation:

“aims of a purely economic nature cannot justify infringements of Community law”. (4) The issue would arise only in the situation where the parties disagreed as to whether the arbitration clause was valid and applicable to the dispute in question. (5) The national court first seised would review the matter and determine whether there should or should not be a reference to arbitration: accordingly there was no risk of circumvention of arbitration, and the worst that could be said was that the seising of the national court was an additional step in the proceedings, but a party who asserted that he was not bound by an arbitration clause could not be barred from having access to the courts having jurisdiction the Brussels Regulation. (6) If an anti-suit injunction was to be allowed, there was a risk that the court precluded from hearing the matter might refuse to enforce any subsequent award on the ground that the arbitrators did not possess jurisdiction.

4. THE RULING OF THE ECJ

In one of its shortest recorded judgments, the ECJ upheld the preliminary opinion of A-G Kokott. The ECJ simply confirmed that “in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings. More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect.” Affirming the comments of the Advocate-General, the ECJ went on to rule that if the subject matter was within the Brussels Regulation, then a preliminary issue concerning the scope of an arbitration clause was also within the Regulation. Given that the court first seised possessed exclusive jurisdiction to rule on that matter, an anti-suit injunction deprived it of that jurisdiction and was not compatible with the Brussels Regulation. Anti-suit injunctions undermined mutual trust. Finally, the possibility of obtaining an anti-suit injunction meant that a party could evade judicial proceedings merely by relying on an arbitration clause. The ECJ ruled as follows:

It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

5 SOME THOUGHTS

The outcome of all of this is that proceedings fall within the Brussels Regulation if the substantive action is one which is caught by the Regulation (and that will almost inevitably be the case given that the Regulation by its terms applies to “civil and commercial” matters) and jurisdiction is conferred by the Regulation on the courts of an EU or EFTA state. *West Tankers* only prevents an anti-suit injunction where the proceedings are before the courts of another EU or EFTA state: they can still be issued to restrain participation in proceedings anywhere else in the world. The potential impact of this decision has been the subject of much discussion. The House of Lords was fearful that England would come to be regarded as a jurisdiction which was not “user-friendly”, and that there could be a corresponding loss of business to jurisdictions with more supportive regimes. The move by places such as Bermuda, Singapore and New York to establish themselves as major international arbitration centres by adopting appropriate arbitration rules was thought to be a major concern. However, as has been seen above, A-G Kokott thought that this was a price well worth paying if the alternative was the undermining of the Brussels Regulation.

That consideration aside, the ruling appears to undermine the very concept of arbitration. The effect of the ECJ’s approach is to treat the court first seised as having exclusive jurisdiction over the proceedings and that its jurisdiction can be removed only if there is a valid arbitration clause. In other words, an

arbitration clause is to all intents and purposes being treated as a defence to judicial proceedings, and it is for the court first seised alone to determine whether or not it has been deprived of jurisdiction. This implies some form of second-class status for arbitration and disregards the possibility that the foreign proceedings constitute a breach of contract. That point aside, the reasoning is completely contrary to the twin principles that an arbitration clause is a separate undertaking distinct from the substantive contract to which it relates, and that arbitrators can determine their own jurisdiction (*kompetenz-kompetenz*). Turning first to separability, if an arbitration clause exists, it takes effect as a wholly independent agreement. On that basis it cannot properly be said that an injunction to restrain breach of that agreement is anything other than about arbitration: it has nothing to do with the substantive agreement itself, and does not in any way impinge upon the merits of the dispute between the parties. The ECJ's analysis, by contrast, treats an arbitration clause as a means by which the court first seised of jurisdiction can be deprived of that jurisdiction. As far as *kompetenz-kompetenz* is concerned, it is worth repeating the words of A-G Kokott that "It is also not obvious why examination [of jurisdiction] should be reserved to the arbitral body alone, as its jurisdiction depends on the effectiveness and scope of the arbitration agreement ... The fact that the law of the arbitral seat has been chosen as the law applicable to the contract cannot confer on the arbitral body an exclusive right to examine the arbitration clause." To the contrary, *kompetenz-kompetenz* recognises that the arbitrators should be given the first opportunity to determine their jurisdiction, subject to an appeal to the courts of the curial jurisdiction. The effect of judicial proceedings is to deprive the arbitrators of that opportunity, and an anti-suit injunction does no more than restore the status quo. It is therefore submitted that the reasoning in *West Tankers* displays a fundamental misunderstanding of the nature of arbitration.

