

INSURANCE AND REINSURANCE

NewsWire

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Non-Party Access to English Court Documents

By Mark Pring, London

In October 2006, a new civil procedure rule was introduced allowing non-parties access to a number of categories of documents filed in English court proceedings¹, without requiring the permission of the court.

When the rule change was first proposed, it triggered considerable debate amongst lawyers regarding, in particular, the risk of releasing commercially sensitive information contained in court documents.

The strength of this debate led to the dropping of the original proposal to make the rule change retrospective. As a result, non-parties will still need the court's permission to obtain access to documents if they were filed before 2 October 2006. Nonetheless, concerns remain that a party's confidential information might fall into the hands of, for instance, commercial competitors.

The UK Government's stated objective for introducing this change stemmed from a desire to promote openness and public confidence in the court system. It was hoped that the increased exposure of court documents to the public eye would operate as a check on judicial decision making and a safeguard for the rights of the public.

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It should also be borne in mind, however, that the change followed intense lobbying, by the media and by political groups, for greater access to court documents, in order to allow reporting on matters of perceived public interest. The Government and the media, in particular, did not necessarily have the same motives for pushing the change through.

Background

Prior to the rule change, the only document that non-parties could obtain without a court order (and even then only in prescribed circum- / continued page 2

¹ Although the rule does not apply, for instance, to family proceedings.

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stances) was the claim form. Formerly known as a writ of summons, a claim form typically contains only brief details of a claim. Non-parties could only access other documents if they could show “good cause”. This was, in practice, a heavy evidential burden.

Committee for guidance. The Committee stated that rule 5.4C should be interpreted strictly, not “purposively”. It added that guidance would be given to court staff to the effect that automatic access should only be available for those documents that fall clearly within the definition of statements of case contained in CPR 2.3(1). The Committee emphasised that it did not consider that this was unduly restrictive, since non-parties

“The key issue is how the English courts will in practice deal with applications for permission to obtain copies of documents filed at court”

As a result of the rule change, members of the public are now normally able to obtain copies of all “statements of case” (formerly known as pleadings), i.e., the claim form, the particulars of claim, the defence and counterclaim and the reply, as well as parties’ responses to “requests for further information” seeking clarification of pleaded matters².

So far as other documents on the court file are concerned — including documents “filed with” or “attached to” statements of case — a non-party must apply to the court for permission to obtain a copy. There is no automatic right of access to key categories of documents such as witness statements, expert reports and notices of appeal.

Right of access since 2 October 2006 have not, therefore, been unfettered, but the key issue is how the English courts will deal with applications for permission under the new rule 5.4C of the Civil Procedure Rules (“CPR”).

The approach of the English courts

How do the English courts approach rights of access to court documents in practice?

It is clear, first of all, that a narrow view will be taken of which documents fall within the definition of “statements of case”.

In a recent case in relation to “judicial review” proceedings, a non-party sought access to a copy of the response to the claim for judicial review, on the ground that such a response is analogous to a defence. Given the technical nature of the application, the matter was referred to the CPR Rules

can still gain access to documents falling outside that definition by applying to the court, so long as they could identify appropriate reasons for requesting access.

There is, however, no fully developed guidance yet from the courts as to how a non-party’s application for permission for access to documents *not* covered within the definition of “statements of case” will be treated. The only significant case so far dealing directly with the new rule 5.4C was heard by Keith J on 6 June 2007 (the “Sayers case”³) and the facts of that case were somewhat special. Nonetheless, it does offer some insight into how the relevant legal principles might be applied in practice.

In *Sayers*, the Secretary of the Department of Health and Human Services of the USA (the “Secretary for Health”) applied for permission to obtain from the English court records certain documents filed by the Defendant healthcare companies in the high-profile “MMR/MR”⁴ vaccine litigation. The Secretary

² In addition, English case law distinguishes between filed documents which have been read (or treated as read) in “open court” – i.e., not in a private hearing – and filed documents which have not been so read. In the former case, anyone with a “legitimate interest” in such a document would normally be given permission to obtain a copy.

