OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 4 September 2008 [1]

I — Introduction

1. The House of Lords has referred a question to the Court of Justice for a preliminary ruling as to whether anti-suit injunctions to give effect to arbitration agreements are compatible with Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Regulation No 44/2001). [2]

2. In its judgment in *Turner* [3] the Court has already held, in a different context, that the Brussels Convention [4] precludes anti-suit injunctions. In that case a party to proceedings pending before a *national* court of the United Kingdom was restrained from commencing or continuing proceedings before the courts of another Member State. Now the Court must decide whether anti-suit injunctions are also impermissible when made in support of arbitral proceedings.

3. In the United Kingdom, courts have continued to issue anti-suit injunctions since the judgment in *Turner* when, in their view, a party is bringing proceedings before a court of another Member State in breach of an arbitration agreement under which the arbitral seat is the United Kingdom. [5] They are of the opinion that the judgment in *Turner* is not incompatible with that practice, since Regulation No 44/2001 does not apply to arbitration.

1 — Original language: German.

2 — OJ 2001 L 12, p. 1.

3 — Case C-159/02 *Turner* [2004] ECR I-3565.

4 — Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968, as amended by the Convention of 9 October 1978 on the Accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1, and — amended text — p. 77), by the Convention of 25 October 1982 on the Accession of the Hellenic Republic (OJ 1982 L 388, p. 1) and by the Convention of 26 May 1989 concerning the accession of the Kingdom of Spain and the Portuguese Republic (OJ 1989 L 285, p, 1).

5 — See *Through Transport Mutual Assurance Association (Eurasia) Ltd* v *India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67.

II — Legal framework

A — *New York Convention*

4. All the Member States of the European Community are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 ('New York Convention'). [6]

5. Article I(1) of the New York Convention lays down its scope of application:

'This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal…'

6. Article II of the New York Convention provides:

'1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

…

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.'

7. Article V of the New York Convention governs the recognition and enforcement of arbitral awards, in particular the conditions under which the recognition and enforcement of an arbitral award may, exceptionally, be refused. Those conditions include, inter alia, the incapacity of one of the parties to the arbitration agreement under the law

6 — United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, United Nations Treaty Series (UNTS), Volume 330, p. 3. For list of Contracting States see: www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

governing the person, the invalidity of the arbitration agreement under the proper law of the contract or under the law of the country where the award was made, infringement of the basic principle of due process under the law of the country in which the arbitration proceedings took place and the fact that the award goes beyond the scope of the arbitration agreement. In addition recognition and enforcement may be refused if, under the law of the country in which the arbitral award is to be recognised and enforced, the subject-matter of the difference is not capable of settlement by arbitration or recognition or enforcement would be contrary to the public policy of that country.

B — *Regulation No 44/2001*

8. Recitals 14, 15, 16 and 25 in the preamble to Regulation No 44/2001 read as follows:

‘14. The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

15. In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of *lis pendens* and related actions. …

16. Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

…

25. 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.’

9. Article 1 of the Regulation governs its scope as follows:

‘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.’

10. Article 5 of the Regulation specifies the courts having jurisdiction in respect of tort:

‘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 for the place where the harmful event occurred or may occur;

…’

11. Reference should also be made to the rules of the Regulation aimed at preventing conflicting decisions. Article 27 of the Regulation governs cases of *lis pendens:*

‘Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.’

12. In addition, Article 28 of the Regulation provides for the prevention of irreconcilable judgments in respect of related actions:

'1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.'

C — Applicable national law

13. In English law the legal basis for anti-suit injunctions is Section 37(1) of the Supreme Court Act 1981, which reads: '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.' Regarding anti-suit injunctions in support of arbitration agreements, it is clear from Section 44(1) and (2)(e) of the Arbitration Act 1996 that the national courts have the same power of making orders as they have in court proceedings.

