

**Czech (& Central European)  
Yearbook of Arbitration<sup>®</sup>**



**Czech (& Central European)  
Yearbook of Arbitration®**

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All contributions in this book are subject to academic review.



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## List of Abbreviations

AAA	American Arbitration Association
ACCP	Austrian Code of Civil Procedure
ADR	Alternate dispute resolution
ArbAct	Act [Czech Republic] No. 216/1994 Coll., on Arbitration and Enforcement of Arbitral Awards, as amended
BEPS Project	Base Erosion and Profit Shifting Project
BIT	Bilateral Investment Treaty
CAFTA	Central American – United States Free Trade Agreement
CAM	Chamber Arbitral Maritime
CAS	Chromalloy Aeroservices
CCI RF	Chamber of Commerce and Industry of the Russian Federation
CETA	Comprehensive Economic and Trade Agreement
CFC	Controlled Foreign Companies
CIArb	Chartered Institute of Arbitrators
CIETAC	China International Economic and Trade Arbitration Commission
CJEU	Court of Justice of the European Union
DIS	Deutsche Institution für Schiedsgerichtsbarkeit
DTC	Double Tax Conventions
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EU	European Union
European Convention on International Commercial Arbitration	European Convention on International Commercial Arbitration Geneva, 1961
FAA	Federal Arbitration Act
FCIArb	Fellow of the Chartered Institute of Arbitrators
FOSEA	Federation of Oil, Seeds and Fats Associations
FTA	Free Trade Agreement

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<b>GAA</b>	Guarantees Acknowledgment Act of Alberta
<b>GAFTA</b>	Grain and Feed Trade Association
<b>GCCP</b>	German Code of Civil Procedure
<b>Geneva Convention 1927</b>	Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927
<b>Geneva Protocol 1923</b>	Protocol on Arbitration Clauses, Geneva, 24 September 1923
<b>Hague Convention</b>	Convention for the Pacific Settlement of International Disputes adopted at the 1907 Hague Peace Conference
<b>HKIAC</b>	Hong Kong International Arbitration Centre
<b>ICAC</b>	International Commercial Arbitration Court
<b>ICC</b>	International Chamber of Commerce
<b>ICCA</b>	International Congress and Convention Association
<b>ICDR</b>	International Centre for Dispute Resolution
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ICSID Convention</b>	Convention on the Settlement of Investment Disputes between States and Nationals of other States, Washington, 1965
<b>ICT</b>	International Court of Justice
<b>ICT Rules</b>	the Rules of the International Court of Justice of 1978
<b>ICT Statute</b>	the Statute of the International Court of Justice of 1945
<b>ILA</b>	International Law Association
<b>IMA</b>	Arbitration Center at the Institute of Modern Arbitration
<b>JAMS</b>	Judicial Arbitration and Mediation Services
<b>LCIA</b>	The London Court of International Arbitration
<b>LMAA</b>	London Maritime Arbitrators Association
<b>MAC</b>	Maritime Arbitration Commission
<b>MAP</b>	Mutual Agreement Procedure

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<b>MGIMO</b>	Moscow State Institute of International Relations
<b>ML</b>	UNCITRAL Model Law on International Commercial Arbitration
<b>NAFTA</b>	North American Free Trade Agreement
<b>New York Convention</b>	Convention in the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>PAI</b>	Permanent Arbitral Institution
<b>PILA</b>	(Swiss) Private International Law Act
<b>PILS</b>	Private International Law of Switzerland
<b>QMUL</b>	Queen Mary University of London
<b>RAAB</b>	Arbitral Institution for Constructions
<b>RF CCI</b>	Chamber of Commerce and Industry of the Russian Federation
<b>RIAA</b>	Reports of International Arbitral Awards
<b>RSP</b>	Arbitration Center at Russian Union of Industrialists and Entrepreneurs
<b>SCC</b>	Stockholm Chamber of Commerce
<b>SIAC</b>	Singapore International Arbitration Centre
<b>Slovak Arbitration Act</b>	Act No. 244/2002 Coll. on Arbitration, as amended
<b>Slovak Constitution</b>	Act No. 460/1992 Coll. Constitution of the Slovak Republic
<b>Swiss Federal Constitution</b>	Federal Constitution of the Swiss Confederation of April 18, 1999
<b>TAS</b>	Tribunal arbitral du sport
<b>UAL</b>	Law of Ukraine “On International Commercial Arbitration”
<b>UCCI</b>	Ukrainian Chamber of Commerce and Industry
<b>UML</b>	UNCITRAL Model Law on International Arbitration
<b>UNCITRAL</b>	United Nations Commission on International Trade Law
<b>UNCITRAL Arbitration Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law
<b>UNCITRAL Model Law</b>	Model law on International Commercial Arbitration as adopted by the United

**UNCTAD**

**VIAC**

**WIPO**

**ZPO**

Nations Commission on International  
Trade Law on 21 June 1985, with  
amendments on 7 July 2006  
United Nations Conference on Trade and  
Development  
Vienna International Arbitral Centre  
World Intellectual Property Organization  
German Civil Procedure Code

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Rimantas Daujotas

## The Arbitral Tribunal's Anti-suit Injunctions in European Union Law – the *West tankers* & *Gazprom* cases

**Key words:**

*Brussels Regulation* | *Arbitration* | *Gazprom* | *anti-suit* | *West-tankers* | *EU Law*

**Abstract** | *This article discusses the relationship between the national law, European Union law and arbitral procedure with respect to the anti-suit injunctions issued by arbitration tribunals. The article analyses and compares conclusions of the Court of Justice of the European Union (CJEU) in the West Tankers and Gazprom cases, specifically in the context of the relationship between an anti-suit injunction and the arbitration procedure. It is argued that the Gazprom judgment had clearly reinforced the arbitration exception of the Brussels Regulation. Arbitral tribunals are not courts of a State and the latter had also enabled the CJEU to reject the mutual trust argument. It is emphasized that what is of significant importance to anti-suit injunctions in general is that the CJEU had specifically noted that an arbitral tribunal's prohibition of a party from bringing certain claims before a court of a Member State cannot deny that party judicial protection. It was found that any power the arbitral tribunal itself has to grant such relief is not fettered by the Brussels I Regulation. However, it was also found that the award still has to go through the national court's standard recognition and enforcement process, outside the framework of the Regulation, and instead be governed by national residual law as well as the New York Convention.*



