

## The West Tankers [2009] decision and its impact in international commercial arbitration

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### I. INTRODUCTION

Arbitration can be considered an established method of determination for international commercial disputes.<sup>1</sup> The arbitration agreement has an obligation to refer disputes that arise between the contracting parties to arbitration. One way of preventing a party from breaching such an agreement by bringing a claim in a court other than the seat court is through anti-suit injunction. Anti-suit injunction prevents parallel litigation that might delay the resolution of disputes.<sup>2</sup> The common law systems have a long tradition of using anti-jurisdiction to protect the substantive interests of contracting parties.<sup>3</sup> For example, in 1911 anti-suit injunction was used in *Pena Copper Mines Ltd v Rio Tinto Co Ltd*.<sup>4</sup> However, since 2009, the ability of English courts to grant anti-suit injunction in favour of arbitration clause within the European Union (EU) has been severely crippled by a recent European Court of Justice (ECJ) ruling.<sup>5</sup> This ruling was in the well-known West Tankers case,<sup>6</sup> where the ECJ stated that anti-suit injunction was incompatible with the EU jurisdiction regime in the Brussels I Regulation.<sup>7</sup> The impact of the West Tankers case on downplaying the validity of an arbitration agreement is an arguable issue. In this argument, the ECJ and English courts have contrary points of view and many proposals and reforms have been suggested. This paper will discuss this issue in four sections. First, the facts of the West Tankers case will be explained. Second, the points of view of both the ECJ and the English courts will be analysed. Third, the impact of the West Tankers case on arbitration agreements in Europe will be reviewed, including its impact on the position of London as a major centre of international arbitration, the effect of such a decision on increasing torpedo actions and the high cost and time-consumption faced by the parties. Finally, this paper will examine the efficiency of some of the proposals and possible reforms.

### II. THE FACTS OF THE WEST TANKERS CASE

West Tankers chartered a vessel to Erg Petroli Spa (Erg).<sup>8</sup> The contract included a clause to refer "all differences and disputes of whatsoever nature arising out of [the] charter shall be put to arbitration" in London.<sup>9</sup> The vessel collided with a jetty in the Italian port of Syracuse.<sup>10</sup> Consequently, Erg submitted a claim against West Tankers in London for uninsured losses, such as the losses with respect to the liabilities to pay for demurrage to third parties.<sup>11</sup> With regard to the insured losses, the insurers subrogating for Erg commenced proceedings in Italy against West Tankers to recover what they had paid to Erg.<sup>12</sup> The insurer relied on the right

<sup>1</sup> Redfern Alan, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004) 1.

<sup>2</sup> Laurent Lévy, 'Anti-Suit Injunctions Issued by Arbitrators', in Emmanuel Gaillard (ed), *Anti-suit Injunctions in International Arbitration* (IAI International Arbitration Series 2005) 28.

<sup>3</sup> Patrizio Santomauro, 'Sense and Sensibility: Reviewing West Tankers and Dealing with its Implications in the Wake of the Reform of EC Regulation 44/2001' (2010) 6(2) *Journal of Private International Law* 281, 282.

<sup>4</sup> (1911) 105 LT 864.

<sup>5</sup> Grace Gunah Kim, 'After the ECJ's West Tankers: The Clash of Civilizations on the Issue of an Anti-Suit Injunction' (2010) 12(1) *Cardozo J. Conflict Resol* 573, 573.

<sup>6</sup> *Allianz SpA v West Tankers Inc* [2009] ECR I-663

<sup>7</sup> Geoffrey Fisher, 'Anti-suit Injunctions to Restrain Foreign Proceedings in Breach of an Arbitration Agreement' (2010) 22(1) *Bond Law Review* 1, 1.

<sup>8</sup> Ala'eldin Ababneh and Sakher Alkasawneh, 'The Relationship Between Arbitration and Jurisdiction Within Europe Post the West Tankers Case' (2013) 33 (1) *Business Law Review* 82, 82.

<sup>9</sup> *West Tankers* (n 6) para [3]

<sup>10</sup> Ababneh and Alkasawneh (n 8) 82.

<sup>11</sup> *West Tankers* (n 6) para [2].

<sup>12</sup> Ababneh and Alkasawneh (n 8) 82.

of subrogating under Article 1961 of the Italian Civil Code.<sup>13</sup> The insurer claimed that they were not a party in the charter party, and so there was no obligation to submit the claim to arbitration.<sup>14</sup> The insurer claimed the Italian court was a ‘first seat’ court under the Brussels I Regulation.<sup>15</sup> While, West Tanker obtained an anti-suit injunction from the English court preventing the insurer from pursuing the proceeding in Italy. The Italian court “was informed of the injunction, but it declined to stay the proceeding”.<sup>16</sup> Therefore, West Tankers alleged that the case came within the scope of the arbitration clause and sought anti-suit injunction.<sup>17</sup> This case was referred by the House of Lords to the ECJ with several arguments with regard to the granting of anti-suit injunction.<sup>18</sup> The ECJ, however, did not grant anti-suit injunction. As a result of this rejection, the arbitration agreement faces difficulties in terms of enforcement. In addition, many arguments have been raised, particularly between the English courts and the ECJ, which will be discussed in the next section.