14. Anti-suit injunctions are directed against actual or potential claimants in proceedings abroad. Such parties are restrained from commencing or continuing proceedings before the foreign court. Non-compliance with an anti-suit injunction is a contempt of court, for which serious penalties can be imposed, including imprisonment or seizure of assets situated in the United Kingdom. In addition there is a risk that the United Kingdom courts will not recognise and enforce judgments delivered abroad in breach of an anti-suit injunction. [7]

7 — See *Toepfer International GmbH* v *Molino Boschi* (Q.B.D) [1996] 1 Lloyd's Rep 510, [1996] C.L.C 738, [1997] I.L.Pr. 133; *Philip Alexander Securities and Futures Limited* v *Bamberger* (Court of Appeal) [1997] I.L.Pr. 73; [1996] C.L.C 1757.

III — Facts, the reference for a preliminary ruling and proceedings before the Court of Justice

15. In August 2000 the Front Comor, a vessel owned by West Tankers Inc and chartered to Erg Petroli SpA, collided with a jetty owned by Erg Petroli in Syracuse (Italy) and caused damage. The charterparty contained an arbitration agreement providing that all disputes arising from the contract were to be dealt with by an arbitral body in London. Further it was agreed that English law was applicable to the contract.

16. Riunione Adriatica di Sicurtà SpA, since 1 October 2007 Allianz SpA, and Generali Assicurazioni Generali ('Allianz and Others') had insured Erg Petroli and paid compensation for the damage arising from the collision up to the limit of the insurance cover. Erg Petroli claimed damages against West Tankers for its uninsured losses in arbitration proceedings in London.

17. On 30 July 2003 Allianz and Others commenced proceedings against West Tankers before a court in Syracuse to recover the amounts which they had paid Erg Petroli under the insurance policies. The issues of liability in the court proceedings in Italy are essentially the same as those in the arbitration proceedings. The main question in both cases is whether West Tankers can rely on the exclusion from liability for navigation errors in clause 19 of the charterparty or under the so-called Hague Rules. [8]

18. On 10 September 2004 West Tankers commenced proceedings in the High Court of the United Kingdom against Allianz and Others, seeking a declaration that the dispute which was the subject-matter of the proceedings in Syracuse arose out of the charterparty and that Allianz and Others, who were claiming by right of subrogation, were therefore bound by the arbitration agreement. West Tankers also applied for an injunction to restrain Allianz and Others from taking any further steps in relation to the dispute except by way of arbitration and, in particular, requiring them to discontinue the proceedings in Syracuse.

19. The High Court referred to the fact that, according to the case-law of the Court of Appeal, [9] the judgment in *Turner* did not preclude anti-suit injunctions in support of arbitration agreements and granted the applications.

8 — *International Convention for the Unification of Certain Rules of Law relating to Bills of Lading* (Brussels, 25 August 1924), amended by the *Protocol to Amend the International Convention for the Unification of Certain rules of Law relating to Bills of Lading (Visby Rules)* (Brussels, 23 February 1968) and the *Protocol amending the Convention, as amended by the Protocol of 23 February 1968* (Brussels, 21 December 1979) (UNTS Vol. 1412, p. 127 [No 23643]).

9 — *Through Transport Mutual Insurance Association (Eurasia) Ltd* v *New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67.

20. By order of 21 February 2007 the House of Lords, before which an appeal against that decision was brought, referred the following question to the Court for a preliminary ruling:

'Is it consistent with Regulation (EC) 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?'

21. In the proceedings before the Court observations were submitted by the parties to the main proceedings, the French Government, the United Kingdom Government and the Commission of the European Communities.

IV — The question referred for a preliminary ruling

22. By the question which it has referred for a preliminary ruling, the House of Lords wishes to clarify, in connection with the judgment in *Turner*, whether anti-suit injunctions are also incompatible with Regulation No 44/2001 if they are granted in relation to a dispute which the parties have made subject to arbitration.

A — *The judgment in Turner*

23. In *Turner* the Court held that the Brussels Convention precludes the imposition of an anti-suit injunction in connection with proceedings before the court of another Member State, even where the proceedings abroad are brought by a party in bad faith with a view to frustrating the existing proceedings.

