National Navigation Co v Endesa Generacion SA (The Wadi Sudr): Dead Ahead? West Tankers sails on in the Court of Appeal in The Wadi Sudr

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1. INTRODUCTION
In The Wadi Sudr the English Court of Appeal considered whether a judgment of another state within the scope of the Brussels Regulation was required to be recognised in English court proceedings themselves falling outside of that regime by virtue of the arbitration exception in art.1(2)(d). The Court of Appeal reversed Gloster J.’s decision at first instance, ruling that such a judgment had to be recognised and was binding upon the English court, irrespective of whether the English proceedings were potentially excluded under the arbitration exception.

The decision is significant as a further examination of the impact of the European Court of Justice (ECJ)’s decision in West Tankers on the important issue of the interface between national court and arbitration proceedings, which in turn has serious practical implications on the options available to a contracting party faced with breach of an agreement to arbitrate. The decision also highlights the deficiencies in the current position following West Tankers and underscores the need for reform in this area, as recognised by the European Commission (EC) in its report and Green Paper on the operation of the Regulation, to avoid unnecessary and costly satellite litigation.

In addition to an analysis of the Court of Appeal’s reasoning in The Wadi Sudr, this note considers the status and relative merits of the EC’s proposed reforms and suggests a form of arbitration clause commercial contract parties might use to mitigate the risks arising from the present uncertainties.

2. BACKGROUND
The background, so far as is material, is that NNC contracted to deliver coal to Endesa aboard a vessel, The Wadi Sudr, pursuant to a bill of lading expressly incorporating the terms of a charterparty. Both the head charter (expressed to be governed by English law) and the voyage charter required disputes to be determined by arbitration in London.

3 National Navigation Co v Endesa Generacion SA (The Wadi Sudr) [2009] EWHC 196 (Comm); [2009] 1 Lloyd’s Rep. 666. Granting declaratory relief in favour of NNC that disputes between the parties were referable to London arbitration and that the English court was not required to recognise the prior Brussels regime state judgment.
5 Report on Application of Regulation 44/2001 COM(2009) 174 final. Pursuant to art.73, the Commission was to present a report to the European Parliament on the Regulation’s application within five years after its entry into force. The Commission’s consultation ended on June 30, 2009.
Endesa commenced proceedings before the Mercantile Court in Almería, Spain to arrest the ship and claiming damages for short delivery under the bill of lading. NNC subsequently requested a stay of the Spanish proceedings on the basis that the arbitration clause was incorporated by reference in the bill of lading.

On July 3, 2008, NNC commenced an arbitration against Endesa in London seeking a negative declaration (i.e. a declaration of no liability) against Endesa. Further, on July 8, 2008, NNC commenced proceedings in the English Commercial Court in support of the London arbitration, seeking relief including an anti-suit injunction (to restrain Endesa from pursuing its claims other than through London arbitration) and a declaration that disputes between the parties were referable only to London arbitration and that the English court was not required to recognise the Spanish judgment. For its part, Endesa argued that the judgment of the Almería court was binding on the English court under art.33 of the Regulation and created an issue estoppel preventing that court from reaching a different decision.

On September 8, 2008, the Almería court ruled, applying Spanish law, that the arbitration clause was not incorporated in the bill of lading and therefore refused to decline jurisdiction, also holding that NNC had waived any right to rely on the arbitration clause by instituting the English court proceedings. Nevertheless, the Almería court decided to stay the proceedings before it under art.27 of the Regulation pending a ruling from the English court establishing its position as the court first seised.

3. THE FIRST INSTANCE DECISION
The first instance decision was handed down by Gloster J. on April 1, 2009. Unsurprisingly, applying West Tankers, the anti-suit application was dismissed. However, Gloster J. granted the application for a declaration in the arbitration claim. She held that the Almería court’s judgment—itself a Regulation judgment—was not required to be recognised pursuant to art.33(1) of the Regulation on the basis that NNC’s arbitration proceedings before the English court were not within the Regulation’s scope by virtue of the arbitration exception in art.1(2)(d). At [97]:

“[A]lthough the judgments of the Almería Court are Regulation judgments, they are not required to be recognised, pursuant to Article 33(1) of the Regulation, in proceedings in another Member State, which are not themselves proceedings within the Regulation, because, in the latter proceedings, the Regulation simply does not apply. As the Court of Appeal pointed out in Through Transport, at this stage (and before any separate proceedings to enforce a substantive judgment of the Almería Court on the merits of the case), such a decision is no more than a decision as to that Court's jurisdiction to entertain Endesa’s Article 5(1) claim.”