## 2.1 The English Court Arguments

In the United Kingdom, the House of Lords has the power to serve an anti-suit injunction in support of an arbitration agreement under the Senior Courts Act 1981 sections 37(1) and 44(1) and the Arbitration Act 1996 section (2)(e).<sup>19</sup> However, this principle was changed after the ECJ decision in the West Tankers case. The House of Lords referred the matter to the ECJ and expressed their support of anti-suit injunction, and this included two reasons for the support of anti-suit injunction in a breach of the arbitration agreement. The first reason is that the Brussels I Regulation excluded arbitration from its scope in the broad interpretation of article 1(2)(d).<sup>20</sup> Article 1(2)(b) states that “the Regulation shall not apply to ... arbitration”.<sup>21</sup> Moreover, the House of Lords argued that the ECJ by itself held the same position<sup>22</sup>: “to extend to court proceedings in which the subject matter is arbitration”.<sup>23</sup> Whereas, arbitration agreements are covered by The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC), to which all EU countries are a party in. The House of Lords held that the Brussels I Regulation states, in Article 71, that “This Regulation shall not affect any conventions to which the Member States are parties”.<sup>24</sup> On the same hand, the NYC confirms that all Member States should respect and enforce arbitration agreements.<sup>25</sup> Therefore, the ECJ decision can be seen to be non-compliant with the NYC obligations, as it rejected anti-suit injunction, which was seeking to bring the breaching party into compliance with the arbitration agreement. The second reason is that the nature of the Brussels Regulations were incompatible with an arbitration agreement in which the parties had chosen to apply deferent principles in choosing a jurisdiction.<sup>26</sup> It has been argued that in the European laws there is a lack of a comparable community instrument unifying the arbitration jurisdiction.<sup>27</sup> Hence, the common law approach in granting anti-suit injunction is to enforce parties’ promises to place their disputes with an arbitration tribunal. The common law supporters claim that such an approach, therefore, does not affect the comity of foreign states’ interests.<sup>28</sup> Another important fact is that an anti-suit injunction cannot interfere with a foreign court’s

<sup>13</sup> *West Tankers Inc. v. Ras Riunione Adriatica di Sicurta SpA* (n 9) [5].

<sup>14</sup> Daniel Rainer, ‘The Impact of West Tankers on Parties’ Choice of a Seat of Arbitration’ (2009) 95 (2) Cornell Law Review 431, 438.

<sup>15</sup> *ibid* 438.

<sup>16</sup> Antonin Pribetic, ‘Case Note: Opinion of Advocate General Kokott in Allianz Spa (Formerly Riunione Adriatica Di Sicurta Spa) and Others v. West Tankers Inc. (Case C 185/07 Delivered on 4 September 2008)’ (2008) 13(1) Transnational Dispute Management <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1263473&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1263473&download=yes)> accessed 6 May 2020.

<sup>17</sup> Ababneh and Alkasawneh (n 8) 82.

<sup>18</sup> *ibid* 82.

<sup>19</sup> Santomauro (n 3) 282.

<sup>20</sup> Alexis Mourre and Alexandre Vagenheim, ‘The Arbitration Exclusion in Regulation 44/2001 after West Tankers’ (2009) 12(5) International Arbitration Law Review 75, 75.

<sup>21</sup> Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (2000) No 44/2001 Art 1(2)(b).

<sup>22</sup> This position can be seen in *Marc Rich & Co AG v Societa Italiana Impianti PA* [1991] ECR I-3855 (the Atlantic Emperor).

<sup>23</sup> John Zadkovich and Nicholas Roberts, ‘West Tankers 2012: Pro-Arbitration through Enforcement of Declaratory Awards’ (2012) 2(1) International Arbitration Law Review 51, 51.

<sup>24</sup> Ababneh and Alkasawneh (n 8) 81.

<sup>25</sup> Clarkson C.M.V. and Hill Jonathan, *The Conflict of Laws* (3rd edn, OUP 2006) 258.

<sup>26</sup> Zadkovich and Roberts (n 3) 51.

<sup>27</sup> *West Tankers* (n 6) para [15].

<sup>28</sup> *Donohue v Armco Inc* [2002] 1 Lloyd’s Rep 425, 432

jurisdiction, as it is granted only ‘in personam’.<sup>29</sup> Also, it has been argued that the court first seized will not consider an anti-suit injunction as interference with comity, as the English court ruled on the scope of English arbitration clauses.<sup>30</sup> However, although an anti-suit injunction is useful in avoiding parallel court proceedings in another jurisdiction,<sup>31</sup> the anti-suit injunction has been rejected by the ECJ.