³ *Paul Sayers & Ors - v - Smithkline Beecham Plc and others*, IHQ/07/0412 (2007).

⁴ A reference to (1) the measles, mumps and rubella and (2) the measles and rubella “combination” vaccines offered under a mass immunisation programme for infants introduced by the UK’s National Health Service in 1988.

for Health is named as the respondent to the estimated 5,000 petitions filed so far in the so-called “Omnibus Autism Proceedings” in the USA. Those proceedings were established by the Office of Special Masters of the US Court of Federal Claims in 2002, to handle all claims made under the US National Vaccine Injury Compensation Program in relation to allegations that the MMR vaccine, or vaccines containing thimerosal (or a combination of the two) had caused disorders in the spectrum of autistic conditions.

Keith J decided that the Secretary for Health should have permission to obtain from the court records copies of identified expert reports, subject to certain conditions regarding (1) the redaction of confidential personal information relating to the claimants in the English litigation and (2) the use of the reports for any purpose other than in the Omnibus Autism Proceedings.

He recognised that opposition to any application under rule 5.4C would normally come from the party who had “commissioned” the relevant documents filed at court. In this instance, however, the situation was unusual in that the parties who had filed the expert reports at court (the defendant healthcare companies) did not oppose the Secretary for Health’s application — since it was in their interest for the Secretary for Health to be successful in resisting claims that the MMR vaccines cause autism. The opposition came from the “litigation friends” representing certain claimants in the English vaccine litigation (in the absence of legal funding for solicitors) — which Keith J assumed stemmed from a desire to undermine the Secretary for Health’s chances of successfully defending the Omnibus Autism Proceedings, given the evidential linkage between those proceedings and the English litigation.

Keith J emphasised that the Secretary for Health should only have access to the expert reports “*if there are strong grounds for thinking that access to them is necessary in the interests of justice.*” In addition, since much of the material on which those reports were based emanated from the claimants to the English litigation and were provided by them on disclosure, the principles guiding the determination of applications under the separate CPR rule 31.22 (governing the subsequent use of disclosed documents) should apply equally to the Sayers application: “*the Secretary for Health accepts that ... he should not be in a better position than the [healthcare company] defendants would have been if they were making an application for their use of the reports under rule 31.22.*”

In applying the above test to the facts, Keith J referred to the “*legitimate interest*” of the Secretary for Health in gaining

access to the expert reports and the “*special circumstances*” requiring such access, given not least the “*immense public importance*” of the Omnibus Autism Proceedings.

In reaching his decision, Keith J carefully noted a number of factors:

- 1 In order to test expert evidence produced on behalf of the claimant in the first case due for trial in the Omnibus Autism Proceedings (Michelle Cedillo) “*[the Secretary of Health’s] only real option is to question the methodology of Professor O’Leary and his team in analysing the tests which they carried out on the specimens taken from the claimants in the MMR/MR vaccine litigation and on the controls. To do that, the Secretary for Health needs to be able to make appropriate use of such documents as throw light on how Professor O’Leary and his team carried out their work.*”
- 2 Equally, “*It would not serve the interests of justice if the special masters were denied evidence which is said to undermine a key plank of the petitioners’ case. The special masters would be getting a completely one-sided picture if they were not allowed the opportunity to consider that evidence ... It is axiomatic that the special masters should have at their disposal the best evidence which is available. The need to spare the special masters from coming to a conclusion based on an analysis of only part of the potentially available evidence amounts to special circumstances which, on the face of it, justifies the Secretary for Health having access to copies of reports.*”
- 3 The Secretary for Health had reduced the scope of the application from a “*wide-ranging number of documents*” to specified expert reports.
- 4 The Secretary for Health was prepared to undertake that he would not use the reports for any purpose other than to advance his case in the Omnibus Autism Proceedings.
- 5 It was, in practice, possible, based on Keith J’s review of the relevant expert reports purely for this purpose, to redact all confidential medical information relating to the English claimants (the need for maintaining confidentiality being a “*paramount consideration*” in medical cases). As a further consequence, no issues relating to the protection of information that would otherwise be covered by the Data Protection Act 1998 arose.
- 6 The right to “*privacy*” of the claimants in the English vaccine litigation, enshrined in Article 8 / *continued page 4*

