that such steps would be unreasonable. The cost of curing the breach was thought to be disproportionate to the benefit that would accrue to the promisee and it was found that the promisee did not intend to use the damages that were sought in order to cure the defect. On these bases, the House of Lords made a relatively small award for loss of amenity.

The High Court distinguished *Ruxley* on its facts, albeit without providing a detailed explanation. It also noted possible inconsistency between the citation in that case of *Radford* with approval and the award actually made. This observation is not without foundation. The promisee in *Ruxley* was refused the funds needed to obtain the swimming pool for which he had contracted and had to tolerate non-compliant performance. Whilst he was not left without a remedy, the loss of amenity award could in no way be equated with the bargained-for performance.

Some may argue that as the contractual purpose of the promisee was purely financial and in view of the vast divergence in outcome between the cost of cure and difference in value measures of damages, the decision of the High Court of Australia leads to economic waste, overcompensates and is incongruous with the duty to mitigate loss. It is submitted, however, that the decision should be welcomed for providing wider protection of the performance interest. In awarding the promisee the funds necessary to secure actual performance, the court gave great weight to the interest of the promisee in obtaining the bargained-for performance. This has the merit of avoiding the promisee being required simply to tolerate the breach of contract. It also recognises that contracting parties usually enter into agreements to obtain performance and reinforces the security of transactions.

SOLÈNE ROWAN

### ARBITRATION AND ANTISUIT INJUNCTIONS IN EUROPE

No longer can English courts restrain proceedings before the courts of other EU Member States on the ground that they infringe an English arbitration agreement. In Case C-185/07 *Allianz SpA* v. *West Tankers Inc.* (10 February 2009), the Court of Justice held that such relief is incompatible with Regulation 44/2001, the Brussels I Regulation ("the Regulation").

Allianz, subrogated insurers of an Italian insured, had sued West Tankers in Italy, contrary to the insured's contract with West Tankers, which bound Allianz to submit any disputes to arbitration in England. They claimed damages in delict, asserting jurisdiction under Article 5(3) of the Regulation. West Tankers countered by seeking an

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injunction from the English courts restraining the Italian proceedings. The Court of Justice prohibited such relief in principle in Case C-281/02 *Turner* v. *Grovit* [2004] E.C.R. I – 3565. But *Allianz* was arguably different, prompting the reference to the Court of Justice. Article 1(2)(d) of the Regulation provides (delphically) that "arbitration" is outside the Regulation's scope. This suggested that injunctions enforcing arbitration agreements, because ancillary to arbitration, were unaffected by the Regulation.

The House of Lords concluded emphatically in *Allianz* that such orders were free of the Regulation ([2007] UKHL 4, noted [2007] 66 C.L.J. 493). The Court of Justice disagreed. Proceedings to enforce arbitration agreements by injunction have the right to arbitrate as their subject matter and so fall outside the Regulation. But the *effet utile* of the Regulation requires that it cannot be overridden by national law as to matters within its scope. The issue in *Allianz* was whether the arbitration agreement prevented the Italian courts from exercising jurisdiction in proceedings to which the Regulation clearly applied. That preliminary issue was as much subject to the Regulation as Allianz's substantive claim, and its effective disposal under the Regulation as important. The role of the *acquis communautaire* thus confirmed, the Court concluded that the injunction sought in *Allianz* undermined the Regulation's effectiveness. National courts must determine unhindered issues preliminary to their jurisdiction, such as the effect of arbitration or jurisdiction agreements: Case C-116/02 *Erich Gasser GmbH* v. *MISAT* [2003] E.C.R. I-14693. And litigants like Allianz may legitimately challenge such agreements by suing in the courts of their choice.

*Allianz* establishes a comprehensible distinction. The effect of arbitration agreements belongs to national law, save where it implicates the civil jurisdiction of national courts. But the Court's reasoning, developed in paragraphs [22] to [32] of the judgment, is profoundly unsatisfying:

*(i)* It ignores the compelling argument, endorsed by the House of Lords, that Article 1(2)(d) should be broadly construed. The mere presence of an arbitration agreement arguably signals the parties' intention that their dispute is a private matter, unconstrained by the Regulation. This is not, as the Court perhaps supposed, an extra-legal aspiration irrelevant to construing the Regulation but a robust measure of Article 1's scope.

*(ii)* To suggest that such relief has the effect (as stated by the Court) of "stripping" the Italian court of its competence to test the arbitration agreement is misconceived. At worst, if restrained, Allianz would itself have discontinued its action, which must always be a claimant's choice.