## 2.2 European Court of Justice Arguments

The main argument of the ECJ is that an anti-suit injunction is not compatible with the Brussels I Regulation, as the court’s jurisdiction cannot be reviewed by another Member State.<sup>32</sup> The reason behind such a decision is the uniform application of the Regulation across EU Member States, and confidence and mutual trust should be granted to other courts in deciding their own jurisdiction.<sup>33</sup> The ECJ stated that the anti-suit injunction granted by the English courts “runs counter to the trust which the Member States [must] accord to one another’s legal system and judicial institutions”.<sup>34</sup> Moreover, the ECJ held that, although the anti-suit relief granted by the English courts could have benefits to parties, it is outweighed by the urgent need for harmonisation within the EU, since this provides legal stability.<sup>35</sup>

The ECJ decided contrary to the English court, which held that the *West Tankers* case does not fall within the scope of the Regulation. The ECJ found that the *West Tankers* case fell within the scope of the Regulation, since the core subject matter of the proceeding was a claim for damage in front of the Italian court.<sup>36</sup> Such a claim is under the jurisdiction of the Italian court, as the damage occurred in Italy. This claim considered that civil and commercial matters were covered by the Regulation.<sup>37</sup> Also, the ECJ found that the ‘preliminary issue’ regarding the application and validity of the arbitration agreement fell within the Regulation’s scope and therefore had to be decided by the Italian court.<sup>38</sup> This can be seen as a rational matter, because if the general rules exclude the matter from a court’s jurisdiction, the preliminary issue cannot be excluded, as the decision cannot be addressed without the matter.<sup>39</sup> The ECJ also held that nothing in the Regulation would prevent a Member State’s court from deciding on the validity of the arbitration agreement as long as the court had jurisdiction under the Regulation.<sup>40</sup> Finally, the ECJ supported its view using Article II(3) of the NYC.<sup>41</sup> Article II(3) states that “... when seised of an action in a matter in respect of which the parties have made an arbitration agreement, that will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null, void, inoperative or incapable of being performed”.<sup>42</sup>

This article requires the court in a Contracting State to decide on the validity of the arbitration agreement that is brought in front of the court by the party who breached the arbitration agreement. It has been claimed that this Article allows no justification for using an anti-suit injunction to enforce the agreement.<sup>43</sup> However, depending on Art II(3) of the NYC to support the *West Tankers* decision seems to be unconvincing.<sup>44</sup> It has been argued, with regard to the NYC requirement in this article, that the “court should give effect to an arbitration agreement

<sup>29</sup> *West Tankers Inc v Ras Riunione Adriatica di Sicurtà* (The *Front Comor*) [2005] 2 Lloyd’s Rep 257 (QB).

<sup>30</sup> Fisher (n 7) 1.

<sup>31</sup> Christian Heinze and Anatol Dutta, “Enforcement of Arbitration Agreements by Anti-suit Injunctions in Europe – From *Turner* to *West Tankers*” in Paul Volken and Andrea Bonomi (eds) *Yearbook of Private International Law* (European Law Publisher 2007) 430.

<sup>32</sup> Kulpers Jan-Jaap, ‘Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice’ (2009) 10(11) *German Law Journal* 1505, 1515.

<sup>33</sup> Gilles Cuniberti, ‘Buy Propecia Online No Prescription’ (2009) <<http://conflictoflaws.net/2009/west-tankers-and-indian-courts/>> accessed 3 May 2020.

<sup>34</sup> *West Tankers* (n 9) para [30].

<sup>35</sup> Rainer (n 14) 460.

<sup>36</sup> Paul Beaumont and Emma Johnston, ‘Can Exequatur be Abolished in Brussels I Whilst Retaining a Public Policy Defence?’ (2010) 6(2) *Journal of Private International Law* 249, 265.

<sup>37</sup> *ibid* 265.

<sup>38</sup> *West Tankers* (n 9) para [26].

<sup>39</sup> Ababneh and Alkasawneh (n 8) 81.

<sup>40</sup> Ababneh and Alkasawneh (n 8) 86.

<sup>41</sup> Zadkovich and Roberts (n 23) 51.

<sup>42</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (New York Convention) Art II(3).

<sup>43</sup> Fisher (n 7) 7.

<sup>44</sup> Stuart Dutson and Mark Howarth, ‘After *West Tankers*: Rise of the ‘Foreign Torpedo’?’ (2009) 75(3) *Arbitration* 334, 339.

unless the agreement is ‘null and void, inoperative or incapable of being performed’.<sup>45</sup> The likelihood of the arbitration agreement to be of no legal effect and incapable of performance is extremely low, and it would occur only in rare instances, such as with the death of the nominated arbitrator.<sup>46</sup> Therefore, the arbitration tribunal is required to decide on the validity of the arbitration agreement, but it does not fall within the foreign court’s jurisdiction.<sup>47</sup>

The ECJ seems to adopt the civil law approach of not using anti-suit injunction because it interferes in foreign jurisdiction and affects the principle of international comity.<sup>48</sup> Such approach aims to force Member States to respect each other’s justice systems. However, such approach creates interference between national courts and arbitration agreements, which seems to challenge grounds of arbitration. For instance, this can be seen in the neglecting of party autonomy, where they sign an arbitration agreement to avoid dealing with national courts.<sup>49</sup> Thus, by allowing the breaching party to seek remedy in courts other than the seat court, the party autonomy principle can be affected. Furthermore, the Regulation recognises this in the arbitration exclusion in Art1(2)(d).