The Companies Act

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of the European Convention on Human Rights, would not be infringed as a result of the use of the redacted expert reports in the Omnibus Autism Proceedings. Even if there was a risk that this was the case, Keith J noted that the right was not an “absolute” one; under Article 8(2) it could be “interfered” with where that was “in accordance with the law” and “necessary for the protection of health or morals, or for the protection of the rights and freedoms of others.” In this instance, Keith J did not hesitate to conclude that “the Secretary for Health’s ... right to a fair trial would be compromised if the reports could not be relied upon in order to show that the results of the test runs were unreliable. And the interference is

which Sayers was being heard make it perhaps a special case. Keith J noted that “The outcome of the Omnibus Autism Proceedings is of considerable public interest and importance. Whether any of the childhood vaccines causes autism is an emotionally charged issue. If it is decided that they cause or contribute towards autism, vaccination rates may decline, with the result that infectious diseases which have up to now been under control may re-emerge. Moreover, the potential costs in financial terms of meeting the current petitions, should they prove successful, will be enormous, one estimate placing the cost at about US\$15 billion.”

Nonetheless, other judges may well follow his rigorous approach to applications under rule 5.4C where, for instance, commercially confidential (as opposed to medically confidential) information is involved. At least some of the factors listed

In view of the new rule and the risk of public scrutiny at an early stage of litigation, parties who are considering setting out sensitive or confidential information in their statements of case must adopt a cautious view.

also necessary for the protection of health. The need to confirm or allay fears about the MMR vaccines is obvious, and that means that any litigation about the safety of the vaccines, whether in the United States, the United Kingdom or elsewhere, should have as much of the relevant evidence available to it as is possible within the confines of adversarial litigation.”

- 7 Finally, the argument that the Secretary for Health’s undertaking did not prevent the petitioners in the Omnibus Autism Proceedings from using the reports for other purposes — i.e., the English court could not exercise sufficient control over their future use — could be met by reference to safeguards that would no doubt be imposed in the Omnibus Autism Proceedings: “the special masters can be trusted to impose suitable conditions as to the use of the reports, namely that they can only be used for the purpose of the current proceedings and that the anonymisation of any confidential medical information in the reports should be preserved.”

The significance and sensitivity of the factual context in

above — and conditions imposed on access — may well prove relevant to other non-party applications for access.

How can parties protect documents filed at court?

At least one commercial provider has launched a database offering search, monitoring and tracking facilities in respect of filings in cases proceeding in the English High Court.

As a consequence, it is now far easier for interested non-parties to be aware of at least the fact of litigation. Businesses could, for example, set up searches to alert them whenever their rivals are involved in litigation, in order to assess whether, along with statements of case, that might wish to seek access to other filed documents.

In view of the new rule and the risk of public scrutiny at an early stage of litigation, parties who are considering setting out sensitive or confidential information in their statements of case (or any other filed documents) must adopt a cautious view. What would the consequences be of public access to such information? The benefits to a party’s case of including details of a sensitive or confidential nature will need to be

carefully weighed against the potential damage such information might cause if made available to non-parties.

Some commentators have suggested that a party might consider placing particularly sensitive information — if crucial to the case — in an “appendix” to the relevant statement of case, since (as indicated above) the court’s permission is required in relation to obtaining copies of attachments to statements of case. This approach carries its own risks, however. Depending on the facts (and in particular the relationship between the statement of case and the attachment), the court might consider that dividing a statement of case in this way is artificial and grant permission in any event.

Again in relation to statements of case, a party may seek to pre-empt any such danger by making an application for an order restricting non-party access to the court file.