24. In the grounds of that judgment, the Court relies, essentially, on the principle of mutual trust which underpins the system of the Convention. [10] It states:

'At the outset, it must be borne in mind that the [Brussels] Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions. It is that mutual trust which has enabled a compulsory system of jurisdiction to be established, which all the courts within the purview of the Convention are required to respect, and as a corollary the waiver by those States of the right to apply

10 — See in particular recital 16 in the preamble to Regulation No 44/2001 (cited in paragraph 8 of this Opinion).

their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments.' [11]

25. In that connection the Court cited the judgment in *Gasser* [12] in which it had to answer the question whether a court second seised must stay proceedings on account of *lis pendens* in another Contracting State pursuant to Article 21 of the Brussels Convention (corresponding to Article 27 of Regulation No 44/2001) even where, in the view of the court seised subsequently, the court first seised clearly has no jurisdiction on account of an agreement conferring jurisdiction. Even if the proceedings to determine jurisdiction before the court first seised are very protracted and may have been brought there only in order to delay proceedings, the Court refused to make exceptions to the *lis pendens* rule. The court first seised must examine its jurisdiction itself. Only if that court declines jurisdiction may the court seised subsequently continue the proceedings pending before it. [13]

26. Also in the judgment in *Turner* the Court points out that the Convention does not permit — apart from the exceptions referred to in the first paragraph of Article 28 — a court to review the jurisdiction of a court of another Contracting State. [14] If a party is restrained from commencing or continuing proceedings before a court of another Contracting Party by an anti-suit injunction, that constitutes interference with that court's jurisdiction which is incompatible with the system of the Convention and impairs its effectiveness. [15] The fact that that injunction is addressed to the defendant and not directly to the foreign court is irrelevant. [16]

B — *Compatibility with Regulation No 44/2001 of anti-suit injunctions to give effect to an arbitration agreement*

27. The crucial question in the present case is whether the principles set out in *Turner* can be applied to anti-suit injunctions in support of arbitration proceedings.

28. The fact that the basis of the judgment in *Turner* was the Brussels Convention, whereas Regulation No 44/2001 is applicable, *ratione temporis*, to the present case, is no hindrance. The regulation is intended to update the Convention, while adhering to its structure and basic principles [17] and ensuring its con-

11 — *Turner* (cited in footnote 3, paragraph 24).
12 — Case C-116/02 *Gasser* [2003] ECR I-14693, paragraph 72.
13 — *Gasser* (cited in footnote 12, paragraphs 54 and 73).
14 — *Turner* (cited in footnote 3, paragraphs 25 and 26).
15 — *Turner* (cited in footnote 3, paragraphs 27 and 29).
16 — *Turner* (cited in footnote 3, paragraph 28).
17 — Commission Proposal of 14 July 1999 for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 final, OJ 1999 C 376 E, p. 1, points 2.1 and 4.1).

tinuity. [18] The provisions characteristic of the system's arrangements and the principle of mutual trust on which that system is based therefore remain essentially the same. [19]

29. In particular, however, nothing has changed regarding the exclusion of arbitration from the scope of application of the Brussels Convention or the Regulation. [20] In defining 'arbitration', reference may therefore be made to the travaux préparatoires for the Convention, as well as to the case-law of the Court in that regard.

30. It is specifically because of the exclusion of arbitration from the scope of Regulation No 44/2001 in Article 1(2)(d) that the House of Lords takes the view that the *Turner* case-law cannot be applied to the present case. In that case the Court expressly related the principle of mutual trust to proceedings *within the scope of the Convention.* Arbitration includes not only arbitration proceedings themselves and the recognition and enforcement of arbitral awards but also all national court proceedings in which the subject-matter is arbitration. As anti-suit injunctions support the conduct of arbitration proceedings, it argues that proceedings seeking the issue of such injunctions are covered by the exception in Article 1(2)(d) of Regulation No 44/2001.

1. The exclusion of arbitration from the scope of application of Regulation No 44/2001

31. Before defining the term 'arbitration' in Article 1(2)(d) of Regulation No 44/2001, it is necessary to clarify in relation to which proceedings the scope of application of the regulation is to be determined more specifically.

32. The House of Lords, West Tankers and the United Kingdom Government lay emphasis on the proceedings pending in England for the issue of an anti-suit injunction. They assume that those proceedings cannot be contrary to the regulation since they fall within the arbitration exception. [21] On

18 — See recital 19 in the preamble to Regulation No 44/2001.