### III. THE IMPACT OF THE WEST TANKERS DECISION

In the following section, the impact of the West Tankers decision on the position of London as an international arbitration venue, increasing torpedo actions and the time and cost consumption will be discussed in the following sections.

#### 3.1 London’s position as an international arbitration venue

Enforcing arbitration agreements through anti-suit injunctions has been a subject for intense debate in both common and civil law countries.<sup>50</sup> The West Tankers decision rendered the most critical opinion.<sup>51</sup> It has been argued that this decision has led to a considerable disadvantage for arbitrating parties by reducing the certainty of their agreement, which has affected London as the hub for arbitration. It has been assumed by some that London might lose its important position as a seat for international commercial arbitration,<sup>52</sup> though others argue that it will not be affected.<sup>53</sup> Those arguing that the decision will have a negative impact on the reputation of London as an attractive venue for international arbitration suggest that by preventing English courts from granting anti-suit injunctions within the EU, businesses may lack the motivation to choose London as a seat for their arbitration agreement.<sup>54</sup> Apart from other attractive aspects of London, such as the linguistic advantages, location<sup>55</sup> and the high standard of the Arbitration Act of 1996,<sup>56</sup> the anti-suit injunction is an important tool for attracting business. Lord Hoffmann emphasised the importance of such injunction relief in attracting businesses to choose London as a seat for their arbitration agreements. He revealed that such injunctions are “an important and valuable weapon . . . [.] [to] promote legal certainty and reduce the possibility of conflict between the arbitration award and the judgment of a national court”.<sup>57</sup> This negative affect can be expanded to several famous European hubs of international commercial arbitrations, such as Paris, Stockholm and Vienna.<sup>58</sup> This loss of effectiveness can be seen as the result of the anti-suit injunction being prohibited by the ECJ; hence, businesses might prefer to choose hubs that offer anti-suit injunctions, such as New York and Singapore.<sup>59</sup> Therefore, as Lord Hoffmann pointed out, Europe would “handicap itself by denying its courts the right to

<sup>45</sup> *ibid* 339.

<sup>46</sup> *ibid* 339.

<sup>47</sup> *ibid* 339.

<sup>48</sup> Kim (n 5) 547.

<sup>49</sup> Dutson and Howarth (n 44) 338.

<sup>50</sup> Rainer (n 14) 433.

<sup>51</sup> Lynn Abell, ‘Disarming the Italian Torpedo: The 2006 Italian Arbitration Law Reforms as a Small Step Toward Resolving the West Tankers Dilemma’ (2013) 24(1) *The American Review of International Arbitration* 335, 335.

<sup>52</sup> Rainer (n 14) 433.

<sup>53</sup> Santomauro (n 3) 325.

<sup>54</sup> Mark Materna, ‘An Unnecessary Consternation: An Analysis of the Future of EU Arbitration in the Wake of the West Tankers Decision’ (2011) 11(3) *Pepperdine Dispute Resolution Law Journal* 571, 576.

<sup>55</sup> *ibid* 576.

<sup>56</sup> Bruce Harris, Rowan Planterose and Jonathan Tecks, *Description of Arbitration Act 1996: A Commentary* (Blackwell Science Publishing 2007).

<sup>57</sup> *West Tankers*, [2007] UKHL 4, [2007] 1 *Lloyd’s Rep.* 391 [21].

<sup>58</sup> Materna (n 54) 576.

<sup>59</sup> Rainer (n 14) 433.

exercise the same jurisdiction”.<sup>60</sup> The advocates for anti-suit injunctions fear that the United States might become more attractive as a seat for arbitrations, since parties do not want to end up with litigation in parallel jurisdictions.<sup>61</sup>

On the other hand, it has been argued that an anti-suit injunction is not a necessary tool with regard to successful competition with the rest of the world.<sup>62</sup> This is because the availability of an anti-suit injunction is “only one, rarely decisive, reason to choose the seat of arbitration”.<sup>63</sup> This opinion is supported by giving examples of major international arbitration centres that do not have such injunction relief, such as Geneva and Paris.<sup>64</sup> Hence, it can be seen from these arguments that the anti-suit injunction is not the only feature that will attract international arbitration, and therefore London’s position may not be affected by the ECJ decision. Moreover, those who argue that London will not be a less arbitration-friendly venue claim that “there are still no signs for a danger for London as arbitration center”.<sup>65</sup> Also, those who argue that the lack of availability of an anti-suit injunction may prevent businesses from choosing London may simply be suggesting this because Lord Hoffmann predicted that parties would do so if the anti-suit injunction was prohibited.<sup>66</sup>

