CORE
Metadata, citation and similar papers at core.ac.uk
Provided by Pepperdine Digital Commons

Pepperdine Dispute Resolution Law Journal

Volume 11 | Issue 3 Article 14

4-1-2011

An Unnecessary Consternation: An Analysis of the Future of EU Arbitration in the Wake of the *West Tankers* Decision

Mark G. Materna

Follow this and additional works at: https://digitalcommons.pepperdine.edu/drlj

Part of the Civil Law Commons, Civil Procedure Commons, Commercial Law Commons, Comparative and Foreign Law Commons, Consumer Protection Law Commons, Contracts Commons, Courts Commons, Dispute Resolution and Arbitration Commons, European Law Commons, Insurance Law Commons, Jurisdiction Commons, Jurisprudence Commons, Law and Economics Commons, Law and Society Commons, Legal Remedies Commons, Litigation Commons, Other Law Commons, Torts Commons, and the Transnational Law Commons

Recommended Citation
Mark G. Materna, *An Unnecessary Consternation: An Analysis of the Future of EU Arbitration in the Wake of the West Tankers Decision*, 11 Pepp. Disp. Resol. L.J. Iss. 3 (2011)
Available at: https://digitalcommons.pepperdine.edu/drlj/vol11/iss3/14

This Article is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Dispute Resolution Law Journal by an authorized editor of Pepperdine Digital Commons. For more information, please contact josias.bartram@pepperdine.edu , anna.speth@pepperdine.edu.

[Vol. 11: 571, 2011]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

An Unnecessary Consternation: An Analysis of the Future of EU Arbitration in the Wake of the *West Tankers* Decision

Mark G. Materna*

I. INTRODUCTION

"Fear cannot be banished, but it can be calm and without panic; it can be mitigated by reason and evaluation."
– Vannevar Bush, renowned U.S. engineer[1]

In the wake of the recent European Court of Justice (ECJ) decision in *Allianz SpA v. West Tankers Inc.*[2] that appeared to limit the powers of Member States of the European Union (Member States) in support of arbitration, there has been a strong trend toward the dramatic.[3] Indeed, the *West Tankers* decision has been called the final nail in the coffin of anti-suit injunctions in Europe and has even been viewed as a cornerstone to a "perverse situation" where the ECJ will promote a broken system.[4] Such

* B.A., University of Pennsylvania, 2006; J.D. candidate at Pepperdine University School of Law, and M.D.R. candidate at Straus Institute for Dispute Resolution, 2011. Special thanks to Mr. John Thompson, who first introduced me to the interesting dynamic of International Relations. Special thanks also to Dr. Maxi Scherer for her insight in relation to this article. Thank you to the journal staff for their dedication and hard work in preparing articles for publication.

1. ELAINE M. FORBES, M.A. & CYNTHIA J. MANSON, INNOVATE, COLLABORATE OR DIE: HOW TO CREATE AN ALLIANCE OR MERGER FOR A STRONGER, MORE EFFECTIVE NON-PROFIT 80 (2007).

2. Case C-185/07, Allianz SpA v. West Tankers Inc., 3 W.L.R. 696 (2009).

3. *See* Posting of Gilles Cuniberti to CONFLICT OF LAWS.NET BLOG, http://conflictoflaws.net/2009/ecj-judgment-in-west-tankers (Feb. 10, 2009).

4. Samantha Tite & Emily Barlass, *Another Nail in the Coffin of Anti-Suit Injunctions in Europe* (Mar. 17, 2009), http://www.vinsonelkins.com/uploadedFiles/VEsite/Resources/WP-IDR-2009_3_13.pdf; Spencer Wolff, *Tanking Arbitration or Breaking the System to Fix It? A Sink Or Swim Approach to Unifying European Judicial Systems: The ECJ in Gasser, Turner, and West Tankers*, 15 COLUM. J. EUR. L. ONLINE 65, 69 (2009), http://www.cjel.net/wp-content/uploads/2009/06/wolff.pdf.

Published by Pepperdine Digital Commons, 2011

arguments assume Member States now have virtually no power to enforce anti-suit injunctions or restrain litigation commenced in another Member State.

Such assumptions are unfounded and, as a result, the strategies that have been proposed to bypass a world without anti-suit injunctions are premature. This article proposes that, despite the *West Tankers* decision, parties are still not free to breach the terms of an arbitration agreement. On the contrary, there has been a strong trend by English courts to find ways of preventing parties from breaching such agreements.

The implications of this analysis are of utmost importance. With no more than a rudimentary understanding of the effects of *West Tankers*, parties may be caught up in the panic of a world without anti-suit injunctions. As a corollary, they may lose faith in Member State courts and could be unwilling to enter into arbitration agreements in these countries, or seek other methods of economic stability altogether. With the economy in such a volatile state throughout the European Union (EU) and much of the world, such results may needlessly add to this instability.[5] In short, this article serves to quell the panic and elucidate that the *West Tankers* decision is not a nail in the coffin, but rather a mechanism to reiterate European courts' dedication to ensuring that arbitration provisions remain a potent force against economic infidelity.

Part II of this article will provide a brief background of anti-suit injunctions and the *West Tankers* decision in the context of EU Arbitration. Part III will outline reactions to this decision and pay particular attention to commentary that illustrates trepidation regarding the future of arbitration agreements in Europe. Part IV will reveal why these fears are overplayed by analyzing two relevant English court decisions, their implications on both micro and macro levels, and why the present system of EU arbitration will remain unchanged. Though such measures are likely premature, Part V discusses some proposals aimed at bypassing a system where anti-suit injunctions are nonexistent. Part VI advocates a fresh perspective reframing *West Tankers* as a catalyst to understanding the bright future of EU arbitration. Finally, Part VII offers a conclusion reiterating the reality of this supposed crisis.

---

5. *See* Posting of Barry Eichengreen & Kevin O'Rourke to VOXEU.ORG., http://www.voxeu.org/index.php?q=node/3421 (Mar. 8, 2010). In reaching this conclusion, Eichengreen and O'Rourke compare empirical evidence from the Great Depression (1929) to the state of the present economy (2009). *Id.* Categories analyzed include: world industrial production, world stock markets, volume of world trade, and industrial output in both small and large European countries. *Id.* In every category, it is evident the economy is now worse off than it was during the Great Depression. *Id.*

II. THE *WEST TANKERS* DECISION

Anti-suit injunctions serve to prevent an opposing party from beginning or continuing to commence a legal proceeding in another forum.[6] The purpose of such orders is to prevent forum shopping—the practice of litigants who try to get their case heard in a court that will render the most favorable decision.[7] In the context of the EU, anti-suit injunctions are governed by the Brussels Regime; these rules regulate the allocation of jurisdiction in international legal disputes of a civil or commercial nature involving residents of a Member State.[8] Specifically, the Brussels I Regulation,[9] a subsection of the Brussels Regime, was at issue in *West Tankers*.

Prior to *West Tankers*, parties seeking to enforce arbitration provisions could turn to English courts and were afforded two options if litigation was commenced in another Member State.[10] First, the English courts had the power to enforce the anti-suit injunction.[11] Second, these courts had the

---

6. *See* Philippa Charles, *Anti-Suit Injunctions: The ECJ Decision of 10 February 2009 in the West Tankers Case* (Aug. 10, 2009), http://www.mayerbrown.com/internationalarbitration/article.asp?id=7381&nid=235. *See generally* THOMAS RAPHAEL, THE ANTI-SUIT INJUNCTION (2008).

7. Assimakis Komninos, *European Court of Justice Finds Anti-Suit Injunctions Unavailable in Support of Arbitration Proceedings in Europe*, INT'L DISPS. Q. (White & Case, New York, N.Y.), Summer 2009, at 16, *available at* http://www.whitecase.com/files/Uploads/Documents/IDQ_Summer_2009_v37.pdf.