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## I. Introduction

- 4.01.** An anti-suit injunction is generally understood as a prohibition by the *court* or *arbitration venue* to bring an action, initiate or continue proceedings in another jurisdiction. A typical situation leading to an anti-suit injunction in a parallel case is when a claimant files a suit to one court or arbitration venue while the defendant brings an action in a different venue. One party then petitions the court or arbitral tribunal to issue an anti-suit injunction to prohibit the other party from proceeding with its actions.<sup>1</sup>
- 4.02.** An anti-suit injunction is an essential characteristic of States with a common-law tradition. Such a tradition goes back to the 15th century and the institution of the anti-suit injunction is associated with the concept of ‘equity.’<sup>2</sup> For example, in English common law in the early 15th century, an anti-suit injunction was a way to prevent the ecclesiastical court’s expansive jurisdiction. English courts started using anti-suit injunctions as a remedy to stop parties from bringing duplicative suits in another common law court within the same jurisdiction or another jurisdiction overseas. It was held that the legal basis for an injunction lies in the *in personam* jurisdiction of the English court over the party to be restrained. The logic behind this was that if a court has jurisdiction over a party to perform contractual duties abroad, the court also has jurisdiction over a party to order it to refrain from doing an act. It should be noted that under common law, an anti-suit injunction precludes *a party* but not a court from commencing or continuing a suit in a foreign or domestic parallel proceeding.<sup>3</sup>
- 4.03.** Nowadays, common law countries still legitimize the use of anti-suit injunctions by ensuring that the injunction is directed against a party and never against a foreign court. This was the opinion prior to the Court of Justice of the European Union

<sup>1</sup> See John Fellas, *Anti-Suit Injunctions*, 3(1) TRANSNATIONAL DISPUTE MANAGEMENT (2006); George A. Bermann, *Use of Anti-Suit Injunctions in International Litigation*, 28 THE COLUM. J. TRANSNAT’L L. 589 (1990); THOMAS RAPHAEL, THE ANTI-SUIT INJUNCTION, Oxford University Press (2008).

<sup>2</sup> See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*. UNIVERSITY OF PENNSYLVANIA LAW REVIEW 909-1002 (1987); George A. Bermann, *Use of Anti-Suit Injunctions in International Litigation*, 28 THE COLUM. J. TRANSNAT’L L. 589 (1990).

<sup>3</sup> Julian Lew, DM, Does national court involvement undermine the international arbitration process, 24 AM. U. INT’L L. REV. 489 (2008).

(CJEU's) ruling in the *West Tankers*<sup>4</sup> case which will be discussed in this article.<sup>5</sup>

- 4.04.** As was mentioned, an anti-suit injunction tradition, which is well-established in the states with a common law system, is based on the assumption that the prohibition refers to a party of the case, rather than the court of another state, and that the only purpose and the outcome of such a prohibition is preventing the party from filing another claim in another court. Therefore it is claimed that no anti-suit injunction may infringe the jurisdiction of the court or otherwise affect the activity of the court. However, as far as European Union law is concerned, the latter approach had changed in the CJEU's *Gazprom*<sup>6</sup> case which will also be addressed in this article.<sup>7</sup>
- 4.05.** An important issue which arises in the context of both the *West Tankers* and *Gazprom* cases is the relationship between an anti-suit injunction and the arbitration procedure. As was the case in the *Gazprom* dispute, an anti-suit injunction was issued not by a national court but by an arbitral tribunal. Depending upon the form of the anti-suit injunction, a tribunal may: 1) enjoin a party from initiating a court or arbitral proceeding; 2) order a party to seek specific relief in related proceedings (i.e. a stay); or 3) order a party to withdraw another lawsuit or to inform the tribunal of its progress.
- 4.06.** Naturally, if a party that is the object of an anti-suit injunction issued by arbitrators does not voluntarily comply, the arbitral injunction must be enforced in the same jurisdiction where the parallel foreign litigation is being pursued in order to have its intended effect. An order that is ignored and unenforceable will likely have the opposite of the intended effect: it may undermine the authority of the arbitrators. This was exactly the issue discussed by the CJEU in the *Gazprom* case.
- 4.07.** Therefore, based on the considerations expressed above, this article will discuss the relationship between national law,

<sup>4</sup> *Allianz SpA, Generali Assicurazioni Generali SpA v. West Tankers Inc.*, Case C-185/07, ECJ, Grand Chamber, Judgment, 10 February 2009.

<sup>5</sup> See also Grace Gunah Kim, *After the ECJ's West Tankers: The Clash of Civilizations on the Issue of an Anti-Suit Injunction*. 12 CARDOZO J. CONFLICT RESOL. 573(2010), Kent Anderson, *What Can the United States Learn from English Anti-Suit Injunctions-An American Perspective on Airbus Industrie GIE v. Patel*, 25 YALE J. INT'L L. 195 (2000).

<sup>6</sup> Judgment of the Court (Grand Chamber) of 13 May 2015, C-536/13, *Gazprom*.

<sup>7</sup> See also Jennifer Lavelle, *The rebirth of anti-suit injunctions in support of arbitration*, 15(1) SHIPPING AND TRADE LAW 1-3 (2015); Ewelina Kajkowska, *Anti-suit injunctions in arbitral awards: enforcement in Europe*. 74(3) THE CAMBRIDGE LAW JOURNAL 412-415 (2015); Chukwudi Paschal Ojiegbe, *From West Tankers to Gazprom: anti-suit injunctions, arbitral anti-suit orders and the Brussels I Recast*, 11(2) JOURNAL OF PRIVATE INTERNATIONAL LAW 267-294 (2015); Guido Carducci, *Notes on the ECJ's ruling in Gazprom: West Tankers is unaffected and anti-suit injunctions issued by arbitral tribunals are not governed by EU Regulation 44/2001*, ARBITRATION INTERNATIONAL aiv048 (2015).