There is no guidance in the rules on the nature of the documents to which the courts would be willing to restrict access and it remains unclear how the courts will respond to such applications in practice. Since the rationale of the rule change was to allow “open justice”, however, they may not be inclined to grant such applications save in very special circumstances. What is more likely is that the courts may order that only specific persons / classes of persons may obtain access (subject to conditions regarding use) or even that such persons / classes of persons can only receive “edited” versions of the relevant statements of case.⁵

Implications of the rule change

Although it is too early to perceive a trend arising from this rule change, it is always possible that a fear of public scrutiny of sensitive documents may well lead some parties to pursue “private” dispute resolution processes, such as arbitration (assuming a prior agreement to arbitrate exists), or even to settle a dispute earlier than they originally anticipated. ☺

Insuring Operational Risk

John Barlow, in London

“Operational risk is defined as the risk of loss resulting from inadequate or failed internal processes, people and systems or from external events. This definition includes legal risk, but excludes strategic and reputational risk.”¹

The Bank for International Settlements sought in its 1988 Accord (“Basel I”) to set out minimal capital requirements for banks and to address credit risk. However, by the 1990’s Basel I was thought to be outdated, with financial institutions focusing on financial risk management due to concerns in connection with “over-the-counter” (OTC) derivatives markets, large and heavily publicised financial losses and regulatory initiatives.

Accordingly, “Basel II” was developed, with a clear focus on creating a framework to strengthen the “soundness and stability” of the international banking system. One area Basel II concentrated on was the question of how insurance could be utilised as a mitigant in connection with a bank’s operational risk capital requirements and it is this issue that is discussed in detail in this article.

Under the current Basel regulatory regime, the amount of capital which a financial institution is required to set aside for operational risk generally varies between 12–15% of its capital base. For large financial institutions this has meant tying up (in real terms) a significant amount of capital.

Previously, the ability to use insurance to replace a bank’s capital base was circumscribed. The Basel Committee on Banking Supervision has revised this aspect, however, and is now proposing that insurance can be used to mitigate a bank’s operational risk capital calculation. Nonetheless, whilst this is a welcome concession, it comes with some significant strings attached. First, the bank is required to comply with the Advanced Measurement Approach (discussed below). Secondly (and somewhat inevitably), this concession will not entitle insurance to be used to mitigate 100% of the operational risk. Finally, the policies that can in principle be considered for the purpose of operational risk mitigation will have to include certain extensions/carve outs.

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⁵ In accordance with sub-rules 5.4C(4)(b) to (d).

¹ Clause 644 of the report by the Basel Committee on Banking Supervision: “International Convergence of Capital Measurement and Capital Standards: A Revised Framework” Comprehensive Version - June 2006 (“the Basel II Report”).

Insuring Operational Risk

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What is the Advanced Measurement Approach (“AMA”)?

Basel II provides that a financial institution can merit an AMA designation provided it observes certain operational risk functions:²

- *“Its board of directors and senior management, as appropriate, are actively involved in the oversight of the operational risk management framework;*
- *It has an operational risk management system that is conceptually sound and is implemented with integrity; and*
- *It has sufficient resources in the use of the approach in the major business lines as well as the control audit areas.”*

The qualitative and quantitative standards required to achieve AMA status are identified by way of high level principles. For example, Basel II requires a bank to have an “independent” operational risk function responsible for the design and implementation of the operational risk management process. The detail of the implementation of these principles is left to the bank, although ultimately it will have to convince its regulator that it has attained the AMA threshold, which will be monitored by the relevant regulator over a period (in the UK, this will be the Financial Services Authority) to ensure that its approach is “credible and appropriate”.

The number of banks capable of achieving AMA status will, as a result, be small. Those banks unable to attain AMA status can, however, seek to achieve the “standardised” approach (or start with the so-called “basic” approach), which details a lesser form of operational due diligence. Basel II states that “[b]anks are encouraged to move along the spectrum of available approaches as they develop more sophisticated operational risk measurement systems and practices.”³ Understandably, the threshold principles for the standardised approach are not as rigorous as the AMA requirements, but do still require significant investment (both in time and cost) in developing operational risk structures.