On the question of whether the reasoning applied in West Tankers—as to the incompatibility of an anti-suit injunction with the Regulation, notwithstanding that one set of proceedings is outside the Regulation and the other within—required an equivalent conclusion in respect of the relief sought by NNC, Gloster J. held at [97]:

“The granting of the declaration sought by NNC would not amount to any attempt by this Court ‘to strip... [the Almería Court] of the power to rule on its own jurisdiction under

7 On the same day, NNC sought from the English Commercial Court a declaration of non-liability to Endesa. This part of NNC’s claims was ultimately struck out. The application was made on the assumption that the contract contained an exclusive jurisdiction clause in favour of the English courts, which was shown to be incorrect. Accordingly, the court had no jurisdiction in respect of this part of NNC’s claim and the application was struck out with indemnity costs awarded against NNC. See further The Wadi Sudr [2009] EWHC 196 (Comm); [2009] 1 Lloyd’s Rep. 666 at [63]–[72].

8 This decision was upheld on appeal on December 3, 2008.
THE WADI SUDR: DEAD AHEAD? WEST TANKERS SAILS ON

[the] Regulation’. Nor would it amount to an attempt by this Court to interfere with that Court’s ‘exclusive’ right to rule on its own jurisdiction pursuant to Articles 1(2)(d) and 5(1). The purpose of the declaration sought by NNC is not to prevent or impede the Almería Court from assuming, or deciding upon, its own jurisdiction. The latter (subject to NNC’s outstanding appeal) has already done so... in my view, any declaration granted by this Court would not threaten or impede or otherwise obstruct any decision by the Spanish court as to its own jurisdiction.”

While expressing hesitation on the point, Gloster J. further concluded that the grant of a declaration would not be something that would contravene the principle of mutual trust underlying the Regulation:

“There can, in my judgment, be no assumption, in circumstances where different Member States have their separate and respective obligations under the New York Convention, that one Member State will be in a position to accept, or should, on grounds of comity, accept, the decision of the court of another Member State, as to the incorporation or validity of an arbitration clause, in circumstances where the latter may well have applied its own law to the question. In other words, the position in relation to a declaration—which is not interfering with the exercise by another Member State of the exercise of a Regulation jurisdiction—is different from that in relation to the grant of an anti-suit injunction.”

She also held, obiter,9 that it would in any event be manifestly contrary to public policy pursuant to art.34(1) of the Regulation to recognise the Almería court’s judgment in view of the relevant obligations under the NYC and the Arbitration Act 1996 s.9(4).10 It therefore followed that, pursuant to the Civil Jurisdiction and Judgments Act 1982 s.32, the court would not be bound by the Almería court’s decision on those matters.

Endesa appealed the judgment of Gloster J. and the appeal came before Waller, Carnwath and Moore-Bick L.JJ. in November 2009.

4. THE COURT OF APPEAL DECISION

On appeal, Endesa sought to uphold Gloster J.’s view that the Almería court’s judgment was a judgment to which the Regulation applied, and contended that there was, therefore, no proper basis for ruling that the English court was not bound by that decision (including on the issue of incorporation of the arbitration clause), irrespective of the substance of the English proceedings. Conversely, NNC argued that the Almería court’s judgment was excluded from recognition under the Regulation.

NNC was required to make this argument because it was common ground that the only way that the English court could avoid recognising the Almería judgment was if the Regulation did not prescribe this. The Court of Appeal’s position was reached by an analysis of the law on res judicata and Civil Jurisdiction and Judgments Act 1982 (CJJA 1982) s.32. As a result of the Almería court judgment, under English common law the issue of whether there was an arbitration clause in the contract was res judicata against NNC and thus the English courts would be bound to follow that decision subject only to a public policy basis for refusing recognition. NNC’s only escape from this outcome could be by virtue of CJJA 1982 s.32(1) and (3) but that escape route would not be available if s.32(4) applied, because the Almería court judgment was one which the English court was required to recognise under the Regulation. Section 32(1), (3) and (4) provides:


10 Arbitration Act 1996 s.9(4): “On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.”
32. Overseas judgments given in proceedings brought in breach of agreement for settlement of disputes

(1) Subject to the following provisions of this section, a judgment given by a court of an overseas country in any proceedings shall not be recognised or enforced in the United Kingdom if—

(a) the bringing of those proceedings in that court was contrary to an agreement under which the dispute in question was to be settled otherwise than by proceedings in the courts of that country; and
(b) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given; and
(c) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of that court.

