

INTRODUCTORY NOTE TO EUROPEAN COURT OF JUSTICE—ALLIANZ SPA V.  
WEST TANKERS INC.  
BY DAVID J. A. CAIRNS\*  
[February 10, 2009]  
+Cite as 48 ILM 485 (2009)+

The *Allianz Spa v. West Tankers Inc.* (“West Tankers”) judgment deals with the relationship between arbitration agreements and the jurisdiction of courts of the European Union, and in particular the power exercised by English courts to issue an anti-suit injunction to restrain legal proceedings brought in the courts of another Member State in breach of an arbitration agreement designating its seat in London.

### *Legislative Background*

Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (“Jurisdiction Regulation”) establishes various rules relating to jurisdiction of the courts of the Member States in civil and commercial matters. Article 5.3 provides that:

A person domiciled in a Member State may, in another Member State, be sued:

...  
3. in matters relating to tort, delict or quasi-delict, in the courts or the place where the harmful event occurred or may occur.<sup>1</sup>

Section 9 (Articles 27-30) of the Jurisdiction Regulation entitled “Lis pendens - related actions” establishes the principle of priority of the court first seized to determine its jurisdiction, and where jurisdiction is established, to decide the dispute.<sup>2</sup>

Article 1 defines the scope of the Jurisdiction Regulation. Article 1.2 provides that “[t]he Regulation shall not apply to . . . (d) arbitration.”<sup>3</sup>

Article 234 of the Consolidated Versions of the Treaty of the European Union and of the Treaty Establishing the European Community (“EC”) provides for the referral to the European Court of Justice (“ECJ”) by the courts or tribunal of a Member State for a ruling on any question relating to, *inter alia*, the interpretation of a regulation of the Council (such as the Jurisdiction Regulation).<sup>4</sup>

Article 222 EC provides that the ECJ shall be assisted by eight Advocates General “acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement.”<sup>5</sup>

### *Factual and Procedural History*

In August 2000, a vessel owned by West Tankers and chartered by Erg Petroli SpA (“Erg”) collided with a jetty owned by Erg in Syracuse, Italy causing substantial damage. The charter party was governed by English law and contained a clause providing for arbitration in London. Erg asked its Italian insurers to pay for the damages sustained and simultaneously commenced arbitration proceedings against West Tankers in London for damages in excess of the insurance policy limit.

The Italian insurers commenced proceedings *in delict* pursuant to the Italian Civil Code against West Tankers in Syracuse to recover the amounts it had paid to Erg under the insurance policies (the “Syracuse proceedings”). West Tanker then commenced proceedings against the insurers in the Commercial Court in London, asking the Court to declare that the issue in the Syracuse proceedings arose out of the charter party, and that the insurers’ subrogated claim was therefore bound by the agreement to arbitrate in London. West Tankers also sought an injunction ordering the insurers to discontinue the Syracuse proceedings (the “anti-suit injunction proceedings”).

The injunction, which was granted by the Commercial Court, was appealed by the insurers to the House of Lords. The House of Lords decided that the appeal raised a question of “very considerable practical importance” and that as a result it should be referred to the ECJ pursuant to Article 234 EC.<sup>6</sup> The House of Lords formulated the

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question referred to the ECJ as follows: "Is it consistent with [the Jurisdiction Regulation] 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?"<sup>7</sup>

The House of Lords observed that an anti-suit injunction in support of an arbitration agreement was excluded from the Jurisdiction Regulation because its purpose was to protect an arbitration agreement. According to the House of Lords, an arbitration agreement was not within the system of allocation of court jurisdictions provided for by the Jurisdiction Regulation. The House of Lords also made a number of observations regarding the negative consequences of preventing English courts from exercising their jurisdiction over anti-suit injunctions on the basis of incompatibility with the Jurisdiction Regulation.

Advocate General Kokott delivered her opinion on September 4, 2008, wherein she proposed that the ECJ should find anti-suit injunctions in support of an arbitration agreement to be outside the Jurisdiction Regulation. Her reasoning emphasized "the principle of mutual trust" which the Member States accord to one another's legal and judicial institutions and which underpins the system of the Jurisdiction Regulation. According to Kokott, mutual trust can "be infringed by a decision of a court of a Member State which does not fall within the scope of the [Jurisdiction Regulation] obstructing the court of another Member State from exercising its competence under the [Jurisdiction Regulation]."<sup>8</sup> This obstruction raised issues of effective legal protection, which was one of the fundamental rights protected by the European Community.<sup>9</sup>

In its Judgment of February 10, 2009 the ECJ ruled that an anti-suit injunction in support of arbitration restraining a person from commencing or continuing proceedings before the courts of another Member State was incompatible with the Jurisdiction Regulation.