Provided that a relevant financial institution can show its regulator that it conforms with the AMA standards, then it may employ insurance as a mitigant to its operational risk calculation. However, because insurance policies import significant “baggage” e.g., duties of utmost good faith, the impact of misrepresentations and warranties, and issues surrounding the timing of indemnity payments, the Basel II committee was only prepared to apply up to a 20% discount on a bank’s opera-

tional risk capital calculation (and, as noted above, this of itself ranges between 12% and 15% of its capital base⁴). Therefore, the attainable “haircut” to a bank’s operational risk capital ranges between 2.4% and 3%.

In order to maximise the “haircut”, the Basel II committee have identified seven risk categories which can be covered by such insurance:

- Internal fraud, e.g., unauthorised activity; theft and fraud; insider trading;
- External fraud, e.g., fraud; robbery; systems security breaches/hacking;
- Employment practices and workplace safety, e.g., employee relations; discrimination.
- Client, products and business practices, e.g., product suitability; fiduciary breaches; privacy breaches; lender liability; improper trade/market practices.
- Damage to physical assets.
- Business disruption and system failure, e.g., hardware/software; utility outage.
- Execution, delivery and process management, e.g., transaction capture; execution and maintenance; failed mandatory reporting requirements; outsourcing.

These operational risks will be familiar to those underwriters writing financial lines business and much of the cover will be found within the portfolio of policies normally available to banks, e.g., bankers blanket bond; professional indemnity/civil liability; employment practices liability; property; business interruption; electronic insurance and directors and officers liability covers⁵. Nevertheless, given individual banks’ approaches to operational risk and depending upon their appetite for risk transfer, it is highly unlikely that financial institutions will achieve the maximum 20% “haircut”, either because not all risks are transferred to insurers or because a bank chooses to manage the operational risk internally, e.g., third-party claims in negligence which it may be more capable of handling/controlling internally.

Another facet which a bank has to address is that certain

² See paragraphs 664-675 of the Basel II report.

³ Paragraph 646.

⁴ “Basel I” calculated the operational risk capital requirement based on a crude measure of a bank’s risk-weighted assets, multiplied by 8%.

⁵ Annex 9 – “Detailed Loss Event Type Classification” and see also section 6.5.25 of the Building Societies and Investment Firms Instrument FSA 2006/41

centres within a bank may be more susceptible to operational risk than others. Basel II identified corporate finance as the “riskiest” operation and retained brokerage as the least risky (and it is expected that the measurement system employed by a bank will allocate economic capital across business lines with the intention of improving the relevant business lines’ risk management).

As noted, it is unlikely that standard contract wordings will suffice and Basel II has identified certain minimum terms/requirements to be included in such policies. The policies should at a bare minimum contain the following terms:

- the insurance provider has a minimum claims-paying ability

uncertainty/timing of payment). Basel II also provides for a segmented approach to AMA approval (and the benefits it conveys), i.e., a mix of standardised/AMA operational risk management across business centres (although the intention is to “uplift” all elements of a bank’s business to an AMA categorisation) and, therefore, any insurance would only apply to the AMA “segments” of the operation.

As a result of these developments, underwriters and brokers are reappraising the traditional covers offered in the London market to financial institutions. A number of approaches to coverage are being adopted, each with its own merits, however, it remains to be seen what approach will be adopted by

“As a result of Basel II, underwriters and brokers are reappraising the traditional covers offered in the London market to financial institutions.”

rating of A (or equivalent);

- the policy should have an initial term of not less than 12 months (“haircut” reductions in the application of the insurance to any operational risk calculation are applied to any residual term of less than 12 months);
- there should be a minimum notice period of 90 days for cancellation of the cover;
- there must be no exclusions of cover in relation to supervisory/regulatory actions or the appointment of a receiver or liquidator (except for events post the appointment of a receiver/liquidator); and
- if the insurance is provided via a “captive” insured, then that captive must reinsure through an independent third party with sufficient financial strength to pay claims.