(3) In determining whether a judgment given by a court of an overseas country should be recognised or enforced in the United Kingdom, a court in the United Kingdom shall not be bound by any decision of the overseas court relating to any of the matters mentioned in subsection (1) or (2).

(4) Nothing in subsection (1) shall affect the recognition or enforcement in the United Kingdom of—

(a) a judgment which is required to be recognised or enforced there under the 1968 Convention [or the Lugano Convention] [or the Regulation].” (Emphasis added.)

Allowing the appeal, the Court of Appeal addressed three central questions. First, were the judgments of the Almería court Regulation judgments? Secondly, on the basis that the judgments were within the Regulation, must they be recognised and apply in the English proceedings (so as to establish an issue estoppel binding the court)? Thirdly, was there any legitimate public policy reason for otherwise refusing recognition of the judgments? These areas are addressed, in turn, below.

Were the Almería judgments Regulation judgments?

We have previously argued11 that the ECJ in West Tankers failed to adequately address the question of why proceedings concerning the validity and application of an agreement to arbitrate should be beyond the Regulation’s reach (on the basis that the essential subject matter is arbitration as established in Marc Rich),12 whereas a preliminary issue in relation to the same matter falls within the Regulation’s mechanism dealing with allocation of jurisdiction. Indeed, the ECJ has recognised that a case may involve matters both within and outside of scope in Hoffmann v Krieg.13

In this context, NNC sought to argue that judgments can be severable so that, in circumstances where a judgment deals with matters outside the scope of the Regulation, art.4814 permitted the courts of another member state to refuse recognition to those aspects.15 Specifically, where, as here, the substance of what is being enforced is a ruling on the

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14 Regulation 44/2001 art.44: “Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.”
15 NNC relied on Van den Boogaard v Laumen (C-220/95) [1997] Q.B. 759; [1997] 3 W.L.R. 284, where the English court, following the grant of a divorce, ordered the husband to transfer property to the wife. When the wife sought to enforce the agreement in the Netherlands, a question arose whether the judgment related to maintenance (in which case it fell within the scope of Regulation 44/2001) or to rights in property arising out of a matrimonial relationship (in which case it fell outside). The court held that, because on divorce the English court
incorporation of an arbitration clause, the court could legitimately refuse to recognise the judgment under the arbitration exclusion. While Waller L.J. acknowledged that this approach had obvious attractions, he felt unable to reach the same conclusion following West Tankers. At [46]:

“The arguments are seductive because they would at least eliminate the lack of reciprocity, but the difficulty is that they seem to me to be contrary to the ruling of the ECJ [in West Tankers] and they do not marry with section 32 of the Civil Jurisdiction and Judgments Act. The ruling of the ECJ seems to me to be that a judgment on a preliminary ruling is a judgment within the regulation if it takes place in proceedings the main scope of which brings them within the regulation. Furthermore a decision on whether an arbitration clause is incorporated into a contract will, in most instances, be very closely tied up with the merits of a contractual dispute where a court must first ascertain what the terms of a contract are. It is the judgment on incorporation and the terms of the contract which is a regulation judgment and to which Article 33 applies. It is to that judgment which section 32(4) applies in its entirety. This was the judge’s view and I agree with it.”

In so rejecting the severability argument and confirming Gloster J.’s finding that the Almería court’s judgment fell within the Regulation, Waller L.J. made clear that he was not persuaded by NNC’s reliance on the ECJ’s ruling in Hoffmann v Krieg.16 At [68]:

“That case was not concerned with any question as to whether a decision of one court was res judicata in proceedings in another court. It was concerned with how a judgment of the German court ordering maintenance on the basis that a couple were still married, was to be reconciled in the courts of Holland with a judgment of a court in Holland that granted the couple a divorce. I cannot for my part see any analogy with the question with which this case is concerned, i.e. whether a decision that there is no arbitration clause which would, but for section 32(3) of the 1982 Act, be res judicata, and whether it loses the protection of section 32(3) by virtue of section 32(4).”