It might also be thought that the points made by A-G Kokott in support of the denial of the right of a court to grant an anti-suit injunction simply do not stand up to scrutiny. They are repeated here for the sake of convenience, with additional comment.

- (1) If the court first seised was precluded from ruling as a preliminary issue on its own jurisdiction, those proceedings could be avoided simply by a party asserting that there was an arbitration clause, and the other would be deprived of his right to go to that court. That is a remote possibility. It happens from time to time, as in *Albon v Naza Motor Trading (No 3)* [2007] 2 Lloyd's Rep 1, but in such a case it is most unlikely that an anti-suit injunction would be granted anyway. The matter would proceed to the court in the usual way, and that court would itself determine whether or not there was a valid arbitration agreement.
- (2) The concept of restraining a party from maintaining proceedings before another court offends the principle of mutual trust between courts. That is certainly true, but must be tempered by the practical consideration that once a matter comes before a court, all manner of procedural devices and delaying tactics can be used to spin out the proceedings, and that assumes that the court itself has adequate procedures to dispose of the matter speedily. That may be the case in some jurisdictions, but it is not the case in others.
- (3) The priority was not to diminish the effectiveness of the Brussels Regulation: "aims of a purely economic nature cannot justify infringements of Community law". This is a value-judgment, and it might be thought to be a pretty curious one given that the original object of the European Community was to increase the wealth of its members.
- (4) The issue would arise only in the situation where the parties disagreed as to whether the arbitration clause was valid and applicable to the dispute in question. Again, that is in essence true, but ultimately it is a fundamentally naive and circular point. The English law reports are replete with cases in which a party has sought to evade his obligation to go to arbitration and has raised spurious arguments as to the validity and scope of the clause in order to delay the arbitration, possibly in the hope that the true claimant will give up. If there was agreement then there would be no need for an application for an anti-suit injunction in the first place.

(5) The national court first seised would review the matter and determine whether there should or should not be a reference to arbitration: accordingly there was no risk of circumvention of arbitration, and the worst that could be said was that the seising of the national court was an additional step in the proceedings, but a party who asserted that he was not bound by an arbitration clause could not be barred from having access to the courts having jurisdiction under the Brussels Regulation. The problem here is the wasted time and costs that may be invoked where a dispute as to the validity or scope of an arbitration clause is contested purely for tactical litigation purposes.

(6) If an anti-suit injunction were to be allowed, there would be a risk that the court precluded from hearing the matter might refuse to enforce any subsequent award on the ground that the arbitrators did not possess jurisdiction. This suggestion, on closer analysis, is baseless. If an anti-suit injunction is granted, the court first seised is prevented from ruling on the question of the validity of the arbitration clause. That fact of itself cannot prejudice the ultimate enforcement of the award in that jurisdiction: if the arbitrators assert jurisdiction and their ruling is not successfully challenged, then enforcement can be refused under the New York Convention by the courts of that state, and it surely cannot make any difference to the outcome whether, at an earlier stage in the proceedings, they were precluded from ruling on that question.

6 THE FUTURE

So what is to be done, given that *West Tankers* has removed the possibility of the grant of anti-suit injunctions within the EU and EFTA? The problem is compounded by the view of Tomlinson J in *DHL GBS (UK) Ltd v Fallimento Finmatica SPA* [2009] EWHC 291 (Comm) that an English court could not refuse to enforce an EU or EFTA judgment given in breach of an arbitration clause. Five possibilities suggest themselves. It is uncertain if any of them work. All that can be said with certainty is that *West Tankers* is not the final word, and that these and other devices will almost certainly be employed in an attempt to overcome the ECJ's failure to recognise the true nature of arbitration.