### *ECJ Reasoning*

The ECJ acknowledged that the anti-suit injunction proceedings were arbitration proceedings within the meaning of Article 1(2)(d) of the Jurisdiction Regulation. Furthermore, agreeing with the House of Lords, the Court noted its previous decisions on jurisdiction and the nature of the rights which the proceeding served to protect.<sup>10</sup> However, unlike the House of Lords, the ECJ also stated that it needed to consider whether the Syracuse proceedings came within the Jurisdiction Regulation, and whether an anti-suit injunction would affect those proceedings, potentially undermining the effectiveness of the Jurisdiction Regulation.<sup>11</sup>

The Court found that under the arbitration agreement the Syracuse Court had exclusive jurisdiction under the Jurisdiction Regulation to rule on the objection to its own jurisdiction. As a result, the anti-suit injunction "necessarily amount[ed] to stripping that court of the power to rule on its own jurisdiction under [the Jurisdiction Regulation]."<sup>12</sup> The ECJ then turned to the principle of mutual trust, strongly relied on by the Advocate General, stating that the anti-suit injunction "runs counter to the trust which the Member States accord to one another's legal systems and juridical institutions and on which the system of jurisdiction under [the Jurisdiction Regulation] is based."<sup>13</sup>

Accordingly, when viewed from the perspective of the anti-suit injunction proceedings—the English courts' perspective—the anti-suit injunction relates to arbitration and is therefore excluded from the Jurisdiction Regulation. Viewed from the Syracuse proceeding's perspective, however, the anti-suit injunction compromised the power of the Syracuse court to determine its jurisdiction, as well as the effectiveness of the Jurisdiction Regulation and the principle of mutual trust. From this perspective, therefore, the anti-suit injunction could not be said to relate only to arbitration.

The ECJ's decision to accept the latter approach was not surprising, especially since it readily accords with the underlying principles of the Jurisdiction Regulation. However, the two approaches serve to emphasize the difficulties left unaddressed by the blanket nature of the arbitration exception to the Jurisdiction Regulation. There is a complex interaction between arbitration and the jurisdiction of national courts, with national courts having an essential role in arbitration procedures, including the appointment of arbitrators, interim measures of protection, the guarantee of fundamental rights and values, and enforcement of awards. As arbitration is international dispute resolution *par excellence*, it often relates to more than one jurisdiction within the European Union. The European Commission has recently issued a Green Paper<sup>14</sup> launching a consultation to review Jurisdiction Regulation, one of the topics dealing with "the interface between the regulation and arbitration."

The House of Lords anticipated that its interpretation of the Jurisdiction Regulation and the survival of the European anti-suit injunction required additional support, and referred in its decision to “the practical realities of commerce”, “party autonomy”, “legal certainty”, and the international competitiveness of European cities as arbitral seats. In his concluding remarks, Lord Hoffman noted that “New York, Bermuda and Singapore are also leading centres of arbitration and each of them exercises the jurisdiction which is challenged in this appeal. There seems to me to be no doctrinal necessity or practical advantage which requires the European Community handicap itself by denying its courts the right to exercise the same jurisdiction.”<sup>15</sup>

Lord Hoffman’s concern appears unjustified. The ECJ Judgment only affects the power of English courts to issue anti-suit injunctions against parties that have commenced proceedings in other Member States; the jurisdiction remains undiminished as regards the rest of the world (as has already been confirmed by the Commercial Court in *Shashoua v Sharma*<sup>16</sup>). European parties negotiating an arbitration agreement are unlikely to prefer New York, Bermuda or Singapore to a European arbitral seat, with the costs and inconveniences of distance, for the single reason of preserving the mutual possibility of anti-suit injunction. In fact, the *West Tankers* decision might encourage European parties to choose London as an arbitration seat in contracts with non-European parties, knowing that English courts can, if necessary, issue an anti-suit injunction in their favour but cannot do so against the European party.