8. *See* GREEN PAPER ON THE BRUSSELS I REGULATION, 2009, http://www.parliament.the-stationery-office.co.uk/pa/ld200809/ldselect/ldeucom/148/14804.htm. The Brussels Regime consists of three parts: the Brussels Convention, the Brussels I Regulation, and the Lugano Convention. *Id.* ¶¶ 2-6. The Brussels Convention was established in 1968 and "sought to avoid parallel legal proceedings within the Community, to simplify the recognition and enforcement of judgments and to strengthen the legal protection afforded to citizens of the Member States." *Id.* ¶ 2. The Brussels I Regulation replaced the Brussels Convention in 2002 and "is designed to contribute to the continued development of an area of freedom, security and justice and to the 'sound operation of the internal market.'" *Id.* ¶ 5. The Lugano Convention, established in 1988, extended the scope of the Brussels Regime to "create common rules regarding jurisdiction and judgments across a single legal space consisting of the Member States . . . and the three European Free Trade Association states of Iceland, Norway, and Switzerland." *Id.* ¶ 6.

9. Council Regulation 44/2001, 2000 O.J. (L 012) (EC).

10. Neville Byford & Afzalah Sarwar, *Arbitration Clauses After West Tankers: The Unanswerable Conundrum? Practical Solutions for Enforcing Arbitration Clauses*, 12 INT'L. ARB. L. REV. 29, 32 (2009), *available at* http://www.morganlewis.com/pubs/IALR_ArbitrationClausesAfterWestTankers_June2009.pdf.

11. *Id.* at 32; *see also* David J. Howell & Sarah Catherine Thomas, *European Court of Justice Decision on Anti-suit Injunction in West Tankers* (April 2, 2009),

authority to claim the costs of court proceedings brought in breach of an arbitration agreement.[12] While the English courts' authority was challenged in limiting the circumstances in which anti-suit relief was available, these courts still had authority to grant an anti-suit injunction and restrain litigation commenced in another Member State.[13]

Before analyzing reactions to *West Tankers*, it is first necessary to understand the facts and rationale of this controversial case. The dispute arose after a collision in Italy involving a vessel chartered by West Tankers to Erg Petroli SpA (Erg).[14] Pursuant to the charter party agreement, Erg commenced arbitration proceedings against West Tankers in London.[15] Subsequently, Erg's insurers (RAS) commenced court proceedings in Italy to recover the insurance sum it had paid to Erg.[16] In response, West Tankers turned to the English High Court for an anti-suit injunction, citing that because the dispute arose out of the charter party it was subject to the London arbitration provision.[17] The High Court granted the anti-suit injunction,[18] but while the House of Lords generally agreed on appeal, it ultimately referred the case to the ECJ.[19]

The crux of the case rested on whether it was consistent with the Brussels I Regulation for a Member State court to restrain a party from commencing or continuing proceedings in another Member State on the ground that those proceedings were in breach of an arbitration provision.[20] Examining the "arbitration exception" of the Brussels I Regulation, the ECJ found that proceedings "which raise a preliminary or incidental issue

---

http://www.fulbright.com/index.cfm?fuseaction=publications.detail&pub_id=3814&site_id=494&detail=yes.

12. Byford & Sarwar, *supra* note 10, at 32.

13. *Id.*; *see also* Tite & Barlass, *supra* note 4, at 1.

14. Case C-185/07, Allianz SpA v. West Tankers Inc., 3 W.L.R. 696, 701 (2009).

15. *Id.* at 701.

16. *Id.*

17. *Id.* Thus, originally the English High Court found that the arbitration was applicable; in an effort to protect West Tankers' right to have the dispute arbitrated, the Court found the proceedings fell outside the scope of the Regulation. *Id. See also* Charles, *supra* note 6.

18. *West Tankers*, 3 W.L.R. at 701. Despite this injunction, RAS petitioned the English Commercial Court to discharge the injunction. *See id.* at 713. This request was denied and a permanent injunction was issued instead. *Id.* It was after this issuance that RAS appealed, and the case was certified to the House of Lords. *Id. See also* Charles, *supra* note 6.

19. *West Tankers*, 3 W.L.R. at 701-02. Before referring the case to the ECJ, the House of Lords made a number of astute observations. Perhaps most notably, it "recognized that the question of whether or not to extend European authority to arbitration would affect the efficacy of arbitration as a method of resolving commercial disputes." Charles, *supra* note 6. Additionally, Lord Hoffman "underlined the importance of the principle of autonomy of the parties to choose the seat of arbitration and governing law." *Id.*

20. *West Tankers*, 3 W.L.R. at 702. *See also* Tite & Barlass, *supra* note 4, at 1.

concerning the applicability of an arbitration agreement" do not fall within this exception.[21] The ECJ reasoned that the subject of the foreign proceedings was of paramount importance in determining whether or not the matter fell within the Regulation.[22] Because the subject matter of the proceedings in Italy was for damages, the ECJ found the Italian court had jurisdiction to decide whether it could hear the issue.[23] Consequently, it was not within the English court's power to grant an anti-suit injunction to preclude the Italian court from exercising its power.[24] Such a result, the ECJ concluded, would not only strip Member courts of the power to rule in their own jurisdiction, but it would also run counter to the trust which Member States accord to each other's court systems on which the Regulation is based.[25]

III. REACTIONS AND FEARS AFTER *WEST TANKERS*

Almost immediately after the ECJ rendered its opinion, there was strong criticism of the *West Tankers* decision. While a few of the arguments may hold some merit, they generally consist of overreactions that have needlessly exacerbated current economic woes. By first understanding the reactions and fears after *West Tankers*, an analysis of why these reactions are unfounded becomes possible.

---

21. Tite & Barlass, *supra* note 4, at 1. Before any ECJ ruling is issued, it is first customary that the ECJ Advocate General issue an advisory opinion. Charles, *supra* note 6. Though it is not binding on the ECJ, it is usually very influential. *Id.* In his advisory opinion, Advocate General Kokott essentially found the English court did not have the power to grant the anti-suit injunction because it impinged on the autonomy of the courts of another Member State. *Id.* It was this rationale that was the basis for the ECJ opinion as a whole. *Id.*

22. *West Tankers*, 3 W.L.R. at 706; *see also* Tite & Barlass, supra note 4, at 1-2.

23. *West Tankers*, 3 W.L.R. at 715. "[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, [which] also comes within its scope of application." *Id.*

24. *Id.* at 711. In reaching this decision, the ECJ, like Advocate General Kokott, relied on the ECJ's earlier decision in Case C-159/02, Turner v. Grovit, 3 W.L.R. 1193 (2005) (upholding the Regulation in a breach of an exclusive jurisdiction clause even though the first set of proceedings was brought by a party in bad faith). *Id.*

25. *Id.* at 704; *see also* Charles, *supra* note 6.

A. *London as a Venue for International Arbitration*

London has long been an international hub for arbitration.[26] Because English law is a popular choice for business counterparties that do not otherwise have a connection to England, these parties have been encouraged to seek arbitration in London.[27] Aside from its convenient location and linguistic advantages, English law has become a cornerstone for arbitration proceedings.[28] A major reason for this phenomenon is the Arbitration Act of 1996,[29] which consolidated case law from around the EU and set out underlying principles that brought English law a step closer to being the standard for international arbitration.[30] Finally, an English court's decision in *Fiona Trust & Holding Corp. v. Primalov* indicated that English courts were strongly supportive of international arbitration.[31] When taken in the aggregate, these factors illustrate that London has established itself as a proverbial powerhouse, among other popular venues such as France and Switzerland, in the world of international arbitration.