19 — In the judgments it has delivered so far concerning Regulation No 44/2001 the Court has thus simply referred to its case-law on the Brussels Convention, in so far as the provisions remain unchanged (See Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 22, and Case C-98/06 *Freeport* [2007] ECR I-8319, paragraphs 23 and 39). On the other hand, however, in Case C-462/06 *Glaxosmithkline and Others* [2008] ECR I-3965, paragraph 15 et seq.), it did not do so, since the applicable provisions on contracts of employment have changed.

20 — Article 1(2)(d) of Regulation No 44/2001.

21 — In defining 'arbitration' the House of Lords refers to Case C-190/89 *Rich* [1991] ECR I-3855, and Case C-391/95 *Van Uden* [1998] ECR I-7091.

the other hand, the national court appears to regard as irrelevant the effect of the anti-suit injunction on the proceedings before the court in Syracuse.

33. That view is surprising, since in *Turner* the Court found that the effect of an anti-suit injunction on the foreign proceedings infringed the Brussels Convention, even if it were assumed that the anti-suit injunction, as a measure of a procedural nature, was a matter of national law alone. [22] Accordingly, the decisive question is not whether the application for an anti-suit injunction — in this case, the proceedings before the English courts — falls within the scope of application of the Regulation, but whether the proceedings against which the anti-suit injunction is directed — the proceedings before the court in Syracuse — do so.

34. Nor is it a prerequisite of infringement of the principle of mutual trust, on which the judgment in *Turner* was substantially based, that both the application for an anti-suit injunction and the proceedings which would be barred by that injunction should fall within the scope of the regulation. Rather, the principle of mutual trust can also be infringed by a decision of a court of a Member State which does not fall within the scope of the regulation obstructing the court of another Member State from exercising its competence under the regulation.

35. The national authorities of a Member State may not impair the practical effectiveness of Community law when they exercise a competence which, for its part, is not governed by Community law. [23] That corresponds for instance to a consistent line of cases in which it has been held that national tax legislation must observe the fundamental freedoms, even though direct taxation falls within the competence of the Member States. [24]

36. In respect of the Brussels Convention the Court has also already confirmed, in its judgment in *Hagen*, that the application of national procedural rules — specifically the conditions governing the admissibility of an action — may not impair the effectiveness of the Convention. [25] In that regard it is irrelevant that the provisions at issue in *Hagen* were of

22 — See *Turner* (cited in footnote 3, paragraph 29).

23 — See *Turner* (cited in footnote 3, paragraph 29).

24 — See inter alia Case C-446/03 *Marks and Spencer* [2005] ECR I-10837, paragraph 29; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 40; and Case C-374/04 *Claimaints in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36).

25 — Case C-365/88 *Hagen* [1990] ECR I-1845, paragraph 20. See also *Turner* (cited in footnote 3, paragraph 29).

national origin and from the outset certainly did not fall within the scope of the Brussels Convention, whereas arbitration is merely excluded from the scope of application of the Regulation.

37. It is more important whether the Regulation applies to the action against which the anti-suit injunction is directed — thus, in this case, the action pending in Syracuse. Should that not be the case, the effectiveness of the Regulation could not be impaired by the anti-suit injunction.

38. The House of Lords, West Tankers and the United Kingdom Government are of the view that, where the parties have contractually agreed to settle disputes arising from a contract exclusively by arbitration, that legal relationship is completely removed from the outset from the national courts, apart from the courts at the arbitral seat. Should that view be correct, an anti-suit injunction which has an impact on national court proceedings cannot in fact be assessed under the criteria of the Regulation.