Moore-Bick L.J., who provided a detailed examination of the earlier case law including Van Uden17 and Marc Rich, emphasised that proceedings calling for a determination as to whether or not an arbitration clause applies will fall either outside or within the Regulation depending on whether that dispute represents the principal subject matter of the proceedings or is an issue that is ancillary to the determination of the substantive dispute. In Moore-Bick’s view, West Tankers was therefore no more than the “latest step” in what he considered to be a “consistent line of authority”.18 As a result, on the question of the application of art.48, this meant that:

“[T]he proceedings can be treated as relating to two or more different subject matters and the consequent judgment as falling partly within and partly outside the scope of the Regulation only in cases where they embrace more than one principal subject matter, so that the determination of one is not a step on the way to the determination of another and cannot therefore be classed as a preliminary issue. In the present case it was necessary for the Spanish court to determine whether an arbitration agreement existed as a step on the way to determining the substantive dispute between the parties. It was therefore a preliminary

could regulate both rights of property arising out of matrimonial relationships and matters of maintenance, the court in the Netherlands must distinguish between the different aspects of the decision. A judgment which relates to matters falling both within and outside the Regulation could be enforced in part if the necessary distinction could be made.


May 2010
issue within the principle enunciated in the cases to which I have referred and therefore the proceedings relating to it take their character from the substantive issue. Article 48 therefore has no application in this case.”

Consequently, the Court of Appeal held that the Almería court judgment in relation to the incorporation of the arbitration clause was covered by the Regulation.

Did the Almería judgments bind the English court?

We have previously argued that the ECJ’s approach to the application and validity of arbitration agreements as an “incidental” matter, with priority given to potential secondary effects on overseas proceedings under the Regulation, creates a greater risk of a party being able to circumvent the agreed arbitration process by initiating vexatious overseas proceedings. Waller L.J. highlighted the practical consequences of this at [41]:

“It may be thought to be unsatisfactory that what appears to be contemplated is the possibility of inconsistent judgments as between member states. Perhaps even more unsatisfactory would appear to be the result which leaves the court in member state A where the proceedings on the merits have been commenced free to ignore a judgment in arbitration proceedings in state B the seat of the arbitration, but if a preliminary ruling can be obtained early enough in state A, the courts in state B are bound by the result of the preliminary ruling in state A.”

Notwithstanding the undesirability of this position, Waller L.J. considered the first instance judge’s reliance on Through Transport to be misplaced and, ultimately, contrary to the ECJ’s judgment in West Tankers:

“If Gloster J. is right in her conclusion that a registered judgment simply does not have to be recognised in proceedings excluded from the regulation, somehow all the findings in relation to issue estoppel, which would apply in a case where a court of a non-member country had decided the point of incorporation but for section 32, do not apply by virtue of section 32(4) applying, whereas one would have thought the object of section 32(4) was actually to make them apply in the case where a judgment of a member state was registerable.

... In my view accordingly the judge sought to gain more from the two paragraphs in Through Transport, quoted by her, than she was entitled to do. Those paragraphs were dealing with a ruling of the Finnish court which could not give rise to a relevant issue estoppel. A regulation judgment can however give rise to an issue estoppel as much in Arbitration proceedings excluded from the regulation as in any other proceedings in an English court.”

In arriving at this conclusion, Waller L.J. did not accept NNC’s submission based on the decision of Burton J. in CMA CGM SA v Hyundai Mipo Dockyard Co Ltd that, as the reference to a “court or tribunal of a Member State” in art.32 of the Regulation does not include an arbitral tribunal, and since NNC was merely seeking a ruling under Arbitration Act 1996 s.32 (following permission from the tribunal), Gloster J. was similarly not bound by the Almería judgments. At [56]:

THE WADI SUDR: DEAD AHEAD? WEST TANKERS SAILS ON

“I confess to having some difficulty with the reasoning of Burton J., since it would seem to me that arbitrators bound to apply English law would have to consider under ordinary principles of English law whether a judgment gave rise to an issue estoppel. But whether that is right or not, Burton J. recognised that an English court was certainly bound by a regulation judgment and in my view it cannot make any difference that the court is acting under section 32 of the Arbitration Act.”