European Union law and arbitral procedure with respect to the anti-suit injunctions issued by arbitration tribunals.

## II. The Gazprom Case

- 4.08.** In order to develop the discussion, the issue raised in *Gazprom* case must first be introduced. The case concerned litigation in Lithuanian courts between the Russian energy company Gazprom and the Ministry of Energy of the Republic of Lithuania regarding the recognition and enforcement of the SCC arbitral award in Lithuania in the case of *OAO Gazprom v. the Ministry of Energy of Lithuania*.
- 4.09.** The arbitration case was focused on the Ministry's breach of the arbitration agreement concluded in the Shareholders agreement, when the Government initiated legal proceedings against Gazprom's officers in Lithuanian courts. The SCC arbitral tribunal had decided that the initiation of the Lithuanian court proceedings by the Ministry was in breach of the arbitration agreement and ordered it to withdraw part of its claims in the national courts which fall under the arbitration agreement.<sup>8</sup> The case was heard by the Supreme Court of Lithuania, which referred to the CJEU for a preliminary ruling as to whether it should refuse to enforce the SCC award, which it believed may have been inconsistent with EU law.
- 4.10.** In particular, the Supreme Court of Lithuania held that the CJEU had not yet examined the relationship between the New York Convention and the Brussels I Regulation. The court held that the arbitral award in question had anti-suit injunction features, where the award allegedly provided that Lithuanian courts did not have a right to hear the relevant civil cases, which fall under the jurisdiction of the arbitral tribunal.<sup>9</sup>
- 4.11.** While referring to the CJEU, the Lithuanian Supreme Court stated that according to CJEU case law in the *West Tankers* case,

<sup>8</sup> The tribunal had ruled that an application before the Lithuanian courts for Investigation Proceedings, pursuant to article 2.124 of the Lithuanian Civil Code, may, under some conditions, amount to bringing to a State court a dispute falling within the scope of the arbitration clause of the SHA, and therefore be in breach thereof. The Tribunal also finds that it has the powers to limit the Ministry's requests (suggested remedies) under items 1.1, 1.3, 1.4 and 1.6 of its Revised Claim filed before the Lithuanian Court, in order to prevent the Ministry from breaching the arbitration clause provided in the SHA. The Tribunal notes that Respondent does not challenge the Tribunal's power to order specific performance if it finds that Respondent has breached the arbitration clause in the SHA.2 As a consequence, the Tribunal finds that it has jurisdiction to order the Ministry not to bring a request before the Lithuanian Court that could affect the rights of the shareholders under the SHA. In light of the Tribunal's findings in the previous section of this award, the Tribunal decides that Respondent must withdraw the following requests made in its Revised Claim of December 9, 2011, before the Lithuanian Court  
 - See *OAO Gazprom v. Ministry of Energy of the Republic of Lithuania - Arbitration No V (125/2011) - SCC - Final Award* - 31 July 2012, available at: [http://www.globalarbitrationreview.com/cdn/files/gar/articles/Gazprom\\_v\\_Lithuania\\_Final\\_Award.pdf](http://www.globalarbitrationreview.com/cdn/files/gar/articles/Gazprom_v_Lithuania_Final_Award.pdf) (accessed on 27 December 2017).

<sup>9</sup> See the ruling of the Supreme Court of Lithuania made on 10 October 2013, available at: <http://>

the prohibition of a Member State to commence or continue proceedings in another Member State's court on the basis of the breach of an arbitration agreement was contrary to the provisions of the Brussels I Regulation. In the court's view, similar conclusions should be reached, when the decision regarding an anti-suit injunction was made by the arbitral tribunal<sup>10</sup> and when it is sought for recognition and enforcement of such an award. Otherwise, the arbitral award on an anti-suit injunction would prevail over the court's decision.

**4.12.** According to the argumentation above, the following questions have been referred to the CJEU:

- 1) Is it the national court's right to reject the recognition and enforcement of the arbitral award which provides for an anti-suit injunction on the basis that this would be the violation of the court's right to decide on its own jurisdiction according to the Brussels I Regulation?
- 2) If the answer to the first question is affirmative, would the same rule apply when the arbitral award issuing an anti-suit injunction limits the claimant's rights in the other case, which is presented before the national court of the other Member State and which has jurisdiction according to the Brussels I Regulation?
- 3) Can the national court, in order to ensure the supremacy of EU law and the full effectiveness of the Brussels I Regulation, refuse the recognition and enforcement of the arbitral award, which limits the courts powers to decide on its own jurisdiction to hear the relevant case, which falls under the Brussels I Regulation?<sup>11</sup>

**4.13.** Therefore, as can be observed, the main issue which had to be discussed by the CJEU was the relationship between the Brussels I Regulation and the New York Convention. In addition, the CJEU had to decide whether enforcement of an arbitral award which produces the effects of an anti-suit injunction could be refused enforcement under the Brussels I Regulation while taking into account the case law formed in the *West tankers* case. Discussion on all these issues will now follow.

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[globalarbitrationreview.com/cdn/files/gar/articles/2013\\_10\\_10\\_SCL\\_ruling\\_EN.pdf](http://globalarbitrationreview.com/cdn/files/gar/articles/2013_10_10_SCL_ruling_EN.pdf) (accessed on 27 December 2017).

<sup>10</sup> However, it must be noted that the SCC Award in question did not possess any of the characteristics of an anti-suit injunction. The SCC Award was rendered by a neutral, independent tribunal, not by a court of the Member State. Moreover, the SCC Award had not restrained the Ministry from commencing or continuing investigation proceedings before the Lithuanian courts. Finally, the SCC Award was not backed up by some kind of court penalty. The award in question had only described the proper implementation of a contractual obligation binding the Ministry and prevented the Ministry from avoiding its contractual obligations.