Given this reality, the *West Tankers* decision was of great concern both to businesses in London and throughout Europe. The rationale behind this fear was simple and was aptly described by Mr. Jamie Maples, an Associate in the London Dispute Resolution Group of Weil, Gotshal & Manges LLP:

> Currently, Europe is home to several major centers for international arbitration, such as Stockholm, Paris, Vienna, and London, to name but a few. If the ECJ strips away the jurisdiction of the national courts in these countries to protect arbitration agreements by way of anti-suit injunctions, there is a significant risk that business people will choose to arbitrate outside Europe instead, in arbitration centers like New York, Singapore, and

26. Interview by Al Driver with Matthew Shankland, Partner in the London Dispute Resolution Group of Weil, Gotshal & Manges LLP, & Jamie Maples, Associate in the London Dispute Resolution Group of Weil, Gotshal & Manges LLP (May 1, 2008), *available at* http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=September&artYear=2009&EntryNo=8230.

27. *Id.*; *see also* Tite & Barlass, *supra* note 4, at 3; Charles, *supra* note 6.

28. *See* Interview with Matthew Shankland & Jamie Maples, *supra* note 26.

29. *See generally* BRUCE HARRIS, ROWAN PLANTEROSE & JONATHAN TECKS, DESCRIPTION OF ARBITRATION ACT 1996: A COMMENTARY (Blackwell Science Publishing 2007) (1996).

30. *See* Interview with Matthew Shankland & Jamie Maples, *supra* note 26.

31. *Id.*; *see* Fiona Trust Holding v. Primalov [2007] UKHL 40, [2008] 1 Lloyd's Rep. 254 (U.K.) (holding it is more difficult to argue to find an arbitration agreement invalid based on the doctrine of severability; instead, a party would need to show evidence directly impeaching the arbitration agreement, which is a much more difficult standard).

> Bermuda, where the relevant state courts are able to issue anti-suit injunctions of this kind.[32]

Not only is the fear of losing business a concern, but London businesspersons in the field of arbitration also feel this decision is a step in the wrong direction, if not contrary to the decision in *Fiona Trust*.[33] As such, instead of London growing as a center for arbitration in Europe, the *West Tankers* decision is feared to have the opposite effect, which may ultimately result in drastic effects on the international arbitration market in London and throughout many parts of Europe.

B. Torpedo Actions

In addition to the effects of *West Tankers* on London as an arbitration venue, there is also the concern of "torpedo actions." A torpedo action is a technique aimed at preventing proceedings from being heard in one Member State by first commencing proceedings in another Member State where the judicial system is notoriously inefficient or slow, such as Italy or Belgium.[34] The Brussels I Regulation states that if proceedings are brought within one jurisdiction, they cannot be heard elsewhere at the same time.[35] As such, parties may delay an action for a prolonged period of time so that by the time the first proceedings are heard in the less efficient Member State court, there may be no point in pursuing the proceedings in another more efficient Member State court system.[36]

Even before *West Tankers*, parties regularly attempted to exploit the Brussels I Regulation by trying to torpedo or paralyze lawsuits.[37] In

---

32. *See* Interview with Matthew Shankland & Jamie Maples, *supra* note 26. Hong Kong may also be a viable option in addition to the venues mentioned by Shankland and Maples. *See* Charles, *supra* note 6.

33. *See* Interview with Matthew Shankland & Jamie Maples, *supra* note 26; *see also Fiona Trust*, 1 Lloyd's Rep. at 254.

34. Patrick Boylan, *West Tankers: End of the Anti-suit in Europe?*(Sept. 29, 2008), http://ld.practicallaw.com/8-383-4278#a511212. This also applies to Lugano countries; nations of the Lugano Convention which include the old member states of the European Union and the members of the European Free-Trade Association (EFTA). *Id.*

35. *See id.*

36. *Id.*; *see also* Council Regulation 44/2001, 2000 O.J. (L 012) (EC).

37. *See* Wolff, *supra* note 4, at 68; *see generally* Pierre Véron, *ECJ Restores Torpedo Power*, 35 INT'L REV. INTELL. PROP. & COMPETITION L. 638 (2004), *available at* http://www.veron.com/publications/Publications/ECJ_Restores_Torpedo_Power.pdf.

response, the ECJ "rebutted any presumption that lengthy proceedings in the courts of one of the Member States could ever give rise to a derogation from Brussels I."[38] This doctrine of "mutual trust" essentially states that despite inevitable delays, English courts must "trust" and decline jurisdiction over torpedo actions, even if brought in bad faith.[39] The purpose of this mutual trust is to facilitate a harmonization of all European Courts.[40] Nevertheless, critics believe that in practice this concept may instead be an incentive for parties to bring bad faith claims. While case law has supported the mutual trust doctrine,[41] critics fear *West Tankers* is another detrimental step toward legitimizing a policy that will cause a rise in bad faith torpedo actions.[42]

C. *Other Concerns*

Because critics feel *West Tankers* only aggrandized the problem of torpedo actions, many fear this may force parties to engage in costly and time-consuming litigation.[43] Consequently, arbitrations may become more expensive and may not be a viable alternative to litigation if costs become comparable.[44] With the rising costs of arbitration, cross-border commercial contracts may be forced to increase as well.[45] Ultimately, some critics feel this case is a basis to lose faith in the ECJ as an efficient, well-reasoned catalyst for justice.[46] As Jonathan Harris, Professor of International Commercial Law at the University of Birmingham (United Kingdom), postulated:

> It is difficult to conceive of a more thinly reasoned or incomplete judgment. It fails sufficiently to examine the central question as to the meaning and scope of the arbitration exclusion. In this respect, the question arises as to whether the validity of the arbitration clause can be so easily dismissed as a preliminary issue in foreign litigation that does not alter the civil and commercial character of those foreign proceedings.[47]

---

38. *See* Wolff, *supra* note 4, at 66.

39. *Id.*; *see also* Véron, *supra* note 37, at 641.

40. *See* Wolff, *supra* note 4, at 68; *see also* Véron, *supra* note 37, at 641.

41. *See* Case C-116/02, Erich Gasser GmbH v. MISAT Srl., 2003 E.C.R. I-14693; *see also*, Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd., 2004 E.C.R. I-3565.

42. *See* Wolff, *supra* note 4, at 69.

43. *See* Tite & Barlass, *supra* note 4, at 2.

44. *Id.*

45. *Id.* at 2-3.

46. *See* Wolff, *supra* note 4, at 69.

47. *Id.* at 68; Posting of Martin George to CONFLICT OF LAWS.NET BLOG, http://conflictoflaws.net/2009/harris-on-west-tankers (Feb. 12, 2009).

With such harsh criticisms, it is apparent that there is much concern over the ECJ and the future of arbitration in general. At the same time, when examined in the context of decisions since *West Tankers*, it becomes evident that these fears are overplayed.

IV. WHY FEARS ARE OVERPLAYED

A. Empirical Evidence of Recent English Court Decisions

As stipulated, there have been a number of fears after *West Tankers*, yet these concerns are unsubstantiated. An analysis of the effects of *West Tankers* requires a discussion of relevant English court decisions, empirical evidence that is not based on mere conjecture. By examining two cases in particular, it becomes evident that there is authority for other ways to avoid the consequences of *West Tankers*. Both cases involve non-breaching parties who brought arbitration proceedings following a ruling in a Member State court. In both cases, the English court ruled it was not bound by the decision of the foreign court. Perhaps most importantly, these cases provide a basis that is instructive of problems encountered in practice, not claims that are unsubstantiated.

1. Protecting the Non-Breaching Party: *CMA v. Hyundai*

In *CMA v. Hyundai*, the parties entered into four shipbuilding contracts that stipulated arbitration proceedings would be held in London.[48] When a dispute arose, CMA commenced proceedings in French court.[49] Despite settling the agreement outside of court, CMA continued with the proceedings in French court and was awarded damages.[50] In response, Hyundai brought arbitration proceedings in London, claiming that CMA had breached the arbitration agreement by continuing proceedings in French court.[51] The arbitrators held in favor of Hyundai, as did the English High Court on appeal.[52] The Court held it was not bound by the ruling of the

48. CMA CGM SA v. Hyundai MIPO Dockyard Co., [2008] EWHC (Comm) 2791, [2009] 1 Lloyd's Rep. 213 [213] (Eng.); Byford & Sarwar, *supra* note 10, at 32.