This point was also addressed by Moore-Bick L.J. at [118]–[119]:

“It is quite true that the Regulation itself does not apply to arbitral tribunals and that arbitrators are not therefore bound by the Regulations themselves to recognise judgments of the courts of Member States of the EU, but it does not follow that foreign judgments, whether of the courts of Member States or other countries, can be disregarded in arbitration proceedings. A judgment of a foreign court which is regarded under English conflicts of laws rules as having jurisdiction and which is final and conclusive on the merits is entitled to recognition at common law…. It follows, therefore, that arbitrators applying English law are bound to give effect to that rule…

Quite apart from that, however, even if the arbitrators in this case were entitled to disregard the Spanish judgment, I do not think that the court can properly do so, since Article 33(1) of the Regulation imposes a legal duty on Member States to recognise judgments given by the courts of other Member States, subject only to the terms of the Regulation itself. The fact that in this case the arbitrators had given their permission to the court’s hearing an application under section 32(1) of the Arbitration Act cannot affect the court’s duty to recognise the judgment of the Spanish court, nor can it affect Endesa’s right to rely on it as giving rise to an issue estoppel.”

By extension of his findings on the non-applicability of art.48, Moore-Bick L.J. also explained the relevance (or lack thereof) of the decision in Hoffman v Krieg24:

“I do not think that the decision in Hoffman v Krieg supports the broad proposition that a judgment in a civil or commercial matter is not entitled to automatic recognition in proceedings before a court of another Member State which fall outside the Regulation. The important question for present purposes, however, is whether it supports the narrower proposition that a judgment in a civil or commercial matter which also relates incidentally to an excluded matter need not be recognised in proceedings in another Member State relating principally to that excluded matter. I do not think it does… There was no discussion [in that case] of the effect of recognition as giving rise to estoppel by record, which is the question that we have to decide, and the judgment does not contain any clear indication of how that question should be decided.”

Finally, on the issue of the interaction with Brussels regime states’ international obligations under the New York Convention (NYC)25 requiring those states’ courts to refuse to hear proceedings brought in breach of an arbitration agreement (and to refrain from hearing substantive arguments as to the arbitrators’ jurisdiction until the arbitral tribunal has itself had an opportunity to do so, reflecting the well-established principle of “competence-competence”),26 which obligations take precedence over the Regulation,27 Waller L.J. stated:

“The United Kingdom’s obligation under the New York Convention to give effect to arbitration agreements does not as it seems to me require the English court not to be

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26 The general principle is recognised in most countries, including under French, German and English law (Arbitration Act 1996 ss.30–32) and in institutional rules such as LCIA art.23, ICC art.6 and UNCITRAL art.21.
27 See Regulation 44/2001 art.71(1).
bound by a decision of a court of a fellow member state and co-signatory of the New York Convention that there was no arbitration clause.”

Moore-Bick L.J. put the point slightly differently at [127]:

“It is quite true that the United Kingdom as a party to the Convention has an obligation to recognise and enforce arbitration agreements where they exist, but it does not follow that the courts of this country have a duty to examine the question for themselves whenever it is alleged that the parties have entered into an agreement of that kind. Whether they have done so in any given case is a question which, for the purposes of the New York Convention, may be determined by any court of competent jurisdiction, there being nothing in the Convention itself which precludes the application of established rules of estoppel by record.”

Therefore, in summary, the Court of Appeal held that, notwithstanding that the English court’s proceedings were themselves non-Regulation proceedings, the English court was nevertheless bound to recognise a judgment of a Brussels regime state given in Regulation proceedings. This finding should come as no surprise to practitioners and scholars familiar with the Regulation. Gloster J.’s view to the contrary was unsustainable.

Should recognition of the Almería judgments be refused on public-policy grounds?