39. It has always been a matter of dispute between the Anglo-Saxon and the continental European schools of law whether the exclusion of arbitration should, though, be understood in that broad sense, as discussed in the report prepared by Professor Dr P. Schlosser on the accession of Denmark, Ireland and the United Kingdom:

'Two divergent basic positions which it was not possible to reconcile emerged from the discussion on the interpretation of the relevant provisions of Article 1, second paragraph, point (4) [of the Brussels Convention]. The point of view expressed principally on behalf of the United Kingdom was that this provision covers all disputes which the parties had effectively agreed should be settled by arbitration, including any secondary disputes connected with the agreed arbitration. The other point of view, defended by the original Member States of the EEC, only regards proceedings before national courts as part of "arbitration" if they refer to arbitration proceedings, whether concluded, in progress or to be started.' [26]

40. Those divergent views can have an effect on the recognition and enforcement of judgments which, in the opinion of a court of a

26 — P. Schlosser, Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (OJ 1979 C 59, p. 71 paragraph 61). See also the Opinion of Advocate General Darmon in Case C-190/89 *Rich* [1991] ECR I-3855, paragraph 23, and the Opinion of Advocate General Léger in *Van Uden*, cited above in footnote 21, paragraph 40 et seq.

Member State in which recognition is sought, have been delivered in disregard of an arbitration clause. [27] In addition they affect overall the issue of who has jurisdiction to examine the effectiveness and scope of the arbitration clause.

41. According to the view favoured by the House of Lords, only the arbitral body itself and the national courts at the seat of arbitration, which support its activities, have jurisdiction to answer that question. The High Court therefore not only issued the anti-suit injunction in the dispute in the main proceedings here, but also found that the dispute arose from the charterparty. Further, it affirmed that the insurance companies, which were not themselves parties to the contract but were claiming by right of subrogation under the contract, were bound by the arbitration clause.

42. According to the continental European approach, it depends, however, on whether the claim for damages falls, in principle, within the scope of Regulation No 44/2001 and whether the Syracuse court — subject to the arbitration plea — has jurisdiction as the place in which the harmful event occurred in accordance with Article 5(3). If the defendant legitimately invokes the arbitration clause in those proceedings, the court would be obliged in principle under Article II(3) of the New York Convention to refer the dispute to the arbitral body.

27 — See Schlosser Report (cited in footnote 26, paragraph 62).

43. The crucial difference between the two approaches is therefore that the arbitration exception is understood broadly in the first view: as soon as it is claimed that there is an arbitration agreement, all disputes arising from the legal relationship are subject exclusively to arbitration, irrespective of the substantive subject-matter. Only the arbitral body and the courts at the seat of arbitration are entitled to examine jurisdiction.

44. The opposite view takes account first and foremost of the substantive subject-matter. If that subject-matter falls within Regulation No 44/2001, a court which in principle has jurisdiction thereunder is entitled to examine whether the exception under Article 1(2)(d) applies and, according to its assessment of the effectiveness and applicability of the arbitration clause, to refer the case to the arbitral body or adjudicate on the matter itself.

45. The wording of Article 1(2)(d) of Regulation No 44/2001 does not give any clear indication as to which interpretation should be preferred. It can be concluded from the use of the term 'arbitration', however, that that means not only the actual arbitration proceedings but also related proceedings before the national courts can be excluded from the scope of the regulation.

46. Recourse to the travaux préparatoires for the previous version of the provision in the Brussels Convention confirm that view. The Jenard Report [28] and the Evrigenis and Kerameus Report [29] explain the reasons for the exclusion of arbitration from the scope of the Brussels Convention, although the EC Treaty referred to arbitration in the former Article 220 (now the second indent of Article 65(a)). Accordingly, the arbitration exception was included in Article 1(2)(4) of the Brussels Convention in order to comply with international agreements already existing in this area — in particular, the New York Convention.

47. The New York Convention lays down rules which must be respected not by the arbitrators themselves but by the courts of the States in question, for example, rules relating to agreements whereby parties refer a dispute to arbitration or on the recognition and enforcement of arbitral awards by the courts of a Contracting State. As the wording also suggests, the parties to the Brussels Convention thus wished to exclude arbitration in its entirety, over and above the actual arbitration proceedings, including proceedings brought before the national courts which are related to arbitration. [30]

48. In the Schlosser Report [31] the following cases are given as examples: the appointment or dismissal of arbitrators, the fixing of the place of arbitration or the extension of the time-limit for making awards. In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the Brussels Convention. Nor does the Brussels Convention cover proceedings and decisions concerning applications for the revocation, amendment, recognition and enforcement of arbitral awards. [32]

49. In contrast, concerning such proceedings which deal with arbitration, Evrigenis and Kerameus state in their report: [33]

'However, 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 Convention, must be considered as falling within its scope.'