It must be noted that the English court will still have the right to grant anti-suit injunctions for non-EU Member States.<sup>67</sup> For instance, in *Shashoua v Sharma*,<sup>68</sup> the English court held that the ECJ decision in the *West Tankers* case would not affect the parties from pursuing anti-suit injunction proceedings in the court of a non-EU Member State.<sup>69</sup> This example was supported by empirical evidence, which denies the negative impact of the ECJ decision. This empirical evidence was found by Materna, who examined two cases involving “non-breaching parties who brought arbitration proceedings following a ruling in a Member State court”. In both cases, the English court ruling was not bound by the ECJ decision.<sup>70</sup> First, in *CMA v Hyundai*,<sup>71</sup> the English court decision indicated that the arbitration agreement can be enforced irrespective of a decision by another Member State court.<sup>72</sup> However, this case was decided prior to *West Tankers*, so it is not certain whether it is a good law.<sup>73</sup> Therefore, it is difficult to relevantly assess the impact of the ECJ decision with regard to whether the impact will be negative or not. Second, in *National Navigation Co. v Endesa*<sup>74</sup> the English court based its decision on Article 34(1) of the Brussels I Regulation.<sup>75</sup> This article includes an exemption from enforcing a foreign judgment that is contrary to public policy. The English court, therefore, found “it would be manifestly against English public policy to recognize the Spanish court’s judgment regarding the arbitration agreement”.<sup>76</sup> However, this view has also been debated. Lord Justice Moore-Bick supported using public policy as a reason for not recognising a foreign judgment in breach of an arbitration agreement as long as there is a clear violation of the NYC.<sup>77</sup> Hence, although the English court cannot use an anti-suit injunction to enforce an arbitration agreement, the public policy defence could discourage the breaching-party from breaching the agreement. This is because this party would face difficulties in enforcing the decision granted by another Member State in the English courts. Therefore, this case may prevent a breach of the arbitration agreement, as it only cost him money and time with a few possibly to enforce the judgment in the English court

<sup>60</sup> *West Tankers*, [2007] UKHL 4, [2007] 1 Lloyd’s Rep. 391 [23].

<sup>61</sup> Rainer (n 14) 436.

<sup>62</sup> *Gasser v MISAT, C-116/02* [2003] E.C.R. I-14693 [21].

<sup>63</sup> Claude Kessler and James Hope, ‘The ECJ Reference in The Front Comor Much Ado About Nothing?’ (2008) 24(2) *Arbitration International* 331, 333.

<sup>64</sup> Ben Steinbruck, ‘The Impact of EU Law on Anti-Suit Injunctions in Aid of English Arbitration Proceedings’ (2007) 50(1) *Civil Justice Quarterly* 358, 363.

<sup>65</sup> Santomauro (n 3) 352.

<sup>66</sup> Rainer (n 14) 461.

<sup>67</sup> Rainer (n **Error! Unknown switch argument.**) 456.

<sup>68</sup> [2009] EWHC (Comm) 957.

<sup>69</sup> *ibid* para 55

<sup>70</sup> Materna (n 54) 580.

<sup>71</sup> [2008] EWHC 2791 (Comm)

<sup>72</sup> Materna (n 54) 580.

<sup>73</sup> Neville Byford and Afzal Sarwar, ‘Arbitration Clauses after *West Tankers*: The Unanswerable Conundrum? Practical Solutions for Enforcing Arbitration Clauses’ (2009) 29(1) *International Arbitration Law Review* 29, 32.

<sup>74</sup> [2009] EWHC 196 (Comm)

<sup>75</sup> *Ibid* [669].

<sup>76</sup> Materna (n 54) 581.

<sup>77</sup> Beaumont and Johnston (n 36) 269.

Therefore, it can be seen from the previous cases that the English court can use alternative approaches to protect arbitration agreements from being breached. This result contrasts with the views of those who argue that the ECJ decision will have a negative impact on the position of London as a major international arbitration centre.

### 3.2. Torpedo Action

Another impact of the *West Tankers* decision is the possibility of “torpedoing” during the enforcement of the arbitration award.<sup>78</sup> A torpedo action is “a method intended at preventing proceedings from being heard in one Member State by first beginning proceedings in another Member State”, particularly in one that is known as a slow judicial system.<sup>79</sup> In the *Brussels I* Regulation, if a proceeding is brought in one jurisdiction, it cannot be heard in another jurisdiction at the same time.<sup>80</sup> It has been argued that the purpose of such an action is to preempt the jurisdiction of a court that would be favourable to another party.<sup>81</sup> By applying the same principle to the *West Tankers* case, it can be seen that the first party wanted to prevent the dispute from being solved by the agreed upon arbitration tribunal in London. Therefore, the torpedo action seems to affect the certainty of the arbitration agreement by causing parallel proceedings in two different jurisdictions, which might delay the proceedings. However, in response to the negative impact of a torpedo action, the ECJ supports its view by emphasising the need for mutual trust. The adopted doctrine of mutual trust by the ECJ clearly shows that, although the torpedo action can result in inevitable delays, English courts must ‘trust’ and decline jurisdiction, even if brought in bad faith.<sup>82</sup> While the concept of mutual trust can promote harmonisation in the EU,<sup>83</sup> it might lead to bad faith claims. Torpedo actions have been criticized as being, in practice, “an incentive for parties to bring bad faith claims”.<sup>84</sup> In particular, critics fear that the *West Tankers* decision could be “another detrimental step toward legitimizing a policy that will cause a rise in bad faith torpedo actions”.<sup>85</sup> In addition, arbitration is a regime that relies on party autonomy without court intervention.<sup>86</sup> After the *West Tankers* decision, the principle of such party autonomy could be affected, as one party could act against the agreed arbitration. The *West Tankers* case allowed torpedo actions in a breach of arbitration agreement, which could significantly affect the exercise of party autonomy.<sup>87</sup>