In order to obtain the necessary “haircut” on insurances, a bank will need to set out its methodology as to how it recognises the relevant insurances. In explaining its methodology, the bank will also need to take into account, inter alia, “the uncertainty of payment as well as mismatches in coverage of insurance policies” (although it is difficult to understand this requirement, given that one of the reasons that only a 20% “haircut” is provided is because of the potential

the majority. The market is looking, for instance, at the issuing of two-year policies (to address the minimum period of 12 months, such policies being cancelled and renewed on the anniversary of the first year), although, understandably, there is a reluctance to issue multi-year policies, given past claims experience in respect of such cover. More generally, wordings are being reviewed in an attempt to broaden cover and dispute resolution clauses are being streamlined to speed up the ability to recover indemnities. At present, only a few financial institutions will be designated as AMA compliant, although it is likely that a number of other financial institutions will aspire to this status in due course.

Banks, insurers and brokers should note that insurance alone is not the sole mitigant with regard to operational risk capital. As the Basel II Accord makes clear, it is the intention to raise the standards of operational risk management throughout the entire banking system and much of this will be achieved by improving banks’ internal processes more generally. ☺

English Anti-Suit Injunctions and Arbitration Proceedings

By Eugene Matveichuk, in London

In recent years, the subject of “anti-suit” injunctions has attracted much controversy and litigation. An anti-suit injunction is essentially an order restraining a party from commencing or pursuing proceedings in another court. Such injunctions are potentially available in England, the US and Bermuda. This article considers recent significant developments in relation to

obligations of that litigant, so that, provided that it is exercised with sensitivity towards the legitimate demands of “comity” (i.e., respect, courtesy and where appropriate the adoption or enforcement of laws of one country or one jurisdiction by another), it is an appropriate form of relief.

The continental European jurisdictions do not share that view, however. They perceive an anti-suit injunction as an illegitimate interference with the jurisdiction of their courts (in one Italian case an anti-suit injunction was described as an “*evident and fraudulent violation of the [Brussels] convention rules*”¹).

The European Court of Justice (the “ECJ”) has reinforced this view in relation to anti-suit injunctions that attempt to

“The purpose of an anti-suit injunction is to make a party adhere to a prior contractual agreement regarding the resolution of disputes.”

the English courts’ approach to applications for an anti-suit injunction.

Anti-suit injunctions represent a potentially useful weapon for preventing a party from breaching, for instance, an arbitration agreement or a clause giving exclusive jurisdiction to the English courts. They have proved in recent years to be particularly important remedies in the fields of insurance and reinsurance. The specific purpose of a party’s application for an anti-suit injunction is to make the other party adhere to a prior contractual agreement in respect of the resolution of disputes. Under Section 37 of the Supreme Court Act, 1981, the English courts have the power to grant an injunction restraining a party from commencing or continuing litigation before a court, including the courts of an overseas jurisdiction, “*in all cases in which it appears to the Court to be just and convenient to do so.*”

The English courts have always sought to emphasise that an anti-suit injunction is directed not at any relevant foreign court but at the party that is deemed to be in breach of contract. The injunction responds to and enforces the personal

restrain proceedings in other European Union (“EU”) member states where a party is acting in alleged breach of an exclusive jurisdiction clause nominating the English courts. There is a growing perception that the ECJ will shortly extend its attack to anti-suit injunctions that seek to restrain other EU-based proceedings that are pursued in breach of an arbitration agreement.

The background to these developments is complicated but important to set out.

Litigation: the ECJ’s approach

In *Turner v Grovit*,² the ECJ was asked to consider the following fundamental question:

¹ In commercial matters in European Member States jurisdiction is governed by European Union (“EU”) Council Regulation No. 44/2001 (the “Brussels Regulation”). This replaced the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (the “Brussels Convention”).

² [2004] 2 Lloyd’s Rep 169.

“Is it inconsistent with the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters signed in Brussels on 27 September 1968 (subsequently acceded to by the United Kingdom) to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the [English] Courts?”

In delivering its judgment, the ECJ stated that the Brussels Convention “is necessarily based on the trust which the Contracting States accord to one another’s legal systems and judicial institutions.” The ECJ held that, as a result, EU national courts should not restrain proceedings already commenced in another EU jurisdiction in breach of an exclusive jurisdiction clause:

“... the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State ... a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court’s jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with ... the Convention.”