Commencing arbitration The first is for the foreign proceedings to be ignored and arbitration commenced. The foreign court may recognise jurisdiction to restrain participation in an arbitration (and the English courts have recognised that they may do so in exceptional circumstances), in which case this possibility could be removed. But if no restraining order is made, there is no reason why the arbitration cannot simply proceed. The claimant in the foreign proceedings may either refuse to participate in the arbitration or apply to the arbitrators for a stay the arbitration proceedings, but in either case the matter is at least under the control of the arbitrators. It was held in *Youell v La Reunion Aerienne* [2009] EWCA Civ 175 that if there is an arbitration in England, and substantive judicial proceedings are commenced elsewhere in the EU or EFTA, those proceedings are not about "arbitration" so that the Brussels Regulation applies to them. That means that the overseas court has to possess jurisdiction under one or other of the substantive grounds in the Brussels Regulation in order to hear the action.

Damages The second is to seek damages. If the foreign court decides that there is a valid arbitration clause and stays its proceedings, the arbitrators are perfectly entitled to award damages for breach of the arbitration clause, and the English courts have held that damages representing indemnity costs are appropriate where an agreed dispute resolution procedure has been disregarded. If the foreign court decides that there is not a valid arbitration clause, and proceeds to give judgment in favour of the claimant in those proceedings, there is nothing to prevent the other party from proceeding with the arbitration. Crucially, it was held by Burton J in *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd* [2008] EWHC 2791 (Comm) that arbitrators fall outside the Brussels Regulation and thus (unlike a court) are not bound by a judgment of a foreign court. Accordingly, the arbitrators can award damages to the claimant in the arbitration even though that party has lost in proceedings brought in the foreign court. All of this is useful, but does not actually prevent proceedings in breach of an arbitration clause from taking place. It

might nevertheless be possible for the arbitrators to indicate that they intend to award damages, representing legal costs awarded on an indemnity basis against the claimant in the foreign proceedings, if the foreign proceedings are not discontinued. The difficulty here, however, is that if the claimant in those proceedings carries on regardless, any award of this sort might not be enforceable in another jurisdiction.

Pre-emptive anti-suit relief Thirdly, the party initiating arbitration proceedings could at the same time, or possibly even earlier, seek an anti-suit injunction from the English court before any other court has been seised of the proceedings. The English courts plainly have jurisdiction to grant such relief, under one or both of section 37 of the Supreme Court Act 1981 or s 44 of the Arbitration Act 1996, although in either case it would have to be shown that the matter is one of urgency and that there are grounds for believing that foreign proceedings in breach of the clause are imminent. But how does such an application sit with *West Tankers*? It will be recalled that the issue in *West Tankers* was the validity of a subsequent anti-suit injunction, the ECJ ruling that an English court cannot grant an anti-suit injunction after foreign proceedings have commenced because the foreign court is first seised of the substantive proceedings, and those subsume questions as to the validity of the arbitration clause. Nevertheless, the ECJ's order ruled that it was not within the power of a court "to make an order to restrain a person from *commencing* or continuing proceedings". This seems to shut out the possibility for once and for all.

The addition of "commencing" plainly cannot be based on the "first seised" rule, appears to be a triumph of doctrine over principle and demonstrates the unsound basis of the ECJ's main ruling. Let it be supposed that the ECJ had not added "commencing". How would *West Tankers* have operated when confronted with a pre-emptive anti-suit injunction? *West Tankers* plainly cannot have decided that an action for an anti-suit injunction is about "arbitration", because if it was then Regulation 44/2001 would not apply to it even if another court was first seised of the substantive issue. So the logic of *West Tankers* is that the application to the English courts is to be regarded as in some way substantive. However, that is plainly not the case: the purpose of the application is to enforce the arbitration clause and not the substantive agreement. Consistency with *West Tankers*, and the prevention of pre-emptive anti-suit injunctions, can be achieved only by arguing that an anti-suit injunction cannot be granted by a court which does not have substantive jurisdiction over the dispute itself, and as the application to the court is by definition denying such jurisdiction (because it is seeking a reference to arbitration) then there is no basis for the application to be entertained. The problem here of course is that article 31 of Regulation 44/2001 expressly authorises a court to grant interim relief, and the ECJ itself in *Van Uden Maritime BV v Deco-Line KG* held that article 31 extends to arbitration proceedings (unless, of course, anti-suit relief is not regarded as an interim measure, so that once again there is no head of jurisdiction under the Regulation). What this shows is that *West Tankers* cannot sensibly be applied to a pre-emptive anti-suit injunction, and once that point is conceded then the very basis of *West Tankers* falls away.