<sup>11</sup> *Ibid.*

### III. Arbitration Exception Under the Brussels I Regulation

- 4.14. First, it must be noted that the issue of recognition or enforcement of an arbitral award which produces effects of an anti-suit injunction does not fall within the scope of the Brussels I Regulation. Article 1(2)(d) of the Brussels I Regulation clearly states that the regulation does not apply to arbitration. Recital 25 of the Brussels I Regulation provides that:

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.<sup>12</sup>

- 4.15. The report of Mr P. Jenard<sup>13</sup> on the Brussels Convention on the issue indicates the following:

There are already many international agreements on arbitration. Arbitration is, of course, referred to in Article 220 of the Treaty of Rome. Moreover, the Council of Europe has prepared a European Convention providing a uniform law on arbitration (*loi uniforme*), and this will probably be accompanied by a Protocol, which will facilitate the recognition and enforcement of arbitral awards to an even greater extent than the New York Convention. This is why it seemed preferable to exclude arbitration. The Brussels Convention does not apply to the recognition and enforcement of arbitral awards; it does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration – for example, proceedings to set aside an arbitral award; and,

<sup>12</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation).

<sup>13</sup> Mr P. Jenard - a rapporteur of the committee of experts set up in 1960 by decision of the Committee of Permanent Representatives of the Member States, following a proposal by the Commission, which prepared a draft Convention, in pursuance of Article 220 of the EEC Treaty, on jurisdiction and the enforcement of judgments in civil and commercial matters. The committee was composed of governmental experts from the six Member States, representatives of the Commission, and observers.

finally, it does not apply to the recognition of judgments given in such proceedings.<sup>14</sup>

- 4.16. Moreover, as the CJEU stated in the *Rich* case,<sup>15</sup> the clause on arbitration competence is intentionally linked to international instruments, to be applied by the national courts rather than by arbitration tribunals proper:

The international agreements, and in particular the abovementioned Convention on the recognition and enforcement of foreign arbitral awards [...] lay down rules which must be respected not by the arbitrators themselves but by the courts of the Contracting States. Those rules relate, for example, to [...] the recognition and enforcement of arbitral awards. It follows that, by excluding arbitration from the scope of the Convention on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.<sup>16</sup>

- 4.17. Moreover, in the aforementioned Judgment in the *Rich* case the Court of Justice pointed out that:

international treaties, the New York Convention especially, establish rules which shall be followed not by the arbitrators themselves but by the courts of the contracting parties. Those rules are, for example, related to agreements on the basis of which parties decide to apply to a court of arbitration, and to the recognition and enforcement of arbitral awards. This leads to the conclusion that by not including arbitration in the scope of the Brussels Convention for the reason that it is already subject to international treaties, the contracting parties intended to fully exclude arbitration-related issues,

<sup>14</sup> See 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. See also Friedrich Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, MICHIGAN LAW REVIEW 1195-1212 (1984); Robert C. Reuland, *Recognition of Judgments in the European Community: The Twenty-Fifth Anniversary of the Brussels Convention*, 14 THE MICH. J. INT'L L. 559 (1992).

<sup>15</sup> *Marc Rich & Co. AG v. Società Italiana Impianti PA* Case C-190/89 [1991] ECR I-3855. See also Marco Darmon, *Marc Rich & Go. AG v. Società Italiana Impianti PA (C-190/89)*, 7(3) ARBITRATION INTERNATIONAL 197-226 (1991).

<sup>16</sup> *Ibid.*

including all the processes related to them, from the national courts.<sup>17</sup>

- 4.18.** Second, cases concerning recognition or enforcement of an arbitration award fall exclusively within the scope of the national law of the Member States and the New York Convention. The Brussels I Regulation was never intended to apply to recognition and enforcement of arbitral awards, as the latter is solely governed by the most successful convention in the history of modern international commercial law – the New York Convention. The title of the Brussels I Regulation itself provides that this regulation applies to the recognition and enforcement of judgments in civil and commercial matters.<sup>18</sup>
- 4.19.** It must be noted that the New York Convention does not explicitly address the issue of anti-suit injunctions. However, the absence of a provision regulating the use of an anti-suit injunction in the New York Convention should not be considered as an intention to make it unlawful. Contrarily, when drafting and negotiating the New York Convention the authors did not consider an anti-suit injunction to be an issue at that time.<sup>19</sup>
- 4.20.** Thus, arbitral awards do not fall within the scope of the Brussels I Regulation and, accordingly, Chapter III ‘Recognition and Enforcement of Court Rulings’ are not be applicable to them. In other words, arbitral awards are not considered to be ‘court rulings’ as defined in Article 32 of the Brussels I Regulation. It is clear that an arbitral award whose recognition is examined by a national court should be subject to the New York Convention. This Convention should also be applicable in cases when an anti-suit injunction issued by a court of arbitration is addressed to a country as a claimant or to its national court which would be competent to hear the proceedings in accordance with the rules of the Brussels I Regulation on jurisdiction.
- 4.21.** It should also be noted that the arbitration jurisdiction is not the jurisdiction as it is seen in the sense of the Brussels I Regulation, as this Regulation is applied only to the national

<sup>17</sup> *Ibid*, see also Ikko Yoshida, *Lessons from The Atlantic Emperor: Some Influence from the Van Uden Case*, 15(4) ARBITRATION INTERNATIONAL 359-380 (1999); Wolfram Krohn, *Marc Rich & Co. AG v. Societa Italiana Impianti PA*, AMERICAN JOURNAL OF INTERNATIONAL LAW 134-142 (1992).

<sup>18</sup> See Hans Van Houtte, *Why Not Include Arbitration in the Brussels Jurisdiction Regulation?* 24(4) ARBITRATION INTERNATIONAL 509-522 (2005); Burkhard Hess, *The Brussels I Regulation: Recent case law of the Court of Justice and the Commission's proposed recast*, 49(3) COMMON MARKET LAW REVIEW 1075-1112 (2012); BRUSSELS I REGULATION. Vol. 1. Walter de Gruyter (Ulrich Magnus, Peter Mankowski, eds., 2007).