### Conclusion

In summary, the *West Tankers* decision highlights the tensions of the arbitration exception to the Jurisdiction Regulation as a means to define the relationship between national jurisdictions and arbitration within the European Community. While English courts can no longer issue anti-suit injunctions in support of an arbitration agreement to prevent the commencement of legal proceedings in other Member States, the decision is unlikely to have any negative effect on the international competitiveness of London as an arbitral seat.

### ENDNOTES

- 1 Council Regulation (EC) 44/2001, art. 5.3, available at [http://curia.europa.eu/common/recdoc/convention/en/c-textes/\\_2001R0044-textes.htm](http://curia.europa.eu/common/recdoc/convention/en/c-textes/_2001R0044-textes.htm).
- 2 *Id.* arts. 27-30.
- 3 *Id.* art. 1.2.
- 4 Consolidated Versions of the Treaty of the European Union and of the Treaty Establishing the European Community, art. 234, 2006 O.J. (C 321E), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>.
- 5 *Id.* art. 222.
- 6 *West Tankers Inc. v. RAS Riunione Adriatica di Sicurta SpA and Others* [2007] UKHL 4, ¶ 22 [hereinafter *West Tankers I*].
- 7 *Id.* ¶ 23.
- 8 Advocate General’s Opinion, Case C-185/07, ¶ 34 (Sept. 4, 2008), available at [http://curia.europa.eu/jcms/jcms/j\\_6/home](http://curia.europa.eu/jcms/jcms/j_6/home).
- 9 *Id.* ¶¶ 34, 58.
- 10 Case C-185/07, *Allianz SpA, formerly Riunione Adriatica di Sicurta SpA, Generali Assicurazioni Generali SpA v. West Tankers Inc.*, Feb. 10, 2009, ¶¶ 22-23, 2009 O.J. (C 82/4).
- 11 *Id.* ¶¶ 24, 25.
- 12 *Id.* ¶¶ 27, 28.
- 13 *Id.* ¶ 30.
- 14 *Commission 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) 175) (Apr. 21, 2009), available at [http://ec.europa.eu/civiljustice/news/docs/green\\_paper\\_judgements\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/green_paper_judgements_en.pdf) (last visited June 30, 2009).
- 15 *West Tankers I*, *supra* note 6, ¶ 21.
- 16 *Shashoua v. Sharma*, [2009] EWHC 957 (Comm), available at <http://www.bailii.org/ew/cases/EWHC/Comm/2009/957.html>.

JUDGMENT OF THE COURT (Grand Chamber)

10 February 2009 (\*)

(Recognition and enforcement of foreign arbitral awards – Regulation (EC) No 44/2001 – Scope of application – Jurisdiction of a court of a Member State to issue an order restraining a party from commencing or continuing proceedings before a court of another Member State on the ground that those proceedings would be contrary to an arbitration agreement – New York Convention)

In Case C-185/07,

REFERENCE for a preliminary ruling under Articles 68 EC and 234 EC from the House of Lords (United Kingdom), made by decision of 28 March 2007, received at the Court on 2 April 2007, in the proceedings

**Allianz SpA**, formerly Riunione Adriatica di Sicurtà SpA,

**Generali Assicurazioni Generali SpA**,

v

**West Tankers Inc.**,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts and A. Ó Caoimh, Presidents of Chambers, P. Kûris, E. Juhász, G. Arestis, A. Borg Barthet, J. Klučka (Rapporteur), E. Levits and L. Bay Larsen, Judges,

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2008,

after considering the observations submitted on behalf of:

- Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, and Generali Assicurazioni Generali SpA, by S. Males QC and S. Masters, Barrister,
  - West Tankers Inc., by I. Chetwood, Solicitor, and T. Brenton and D. Bailey, Barristers,
  - the United Kingdom Government, by V. Jackson and S. Behzadi Spencer, acting as Agents, and V. Veeder and A. Layton QC,
  - the French Government, by G. de Bergues and A.-L. During, acting as Agents,
  - the Commission of the European Communities, by A.-M. Rouchaud-Joët and M. Wilderspin, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 4 September 2008,

gives the following

**Judgment**

1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

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2 The reference was made in the context of proceedings between, on the one hand, Allianz SpA, formerly Riunione Adriatica di Sicurtà SpA, and Generali Assicurazioni Generali SpA ('Allianz and Generali') and, on the other, West Tankers Inc. ('West Tankers') concerning West Tankers' liability in tort.