28 — P. Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 27 September 1968, and the enforcement of authentic instruments, OJ 1979 C 59, p, 1, Chapter 3, IV D.

29 — Evrigenis and Kerameus Report on the Accession of the Hellenic Republic to the Community Convention on Jurisdiction and the enforcement of Judgments in Civil and Commercial Matters (OJ 1986 C 298, p. 1), 10, paragraph 35.

30 — *Rich* (cited in footnote 21, paragraph 18) and *Van Uden* (cited in footnote 21, paragraph 31).

31 — Schlosser Report (cited in footnote 26, paragraph 61).

32 — Schlosser Report (cited in footnote 26, paragraph 64 et seq.).

33 — Cited in footnote 29, paragraph 35.

50. The Court took up that distinction between the subject-matter of proceedings and preliminary issues in the judgment in *Rich*: [34]

'In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.'

51. In that specific case, the defendant had contended that in fact the preliminary issue as to whether a valid arbitration agreement exists was decisive. In the Court's view, it is, however, contrary to the principle of legal certainty for the applicability of the exclusion to vary according to the existence or otherwise of a preliminary issue, which might be raised at any time by the parties. [35]

52. As the Court confirmed in its judgment in *Van Uden*, whether or not proceedings fall within the scope of the Convention or Regulation No 44/2001 must therefore be determined from the substantive subject-matter of the dispute. [36]

53. In the dispute before the court in Syracuse, Allianz and Others are claiming damages by right of subrogation for loss caused to the insured party, Erg Petroli, following a collision between Front Comor and the jetty. The subject-matter is therefore a claim in tort (possibly also in contract) for damages, which falls within the scope of Regulation No 44/2001, and not arbitration.

54. The existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seised must address when examining whether it has jurisdiction. Even if the view were taken that that issue fell within the ambit of arbitration, [37] as a preliminary issue it could not change the classification of the proceedings, the subject-

34 — *Rich* (cited in footnote 21, paragraph 26).
35 — *Rich* (cited in footnote 21, paragraph 27).
36 — *Van Uden* (cited in footnote 21, paragraphs 33 and 34).
37 — In *Rich*, the defendant had in fact argued that the corresponding preliminary issue fell within the scope of the Convention and caused the proceedings as a whole to be included. The Court did not decide the classification of the preliminary issue in the end because it was immaterial to the inclusion of the proceedings within or exclusion of the proceedings from the scope of the Convention.

matter of which falls within the scope of the Regulation. [38] It can be left undecided here how proceedings which concern similar findings in the main case should be evaluated. [39]

55. Incidentally, it is consistent with the New York Convention for a court which has jurisdiction over the subject-matter of the proceedings under Regulation No 44/2001 to examine the preliminary issue of the existence and scope of the arbitration clause itself. Article II(3) of the New York Convention requires national courts to refer the parties to arbitration only under three conditions:

— the subject-matter of the dispute is actually capable of settlement by arbitration. If that is not the case, under Article II(1) of the New York Convention the Contracting State (and its courts) are not required to recognise the arbitration agreement;

— the court of a Contracting State is seised of an action in a matter in respect of which the parties have made an agreement within the meaning of that article;

— the court seised does not find that that agreement is null and void, inoperative or incapable of being performed.

56. Every court seised is therefore entitled, under the New York Convention, before referring the parties to arbitration to examine those three conditions. It cannot be inferred from the Convention that that entitlement is reserved solely to the arbitral body or the national courts at its seat. As the exclusion of arbitration from the scope of Regulation No 44/2001 serves the purpose of not impairing the application of the New York Convention, the limitation on the scope of the Regulation also need not go beyond what is provided for under that Convention.