<sup>19</sup> See Linda Silberman, *New York Convention after Fifty Years: Some Reflections on the Role of National Law*, 38 THE GA. J. INT'L & COMP. L. 25 (2009); Gabrielle Kaufmann-Kohler, *How to Handle Parallel Proceedings: A Practical Approach to Issues Such as Competence-Competence and Anti-Suit Injunctions*, 2 DISP. RESOL. INT'L 110 (2008); Guido Carducci, *Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention: Notes on West Tankers, the Revision of the Regulation and Perhaps of the Convention*, 27(2) ARBITRATION INTERNATIONAL 171-198 (2011).

jurisdiction. For instance, the arbitrators are not subject to claims not related to their competence, which are provided for in the Brussels I Regulation. This conclusion of a general nature is based on the 1979 Jenard report,<sup>20</sup> which refers to the courts of the contracting countries. The arbitration jurisdiction is not considered as the jurisdiction of a Member State since arbitration is a body of private not public justice. The report by Professor Peter Schlosser points out that the Brussels Convention is applicable only to the rulings made by a national jurisdiction.<sup>21</sup>

- 4.22. All of the aforementioned leads to the conclusion that the arbitral award must be recognised and enforced with reference exclusively to the provisions of the New York Convention.<sup>22</sup> Incidentally, in applying the New York Convention, the corresponding institutions have sufficient freedom of assessment provided for by Article V of the New York Convention.<sup>23</sup>

#### IV. What is the Place of the *West Tankers* case in this Context?

- 4.23. In its ruling on *West Tankers* the CJEU concluded that it is incompatible with the Brussels I Regulation for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of

<sup>20</sup> 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.

<sup>21</sup> Peter 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).

<sup>22</sup> It may be further noted that a party concerned would always have the opportunity to review the arbitration agreement and challenge the arbitral award before a Member State court and the latter ensures that judicial protection in the sense contemplated in *West Tankers* is guaranteed.

<sup>23</sup> In this context, another interesting issue to be mentioned in this section is whether or not an arbitral tribunal has a duty to comply with an injunction issued by the national court. In the *Salini* case, an Ethiopian court had issued an order 'enjoining the Claimant from proceeding with the arbitration pending its decision on the Tribunal's jurisdiction'. Despite that, the arbitral tribunal in this case held that:

in the event that the arbitral tribunal considers that to follow a decision of a court would conflict fundamentally with the tribunal's understanding of its duty to the parties, derived from the parties' arbitration agreement, the tribunal must follow its own judgment, even if that requires non-compliance with a court order [of anti-anti-suit injunction]. To conclude otherwise would entail a denial of justice and fairness to the parties and conflict with the legitimate expectations they created by entering into an arbitration agreement. It would allow the courts of the seat to convert an international arbitration agreement into a dead letter, with intolerable consequence for the practice of international arbitration more generally. See *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4.

another Member State on the grounds that such proceedings would be contrary to an arbitration agreement.<sup>24</sup>

**4.24.** An anti-suit injunction, as defined by the European Court of Justice (ECJ) in *Turner*<sup>25</sup> is ‘a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court’. In the latter case, the ECJ ruled that an anti-suit injunction occurs ‘whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State’.<sup>26</sup>

**4.25.** In *West Tankers* the CJEU, referring to the opinion of Advocate General Kokott,<sup>27</sup> also defined an anti-suit injunction:

An anti-suit injunction, such as that in the main proceedings, may be directed against actual or potential claimants in proceedings abroad. As observed by the Advocate General in point 14 of her Opinion, non-compliance with an anti-suit injunction is contempt of court, for which penalties can be imposed, including imprisonment or seizure of assets.<sup>28</sup>

**4.26.** It is clear that when defining an anti-suit injunction, the CJEU identifies three main characteristics: 1) it is an order imposed by a court, 2) it is an order restraining a party from commencing or continuing proceedings before a foreign court, 3) such an order is backed up by some kind of court penalty.

**4.27.** In *Turner* and *West Tankers*, the CJEU held that the Brussels Convention and the Brussels I Regulation respectively preclude a Member State’s court from issuing an anti-suit injunction in relation to civil and commercial proceedings before the courts of another Member State.

However, as will be discussed below, the case law of *Turner* and *West Tankers* has no application to the issue of

<sup>24</sup> See also Patrizio Santomauro, *Sense and sensibility: Reviewing West Tankers and dealing with its implications in the wake of the reform of EC Regulation 44/2001*, 6(2) JOURNAL OF PRIVATE INTERNATIONAL LAW 271-325 (2010); Guido Carducci, *Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention: Notes on West Tankers, the Revision of the Regulation and Perhaps of the Convention*, 27(2) ARBITRATION INTERNATIONAL 171-198 (2011).

<sup>25</sup> *Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA*. C-159/02 [2004] ECR I-3565.

<sup>26</sup> *Ibid.*

<sup>27</sup> *West Tankers* (C-185/07), Opinion of Advocate General Kokott, 9 September 2008.

<sup>28</sup> *West Tankers*, paragraph 20.

enforcement of an arbitral award which produces the effects of an anti-suit injunction.

4.28. Moreover, the case law cannot be extended to the context of arbitration which materially differs from litigation.

4.29. In the *West Tankers* the CJEU stated that the claim of the court of a Member State on:

The use of an anti-suit injunction to prevent a court of [another] Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Regulation No 44/2001, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Regulation No 44/2001.<sup>29</sup>

4.30. This led the CJEU to conclude that an anti-suit injunction by a Member State 'is contrary to the general principle that every court seized itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it',<sup>30</sup> and that the Brussels I Regulation prohibits the court of a Member State to rule on jurisdiction of another court. According to the CJEU, these provisions include provisions within the scope of the Brussels I Regulation.

4.31. However, the fact that the preclusion of anti-suit injunctions identified in the cases referred to does not extend to arbitration is evident from the reasoning of the CJEU in those cases. In *West Tankers*, the CJEU applied the same reasoning in the context of an anti-suit injunction sought in relation to civil and commercial proceedings before the Tribunale di Siracusa. One party to this case objected to that court's jurisdiction on the basis of an arbitration agreement, with another disputing its applicability. Moreover, the CJEU in *West Tankers* added that:

... if, by means of an anti-suit injunction, the Tribunale di Siracusa was prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of

<sup>29</sup> *West Tankers*, paragraph 28.

<sup>30</sup> *West Tankers*, paragraph 29.