49. *CMA*, 1 Lloyd's Rep. at 213; Byford & Sarwar, *supra* note 10, at 32.

50. *CMA*, 1 Lloyd's Rep. at 213; Byford & Sarwar, *supra* note 10, at 32.

51. *CMA*, 1 Lloyd's Rep. at 213; Byford & Sarwar, *supra* note 10, at 32.

52. *CMA*, 1 Lloyd's Rep. at 213-14; Byford & Sarwar, *supra* note 10, at 32.

French court.[53] Instead, the Court examined what would have happened if the contract had not been breached.[54] Essentially, it relied on the tenet that contract breakers should not be entitled to benefit from their own wrongdoing.[55] Pursuant to this rationale, the High Court found that, had the contract not been breached, the matter would have been resolved by arbitration and there would never have been a French judgment.[56]

In the context of *West Tankers*, *CMA* illustrates that a non-breaching party may sue a breaching party to enforce an arbitration agreement even though another Member State court has delivered an earlier judgment in the breaching party's favor.[57] With this rationale in mind, the *West Tankers* decision does not seem so daunting. After all, even if a non-breaching party were in the precarious position of having an unfavorable judgment rendered against it from another Member State court, it is likely that the arbitration provision will be enforced—assuming it would have been enforced if the contract had not been breached.[58] As such, despite the fears that *West Tankers* would facilitate a system where arbitration agreements could easily be manipulated, the rationale presented in *CMA* illustrates the contrary—arbitration agreements may be enforced irrespective of a decision by another Member State court.[59]

Perhaps the only deficiency in this rationale is that *CMA* was decided prior to *West Tankers*. Nevertheless, there is no indication that this is no longer good law.[60] In fact, the English court's decision in *National Navigation v. Endesa*[61] supports this rationale.[62]

---

53. *CMA*, 1 Lloyd's Rep. at 213-14; Byford & Sarwar, *supra* note 10, at 32.

54. *CMA*, 1 Lloyd's Rep. at 222-23; Byford & Sarwar, *supra* note 10, at 32.

55. *CMA*, 1 Lloyd's Rep. at 222-23; Byford & Sarwar, *supra* note 10, at 32. This rationale was first established in a much older case, though there is no indication it is outdated, nor has its reasoning been overturned. *See* New Zealand Shipping Co. Ltd. v. Société des Ateliers et Chantiers de France, [1919] A.C. 1 (H.L.) (U.K.).

56. *CMA*, 1 Lloyd's Rep. at 223 ("Had [the contract] not been breached, then the parties would have both complied with their obligations to have the matter resolved by arbitration, and there would be no French judgment . . . ."); Byford & Sarwar, *supra* note 10, at 32.

57. *See* Byford & Sarwar, *supra* note 10, at 32.

58. *See id.*

59. *See id.*

60. See *id.* ("[T]he proposition that the English courts are not necessarily bound by earlier decisions of other EU courts is supported by the more recent decision of the English High Court . . . .").

61. Nat'l Navigation Co. v. Endesa Generacion SA (*Endesa I*), [2009] 1 Lloyd's Rep. 666, 669 (Eng.), *overruled by* Nat'l Navigation Co. v. Endesa Generacion SA (*Endesa II*), [2009] EWCA (Civ) 1397, 2009 WL 4667033 (Eng.).

62. *See* Byford & Sarwar, *supra* note 10, at 32-33.

2. The Public Policy Exception: *National Navigation Co. v. Endesa*

The controversy in *National Navigation Co. v. Endesa* involved a supply contract where National Navigation (NNC) agreed to deliver coal to Endesa via NNC's vessel.[63] Subsequently, the vessel suffered damage, and the goods were not delivered to Endesa in Spain.[64] Though the charter party included a London arbitration clause, Endesa commenced proceedings against NNC in Spain.[65] Shortly thereafter, NNC commenced proceedings against Endesa in England and sought declaratory relief.[66] In response, the Spanish court found there was no arbitration agreement, and even if there was, it was repudiated by the commencement of the proceedings in England.[67] Thus, at first, it appeared this case would be major blow to the future of arbitration agreements.

Expanding on the rationale in *CMA*,[68] the English court in *Endesa* found "that they were not required to recognize the Spanish judgments in proceedings in another Member State which were not themselves proceedings within the Regulation because of the arbitration exception in [Article] 1(2)(d)."[69] In addition, the English court applied Article 34(1) of the Brussels I Regulation—the public policy exception.[70] This exception states that a judgment will not be recognized if it is manifestly against public policy.[71] In *Endesa*, the English court found it would be manifestly against English public policy to recognize the Spanish court's judgment regarding the arbitration agreement.[72] As a result, the English court found it necessary to make an independent decision and ultimately held there was a valid arbitration agreement that was not waived by NNC.[73]

The implications of this ruling are of paramount importance. Critics of *West Tankers* concerned with the uncertainty of arbitration may take solace

---

63. *Endesa I*, 1 Lloyd's Rep. at 669.

64. *Id.* at 669-70.

65. *Id.*

66. *Id.* at 671; *see also* Byford & Sarwar, *supra* note 10, at 32-33.

67. *Endesa I*, 1 Lloyd's Rep. at 676; *see* Byford & Sarwar, *supra* note 10, at 32-33.

68. In dicta, the court in *CMA* "left open the possibility that, due to the wording of the Regulation, the Regulation did not apply to arbitration tribunals and that therefore they were not bound to recognize court judgments." Byford & Sarwar, *supra* note 10, at 33.

69. *Id.*; *see also Endesa I*, 1 Lloyd's Rep. at 690-91.

70. Byford & Sarwar, *supra* note 10, at 33; *see also Endesa I*, 1 Lloyd's Rep. at 695-96.

71. *Endesa I*, 1 Lloyd's Rep. at 695-96; *see also* Byford & Sarwar, *supra* note 10, at 33.

72. *Endesa I*, 1 Lloyd's Rep. at 695-96; *see also* Byford & Sarwar, *supra* note 10, at 33.

73. *Endesa I*, 1 Lloyd's Rep. at 695-96; *see also* Byford & Sarwar, *supra* note 10, at 33.

in the fact that Endesa evidences that English courts are very reluctant to allow parties to breach the terms of an arbitration agreement.[74] Despite the ECJ's decision in *West Tankers*, English courts have found alternative ways to preclude arbitration agreements from being arbitrarily breached.[75]

3. Micro and Macro Level Implications

On a micro level, these cases bring a number of specific expositions to light. In *CMA*, the English court applied the rationale that contract breakers should not be entitled to benefit from their wrongdoing.[76] In *Endesa*, the court employed the public policy exception as a mechanism to find that an arbitration agreement existed.[77] Thus, the English courts have been able to discover new avenues to ensure the future of arbitration.

On a macro level, this indicates a propensity toward facilitating arbitration. While it remains to be seen whether this rationale will continue to be used by English courts long-term, there is no indication it will not remain a viable option through which English courts have some power to enforce arbitration agreements.[78] Thus, the panic that has grasped much of Europe is exaggerated as there is no indication the future of arbitration is in jeopardy. From these two English court cases, it appears arbitration will remain an immutable tenet in European commercial agreements.

B. London Will Remain a Center for International Arbitration

Once the basis of relevant English court cases has been applied, it is now appropriate to address the aforementioned concerns. A major fear has been whether or not London will remain a major player in international

74. *See* Byford & Sarwar, *supra* note 10, at 33.