Nonetheless, it can be argued that torpedo actions do not have a negative impact on arbitration agreements. This is due to the fact that even if the breaching party has been rendered a judgment from a court of jurisdiction other than the seat court, the non-breaching party can sue the breaching party in order to enforce an arbitration agreement in the seat court.<sup>88</sup> Hence, if the breaching party unjustly enriched the party, this party still has the right to claim a breach of the arbitration agreement in the seat court.<sup>89</sup> In addition, the seat court may refuse to enforce the judgment, if it has been rendered contrary to the arbitration agreement, on the ground of public policy.<sup>90</sup> Therefore, it can be seen that the fear of torpedo actions might not have a dramatic effect, and arbitration in the EU will remain unchanged.<sup>91</sup>

### 3.3. Costs and Time Consumption

Although, the effect of torpedo actions can be overcome by the non-breaching party suing the breaching party in the court seat or by applying the public policy of the seat court, the high costs and the delay resulting from the torpedo action remain serious issues. After the *West Tankers* decision, critics feared that parties might engage in

<sup>78</sup> Santomauro (n 3) 323.

<sup>79</sup> Georgios Zekos, ‘Arbitrations Status under EU Law’ (2012) 13(3) *The Journal of World Investment & Trade* 390, 392.

<sup>80</sup> Patrick Boylan, ‘*West Tankers*: End of the Anti-suit in Europe?’ (Sept. 29, 2008) <<http://ld.practicallaw.com/8-383-4278#a511212>> accessed 5 May 2020.

<sup>81</sup> Pierre Véron, ‘ECJ Restores Torpedo Power’ (2004) 35(6) *International Review of Intellectual Property and Competition Law* 638, 639.

<sup>82</sup> Wolff Tanking, ‘Arbitration or Breaking the System to Fix It? A Sink or Swim Approach to Unifying European Judicial Systems: The ECJ in *Gasser*, *Turner*, and *West Tankers*’ (2009) 15 (1) *Columbia Journal of European Law Online* 65, 66 <[http://www.cjel.net/online/15\\_2-wolff-2/](http://www.cjel.net/online/15_2-wolff-2/)> accessed 5 May 2020.

<sup>83</sup> Véron (n 81) 641.

<sup>84</sup> Materna (n 54) 578.

<sup>85</sup> Tanking (n 82) 96.

<sup>86</sup> Ababneh and Alkasawneh (n 8) 83.

<sup>87</sup> Jan-Jaap (n 2) 1516.

<sup>88</sup> *CMA CGM SA v Hyundai MIPDO Dockyard Co.*, [2008] EWHC (Comm) 2791, [2009] 1 *Lloyd's Rep.* 213 (Eng).

<sup>89</sup> *ibid.*

<sup>90</sup> See section (3.1) above.

<sup>91</sup> Materna (n 54) 585.

costly and lengthy litigation,<sup>92</sup> which could undermine arbitration as being faster and cheaper than litigation. These advantages are why parties often opt for arbitration in the first place.<sup>93</sup> Consequently, arbitration might not be a viable alternative to litigation, as the costs could become comparable.<sup>94</sup> This is a significant issue, as a party, who had already agreed on arbitration, could face the undesirable consequences of a torpedo action, namely time-consuming and costly litigation.<sup>95</sup> More importantly, businesses may fear a torpedo action, as one party could seek to delay the resolution of a dispute. Consequently, the price of cross-border commercial disputes may go up.<sup>96</sup> On the other hand, contrary to the previous arguments, which show that arbitration might be affected by the West Tankers case, it has been claimed that the speediness of arbitration will remain a formidable asset when compared to litigation.<sup>97</sup> Similarly, the price of arbitration will not rise to the price of litigation.<sup>98</sup> This assumption is supported by the fact that both arbitration and litigation have similar expenses, in particular with regard to translation and travel costs.<sup>99</sup> Accordingly, cost is rarely used to decide whether parties will choose arbitration or litigation.<sup>100</sup> In addition, the high cost of an anti-suit injunction can also prevent parties from using such relief, in particular if it is not certain whether the English court will exercise its discretion in favour of the party who asked for the injunction.<sup>101</sup>

#### IV. POSSIBLE SOLUTIONS AND REFORMS

The impact of the West Tankers case on arbitration is a debatable issue. Although some deny the negative consequences of the West Tankers case on arbitration, there are many who argue that the West Tankers case will have a significant impact by undercutting the validity and enforcement of arbitration agreements in the EU. As a result, some proposals and reforms have been suggested in order to mitigate the negative consequences of the West Tankers case on arbitration.