Regulation No. 44/2001 and would therefore be deprived of a form of judicial protection to which it is entitled.<sup>31</sup>

- 4.32. The fundamental aspect of the *West Tankers* ruling is that the Regulation gives the courts of Member States a mandate. According to this mandate, all the courts that have been applied to pursuant to their existing rights shall determine whether they have jurisdiction to make a ruling concerning a suit brought to be heard. Such a mandate cannot be restricted, considering that no other court is in a better position to decide about its jurisdiction. A party could eventually avoid a trial building upon an arbitration agreement. The opposing party, considering the agreement void, ineffective or unenforceable, would therefore be prevented the opportunity to apply to the national court or it would be deprived of one of the legal defence remedies to which it is entitled.<sup>32</sup>
- 4.33. This conclusion is also in effect, perhaps even more, in a case when the obligation is imposed by the court of arbitration, instead of another national court. The Regulation does not apply to the arbitration. However, the very recital 12 of the Regulation clearly reveals that the Regulation shall not inhibit the courts of Member States from examining whether an arbitration agreement is void, ineffective or unenforceable when they are applied to concerning the subject matter of the proceedings on which the arbitration agreement was concluded between the parties. Therefore, in the correlation between the arbitration and the Regulation, the final decision concerning the validity or applicability of the arbitration agreement is taken up by the Member States' courts. This would not be prevented if anti-suit injunctions by arbitrations were recognised.<sup>33</sup>

## V. The Relation of the Brussels I Regulation to Anti-suit Injunctions Issued by Arbitral Tribunals

- 4.34. In this respect, the arbitration award which produces the effects of an anti-suit injunction does not resolve the dispute as to its substance. Rather, it only obligates one of the parties to not

<sup>31</sup> *West Tankers*, paragraph 31.

<sup>32</sup> See also Jacob Grierson, *Comment on West Tankers Inc. v. RAS Riunione Adriatica di Sicurtà S. p. A. (The Front Comor)*, 26(6) JOURNAL OF INTERNATIONAL ARBITRATION 891-901 (2009); George A. Bermann, *Reconciling European Union Law Demands with the Demands of International Arbitration*, 34 FORDHAM INT'L LJ 1193 (2010).

<sup>33</sup> See Peter Arnt Nielsen, *The New Brussels I Regulation*, 50(2) COMMON MARKET LAW REVIEW 503-528 (2013); Grace Gunah Kim, *After the ECJ's West Tankers: The Clash of Civilizations on the Issue of an Anti-Suit Injunction*, 12 CARDOZO J. CONFLICT RESOL. 573 (2010).

- commence or continue the proceeding at a court regarding the matters that the arbitration institution assigned to the scope of the arbitration clause, and thus to its own competence.
- 4.35.** The CJEU has already specified that the Brussels I Regulation is to be interpreted as precluding the grant of an injunction. A court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings.<sup>34</sup> The CJEU had also already ruled that such an assessment runs counter to the principle of mutual trust underlying the Brussels I Regulation as it restricts the competence of a foreign court by prohibiting the court to rule on its own jurisdiction and decide whether the application filed to it should be considered an abuse.
- 4.36.** However, this does not hold true for the court of a Member State which considers whether to recognize the award of an international arbitral tribunal concerning a dispute assigned to the scope of the Regulation where that arbitral award restricts the competence of that court or the court of another Member State with respect to the dispute under Brussels I Regulation.
- 4.37.** First, the only objective of the Brussels I Regulation is to establish the rule according to which the jurisdiction is distributed between the courts of Member States, rather than between arbitration institutions and the courts of Member States.
- 4.38.** Therefore courts of Member States are prohibited from issuing an obligation not to commence or continue proceedings in the court of another Member State, because such an obligation is contrary to Brussels I Regulation. The case-law of the CJEU established by the judgments in the *West Tankers* case should not be binding upon arbitration institutions because they have been excluded from the scope of the Regulation.<sup>35</sup>
- 4.39.** Second, as was mentioned above, cases concerning the recognition or enforcement of an arbitration award do not fall within the scope of the Brussels I Regulation. Such cases fall exclusively within the scope of the national law of Member States and the New York Convention. In this respect Article V of the New York Convention has several bases upon which

<sup>34</sup> *Turner*, paragraph 31., see also Gordon Blanke, *The ECJ's Recent Jurisprudence on Anti-Suit Injunctions under the Brussels Convention*, 16(3) EUROPEAN BUSINESS LAW REVIEW 591-620 (2005); Guido Carducci, *Validity of Arbitration Agreements, Court Referral to Arbitration and FAA § 206, Comity, Anti-Suit Injunctions Worldwide and Their Effects in the EU Before and After the New EU Regulation 1215/2012*, 24 AM. REV. INT'L ARB. 515-681 (2013).

<sup>35</sup> BRUSSELS I REGULATION. Vol. 1. Walter de Gruyter (Ulrich Magnus and Peter Mankowski, eds. 2007); Jacomijn J. van Haersolte-Van Hof, *The Arbitration Exception in the Brussels Convention: Further Comment*, 18(1) JOURNAL OF INTERNATIONAL ARBITRATION 27-39 (2001).

the court referred to for a preliminary ruling may refuse to recognize the arbitration award in its State. The bases specified in the Convention do not indicate that a court applied to regarding recognition of an arbitral award could refuse to recognize the award. This is based on the Brussels I Regulation. Courts of Member States would normally have jurisdiction to consider the dispute. This means that, should the questions filed by the referring court be answered in the affirmative, the list of the bases provided in Article V of the New York Convention would be supplemented by a new basis to refuse to recognize an arbitral award.<sup>36</sup>

- 4.40.** Such an answer is even less probable because according to Article VII, a party in interest is allowed to rely on more favourable national legal provisions of the Member State in which the recognition of the arbitral award is sought. However, permission to deviate from the specifically listed bases in the cases when the provisions of the national law are more favourable, would provide the Member States with a possibility contradictory to the New York Convention to unilaterally specify the conditions for the recognition of an arbitral award. For example, it would require that the courts of Member States have the jurisdiction to consider a specific case, according to the provisions of the Brussels I Regulation.
- 4.41.** Third, the implementation of Article V of the New York Convention specifying the conditions for recognition of an international arbitral award does not seem to be incompatible with the Brussels I Regulation, when the award requested to be recognised actually obligates one of the parties to not commence or continue a proceeding in the court of another Member State.
- 4.42.** Article V(2) of the New York Convention states that the recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.
- 4.43.** Thus Article V(2)(a) of the New York Convention permits a court of a Member State to refuse to recognise an arbitral award when it becomes evident that the dispute in a specific area under the national law are not arbitrable. It should be concluded