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*(iii)* It is incoherent to conclude that the Regulation privileges the Italian court's role in assessing the agreement's effect. True, as the Court affirmed, the court first seised has sole responsibility for determining the effect of an agreement to another court's jurisdiction (*Gasser*), and no court may review another's competence (Case C351/89, *Overseas Union Insurance* [1991] E.C.R. I-3317). Such considerations are decisive in cases involving parallel proceedings in the courts of two Member States. They inform Articles 27 and 28 of the Regulation, conferring exclusive *competence-competence* on the court first seised. But they are irrelevant in cases like *Allianz*, involving arbitration in England and judicial proceedings in Italy, where those articles are inapplicable and the imperative to prevent parallel litigation falls away.

*(iv)* To assert that such relief infringes the principle of mutual trust between Member States is similarly suspect. However worthy an aspiration, the principle counts in the present context only if it promotes the regime's paramount objective of eradicating parallel proceedings and irreconcilable judgments. But it cannot do so in *Allianz*, where the regime's rules controlling parallel proceedings are inapplicable.

*(v)* Why did it matter that such relief would have prevented Allianz from challenging the arbitration agreement in Italy? It was obviously the injunction's purpose to discourage Allianz's action. But this is scarcely significant when Allianz could always have challenged the agreement before the arbitrators in England. Access to justice does not entail access to justice wherever a claimant wishes (*cf. The Kribi* [2001] 1 Lloyd's Rep. 76).

The decision in *Allianz* is alarmingly insecure. Hard to defend analytically, it is perhaps less about the true meaning of the Regulation, more about promoting two policy objectives come what may – the primacy of the Regulation over national law and harmonizing civil procedure in Member States.

The decision's practical implications may seem less severe than those of *Gasser*, where a party pre-empted by proceedings in a non-contractual forum was barred by Article 27 of the Regulation from suing elsewhere on a jurisdiction agreement while those proceedings were pending. West Tankers, though wrong-footed by the Italian proceedings, could still initiate arbitral proceedings in England, to which Article 27 does not apply. Moreover, the Italian court would doubtless have referred the parties to arbitration eventually under Article II(3) of the New York Convention on foreign arbitral awards. But *Allianz* is troubling nonetheless. To curb national remedies protecting

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arbitration defeats the expectations of those who trust in the protective measures available at the seat of arbitration. To rely upon a court's Article II(3) power to insist on arbitration assumes that such intervention is timely, and ignores the prejudice caused merely by launching pre-emptive proceedings. If unchecked, such proceedings may also distort the arbitral process, altering the balance of advantage, and gifting a tactical victory to the pre-empting party. More significantly, they may inhibit resort to arbitration altogether if the pre-empted party exhausts its resources by defending them, so that the dispute is never arbitrated, effectively neutralising the arbitration agreement. Certainly, *Allianz* shuns the principle (arguably implicit in Article 1(2)(d)) that an agreement to arbitrate represents a legitimate waiver by the parties of the rules of the Brussels Regulation.

RICHARD FENTIMAN

### A SET-BACK FOR THE "VILLAGE GREEN INDUSTRY"?

THE "village green industry", so called by some because new town and village green applications have become a widely used weapon in the armoury of the anti-development movement where the planning system has failed to prevent the advance of the bulldozers, has been dealt a further blow by the recent decision of the Court of Appeal in *R (on the application of Kevin Lewis)* v. *Redcar and Cleveland Borough Council* [2009] EWCA Civ 3 ("*Redcar*"). The Court of Appeal upheld the decision of the High Court, ruling that the criteria for registration had not been satisfied.

This case concerned Coatham Common, land owned by Redcar and Cleveland Borough Council, which had been occupied and used by Cleveland Golf Club for many decades until 2002. The owner of Coatham Common had entered into a development partnership with the second respondent, Persimmon Homes (Teeside) Ltd., and planning permission to develop Coatham Common, together with other adjoining land, was granted in May 2007. In June 2007 an application was submitted to Redcar and Cleveland Borough Council, as registration authority, to register Coatham Common as a new green pursuant to section 15 of the Commons Act 2006 ("the 2006 Act"). This provision requires that for land to qualify for registration it must have been used by a significant number of the inhabitants of the locality as of right for lawful sports and pastimes for at least 20 years, the key phrase for the purposes of this comment being "as of right".

The proper interpretation of "as of right" has caused much confusion. It is universally accepted that user as of right must be *nec vi, nec clam, nec precario*. However, the courts have resisted any urge they

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