75. Note that during the writing of this article, the decision in *Endesa* was overturned. Nat'l Navigation Co. v. Endesa Generacion SA (*Endesa II*), [2009] EWCA (Civ) 1397, 2009 WL 4667033 (Eng.). In reaching its decision, the court evaluated the public policy argument, but found that there was no public policy exception since Endesa was entitled to challenge the incorporation of the arbitration clause. *Id.* ¶ 62. It is important to recognize that this decision does not mean the public policy exception is not a viable tool for English courts as a whole; it was simply decided not to pertain to this narrow set of circumstances: "The English court *in such circumstances* is not entitled to examine for itself whether the clause is incorporated and that is the end of the matter." *Id.* (emphasis added). As such, the public policy exception is still a viable weapon for English courts and will likely be used in the future as a mechanism to help them enforce arbitration agreements.

76. *See* CMA CGM SA v. Hyundai MIPO Dockyard Co., [2008] EWHC (Comm) 2791, [2009] 1 Lloyd's Rep. 223 (Eng.).

77. *See Endesa I*, 1 Lloyd's Rep. at 669-70.

78. *See* Byford & Sarwar, *supra* note 10, at 32-33.

arbitration in light of *West Tankers*.[79] It is undisputed that the availability of anti-suit injunctions has played a role in why London is such a popular venue for international arbitration.[80] However, stating that voidance of anti-suit injunctions would have such a drastic negative effect on London's importance as a center for international arbitration insinuates that anti-suit injunctions are the only reason arbitration in London is so coveted. This assumption is false. In reality, there are a number of other reasons London has become such a popular hub for arbitration proceedings.

First and foremost, London is conveniently located and easily accessible to parties both within the United Kingdom and throughout Europe.[81] As a leader in international arbitration, especially since the institution of the Arbitration Act of 1996,[82] London is unique because it offers an availability of experts accustomed to dealing with many types of commercial disputes.[83] Evidently, the *West Tankers* decision will have absolutely no effect on this aspect, and there is no reason to believe London will not continue to grow as a center of arbitration based on these offered conveniences.[84]

In addition to location, London also remains a venue that has been recognized as neutral in the scope of arbitration proceedings.[85] Moreover, because English is recognized as the preferred language of business throughout the European Union, London serves as a convenient place where parties can engage at a neutral location in a language shared by the host nation.[86]

Aside from location, neutrality, and language, London is also popular because it conducts arbitrations pursuant to the Arbitration Act of 1996.[87] Prior to the institution of this Act, "the tendency of the English courts to

79. *See* Interview with Matthew Shankland & Jamie Maples, *supra* note 26.

80. *See id.*

81. *See id.* (proposing that London holds a geographic advantage).

82. *See* Heather Neilson, *London as a Seat of Arbitration?*, INT'L LEGAL NEWS, Mar. 27, 2009, http://www.imakenews.com/iln/e_article001393038.cfm?x=b11,0,w; *see generally* Arbitration Act, 1996, c. 23 (Eng.), *available at* http://www.opsi.gov.uk/Acts/acts1996/ukpga_19960023_en_1.

83. *See* Neilson, *supra* note 82.

84. *See* Tite & Barlass, *supra* note 4, at 3.

85. *Id.*

86. *See generally* Stephen Bickford-Smith, Barrister & FCIArb Chartered Arbitrator, Address at Herbert Smith LLP (May 20, 2009) (highlighting the universality of the English language as a means of business communication), *available at* http://www.landmarkchambers.co.uk/__data/assets/pdf_file/0016/60910/SBS_Which_Seat_to_Choose_-_Arbitration_Talk.pdf.

87. *See* Neilson, *supra* note 82; *see generally* Arbitration Act, 1996, c. 23 (Eng.).

intervene in arbitral proceedings meant that England was perceived as insular and outdated."[88] The Act was enacted to make arbitration laws more user-friendly and ultimately helped harmonize the laws of other countries with English arbitration law as much as possible.[89] This progress, coupled with the fact that *West Tankers* does not affect the Arbitration Act of 1996, will likely mean that London will continue to remain a popular destination for those seeking arbitration in the EU.

Also of note when discussing London's importance in the world of international arbitration is the availability of experts who act as arbitrators.[90] Rather than practicing arbitration as a subsidiary to their primary practice, these experts specialize in arbitrating a broad range of commercial disputes that are often highly complex.[91] Moreover, instead of being averse to arbitration, local courts are supportive of the process and results of arbitration.[92] For this reason, London is considered a specialized venue in this context.[93] To surmise that this strong reputation will simply diminish due to *West Tankers* is incorrect.

When examining the claim that anti-suit injunctions are a key determinant in deciding whether or not a party will seek arbitration in London, it is helpful to examine venues that do not offer the luxury of anti-suit injunctions. Popular destinations such as Stockholm, Geneva, Paris, and Zurich are all preferred venues for international arbitration, yet anti-suit injunctions are not available at any of these venues.[94] Accordingly, it can be inferred that the availability of anti-suit injunctions is not a determining factor on its own as to whether a party will seek arbitration in a particular

---

88. Neilson, *supra* note 82.

89. *See* Neilson, *supra* note 82. The Act is also supportive of arbitration because it is contains unique powers:

> The 1996 Act is supportive of arbitration in the sense that the English court is empowered to make orders in support of the arbitral jurisdiction of a tribunal including the granting of injunctive relief, making orders for the preservation of evidence and compelling witnesses to give evidence. Such supportive measures may be critical to the smooth running of an arbitration, particularly where a recalcitrant party is involved.

Id. In addition, an arbitral award will be recognized with the same authority as if it was an order of the court. This imparts a "finality" to the proceedings that are of paramount importance in the world of business. *Id.*

90. *Id.*; *see also* Tite & Barlass, *supra* note 4, at 3.

91. *See* Neilson, *supra* note 82.

92. *Id.*; *see also* Boylan, *supra* note 34.

93. *See* Neilson, *supra* note 82.

94. *See* Boylan, *supra* note 34. While this list is far from exhaustive, it still illustrates just how many popular international arbitration venues exist that do not offer anti-suit injunctions. *Id.*

venue. Thus, like the aforementioned cities, London will likely remain a popular seat for international arbitration.

C. *Torpedo Actions Are of Ancillary Concern*

As mentioned previously, torpedo actions are aimed at preventing proceedings from being heard in one Member State by first commencing proceedings in another Member State where the judicial system is notoriously inefficient or slow.[95] By examining the rationale in *CMA* and *Endesa*, it becomes evident that torpedo actions lose their luster as formidable opponents to arbitration.

As a reminder, *CMA* held that a non-breaching party may sue a breaching party to enforce an arbitration agreement even though another Member State court has delivered an earlier judgment in the breaching party's favor.[96] This is rooted in the principle that contract breakers should not be entitled to benefit from their wrongdoing.[97] Applying this rationale to torpedo actions, a non-breaching party can sue a breaching party to enforce an arbitration agreement in the seat of arbitration, despite an outstanding judgment rendered by a court of another jurisdiction.[98] Thus, if a breaching party's actions were found to have unjustly enriched the party, that party still may be sued for breaching an arbitration agreement.[99] As a result, torpedo actions will not have the dramatic effect that many have fearfully envisioned, and arbitration in the EU will essentially remain unchanged.

The rationale in *Endesa* illustrates a similar conclusion to that in *CMA*. As discussed earlier, the importance of *Endesa* was that it established that in the context of arbitration, a judgment will not be recognized if it is manifestly against public policy.[100] This exception is relatively broad, and if necessary, it is reasonable to believe that courts can use this rationale as a

95. *See supra* Part III.B.

96. *See* CMA CGM SA v. Hyundai MIPO Dockyard Co., [2008] EWHC (Comm) 2791, [2009] 1 Lloyd's Rep. 213 (Eng.); *see also* Byford & Sarwar, *supra* note 10, at 32.