### Legal context

#### *International law*

3 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958 (*United Nations Treaty Series*, Vol. 330, p. 3) ('the New York Convention'), provides as follows in Article II(3):

'The court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

#### *Community law*

4 According to recital 25 in the preamble to Regulation No 44/2001:

'Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.'

5 Article 1(1) and (2) of that regulation provides:

'1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.

2. The Regulation shall not apply to:

...

(d) arbitration.'

6 Article 5 of that regulation provides:

'A person domiciled in a Member State may, in another Member State, be sued:

...

(3) in matters relating to tort, delict or quasidelict, in the courts for the place where the harmful event occurred or may occur;

...'

#### *National law*

7 Section 37(1) of the Supreme Court Act 1981 provides:

'The High Court may by order (whether interlocutory or final) grant an injunction . . . in all cases in which it appears to the court to be just and convenient to do so.'

8 Section 44 of the Arbitration Act 1996, entitled 'Court powers exercisable in support of arbitral proceedings', provides:

'(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are:

...

(e) the granting of an interim injunction . . . '.

### The dispute in the main proceedings and the question referred for a preliminary ruling

9 In August 2000 the *Front Comor*, a vessel owned by West Tankers and chartered by Erg Petroli SpA ('Erg'), collided in Syracuse (Italy) with a jetty owned by Erg and caused damage. The charterparty was governed by English law and contained a clause providing for arbitration in London (United Kingdom).

10 Erg claimed compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess. West Tankers denied liability for the damage caused by the collision.

11 Having paid Erg compensation under the insurance policies for the loss it had suffered, Allianz and Generali brought proceedings on 30 July 2003 against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the sums they had paid to Erg. The action was based on their statutory right of subrogation to Erg's claims, in accordance with Article 1916 of the Italian Civil Code. West Tankers raised an objection of lack of jurisdiction on the basis of the existence of the arbitration agreement.

12 In parallel, West Tankers brought proceedings, on 10 September 2004, before the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court), seeking a declaration that the dispute between itself, on the one hand, and Allianz and Generali, on the other, was to be settled by arbitration pursuant to the arbitration agreement. West Tankers also sought an injunction restraining Allianz and Generali from pursuing any proceedings other than arbitration and requiring them to discontinue the proceedings commenced before the Tribunale di Siracusa ('the anti-suit injunction').

13 By judgment of 21 March 2005, the High Court of Justice of England and Wales, Queens Bench Division (Commercial Court), upheld West Tankers' claims and granted the antisuit injunction sought against Allianz and Generali. The latter appealed against that judgment to the House of Lords. They argued that the grant of such an injunction is contrary to Regulation No 44/2001.

14 The House of Lords first referred to the judgments in Case C116/02 Gasser [2003] ECR I14693 and Case C159/02 Turner [2004] ECR I-3565, which decided in substance that an injunction restraining a party from commencing or continuing proceedings in a court of a Member State cannot be compatible with the system established by Regulation No 44/2001, even where it is granted by the court having jurisdiction under that regulation. That is because the regulation provides a complete set of uniform rules on the allocation of jurisdiction between the courts of the Member States which must trust each other to apply those rules correctly.

15 However, that principle cannot, in the view of the House of Lords, be extended to arbitration, which is completely excluded from the scope of Regulation No 44/2001 by virtue of Article 1(2)(d) thereof. In that field, there is no set of uniform Community rules, which is a necessary condition in order that mutual trust between the courts of the Member States may be established and applied. Moreover, it is clear from the judgment in Case C-190/89 Rich [1991] ECR I-3855 that the exclusion in Article 1(2)(d) of Regulation No 44/2001 applies not only to arbitration proceedings as such, but also to legal proceedings the subject-matter of which is arbitration. The judgment in Case C-391/95 Van Uden [1998] ECR I7091 stated that arbitration is the subject-matter of proceedings where they serve to protect the right to determine the dispute by arbitration, which is the case in the main proceedings.

16 The House of Lords adds that since all arbitration matters fall outside the scope of Regulation No 44/2001, an injunction addressed to Allianz and Generali restraining them from having recourse to proceedings other than arbitration and from continuing proceedings before the Tribunale di Siracusa cannot infringe the regulation.