It has been suggested that one simple way to protect the validity of arbitration agreements following the West Tankers case is by introducing a new provision in the Brussels I Regulation that would permit Member States to refuse to enforce a judgment regarding arbitration that it considers to be valid, either on the merit of the disputes or the validity of the arbitration agreement.<sup>102</sup> This solution seems to harmonise the Member States obligation toward the NYC and would require only a limited amendment of the Regulation.<sup>103</sup> Nevertheless, such a solution may give rise to parallel proceedings in Member States.<sup>104</sup>

However, a better solution could be the suggestion of the Heidelberg report, which suggested the deletion of the arbitration exclusion in Article 1(2)(d) in the Regulation and granted the court of seat supervision over the arbitration.<sup>105</sup> It then gives priority to the court of seat in deciding on the validity and scope of an arbitration agreement.<sup>106</sup> This can be seen in the new proposed article 27A:

A court of a Member State shall stay the proceedings once the defendant contests the jurisdiction of the court with respect to existence and scope of an arbitration agreement if a court of the Member State that

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<sup>92</sup> Samantha Tite and Emily Barlass, 'Another Nail in the Coffin of Anti-Suit Injunctions in Europe' (Mar. 17, 2009) <[http://www.vinsonelkins.com/uploadedFiles/VEsite/Resources/WP-IDR-2009\\_3\\_13](http://www.vinsonelkins.com/uploadedFiles/VEsite/Resources/WP-IDR-2009_3_13)> accessed 5 May 2020.

<sup>93</sup> Byford and Sarwar (n 73) 29.

<sup>94</sup> Tite and Barlass (n 92) 2.

<sup>95</sup> *ibid.*

<sup>96</sup> *ibid.*

<sup>97</sup> Materna (n 54) 587.

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

<sup>100</sup> Peter Sherwin, Ana Vermal and Elizabeth Figueira, 'The Decision to Arbitrate', International Arbitration <<http://www.proskauer.com/arbitration/19/I>> as cited by Materna (n 54).

<sup>101</sup> Claude and Hope (n 63) 334.

<sup>102</sup> Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (COM/2009/0175 final) <<http://www.publications.parliament.uk/pa/ld200809/ldselect/ldcom/148/14804.htm>> accessed 6 May 2020.

<sup>103</sup> Andrew Pullen, 'The Future of International Arbitration in Europe: West Tankers and the EU Green Paper' (2009) 12(4) International Arbitration Law Review 56, 57.

<sup>104</sup> *ibid.* 59.

<sup>105</sup> Jan-Jaap (n 32) 1515.

<sup>106</sup> Pullen (n 103) 85

is designated as place of arbitration in the arbitration agreement is seized for declaratory relief in respect to the existence, the validity and/or scope of that arbitration agreement.<sup>107</sup>

The Heidelberg report offers guiding principles for including arbitration within the scope of the Regulation. First, regional regulation should not be infringed within the NYC, as the NYC has a uniform framework for the enforcement of arbitration awards and arbitration agreements.<sup>108</sup> Second, the Regulation should avoid addressing questions that are dealt with by the NYC.<sup>109</sup> However, this deletion seems to have no consensus with regard to its effectiveness, as it has been argued that deletion of the arbitration exclusion “makes all judgments on the applicability of an arbitration agreement entitled to recognition under the Regulation”, which creates another area of potential conflict with regard to Member State obligations under the NYC.<sup>110</sup> This conflict can be seen when “the automatic recognition of a decision invalidating an arbitration agreement on grounds which are not set forth in the New York Convention would lead Member States to breach their obligations under Art II”.<sup>111</sup> Moreover, by establishing the priority of the court of seat, it is obvious that the principle of *les pendens* would be set aside. The Green Paper thought to give “[P]riority to the courts of the Member State where the arbitration takes place to decide on the existence, validity, and scope of an arbitration agreement.”<sup>112</sup> However, such a suggestion leads to two observations. First, such a suggestion may “force a party willing to initiate the arbitration to resort to the courts at the seat”.<sup>113</sup> Hence, the proposal may be considered as contrary to the parties’ intention to avoid the courts and may even create a race to courts.<sup>114</sup> Second, this suggestion does not take into account the law of countries like France, as it admits the negative effect of the competence-competence principal.<sup>115</sup>

In addition, the deletion proposal neglects the role of the arbitration tribunal and only focuses on the role of the court.<sup>116</sup> This can be inevitable in an instrument dealing with judgments and court jurisdiction,<sup>117</sup> This illustrates the reason behind the inappropriateness of Regulation to be a right instrument to reform the European arbitration agreement.<sup>118</sup>

On the other hand, in 2010, the European Commission published a revised draft of Council Regulation 44/2001.<sup>119</sup> The draft was contrary to the proposal of the Green Paper (which suggested the deletion of the arbitration exclusion), as Article 1(2)(d) was kept.<sup>120</sup> Further, the proposal makes two new provisions. First, the proposed Article 29(4) states that:

A court seized of a dispute [is required] to stay proceedings if its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seized of the case, or court proceedings relating to the arbitration agreement have been commenced in the member state of the seat of the arbitration.<sup>121</sup>

Such a proposed article seems to be satisfactory, as it imposes an obligation on Member States to stay proceedings when an arbitration tribunal or the court of the seat has been seized. However, it has been argued that such an article requires amendment. For instance, the trigger mechanism in Article 29(4) seems to be inadequate because the requirement for the proceedings is only “to determine ... the existence, validity or effects” of the arbitration agreement.<sup>122</sup> “It does not, presently, require that the precise question as to whether the

<sup>107</sup> The Report on the Application of Regulation Brussels I (Heidelberg) (2007).