97. *See CMA*, 1 Lloyd's Rep. at 213; *see also* Byford & Sarwar, *supra* note 10, at 32.

98. *See CMA*, 1 Lloyd's Rep. at 213; *see also* Byford & Sarwar, *supra* note 10, at 32.

99. *See CMA*, 1 Lloyd's Rep. at 213; *see also* Byford & Sarwar, *supra* note 10, at 32. Though it may seem a rudimentary point, it is important to note that this rationale will only apply to arbitration agreements that are consented to by both parties. If no such agreement exists, torpedo actions become a very real danger that can have serious consequences for the non-breaching party.

100. *See* Nat'l Navigation Co. v. Endesa Generacion SA (*Endesa I*), [2009] 1 Lloyd's Rep. 666, 669 (Eng.), *overruled by* Nat'l Navigation Co. v. Endesa Generacion SA (*Endesa II*), [2009] EWCA (Civ) 1397, 2009 WL 4667033 (Eng.).; *see also* Byford & Sarwar, *supra* note 10, at 32-33.

catalyst to preclude parties from taking advantage of torpedo actions. Consequently, this exception may serve to counterbalance torpedo actions, rendering the panic discussed above moot. As a result, the other aforementioned concerns, namely costly litigation and the lack of faith in the ECJ, are also moot because the analysis illustrates a system where the future of effective arbitration in the EU is bright.

D. Narrowness of the Decision Precludes Far-Reaching Effects

Finally, it is important to remember that the *West Tankers* decision was narrow; though the ruling limited the English court's jurisdiction inside the EU, English courts are still free to grant anti-suit injunctions in nations outside of the EU and Lugano nations.[101] As a result, English courts may restrain proceedings in nations such as Norway, Switzerland, and Iceland.[102]

In contrast, there is no indication that the decisions in *CMA* and *Endesa* are as narrow as that in *West Tankers*. Through these decisions, English courts set a precedent in international proceedings that they will protect the non-breaching party and are intent on enforcing arbitration agreements in the name of public policy. Because London is viewed as a leader in international arbitration, this rationale will likely spread to neighboring courts throughout the EU and possibly beyond. Therefore, it would be fair to assume that EU courts will likely make it more difficult to breach arbitration agreements and, thanks to *CMA* and *Endesa*, now have a general framework to ensure this outcome.

E. The Present State of International Arbitration in the EU Will Remain Intact

When examining the effects of *West Tankers* as a whole, the logical question arises: what effect, if any, will this decision have on international arbitration in the EU? Building on the conclusions of the previous analysis coupled with an examination of the present major advantages and disadvantages of international arbitration, it may be concluded that international arbitration in the EU will be no better or worse as a result of *West Tankers*.

101. Byford & Sarwar, *supra* note 10, at 29.
102. *See* Boylan, *supra* note 34.

1. Advantages of International Arbitration Will Remain Unchanged

Despite recent developments that indicate international arbitration proceedings have become much slower, they are generally faster than litigation.[103] There are several reasons for this phenomenon. First, the lack of any procedural rules allows the parties a certain level of latitude to tailor the procedure to fit their particular needs.[104] Moreover, arbitral awards are final and not subject to appeal, which means that arbitration, at least in principle, resolves the dispute in a much more timely fashion than litigation.[105] Lastly, arbitrators generally have more flexible schedules than judges overseeing court proceedings.[106] Accordingly, arbitrations can be scheduled on weekends and holidays if necessary, and the process can be resolved more quickly.[107] This flexibility can provide some important advantages in terms of resources and convenience over the slower and potentially far more treacherous realm of litigious proceedings.

In the context of *West Tankers*, this advantage will remain unchanged. While it may be argued that *West Tankers* will result in time-consuming and costly litigation for innocent parties that will be forced to litigate in a foreign court after they had previously agreed to arbitrate, the previous analysis

---

103. *See* Peter Sherwin, Ana Vermal & Elizabeth Figueira, *The Decision to Arbitrate*, INT'L ARB., http://www.proskauerguide.com/arbitration/19/I (last visited Apr. 19, 2011). Even though international arbitration is generally speedier than litigation, a number of factors are making arbitration a slower process than it has been in the past. *Id.* For example, given that more parties are choosing arbitration, the cases that are arbitrated are becoming increasingly complex and take longer to reach a resolution. *Id.* Parties are also agreeing to more lengthy procedures given the nature of their more complex disputes. *Id.* Additionally, if the arbitration has its seat in a country with outdated international arbitration laws, a party may disrupt the arbitration by bringing courts into the process. *Id. See also* Guide to International Arbitration in Europe, EUR. ARB. REV. (WilmerHale, London, U.K.), 2007, at 3-4, *available at* http://www.wilmerhale.com/files/Publication/1ce4f65a-f4b5-45b0-bcb5-78560c03fe30/Presentation/PublicationAttachment/0e8a8937-f537-4d7a-8ca4-ab5a40fb7f17/Guide%20to%20International%20Arbitration%20in%20Europe%20-%20Introduction.pdf.

104. *See* Sherwin, Vermal & Figueira, *supra* note 103; *see also* James W. Morando & Nan E. Joesten, *Leverage Points in International Arbitration*, IP LITIGATOR, May/June 2005, *available at* http://www.fbm.com/index.cfm/fuseaction/publications.detail/object_id/a053f2f3-5924-46f8-bcb8-14ae4b4f0880/LeveragePointsinInternationalArbitration.cfm.

105. *See* Sherwin, Vermal & Figueira, *supra* note 103; *see also* K&L Gates, *Practices and Industries: Arbitration—International and Domestic*, http://www.klgates.com/practices/ServiceDetail.aspx?service=61#benefits (listing toward the end of the webpage "The Benefits of International Arbitration").

106. *See* Sherwin, Vermal & Figueira, *supra* note 103.

107. *Id.*

illustrates such predictions are far-fetched. In reality, the speediness of international arbitration proceedings will remain a formidable asset for those seeking an alternative to litigation.

In addition to the advantage of its speed as a process, another important benefit of international arbitration is that it is generally much less costly than litigation.[108] This stems in large part from the fact that international arbitral awards are not subject to appeal and are more easily enforced than a foreign court judgment.[109] Despite a number of costs that are associated with international disputes in general, namely expenses associated with translation and travel costs, these facets are the same in litigation as they are in arbitration.[110] As a result, such costs seldom play a role in the decision-making process in helping parties decide whether to choose arbitration or litigation in the international context.[111]

Much like the advantage of speediness, these cost-efficient advantages associated with international arbitration will remain intact irrespective of the *West Tankers* decision. As previously noted, English courts are setting a precedent to protect non-breaching parties in the name of public policy that could conceivably spread to other EU courts and beyond.[112] This will ensure that many courts, both inside and outside the EU, may soon make it much more difficult to breach an arbitration agreement, which will result in arbitration being as popular as it is presently. Consequently, the notion that *West Tankers* will result in more costly litigation is a fiction; the favorable costs of arbitration will likely remain a strong incentive for parties seeking to resolve an international dispute.

---

108. *See* K&L Gates, *supra* note 105.

> Although many commentators take the view that [i]nternational [a]rbitration is progressively adopting procedures and approaches which more closely mirror state court litigation, scope still exists to construct more cost-effective procedures, . . . [d]ocumentary disclosure is rarely conducted, . . . depositions are rarely granted, the tribunal commonly takes a more hands on approach to procedure, and techniques such as witness conferencing and chess clock time divisions can dramatically reduce the duration, and hence the cost, of the process.

Id. *See also* Sherwin, Vermal & Figueira, *supra* note 103.

109. *See* Sherwin, Vermal & Figueira, *supra* note 103; *see also* Morando & Joesten, *supra* note 104.

110. *See* Sherwin, Vermal & Figueira, *supra* note 103.