Having decided that the English court was bound to recognise the Almería judgments under the Regulation, there was no basis for then refusing recognition on public-policy grounds. Moore-Bick L.J. stated at [125] and [131]:

“It is not, I think, contrary to public policy to recognise a judgment of a foreign court of competent jurisdiction simply on the grounds that an English court would have come to a different decision. For example, if a foreign court purporting to apply English law to a contract with the aid of expert witnesses were to reach a conclusion that an English court would think wrong, it would not be contrary to public policy to enforce the judgment and it is difficult to see why for this purpose arbitration agreements should be given a status above that of other obligations. Whether a foreign judgment will be recognised depends primarily on whether under English conflict of laws rules the court in question is regarded as having jurisdiction over the parties. In my view the question whether the courts of this country should recognise a foreign judgment given in proceedings taken in breach of an arbitration agreement is also essentially one of jurisdiction.

... In my view, however much importance is attached to arbitration, or even to the principle that contracts are to be performed, it cannot be said that the failure on the part of the Spanish court in good faith to give effect in this case to an arbitration agreement imperfectly spelled out in the bill of lading (but in the eyes of English law sufficiently incorporated by reference) would involve a manifest breach of a rule of law regarded as essential in the legal order of the United Kingdom or of a right recognised as being fundamental within that legal order.”

There may be a different outcome where, for example, judgment had been obtained through conscious wrongdoing (which Moore-Bick L.J. indicated could include pursuing proceedings in defiance of an injunction), but that was not the case here.

If the Court of Appeal had come to a different conclusion, then both English common law and the Regulation (art.34(1)) would have allowed the English court to refuse to recognise the Almería judgment. It is this aspect of the Court of Appeal’s judgment which one can imagine may be the subject of further scrutiny both in arbitral awards and, perhaps, in the newly established English Supreme Court. The Court of Appeal, albeit in eloquent

THE WADI SUDR: DEAD AHEAD? WEST TANKERS SAILS ON

prose, has consciously chosen to elevate what it appears to conceive is proper compliance with European principles of practical effectiveness and/or mutual trust above (what many others would consider to be a higher calling) proper compliance with the NYC and respect for the international arbitration regime that it has fostered. The Court of Appeal did not question Gloster J.’s conclusions that, as a matter of the *lex arbitri* and the law governing the arbitration agreement, the London arbitration clause was incorporated into the bill of lading. In these circumstances, while the Court of Appeal’s judgment will comfort European law purists, it undoubtedly undermines party autonomy and significantly dilutes the attraction of arbitration as a private form of dispute resolution, as well as its international efficacy.

5. ANALYSIS

The Court of Appeal’s decision is unsurprising in the light of *West Tankers* and subsequent case law applying a narrow interpretation of the arbitration exception. The reciprocity problem highlighted by Waller L.J., however, leaves a striking gap in the Regulation framework and presents an obvious advantage to a party who commences foreign court proceedings in apparent breach of an arbitration agreement. In particular, where a party brings proceedings on the merits denying the existence, validity or applicability of an agreement to arbitrate, it can obtain judgment on those issues, which will be within the scope of the Regulation and which must be recognised and enforced by the courts of other Brussels regime states. Conversely, where a party seeks to establish the existence, validity or applicability of an agreement to arbitrate, any proceedings it initiates to those ends (for example, requesting declaratory relief, as in *The Wadi Sudr*) will come within the arbitration exclusion with the result that the judgment will not be entitled to recognition under the Regulation.

At best, this significantly increases the likelihood of parallel proceedings, resulting in additional delays and costs, in circumstances where the parties have prima facie agreed the process and rules to be applied to disputes between them, in a pre-agreed forum outside the rules of any national court. At worst, it serves as an open invitation to a recalcitrant party to circumvent the agreed dispute resolution mechanism by initiating proceedings on the merits in the Brussels regime state in which it considers a favourable ruling on the invalidity and/or non-applicability of the arbitration agreement to be most likely. It could then seek to deploy such a judgment, or a judgment dealing with the merits, before the courts of the arbitration seat, for example to challenge the arbitral tribunal’s jurisdiction, or to resist enforcement of any award.