Thus, the ECJ in *Grovit* found that anti-suit injunctions against parties pursuing “proceedings properly before” the court of an EU member state constitute a direct interference with the rights of those parties to engage in litigation in an appropriate jurisdiction.

This decision has dramatically reduced the scope for obtaining anti-suit injunctions so far as an alleged breach of an exclusive jurisdiction clause nominating the English courts is concerned. Only if the other party is seeking to commence or continue litigation in a non-EU member state can the English courts consider granting an anti-suit injunction.

Arbitration agreements

The remit of the Brussels Regulation specifically excludes arbitration proceedings, but the question of whether the *Grovit* reasoning should apply equally to anti-suit injunctions seeking to enforce arbitration agreements has been a source of significant and ongoing debate.

In this context, it is notable that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the “New York Convention”) — to which all EU Member States

are party — generally obliges courts to stay legal proceedings initiated in defiance of an arbitration agreement. In addition, the Arbitration Act 1996 provides the English Court with power to grant an interim injunction “for the purposes of and in relation to arbitral proceedings” (Section 44(1)).

In view of the tensions between the English and the Continental European perspectives on anti-suit injunctions, however, the United Kingdom House of Lords has recently referred this issue to the ECJ (see *West Tankers Inc v. RAS Riunione Adriatica di Sicurtà SpA & Others*³). The ECJ will have to decide whether it is “consistent with EC Regulation 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...”

A number of commentators have suggested that, if the ECJ were to apply *Grovit* principles to anti-suit injunctions in support of arbitration proceedings, this could potentially damage the reputation of London (or indeed any other EU centres) as an attractive “seat” for the conduct of arbitrations.

The *West Tankers* case arose out of the collision of a ship with a jetty. The charter party contained a clause providing for arbitration in London. The charterers commenced arbitration against West Tankers in London, claiming uninsured losses. The insurers of the jetty sued the ship owners in a court in Italy (the place where the damage occurred), which was the appropriate court of jurisdiction under Article 5.3 of the Brussels Regulation. The ship owners then sought an anti-suit injunction in England restraining the insurers from pursuing their claim in the Italian courts, on the basis that they were in breach of an arbitration clause in the charter party agreement in commencing proceedings in Italy.

The dispute in *West Tankers* was considered in the first instance by the English High Court, where the insurers questioned whether it would be consistent with the Brussels Regulation for an English Court to grant an injunction restraining proceedings in another EU Member State. Colman J made the decision to grant the injunction restraining the insurers from pursuing the Italian proceedings, on the basis that it was not inconsistent with the Brussels Regulation to do so.

Nonetheless, an appeal was granted / continued page 10

³ [2007] UKHL 4.

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directly to the House of Lords.⁴

The House of Lords took particular note of the fact that, although the jurisdictions of the courts of EU member states are governed by the Brussels Regulation, Article 1.2(d) of that Regulation expressly provides that it shall not apply to arbitra-

reduces the possibility of conflict between an arbitration award and the judgment of a national court.

In the opinion of the House of Lords, an arbitration clause takes effect outside the Brussels Regulation regime and its enforcement is not subject to its terms. The contrary argument was described by Lord Hoffman, quoting one distinguished German academic, as “*divorced from reality*”. This was because extending the application of the Brussels Regulation to orders

Although the House of Lords [in *West Tankers*] ultimately felt obliged to refer the question to the ECJ, they were at pains to express the view that anti-suit injunctions remained acceptable where their purpose is to enforce an arbitration agreement.”

tion. The House of Lords unanimously agreed in principle with Colman J that granting an injunction in this case would not be inconsistent with the Regulation, as the proceedings appeared to fall outside its scope.