111. *Id.*

112. *See* Nat'l Navigation Co. v. Endesa Generacion SA (*Endesa I*), [2009] 1 Lloyd's Rep. 666, 669 (Eng.), *overruled by* Nat'l Navigation Co. v. Endesa Generacion SA (*Endesa II*), [2009] EWCA (Civ) 1397, 2009 WL 4667033 (Eng.).

Perhaps one of the most prevalent draws to international arbitration is the option of a confidentiality agreement.[113] Unlike court proceedings, arbitral proceedings are private and not part of the public record.[114] Arbitration, therefore, is an attractive option to parties that would prefer to resolve their disputes outside the scope of the public consciousness.[115] Assuming parties specifically agree to arbitration beforehand, this characteristic of arbitration can almost never be breached.[116] Accordingly, because it can be enforced even if parties commence proceedings in another nation, *West Tankers* will have virtually no effect on confidentiality agreements in the broader context of EU arbitration.

Another advantage of arbitration is that it gives parties the freedom to select the place and language of the arbitration proceedings.[117] Arbitration allows a great deal of latitude in this context so the parties can tailor the process to fit their own respective needs.[118] For example, if preferred, parties may even agree to have the proceedings conducted in two languages.[119] Unlike litigation, the place of the proceeding does not determine the language in which the arbitral proceeding will be conducted.[120] This advantage can be viewed as an extension of the flexibility of international arbitration in general; a process where parties are not bound by a strict set of evidentiary or procedural rules but are virtually free to shape the procedure for their particular dispute.[121] While it may be argued that this flexibility may serve as an incentive to commence torpedo actions after *West Tankers*, the previous analysis illustrates this is not a

113. Morando & Joesten, *supra* note 104; *see also* Sherwin, Vermal & Figueira, *supra* note 103.

114. *See* Sherwin, Vermal & Figueira, *supra* note 103.

115. *Id.*

116. *Id.* Note that in some rare circumstances, even if parties have agreed to confidentiality, an award might be disclosed. These situations typically arise with public companies or "in the context of enforcement proceedings." *Id.*

117. *See Guide to International Arbitration*, *supra* note 103; *see also* Sherwin, Vermal & Figueira, *supra* note 103. "The decision cannot, however, always be dictated by convenience only: the parties also need to take into account how arbitration-friendly the chosen location is in order to avoid disruptive court intervention." *Id.*

118. *See* Sherwin, Vermal & Figueira, *supra* note 103.

119. *Id.* While this is true, it is more common that the parties will agree on one language and expressly allow documents to be filed in two or more languages without translation. *Id.* To avoid language ambiguities, the arbitration clause provision should specifically mention, without limitation, possible areas of contention. *See also* Morando & Joesten, *supra* note 104.

120. *See* Sherwin, Vermal & Figueira, *supra* note 103.

121. *Id.*

cause of concern given the potentially broad implications of a public policy exception. For those seeking a more structured process than arbitration to resolve an international dispute, litigation is always available. The availability of these two options on different ends of the flexibility spectrum indicates that the present state of international arbitration will likely remain unaffected.

A final advantage of international arbitration is the ease of enforcing arbitral awards.[122] Many times in international disputes, the prevailing party may need to enforce the award in another nation where the losing party has assets.[123] In contrast to litigation, where there are no multilateral treaties available between countries to enforce each other's court judgments, international arbitration offers nations the option to ratify The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[124] Except for a number of limited exceptions,[125] the New York Convention requires signatory states to recognize arbitral awards rendered in other countries.[126]

As it relates to *West Tankers*, the availability of the New York Convention serves as a virtual security blanket. Because it has been ratified by over 140 nations, it acts as a formidable opponent to economic infidelity and will make parties think twice before attempting to shirk their responsibilities as a losing party.[127] Though seeking enforcement by the New York Convention would be preemptive given the many reasons stipulated earlier, its mere existence will ensure that the enforceability advantages afforded by international arbitration will remain unchanged.

2. Disadvantages of International Arbitration Will Remain Unchanged

Like virtually every process, there are certain disadvantages with international arbitration. Among the most glaring deficiencies is that in international arbitration, discovery is usually limited and at times, even

122. *See Guide to International Arbitration*, supra note 103; *see also* Sherwin, Vermal & Figueira, *supra* note 103.

123. *See* Sherwin, Vermal & Figueira, *supra* note 103.

124. *Id. See also* Convention on Recognition of Foreign Arbitral Awards (New York Convention), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, art. IV, §§ 1-2, *available at* http://www.wipo.int/amc/en/arbitration/ny-convention/text.html [hereinafter New York Convention].

125. New York Convention, *supra* note 124, art. V, §§ 1-2.

126. New York Convention, *supra* note 124, art. III. *See also* Sherwin, Vermal & Figueira, *supra* note 103.

127. *See* Sherwin, Vermal & Figueira, *supra* note 103.

totally excluded from the process altogether.[128] Moreover, though it has been discussed as a potential advantage of international arbitration, the absence of appeals could instead turn out to be a disadvantage in certain cases.[129] For example, while the absence of an appeal guarantees there will be only one proceeding and precludes the losing party from commencing expensive and time-consuming appellate procedures, it simultaneously ensures no other tribunal may review a flawed award.[130] Thus, in some circumstances international arbitration advocates a system that necessitates court intervention while simultaneously precluding such measures.[131] Lastly, because arbitration is a consensual process, arbitrators do not have the ability to consolidate actions or join third parties that were not signatories to the arbitration agreement.[132] This is in dramatic contrast with litigation where a court has the power to consolidate actions and join third parties without the parties' consent.[133]

Notwithstanding the faulty presumption that *West Tankers* will drastically affect EU arbitration, the aforementioned shortcomings will not change. After all, anti-suit injunctions have no conceivable relation to deficiencies in the discovery process. Likewise, a trend toward requiring appeals in international arbitration as a means to preclude the "death of anti-suit injunctions"[134] is inconceivable; such a result would conflict with a major reason many seek arbitration in the first place: to use a cost-effective process where there is finality to the dispute.[135] Essentially, any advantages

---

128. *Id.* Indeed, this can be viewed as either an advantage or disadvantage depending on the situation of the party in a dispute. For example, it can be an advantage to parties unfamiliar or uncomfortable with the sometimes hostile process of discovery. *Id.*

129. *Id.*; *see also* Morando & Joesten, *supra* note 104.

130. *See* Sherwin, Vermal & Figueira, *supra* note 103.

> The impossibility to appeal arbitral awards is thus an advantage only where the tribunal has rendered a well-founded award. In order to minimize the risk of a flawed award, and unless the amounts at stake in the arbitration are too low to justify a three member tribunal, it is thus as a general matter recommended that the parties agree on three arbitrators rather than one.

Id.

131. *Id.*

132. *Id.*

133. *Id.*

134. Tite & Barlass, *supra* note 4, at 1.

135. *See* Morando & Joesten, *supra* note 104; *see also* Sherwin, Vermal & Figueira, *supra* note 103.

of requiring appeals would be outweighed by the negative effects such measures would have on the finality and cost-effectiveness of international arbitration. Lastly, since there is no discernible connection between the *West Tankers* decision and the inability of arbitrators to consolidate actions or join third parties, this limitation will likely continue in the world of international arbitration.

In short, the present state of international arbitration will remain intact. The myriad of advantages that international arbitration provides are unique, namely its efficiency and flexibility, which has resulted in a steady rise in popularity for parties seeking an alternative to litigation.[136] This popularity has steadily risen despite some shortcomings.[137] As a result of this popularity, not only for parties, but also for courts who view this option as a mechanism that eases arduous caseloads, it would take a dramatic step to change the current state of international arbitration.[138] *West Tankers* fails in this regard and will likely impact neither the advantages nor the disadvantages espoused with international arbitration, at least not in the foreseeable future. Instead, the present system will remain relatively unchanged even in the face of the unnecessary consternation that has developed.