<sup>36</sup> See also Jean-Paul Beraudo, *The Arbitration Exception of the Brussels and Lugano Conventions: Jurisdiction, Recognition and Enforcement of Judgment*, 18(1) JOURNAL OF INTERNATIONAL ARBITRATION 13-26 (2001); Raphael Thomas, *The Arbitration Exclusion in the Brussels Convention 1968: An English Perspective*, 7(3) JOURNAL OF INTERNATIONAL ARBITRATION 49-52 (1990).

that Article V of the New York Convention establishes a clearly defined permission to courts of Member States to assess the validity of the arbitration agreement for themselves on the basis of which the international arbitral award was passed. In other words, the New York Convention permits courts of Member States to verify whether the conditions of Article V(2)(a) of the New York Convention have been fulfilled, and decide on their possible exclusive jurisdiction to consider the dispute with respect to which the arbitration award has been passed.

4.44. Finally, it must be noted that the arbitral award is not a judgment within the meaning of the Brussels I Regulation. The arbitral award is not rendered by a court of the Member State. This also entails that the award may not be regarded as a judgment within the meaning of the Brussels I Regulation.

4.45. Under Article 32 of the Brussels I Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court. As it is stated in the commentary on the article 32 of the Brussels I Regulation,<sup>37</sup> the Brussels I Regulation applies only to decisions issued by courts or tribunals. Although the Brussels I Regulation does not provide a definition of what constitutes a court or a tribunal, it is understood that this covers any judicial authority acting independently from other organs of the State and whose decisions are taken following a procedure having the characteristics of a judicial proceeding, i.e. based on the respect for the principle of due process.

As it was stated by the CJEU in the *Emilio Boch*<sup>38</sup> case:

.... in order to be a 'judgment' for the purposes of the Convention the decision must emanate from a judicial body of a Contracting State deciding on its own authority on the issues between the parties.

That condition is not fulfilled in the case of a settlement, even if it was reached in a court of a Contracting State and brings legal proceedings to an end. Settlements in court are essentially contractual

<sup>37</sup> Patrick Wautelet, Brussels I Regulation – A Commentary, *Sellier*, 529-549 (2007).

<sup>38</sup> *Solo Kleinmotoren GmbH v. Emilio Boch*, Case C-414/92 [1994] ECRI-2237, 1-2255, paragraph 17 and 18.

in that their terms depend first and foremost on the parties' intention...

- 4.46. A similar conclusion was reached by the CJEU in the *Owens v Bracco* case,<sup>39</sup> where the court confirmed that:

it follows from the wording of Articles 26 and 31 of the Convention, which must be read in conjunction with its Article 25, that the procedures envisaged by Title III of the Convention, concerning recognition and enforcement, apply only in the case of decisions given by the courts of a Contracting State. Articles 26 and 31 refer only to 'a judgment given in a Contracting State.

- 4.47. It went on to state that Article 25 provides that, 'for the purposes of the Convention, 'judgment' means any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called.'

- 4.48. Thus, it is clear that the arbitral tribunal is not some kind of judicial body of a Member State as the arbitration proceedings and the arbitral tribunal itself are essentially contractual in their sense and depend on the parties' intention. Taking all of the above together, it is clear that the Brussels I Regulation cannot be applied to arbitral awards, or to judgments given by ecclesiastical courts or decisions rendered by international courts or tribunals.<sup>40</sup>

## VI. Why West Tankers is Irrelevant with Respect to Arbitral Awards Having an Anti-suit Injunction

- 4.49. As was previously observed, in the judgment in *West Tankers*, the CJEU stated that the claim of a court of a Member State on the use of an anti-suit injunction to prevent a court of another Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of Brussels I Regulation, from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it

<sup>39</sup> *Owens Bank Ltd. v. Fulvio Bracco and Bracco Industria Chimica SpA*, (Case C-129/92) [1994] ECR I, paragraph 17.

<sup>40</sup> The Regulation No 44/2001 will not apply either to judgments given by courts of Member States which purport to annul, modify or otherwise enforce arbitral awards. According to the CJEU 'by excluding arbitration from the scope of the Convention [Regulation] on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts' (*Marc Rich*); P. Wautelet, *Brussels I Regulation – A Commentary*, Sellier, 2007, pp. 529-549. See also *Arab Business Corp. Int. Finance & Investment Co. v. Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep. 485 (Q.B.D.), paragraph 227 (no application of the Regulation to a judgment enforcing an award).

necessarily amounts to stripping that court of the power to rule on its own jurisdiction under Brussels I Regulation.

- 4.50.** This leads the CJEU to first conclude that an anti-suit injunction by a Member State is contrary to the general principle that every court seized itself determines, under the rules applicable to it, whether it has jurisdiction to resolve the dispute before it.<sup>41</sup> and that the Brussels I Regulation prohibits a court of a Member State to rule on the jurisdiction of another court. According to the CJEU, these provisions include provisions on the scope of the Brussels I Regulation.
- 4.51.** However, in the *Gazprom* case the Lithuanian Supreme Court claimed that an arbitration award in question was an anti-suit injunction, as defined in the relevant case law.
- 4.52.** A national court, seized with a request to recognise and enforce an anti-suit injunction delivered by an arbitration tribunal is free to reject the same, where the arbitration in this respect exceeds its competence (Article V(1)(c) of the New York Convention) or the subject matter of the arbitration award is not capable of settlement by arbitration under the law of the country of enforcement (Article V(2)(a) of the New York Convention). Hence a court dealing with an issue of enforcement may verify jurisdiction of the primary court under the New York Convention. This aspect alone is different from the framework of the Brussels I Regulation, serving as a basis for the case law in *West Tankers*.
- 4.53.** However, in the event a court dealing with an issue of enforcement finds that the arbitration did have jurisdiction, there is nothing in the Brussels I Regulation preventing the courts of the Member States, dealing with the issues of enforcement, from recognising and enforcing an arbitration award in question. The Brussels I Regulation primarily seeks to avoid restriction of the freedom of the parties to assign a dispute to arbitration. In those cases where the Union legislator has restricted the substantive scope of arbitration, the court of a Member State dealing with an issue of enforcement may, as stated above, refuse recognition of an arbitration award (Article V(2)(a) of the New York Convention).
- 4.54.** Unlike the judgment in *West Tankers*, the *Gazprom* case involved agreement by the parties as grounds for an enforceable arbitration award. It is essentially the right and duty of the court dealing with the enforcement issue to verify the effect and scope of the same agreement (Article V(1)(c) of the New York Convention). Furthermore, the arbitration tribunal proper,