The ensuing risks and uncertainties arising from (even the possibility of) having to participate in foreign court proceedings, lead to an incentive for the party seeking to uphold the arbitration agreement to take pre-emptive action in the courts of the arbitral seat and, potentially, in other Brussels-regime state courts where enforcement may become necessary. We have previously considered mechanisms for holding parties to their original agreement to arbitrate disputes, and the possible remedies where this cannot be done successfully, as well as safeguards to reduce the risks associated with unexpected satellite litigation. In this context, it is expected that the initial defensive action will be to obtain a determination (and so establish res judicata) on the jurisdictional issues prior to any decision in the foreign court proceedings. This could then be used as a shield in any attempted enforcement of a contrary foreign judgment under the Regulation.


32 Regulation 44/2001 art.34(3) allows a Brussels regime state court to refuse recognition/enforcement of a judgment deemed to be irreconcilable with a judgment given in a dispute between the same parties in the state in which recognition/enforcement is sought.
Notwithstanding the Court of Appeal’s comments in *The Wadi Sudr*, the reciprocity problem, and the resulting “race-to-judgment” through satellite litigation, with priority given to the court first seised, are at odds with states’ separate obligations under the NYC. It is difficult to see why the courts of the arbitral seat *should* defer to the foreign court, when there may be a real risk that that court will not ultimately decline jurisdiction or otherwise impose a stay of the proceedings before it, or that it may not be capable of so doing within a reasonable time. By way of example, the Italian civil procedure rules for summary dismissal are complex and the process entails a consideration of the merits of the case even where there is a challenge on jurisdiction. A party faced with the prospect of unfamiliar rules and processes cannot, therefore, reasonably be expected simply to *trust* that a foreign court will uphold an arbitration agreement. Indeed, as things stand, the national courts of the seat may find themselves bound to recognise a judgment which fails to do just that, notwithstanding that, under the (putative) law they would have applied, the agreement to arbitrate would have been upheld. As noted above, Gloster J. was clearly alive to this risk in her reasoning in *The Wadi Sudr*. Further, while commencing/continuing with the arbitration remains as a key option, this is unlikely to obviate the risk of inconsistent judgments from parallel proceedings and will inevitably lead to increased costs. In any event, it cannot be discounted that the foreign court will resolve the jurisdictional issue as a preliminary matter well before a tribunal issues any award (an outcome which a recalcitrant party could facilitate by refusing to participate in the arbitration and/or challenging the arbitrator’s jurisdiction to hear the dispute). As noted above, the means to deal with this are contained in the public policy exception which exists both at common law and under article 33(4) of the Regulation. Indeed, if the Almería court had instead been based in Russia, China or the Middle East, for example, it is difficult to imagine that the Court of Appeal would not have reached for that lever.

The deficiencies in the current position are clear, as is the potential prejudice to the major European centres for international arbitration. On April 21, 2009 the European Commission published its report on the application of the Regulation together with a Green Paper launching a consultation on, amongst other matters, the interface between the Regulation and arbitration proceedings. For present purposes, the principal question raised in the Green Paper was whether arbitration should be brought within the scope of the Regulation and, in this regard, the Paper envisaged “a (partial) deletion of the exclusion of arbitration from the scope of the Regulation”.

The Commission’s consultation ended on June 30, 2009 and the European Parliament’s Committee on Legal Affairs recently published a working document on the Green Paper, setting out the rapporteur’s “very preliminary findings of principle”. On the question of removal of the arbitration exception, the rapporteur states he “does not favour (even partial) abolition of the exclusion of arbitration from the scope of the regulation”. In particular:

“He tends to endorse to consider that the implications of extending the regulation to cover arbitration would lead to a regionalisation of the law of arbitration in the EU which is at odds with its universal nature. It could also result in the acquisition by the EU of exclusive competence, which, in view of the difficulties brought about by the Court’s opinion in *Lugano*, should not be brought about except by a deliberate legislative act. Moreover, the

33 In principle, any award from the arbitral tribunal would be enforceable under the NYC, however there may well be problems with enforcement before the courts of the Brussels regime state running parallel proceedings.


ideas set out in the Commission’s Green Paper would seem incompatible both with the 1958 New York Convention and with the 1961 Geneva Convention on International Commercial Arbitration. ... The rapporteur therefore considers that the safest course of action and to avoid any interference the Member States’ rights and obligations under the New York and Geneva Conventions, it is best to continue to exclude arbitration from the scope of the regulation.”