Lord Hoffman delivered the leading judgment, in which he noted that “*the most important consideration is the practical reality of arbitration as a method of resolving commercial disputes, people engaged in commerce choose arbitration in order to be outside the procedures of any national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers. Nor is it only a matter of procedure. The choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as amiables compositeurs, apply broad equitable considerations, even a lex mercatoria which does not only reflect any national system of law. The principle of autonomy of the parties should allow them these choices.*”

The House of Lords particularly recognised that the English courts have for many years regarded the jurisdiction to restrain foreign court proceedings “*as an important and valuable weapon in the hands of a court exercising supervisory jurisdiction over...arbitration*”, since it promotes legal certainty and

made in proceedings to which the Regulation does not apply goes far beyond the reasoning in the case law and ignores the practical realities of commerce.

Although the House of Lords ultimately felt obliged to refer this question to the ECJ⁵ their Lordships were at pains to express their own view to the ECJ that anti-suit injunctions remained an acceptable remedy where their purpose is to enforce an arbitration agreement, not least on the basis that an attractive feature of arbitration proceedings is that disputes should be resolved by a consensual mechanism effec-

⁴ Since the English Court of Appeal, to whom any appeal would normally have been referred in the first resort, had previously established (in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd’s Rep 67) that the usual power of the English courts to restrain a party by way of anti-suit injunction from pursuing judicial proceedings in breach of an arbitration clause was available irrespective of the location of the court in which the foreign proceedings were commenced.

⁵ Pursuant to article 234 of the Treaty of Rome, which was designed to secure the uniform judicial interpretation of EU law and on the basis that, despite their firm views, it was unclear to the House of Lords whether the result of *Through Transport* was a correct interpretation of the jurisdiction rules contained in the Brussels Regulation.

tively operating outside any court structures. This was endorsed by Lord Mance in his judgment in *West Tankers*:

“It is in practice no or little comfort or use for a person entitled to the benefit of a London arbitration clause to be told that... the only remedy is to become engaged in the foreign litigation pursued in disregard of the clause. Engagement in foreign litigation is precisely what the person pursuing such litigation wishes to draw the other party into, but is precisely what the latter party aimed and bargained to avoid.”

Next steps

The decision of the ECJ is expected within the next couple of years.

It remains to be seen if the ECJ will accept the reasoning of the House of Lords in *West Tankers*.

In the meantime, in relation to proceedings pursued in such courts in breach of arbitration agreements, although the current English law position is that anti-suit injunctions do not conflict with the Brussels Regulation, pending the ECJ’s decision it is possible in practice that the English courts will be reluctant to grant anti-suit injunctions to restrain such proceedings. In the event that the English do prove reluctant (and even if the ECJ rejects the reasoning of the House of Lords), commentators have identified a number of alternative “remedies” that the relevant arbitration panel might, subject to their powers, consider — such as “reporting orders” or “anti-exacerbation orders” — in order to apply pressure on the party breaching the arbitration agreement. Again, the question remains whether in practice any panel would be brave enough to take this approach to restraining the separate litigation proceedings.

Regardless of the decision of the ECJ, English anti-suit injunctions will continue to be effective in order to protect arbitration agreements in cases where proceedings are pursued in the courts of non-EU member states.

Nonetheless, the eventual decision in *West Tankers* has the potential to have considerable implications for the resolution of commercial disputes generally. Will parties — particularly those that do business with counterparties in both EU and non-EU states but want consistency in the terms of their commercial documents — consider that England remains an appropriate choice of seat for arbitration proceedings given the restrictions that may be imposed by the ECJ on the English courts?

This concern has been expressed most forcefully by the President of the Chartered Institute of Arbitrators, Hew

Dundas, who has commented that *“this case has the potential to change, significantly and adversely, the face of arbitration in the EU with consequent damage to London and other EU arbitration centres. At the heart of the issue is a tension between EU Regulation on the one hand and the realities and requirements of private dispute resolution, particularly international commercial arbitration, on the other. The likely losers in arbitration will be able to play the litigation game, preferably in courts which take years to come to substantive hearing, in order to derail arbitrations. International parties will, as Lord Hoffman and others sagely observe, merely go elsewhere for arbitration.”*

Reflecting such concerns, the UK government has recently indicated that it will do all it can, during discussions on proposed reform of the Brussels Regulation, to ensure that any successor regulation would preserve (or restore) the right of the English courts to restrain breaches of arbitration agreements. ☺

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