17 Finally, the House of Lords points out that the courts of the United Kingdom have for many years used antisuit injunctions. That practice is, in its view, a valuable tool for the court of the seat of arbitration, exercising supervisory jurisdiction over the arbitration, as it promotes legal certainty and reduces the possibility of conflict between the arbitration award and the judgment of a national court. Furthermore, if the practice were also adopted by the courts in other Member States it would make the European Community more competitive vis-à-vis international arbitration centres such as New York, Bermuda and Singapore.

18 In those circumstances, the House of Lords decided to stay its proceedings and to refer the following question to the Court for a preliminary ruling:

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

### The question referred for a preliminary ruling

19 By its question, the House of Lords asks, essentially, whether it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2)(d) of the regulation excludes arbitration from the scope thereof

20 An anti-suit injunction, such as that in the main proceedings, may be directed against actual or potential claimants in proceedings abroad. As observed by the Advocate General in point 14 of her Opinion, non-compliance with an anti-suit injunction is contempt of court, for which penalties can be imposed, including imprisonment or seizure of assets.

21 Both West Tankers and the United Kingdom Government submit that such an injunction is not incompatible with Regulation No 44/2001 because Article 1(2)(d) thereof excludes arbitration from its scope of application.

22 In that regard it must be borne in mind that, in order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the subject-matter of the proceedings (*Rich*, paragraph 26). More specifically, its place in the scope of Regulation No 44/2001 is determined by the nature of the rights which the proceedings in question serve to protect (*Van Uden*, paragraph 33).

23 Proceedings, such as those in the main proceedings, which lead to the making of an antisuit injunction, cannot, therefore, come within the scope of Regulation No 44/2001.

24 However, even though proceedings do not come within the scope of Regulation No 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, *inter alia*, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001.

25 It is therefore appropriate to consider whether the proceedings brought by Allianz and Generali against West Tankers before the Tribunale di Siracusa themselves come within the scope of Regulation No 44/2001 and then to ascertain the effects of the antisuit injunction on those proceedings.

26 In that regard, the Court finds, as noted by the Advocate General in points 53 and 54 of her Opinion, that, if, because of the subjectmatter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within its scope of application. This finding is supported by paragraph 35 of the Report on the accession of the Hellenic Republic to the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36) (‘the Brussels Convention’), presented by Messrs Evrigenis and Kerameus (OJ 1986 C 298, p. 1). That paragraph states that the verification, as an incidental question, of the validity of an arbitration agreement which is cited by a litigant in order to contest the jurisdiction of the court before which he is being sued pursuant to the Brussels Convention, must be considered as falling within its scope.

27 It follows that the objection of lack of jurisdiction raised by West Tankers before the Tribunale di Siracusa on the basis of the existence of an arbitration agreement, including the question of the validity of that agreement, comes within the scope of Regulation No 44/2001 and that it is therefore exclusively for that court to rule on that objection and on its own jurisdiction, pursuant to Articles 1(2)(d) and 5(3) of that regulation.

28 Accordingly, the use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.

29 It follows, first, as noted by the Advocate General in point 57 of her Opinion, that an anti-suit injunction, such as that in the main proceedings, is contrary to the general principle which emerges from the case-law of the Court on the Brussels Convention, that every court seised itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it (see, to that effect, *Gasser*, paragraphs 48 and 49). It should be borne in mind in that regard that Regulation No 44/2001, apart from a few limited exceptions which are not relevant to the main proceedings, does not authorise the jurisdiction of a court of a Member State to be reviewed by a court in another Member State (Case C-351/89 *Overseas Union Insurance and Others* [1991] ECR I3317, paragraph 24, and *Turner*, paragraph 26). That jurisdiction is determined directly by the rules laid down by that regulation, including those relating to its scope of application. Thus in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction (*Overseas Union Insurance and Others*, paragraph 23, and *Gasser*, paragraph 48).

30 Further, in obstructing the court of another Member State in the exercise of the powers conferred on it by Regulation No 44/2001, namely to decide, on the basis of the rules defining the material scope of that regulation, including Article 1(2)(d) thereof, whether that regulation is applicable, such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under Regulation No 44/2001 is based (see, to that effect, *Turner*, paragraph 24).

31 Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of Regulation No 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.

32 Consequently, an antisuit injunction, such as that in the main proceedings, is not compatible with Regulation No 44/2001.

33 This finding is supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, 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 and void, inoperative or incapable of being performed.

34 In the light of the foregoing considerations, the answer to the question referred is that it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.

#### Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

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

[Signatures]

\* Language of the case: English.