Importantly, the rapporteur indicates that the arbitration exclusion should be clarified to make clear that judgments arising from proceedings brought in breach of an agreement to arbitrate and judgments ruling that arbitration agreements are invalid, are outside of the Regulation’s reach and so not entitled to recognition/enforcement in other Brussels regime state courts. The working document proposes that there should be a “separate study and a deeper consultation with practitioners specialising in arbitration and international arbitration bodies” to consider the proper role of the national courts of the arbitral seat.

These initial findings are to be welcomed. The radical proposal to delete, even partially, the arbitration exclusion failed to acknowledge that, by signing up to an arbitration agreement, parties have expressly elected to exclude the general powers of the national courts of any jurisdiction. As we have argued, reintroducing these powers under the guise of the Regulation would risk diluting the strength of arbitration as a private form of dispute resolution. Moreover, just as the decision in West Tankers gave undue precedence to the doctrine of mutual trust between Brussels regime state courts at the expense of a proper analysis of those states’ separate obligations under the NYC, leading to the reciprocity problem, courts may quite reasonably reach different conclusions on the validity or applicability of an arbitration agreement (there being no uniform rules in this area), making the sort of wide-ranging harmonisation envisaged in the Green Paper extremely difficult to achieve in practice in any event.

That said, it is crucial that the distinction formulated in Marc Rich and Van Uden, and developed in West Tankers (as applied in The Wadi Sudr), on the question of when proceedings relating to arbitration will fall within the scope of the Regulation, is not allowed to lead to further erosion of the principles of flexibility and party autonomy underlying arbitration, not to mention costly litigation concerning why recognition/enforcement of judgments should be refused. There remains a persuasive case for giving prima facie priority to the forum expressly chosen by the parties, including in respect of so-called “preliminary” issues such as the validity of an arbitration clause, which it seems reasonable to assume the parties intended would be decided by the courts of the arbitral seat using their supervisory powers. In particular, this has the key attraction of shifting the main battleground back to the jurisdiction of the seat. However, this goal could largely be achieved, albeit indirectly, by a limited amendment to the existing arbitration exception to clarify that a Brussels-regime state court is entitled to refuse recognition/enforcement of a judgment rendered in apparent breach of an agreement to arbitrate, reflecting the position under the NYC (and as proposed by the rapporteur in the working document of the European Parliament’s Committee on Legal Affairs). Also, adoption of the EC’s proposal that the existence of an arbitral award could act to effectively preclude enforcement of an irreconcilable court judgment, would further support the protection of arbitration agreements.

6. MODEL FORM ARBITRATION CLAUSE

Pending any such reform, parties may seek to draft commercial contracts to mitigate the risks and uncertainties highlighted by The Wadi Sudr. A proposed clause in a typical arbitration agreement might be:

“The following provisions apply only where any party wishes to raise any matter as to the existence, validity and/or scope of the [arbitration agreement] for determination in court

proceedings, rather than before the [arbitral tribunal]. These provisions are expressly without prejudice to the ability of the [arbitral tribunal] at all times to rule on such matters itself, in accordance with [relevant rules/legislation]:

1.1 The courts of [seat] shall have exclusive jurisdiction to determine any dispute with respect to the existence, validity and/or scope of the [arbitration agreement].

1.2 Should a party wish to raise in court proceedings (rather than before the [arbitral tribunal]) any matter as to the existence, validity and/or scope of the [arbitration agreement], that party shall use its best endeavours to raise the matter of the existence, validity and/or scope of the [arbitration agreement] before the courts of [seat].

1.3 If any court proceedings are commenced in the courts of any jurisdiction other than [seat] with respect to any [relevant dispute] arising out of or in connection with this Agreement, and any dispute arises in those proceedings between the parties to this Agreement with respect to the existence, validity and/or scope of the [arbitration agreement], then the parties shall use their best endeavours to:

1.3.1 stay those court proceedings in the other jurisdiction pending a determination of either the [arbitral tribunal] or the courts of [seat] with respect to the existence, validity and/or scope of the [arbitration agreement]; and

1.3.2 raise either before the [arbitral tribunal] or in court proceedings before the courts of [seat] the relevant question of the existence, validity and/or scope of the [arbitration agreement]. The decision to raise the question before either the [arbitral tribunal] or the courts of [seat] shall be for the party raising the question, subject to any direction of the courts of [seat].

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