<sup>108</sup> Klára Svobodová, ‘Arbitration Exception in the Regulation Brussels I’ [2008] Masaryk University <<http://www.muni.cz/research/publications/822112>> accessed 6 May 2020.

<sup>109</sup> *ibid* 17.

<sup>110</sup> Pullen (n 103) 58.

<sup>111</sup> Mourre and Vagenheim (n 20) 81.

<sup>112</sup> Green Paper on the Review of Council Regulation (n 102)

<sup>113</sup> Mourre and Vagenheim (n 20) 82.

<sup>114</sup> Mourre and Vagenheim (n 20) 82.

<sup>115</sup> Pullen (n 103) 58.

<sup>116</sup> *Ibid* 82

<sup>117</sup> *Ibid*

<sup>118</sup> *ibid*

<sup>119</sup> Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2010] 2010/0383 (COD)

<sup>120</sup> Green Paper on the Review of Council Regulation (n 102)

<sup>121</sup> Green paper on the Review of Council Regulation (n 112)

<sup>122</sup> Andrew Dickinson, ‘The Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)



agreement applies to the subject matter of the dispute before the Member State court that is required to stay proceedings”.<sup>123</sup>

The second proposal aims to eliminate the problem of the Italian torpedo by requiring the court first seized to establish jurisdiction within six months.<sup>124</sup> It has been claimed that these proposals are helpful attempts to solve the conflict between the Brussels I Regulation and arbitration.<sup>125</sup> However, they are considered insufficient in terms of undoing the impact of the West Tankers case and solving the clash between the NYC and the Brussels I Regulation.<sup>126</sup>

However, the fear of the West Tankers impact might be overestimated. This assumption is based on four facts. First, the English courts still have the right to grant anti-suit injunctions in cases that fall outside the scope of the Brussels I Regulation.<sup>127</sup> Second, although the availability of an anti-suit injunction is a factor, “it rarely is a deciding one”; for example, the local courts in Paris and Geneva rarely issue such injunctions.<sup>128</sup> Third, even though English courts will be unable to grant anti-suit injunctions, the arbitration tribunal sitting in England will still be able to do so.<sup>129</sup> This can be supported by the fact that the arbitrator is a private person, and therefore does not represent the interests of a state; hence, “the arbitrator may decide on the jurisdiction of a judge without breaching state sovereignty”.<sup>130</sup>

## V. CONCLUSION

The West Tankers case led to a significant debate on its impact on arbitration. Some argued that the position of London as a famous seat of international arbitration agreements could be diminished. It might also increase torpedo actions, which affect the non-breaching party and are contrary to party autonomy principles, as a torpedo action opposes the parties’ intention to avoid national courts. Nevertheless, such a claim can be overcome by suing the breaching party to enforce the agreement in the seat court, and the seat court can also refuse the decision of another Member State on the ground of public policy. While increased costs and time consumption could be an impact of the decision, some argued that the price of arbitration would not rise to the price of litigation. Furthermore, the cost of granting an anti-suit injunction is extremely high. Hence, it cannot be claimed that the cost will affect arbitration in the EU.

There have been many proposed amendments to the Regulation to solve the shortcomings of the West Tankers decisions. The best solution could be the Green Paper proposal, which deletes the exclusion and gives priority for deciding jurisdiction to the court of seat. However, this suggestion has been criticized as being contrary to the Member States obligations under Art II of the NYC.

On the other hand, it has been argued that there are no negative impacts of West Tanker decision, and the arbitration will not be affected. This is because the anti-suit injunction is not the only factor that attracts international arbitration to choose London as a seat. For example, Paris is also a famous hub, and it grants no such injunctions. Moreover, the English court will still have the right to grant anti-suit injunctions in cases that fall outside the EU, and the arbitration tribunal can also grant such an injunction.

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(‘Brussels I bis’ Regulation)’ [2011] European Parliament Research Paper No. 11/58 <SSRN: <http://ssrn.com/abstract=1930712>> accessed 12 May 2014

<sup>123</sup> *ibid* 18.

<sup>124</sup> Kim (n 5) 594.

<sup>125</sup> Kim (n 5) 594.

<sup>126</sup> Kim (n 5) 594.

<sup>127</sup> See section 3.1 above.

<sup>128</sup> Claude and Hope (n 63) 333.

<sup>129</sup> *ibid* 333.

<sup>130</sup> Lévy (n 2) 116.

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