57. In its judgment in *Gasser* the Court recognised that a court second seised should not anticipate the examination as to jurisdiction by the court first seised in respect of the same subject-matter, even if it is claimed that there is an agreement conferring jurisdiction in favour of the court second seised. [40] As the Commission correctly explains, from that may be deduced the general principle that every court is entitled to examine its own jurisdiction (doctrine of *Kompetenz-Kompetenz)*. The claim that there is a derogating

38 — See, to that effect, *Rich* (cited in footnote 21, paragraph 27).

39 — The Schlosser Report (cited in footnote 26, paragraph 64) states in that regard: 'In the same way a judgment determining whether an arbitration agreement is valid or not, or because it is invalid, ordering the parties not to continue the arbitration proceedings, is not covered by the 1968 Convention.' That passage is cited by the Court in *Van Uden* (cited in footnote 21, paragraph 32).

40 — *Gasser* (cited in footnote 12, paragraph 13).

agreement between the parties — in that case an agreement conferring jurisdiction, here an arbitration agreement — cannot remove that entitlement from the court seised.

58. That includes the right to examine the validity and scope of the agreement put forward as a preliminary issue. If the court were barred from ruling on such preliminary issues, a party could avoid proceedings merely by claiming that there was an arbitration agreement. At the same time a claimant who has brought the matter before the court because he considers that the agreement is invalid or inapplicable would be denied access to the national court. That would be contrary to the principle of effective judicial protection which, according to settled case-law, is a general principle of Community law and one of the fundamental rights protected in the Community. [41]

59. There is no indication otherwise in *Van Uden*. In that case the Court had to give a ruling regarding jurisdiction in respect of interim measures in a case which had been referred to arbitration in the main proceedings. In that context the Court stated that, where the parties have excluded the jurisdiction of the courts in a dispute arising under a contract and have referred that dispute to arbitration, there are no courts of any State that have jurisdiction as to the substance of the case for the purposes of the Brussels Convention. [42]

60. That statement is certainly correct. The justification for the exclusive jurisdiction of the arbitral body specifically requires, however, an effective arbitration agreement covering the subject-matter concerned. It cannot be inferred from the judgment in *Van Uden* that examination of preliminary issues relating thereto is removed from the national courts.

61. It is also not obvious why such examination should be reserved to the arbitral body alone, as its jurisdiction depends on the effectiveness and scope of the arbitration agreement in just the same way as the jurisdiction of the court in the other Member State. The fact that the law of the arbitral seat has been chosen as the law applicable to the contract cannot confer on the arbitral body an exclusive right to examine the arbitration clause. The court in the other Member State — here the court in Syracuse — is in principle in a position to apply foreign law, which is indeed often the case under private international law.

41 — Case C-222/84 *Johnston* [1986] ECR 1651, paragraphs 18 and 19; Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39; and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37. On the fundamental safeguarding of effective judicial protection, see Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4 November 1950) and Article 47(1) of the Charter of Fundamental Rights of the European Union (proclaimed in Nice on 7 December 2000, OJ 2000 C 364, p. 1).

42 — *Van Uden* (cited in footnote 21, paragraph 24).

62. Finally it should be emphasised that a legal relationship does not fall outside the scope of Regulation No 44/2001 simply because the parties have entered into an arbitration agreement. Rather the Regulation becomes applicable if the substantive subject-matter is covered by it. The preliminary issue to be addressed by the court seised as to whether it lacks jurisdiction because of an arbitration clause and must refer the dispute to arbitration in application of the New York Convention is a separate issue. An anti-suit injunction which restrains a party in that situation from commencing or continuing proceedings before the national court of a Member State interferes with proceedings which fall within the scope of the Regulation.

2. Can considerations regarding the practical reality of arbitration proceedings constitute justification?

63. In the view of the House of Lords, above all the practical reality of arbitration proceedings as a method of resolving commercial disputes requires the English courts to be able to grant anti-suit injunctions in support of arbitration.

64. The House of Lords states in addition that national courts must respect the autonomous decision of the parties to refer disputes to private arbitration. The parties wished to avoid becoming involved in protracted proceedings before national courts. In their choice of the place of arbitration people engaged in commerce will have regard to whether the courts there have effective remedies in support of arbitration at their disposal. The other Member States are at liberty to give their courts similar tools to enhance their attractiveness as a seat of arbitration.