Declaratory relief Fourthly, there could be an application for a declaration from the English court that there is a valid arbitration agreement. Armed with a declaration, it will not be possible to for the judgment of a foreign court denying the existence of an arbitration agreement to be enforced in England. There are, however, two possible objections. The first is that the declaration would have to be for an order that an arbitration clause exists. However, in *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] 2 Lloyd's Rep 1, Thomas J was of the view that the English courts should not make such an order even if they had jurisdiction to do so, as the correct approach was for an application to be made to the arbitrators for resolution of the jurisdictional dispute and not to the court. However, that ruling was made in the context of an English arbitration and Thomas J was concerned to ensure that the arbitrators and not the English courts had the first opportunity to rule on jurisdiction. The judgment was not directed at an international arbitration, and would not be relevant where a declaration is a means of attempting to ensure that the arbitrators do get the first bite of the cherry. Accordingly, in a scenario such as *West Tankers*, the *Vale do Rio* reasoning would not preclude a declaration and indeed would seem to be in support of a declaration. The second possible objection is that, if a foreign court is first seised, an application for a declaration could infringe the *West Tankers*

ruling. The point was not considered in *West Tankers*, given that the issue was not before the ECJ, and the point is not easy. On one hand it could be argued that a declaration is in the same category as an injunction, and has the effect of threatening the enforceability in England of the foreign court's judgment if that court should rule against the existence of an arbitration clause and then make an award in favour of the claimant in the foreign proceedings. On the other hand, a declaration does not restrain participation in the foreign court's proceedings in any way. It may be thought that the former arguments are more compelling, particularly where the application for a declaration is made after the foreign proceedings have commenced. The position of a declaration before such proceedings have commenced is less clear, but would seem to raise the same problems as those of a pre-emptive injunction, discussed above.

Action by the arbitrators Fifthly, consideration could be given to redrafting arbitration clauses so as to confer upon the arbitrators themselves the power to grant anti-suit relief. The default powers of the arbitrators, listed in section 38 of the Arbitration Act 1996, do not include any right to grant an anti-suit injunction, although it is perfectly open to the parties to agree to confer that right (section 38(1)). Let it be supposed that the arbitration agreement does so specify. Plainly it will be necessary for the arbitrators to be appointed before any order can be made, and it is almost certain that by the time that a panel can be constituted foreign proceedings will have been commenced. However, once the arbitrators have been appointed (and, as a result of *The Atlantic Emperor* it will always be possible for this to happen even if the assistance of the court is required, as a court order appointing an arbitrator is "arbitration" and thus not precluded by the Brussels Regulation). The arbitrators are not, on the authority of *CMA CGM SA v Hyundai Mipo Dockyard Co Ltd*, within the Brussels Regulation, so they are perfectly entitled to assert jurisdiction and indeed to grant an anti-suit injunction despite the existence of earlier proceedings in a foreign court. What, however, if the defendant refuses to withdraw his participation in the judicial proceedings? Under section 41(5) of the 1996 Act the arbitrators can issue a peremptory order, and if that is similarly disobeyed then the arbitrators or, with the permission of the arbitrators, the applicant in the arbitration may under section 42, apply to the English court for an order enforcing the peremptory order. The question which arises at this point is whether a court order under s 42 is precluded by the reasoning in *West Tankers*? The point is not an easy one. It could be argued that the effect of such an order is to interfere with the proceedings of another court within the EU or EFTA, in breach of principles of comity and mutual trust, as well as giving rise to the risk of conflicting judgments. But, as against that, the court is not purporting to make any order which relates to the substance of the dispute: it is enforcing a procedural order made by the arbitrators, so that the judgment can be said to be purely, or at the very least primarily, about "arbitration".