reprehensible to obtain property by false pretences, whether or not the obtaining also constitutes a theft. With that in mind, section 3 of the SOA 1956 intelligently provided a specific offence of procuring a woman to have intercourse by false pretences: of which Jheeta was convicted, incidentally, in respect of what he had done while the old Act was still in force. But the new Act, though hitting with the heaviest of hands all forms of sexual naughtiness, from teenage petting, via "homosexual incest" to necrophilia, fails to deal with this type of misbehaviour. Its framers in the Home Office apparently thought that this was covered by the new offence in section 4 of "causing a person to engage in sexual activity without consent"; which shows, alas, how little they understood about consent, or fraud, or mistake – or indeed any other basic concept of the criminal law.

J.R. SPENCER

ARBITRATION AND THE BRUSSELS REGULATION

WHEN, if at all, may English courts restrain claimants from suing in other Member States? The European Court of Justice has declared such relief to be inconsistent with the principle of mutual trust embodied in Regulation 44/2201, governing jurisdiction in national courts: Case C-281/02 *Turner v. Grovit* [2004] ECR I – 3565. But when does the Regulation engage, so that the ban imposed in *Turner* applies? Perhaps it does so whenever the foreign proceedings are within the Regulation's material scope. If so, civil proceedings in the courts of Member States can never be restrained. Alternatively, perhaps the Regulation only engages when it governs jurisdiction in both the foreign and the English proceedings. Judicial proceedings in other Member States could thus be restrained, provided relief is sought in English proceedings beyond the Regulation's reach.

If the second view prevails, the restraint of proceedings in other Member States is generally prohibited. Relief could not be granted, say, to enforce an English jurisdiction agreement. Nor, presumably, if jurisdiction were asserted pursuant to Article 4 of the Regulation, which preserves national law in specified cases, though they remain within the Regulation's scope: ECJ Opinion 1/03 (the "Lugano Opinion").

But the second view has an important consequence. Article 1(2)(d) exempts arbitration from the Regulation's scope. The Regulation governs neither the jurisdiction of arbitrators, nor proceedings for judicial remedies ancillary to arbitration: Case C-190/89 *Marc Rich & Co AG* v. *Società Italiana Impianti PA* [1991] E.C.R. I-3855; C-391/95 *Van Uden Maritime BV* v. *Firma Deco-Line* [1998] E.C.R. I-7091. An

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English court might thus restrain proceedings commenced in another Member State in breach of an agreement to arbitrate in England. Such relief ensures that disputes are resolved in the right country, and by the right means, and discourages tactical litigation elsewhere. Commercial disputes are often submitted to arbitration, increasingly to escape the Regulation, and in the hope that arbitration agreements (unlike jurisdiction agreements under the Regulation) can always be defended by injunction.

In *West Tankers Inc* v. *RAS - Ras Riunione di Sicurata SpA* [2007] UKHL 4, RAS, the subrogated insurers of an Italian company, sued West Tankers in Italy, contrary to the company's previous agreement with West Tankers to arbitrate in England. Their delictual claim concerned damage in Italy, giving the Italian court jurisdiction under Article 5(3) of the Regulation. Accepting that the agreement embraced the claim, the House of Lords referred to the ECJ the question whether such proceedings could be restrained by injunction - and proposed an emphatic answer. If relief, whatever its nature, is sought in proceedings ancillary to arbitration, *Turner* is irrelevant. Any other conclusion would undermine party autonomy, and the efficacy of commercial arbitration.

How might the ECJ reply? The omens are inauspicious. The ECJ is seemingly unimpressed by practical considerations that disturb the Regulation's logic: Case C-116/02 *Erich Gasser GmbH* v. *MISAT* [2003] E.C.R. I-14693. It also regards the uniformity of the Community regime as the ultimate measure of the Regulation's scope, inevitably curtailing the role of national law: Case C-281/02 *Owusu* v. *Jackson* [2005] Q.B. 801.

Even if the second view prevails, much turns on the mechanism whereby Article 1 regulates the scope of the Regulation. Is the juridical nature of the English proceedings decisive? If so, *Turner* is irrelevant once it is established that proceedings concern the conduct of arbitration. Or do the principles and policies of the Regulation provide additional criteria, regulating which remedies ancillary to arbitration are permitted? If so, the cases are hostile to allowing the relief sought in *West Tankers*. The judgment in *Turner* seemingly forbids all injunctions which restrain claimants from bringing proceedings "before a court of another contracting state". The nature of the relief may also be irrelevant. The court in *Turner* denied that anti-suit injunctions are compatible with the Brussels regime because they are concerned with the claimant's conduct, not with jurisdiction. What counts is the effect of such relief on foreign proceedings, not its nature. Is it similarly irrelevant that relief is granted ancillary to arbitration, if targeted at proceedings in another Member State? Again, national procedural law must not impair the operation of the

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Brussels regime: Case C-365/88 *Kongress Agentur Hagen GmbH* v. *Zeehaghe BV* [1990] E.C.R. I-1845. To restrain proceedings in another Member State has this effect, as *Turner* confirms. So an English court could doubtless compel a recalcitrant party to appoint an arbitrator in an English arbitration. But it could not restrain civil proceedings elsewhere in the Community.

Such doctrinal arguments may be less impressive, however, than two arguments of principle, which buttress the position of the House of Lords. First, the injunction in *Turner* conflicted with the Brussels regime because (so the ECJ apparently thought) it purported to determine which of two national courts should exercise jurisdiction in judicial proceedings, a matter governed by the regime. By contrast, *West Tankers* involves arbitration in England, and judicial proceedings in Italy, a case of competing proceedings unregulated by the Regulation, jurisdiction in arbitral proceedings clearly being an excluded matter. To restrain foreign proceedings is no challenge to the Regulation's machinery for allocating jurisdiction in such cases, because there is none.

Secondly, what remedies national courts deploy ancillary to arbitration is a matter concerning, not merely the scope of the Regulation, but the conduct of arbitration in the Community. To restrict those remedies is to control the arbitral practice of Member States. It also cabins the parties' choice of arbitral regime, by controlling a decisive element in their choice of venue. It is not, however, the Regulation's purpose to regulate arbitration in Europe, and the Community market for arbitral services. Nor would this be coherent. Article 1(2)(d), by privileging arbitration, implies a commitment to the principles of choice, privacy and deregulation which animate the arbitral process. Restricting the range of ancillary remedies available in national law subverts those principles. To ask if the European arbitration market needs regulating is a legitimate (if surprising) question. But this is neither the Regulation's role, nor consistent with Article 1's objective of exempting arbitration.

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WORLDWIDE FREEZING ORDERS IN EUROPE

THE worldwide freezing order has been described as one of the two "nuclear weapons" in the commercial court's armoury. In conjunction with a worldwide disclosure order it can provide a claimant with essential protection and reassurance that he will not obtain a judgment which will turn out to be worthless. Whether this weapon is still

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