65. Finally, the House of Lords refers to the competitive disadvantage with which London would be threatened, as compared to other international seats of arbitration such as New York, Bermuda and Singapore, if English courts could no longer issue anti-suit injunctions, unlike the courts of those places.

66. To begin with it must be stated that aims of a purely economic nature cannot justify infringements of Community law. [43] On the other hand, in the interpretation of the Regulation account can be had to the observance of the principle of autonomy, as the Court has stressed in connection with agreements conferring jurisdiction [44] and as recital 14 in the preamble to the Regulation emphasises in that context. Even if arbitration — unlike agreements conferring jurisdiction — does not fall within the scope of the Regula-

43 — See, as regards restrictions on the fundamental freedoms: Case C-288/89 *Gouda* [1991] ECR I-4007, paragraph 10; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 41; and Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 34).

44 — See Case C-23/78 *Meeth* [1978] ECR 2133, paragraph 5, and Case C-387/98 *Coreck* [2000] ECR I-9337, paragraph 14.

tion, the background to the provision shows, nevertheless, that the international rules on arbitration should not be interfered with by Regulation No 44/2001. [45]

67. The interpretation advanced here respects individual autonomy, however, and also does not call into question the operation of arbitration. Proceedings before a national court outside the place of arbitration will result only if the parties disagree as to whether the arbitration clause is valid and applicable to the dispute in question. In that situation it is thus in fact unclear whether there is consensus between the parties to submit a specific dispute to arbitration.

68. If it follows from the national court's examination that the arbitration clause is valid and applicable to the dispute, the New York Convention requires a reference to arbitration. There is therefore no risk of circumvention of arbitration. It is true that the seising of the national court is an additional step in the proceedings. For the reasons set out above, however, a party which takes the view that it is not bound by the arbitration clause cannot be barred from having access to the courts having jurisdiction under Regulation No 44/2001.

45 — See above, paragraph 46.

69. Were the national courts which may have jurisdiction not to be seised, owing to the anti-suit injunction, there is also the risk that those courts might later refuse to recognise and enforce the arbitral award in reliance on Article V of the New York Convention. Also from the point of view of procedural economy, an anti-suit injunction may therefore lead to unsatisfactory results.

70. It is true that the arbitral body or the national courts at its seat, on the one hand, and the courts in another Member State which have jurisdiction under the Regulation in respect of the subject-matter of the proceedings, on the other, may reach divergent decisions regarding the scope of the arbitration clause. If both the arbitral body and the national court declare that they have jurisdiction, conflicting decisions on the merits could result, as pointed out by the House of Lords.

71. Within the scope of application of the Regulation irreconcilable decisions in two Member States should be avoided as far as possible. In cases of conflict of jurisdiction between the national courts of two Member

States, Articles 27 and 28 of Regulation No 44/2001 ensure that there is coordination, as particularly noted by the French Government. However, since arbitration does not come within the scope of the Regulation, at present there is no mechanism to coordinate its jurisdiction with the jurisdiction of the national courts.

72. A unilateral anti-suit injunction is not, however, a suitable measure to rectify that situation. In particular, if other Member States were to follow the English example and also introduce anti-suit injunctions, reciprocal injunctions would ensue. Ultimately the jurisdiction which could impose higher penalties for failure to comply with the injunction would prevail.

73. Instead of a solution by way of such coercive measures, a solution by way of law is called for. In that respect only the inclusion of arbitration in the scheme of Regulation No 44/2001 could remedy the situation. Until then, if necessary, divergent decisions must be accepted. However it should once more be pointed out that these cases are exceptions. If an arbitration clause is clearly formulated and not open to any doubt as to its validity, the national courts have no reason not to refer the parties to the arbitral body appointed in accordance with the New York Convention.

V — Conclusion

74. On the basis of the above considerations, I propose that the question referred by the House of Lords should be answered as follows:

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters precludes a court of a Member State from making an order restraining a person from commencing

or continuing proceedings before the courts of another Member State because, in the opinion of the court, such proceedings are in breach of an arbitration agreement.