V. BYPASSING IMPLICATIONS OF *WEST TANKERS*

The above analysis shows that the panic after *West Tankers* has been overplayed and the future of EU arbitration is not in jeopardy. As such, a discussion of methods aimed at bypassing possible negative implications of *West Tankers* is premature. Nevertheless, in the interest of proposing a broad proposal to quell the panic of *West Tankers*, a brief overview of useful measures is appropriate. Should a party be in a situation where an anti-suit injunction is unavailable and a party is attempting to commence a torpedo action, there are generally three options available.[139]

A. Apply for a Stay

First, the party should apply for a stay—that is, to seek a stay of the foreign court proceedings under Article II of the New York Convention.[140]

136. *See Guide to International Arbitration*, *supra* note 103.
137. *See id.*
138. *See id.*
139. *See* Boylan, *supra* note 34.
140. *See id.* The relevant part of the New York Convention states:

As previously noted, this provision requires signatory states to recognize arbitral awards rendered in other countries.[141] This tactic is practical in the context of EU arbitration, and even outside the EU, because it has been ratified by over 140 nations, including all of the Member States.[142] Should the application for stay be successful, the threat of parallel proceedings in another state will be precluded, and the costs of the breach of the arbitration agreement will be recoverable.[143]

B. Commence Arbitration in London

If the application for stay fails, the party's alternative move should be to commence arbitration in London.[144] Arbitral tribunals, unlike English courts, are under no obligation to stay their proceedings if a foreign court has accepted jurisdiction over the parties' dispute.[145] Consequently, a party may commence arbitration in London that is parallel to the proceedings in a foreign court.[146] Because arbitration in London is likely to be much more efficient and speedy than court proceedings in other countries, such as Belgium and Italy, the arbitral award may be delivered long before the foreign court has rendered its decision.[147] Essentially, the result is that the torpedo action in the slower foreign court backfires against the party attempting "to scupper the agreement."[148]

> The court of a Contracting State, when seized 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.

New York Convention, *supra* note 124, art. II, § 3.

141. *See supra* notes 124-26 and accompanying text.

142. Status, 1958—Convention of the Recognition and Enforcement of Foreign Arbitral Awards, United Nations Commission on International Trade Law (UNCITRAL), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

143. Boylan, *supra* note 34.

144. *Id.*

145. *Id.*

146. *Id.* Indeed, it may even be appropriate to commence parallel proceedings before this stage. *Id.*

147. *Id.* This of course is a generality as it is possible the foreign court proceeding may not take as long as anticipated. Nevertheless, for the most part, certain nations' court proceedings are notoriously slow and should be taken into account.

148. *Id.*

C. *Enforce the Agreement Under the NY Convention*

After receiving an arbitral award in London, the party must overcome the final hurdle of getting the award enforced. For the most part, this will seldom present any obstacle because such an arbitral award will be enforceable in many nations, including all of the Member States that have adopted the New York Convention into their respective laws.[149] Ultimately, these steps represent realistic and effective methods to quash a party attempting to commence a torpedo action. Given that English courts have established a precedent to enforce arbitration agreements and not reward the breaching party, the outlined steps aimed at bypassing torpedo actions will likely be used sparingly. Nevertheless, the reality that there are such viable avenues available further illustrates that the panic surrounding *West Tankers* has been exaggerated.

VI. A FRESH PERSPECTIVE

Ever since the ECJ delivered its judgment in *West Tankers*, the decision and the court have been vehemently criticized. Skepticism and criticism are an integral aspect of improving any system, yet the attention surrounding *West Tankers* has been aggrandized to the level of near panic.[150] From this fiasco, a great level of uncertainty has grown regarding the future of EU arbitration. Even after *Endesa*, which was decided after *West Tankers*, the fear has not been mitigated. Harping on the shortcomings of *West Tankers* precludes scholars and critics from concentrating on new methods to improve the system, which may serve to stabilize a faltering world economy.

Rather than continue on this path of self-destruction, the time has come for leaders in EU arbitration to take action and realize the reality of the situation. While the fear that comes with a decision such as *West Tankers* cannot be completely banished, an approach based on reason and evaluation may quell some of the trepidation. There have already been some initial steps taken with this approach in mind. Most notably, commentators from the United Kingdom, France, and Germany have proposed that legislative change may be needed to cure the deficiencies of the law in this context.[151] The Heidelberg Report advocates removal of the arbitration exemption from the Brussels Regulation and substituting it with a catalyst between

149. *See* UNCITRAL, *supra* note 142; *see also* Boylan, *supra* note 34.

150. *See* Tite & Barlass, *supra* note 4, at 2.

151. *See* George, *supra* note 47; *see generally* BURKHARD HESS, THOMAS PFEIFFER & PETER SCHLOSSER, THE BRUSSELS I REGULATION 44/2001: APPLICATION AND ENFORCEMENT IN THE EU (2008) (for example the Heidelberg Report has taken steps toward achieving this end).

international arbitration and the courts.[152] Though not free from criticism, this proposal advocates a fresh perspective that looks forward and does not dwell on the shortcomings of *West Tankers*.[153] More forward-thinking proposals like this will further ensure that the future of EU arbitration, which has been virtually unaffected by *West Tankers*, will continue to flourish in the future.

VII. CONCLUSION

There has been much trepidation regarding the *West Tankers* decision, which appeared to limit the powers of Member States' courts in support of arbitration. Specifically, there has been much concern over the future of London as a viable center for international arbitration. In addition, the threat of torpedo actions has caused much anxiety. As a corollary, many fear arbitration will become more time-consuming, expensive, and may not remain a realistic option to litigation.

The consternation that has developed is overplayed. An analysis of two key cases, *CMA* and *Endesa*, illustrates that there has been a strong trend by English courts to enforce arbitration agreements. In the future, courts can turn to the rationales in these cases to establish a basis to enforce arbitration agreements, namely that a breaching party cannot benefit from its own wrongdoing and the public policy exception. Furthermore, by examining the plethora of reasons London is popular as a venue for international arbitration, it becomes evident that anti-suit injunctions are not a key determinant in its popularity. Torpedo actions also lose their luster as formidable opponents to arbitration when taking the rationales of *CMA* and *Endesa* into account. As a result, there is no indication that arbitration will become more expensive, time-consuming, or any less viable in the future.

Though premature, there are a number of ways to bypass the implications of the *West Tankers* decision. Should a party be in the precarious position where an anti-suit injunction is unavailable, a party may

152. *See generally* HESS, PFEIFFER & SCHLOSSER, *supra* note 151 (the Report proposed removing the arbitration exemption from the Brussels Regulation and replacing it with an entirely new interface between courts and international arbitration).

153. *See* Resolution on the Implementation and Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, EUR. PARL. (Sept. 7, 2010) (advising strongly against adopting the tenets of the Heidelberg Report). This illustrates that the Report will likely not serve as a viable framework in the future.

apply for a stay, commence arbitration proceedings in London, or enforce the agreement under the New York Convention. At least one of these practices will likely be successful in bypassing *West Tankers*.

The future of arbitration agreements, even in the wake of *West Tankers*, is indeed bright. Given the state of the EU economy, and indeed the world economy at large, it is time to have faith in the Member State courts to provide a source of economic stability. By understanding the rationale of *West Tankers* and its implications, the panic expressed by many parties in the EU should be quelled. As a result, a fresh perspective aimed at forward-thinking can help support some preliminary steps that have already been proposed toward stabilizing the EU economy, and hopefully the world economy as a whole. Though Vannevar Bush's statement was voiced in the context of engineering, his sage advice is applicable to the trepidation regarding *West Tankers* as well: while it may not be possible to completely eliminate the fear created by this decision, it is possible to mitigate any panic via reasoned analysis and evaluation that looks toward the future.