<sup>41</sup> *West Tankers*, paragraph 29.

contrary to the original court in the *West Tankers* judgment, is not governed by the Brussels I Regulation.

- 4.55. Given that lastly the Brussels I Regulation imposes no duty to recognise and enforce arbitrational awards, there is nothing to prevent a court dealing with the issue of enforcement to refuse recognition and enforcement of an arbitration award as ,contrary to the public policy of the country' (Article V(2)(b) of the New York Convention). However, it is not the duty of the Court of Justice to investigate how this should be interpreted, as the issue at hand relates to interpretation of the New York Convention.<sup>42</sup>

## VII. The Gazprom case

- 4.56. On the 13th of May 2015, the CJEU handed down judgment in the *Gazprom* case. The CJEU's judgment has been much anticipated because, in December 2014, Advocate General Wathelet handed down an opinion in which he deployed Recital 12 of EU Regulation 1215/2012 (the 'Recast')<sup>43</sup> and argued that it overturned the *West Tankers* prohibition on intra-EU court anti-suit injunctions in support of arbitration.<sup>44</sup>
- 4.57. Although the *Gazprom* case was decided under the Brussels I Regulation, the Recast has replaced that instrument with respect to proceedings commenced in the EU courts on or after the 10<sup>th</sup> of January 2015. Recital 12 therein aimed to strengthen the arbitration exclusion in order to address a number of the wider problems raised by *West Tankers*.
- 4.58. The new Recital 12 states that when the court of the Member State is presented with a valid arbitral award under the New York Convention and a conflicting judgment by another court

<sup>42</sup> See also Peter Rutledge, *Convergence and Divergence in International Dispute Resolution*, J. DISP. RESOL. 49 (2012); Jan-Jaap Kulpers, *Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice*, 10 GERMAN LJ 1505 (2009); Daniel Rainer, *Impact of West Tankers on Parties' Choice of a Seat of Arbitration*, 95 THE CORNELL L. REV. 431 (2009).

<sup>43</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 20 December 2012, L 351/1. The recast provided clarifications on the application of the legislation to arbitration proceedings. It preserved and further strengthened the arbitration exception pursuant to Article 1.2(d), as in the previous version of the legislation. This was also reiterated in a new Recital 12, which defined the scope of the arbitration exception. Thus, the fact that the Recast of the Regulation dedicated a whole new emphasis to the arbitration exception in the Recital 12 of the legislation makes the arbitration exception even more absolute.

<sup>44</sup> AG Wathelet relied heavily on the Recast Brussels Regulation, which came into force on the 10<sup>th</sup> of January 2015. Interestingly, AG Wathelet's justification for relying on the Recast Brussels Regulation was that 'the main novelty of that regulation, which continues to exclude arbitration from its scope, lies not so much in its actual provisions but rather in recital 12 in its preamble, which in reality, somewhat in the manner of a retroactive interpretative law, explains how that exclusion must be and always should have been interpreted' (see paragraph 91 of the Opinion). The Opinion therefore concluded that the correct interpretation of the Brussels Regulation is that courts of a Member State are not compelled to refuse to recognize and enforce an anti-suit injunction issued by an arbitral tribunal.

of a Member State that is enforceable under the Brussels I Regulation, the *New York Convention* (i.e., the enforcement of the arbitral award) takes precedence over the Brussels I Regulation (i.e., the enforcement of the court judgment) even in the case of inconsistent decisions.

- 4.59.** Turning first to the AG's opinion, he considered that there was nothing in the Brussels I Regulation which required the court to refuse to recognise the tribunal's anti-suit award. In reaching this view he deployed two separate lines of reasoning. First, he stated that, although the case was decided under the Brussels I Regulation, Recital 12 of the Recast was still relevant, as it showed how the arbitration exclusion must and always should have been interpreted. Further, in his view, Recital 12 of the Recast made it clear that, contrary to the CJEU's decision in *West Tankers*, an EU court could grant an anti-suit injunction against court proceedings elsewhere in the EU in support of arbitration. That being the case, there was also nothing in the tribunal's award which offended the Brussels I Regulation.<sup>45</sup>
- 4.60.** This reasoning had not only supported the power of an EU seated tribunal to grant an anti-suit award against court proceedings elsewhere in the EU, but had also permitted an EU court to do the same.
- 4.61.** The AG's second line of reasoning was more conventional. He said that in any event, the matters in dispute were simply untouched by the Brussels I Regulation and should be left to national arbitration law to decide. Accordingly, arbitral tribunals are not bound by the Brussels I Regulation, and, likewise, recognition and enforcement of an award are simply not subject to it.<sup>46</sup>
- 4.62.** In its judgment the CJEU followed the AG's second line of reasoning and held that there was nothing in the Brussels I Regulation that precluded an EU court from giving effect to an anti-suit award made by an arbitral tribunal. This should be left to be determined by the national arbitration law applicable

<sup>45</sup> See also Chukwudi Paschal Ojiegbe, *From West Tankers to Gazprom: anti-suit injunctions, arbitral anti-suit orders and the Brussels I Recast*, 11(2) JOURNAL OF PRIVATE INTERNATIONAL LAW 267-294 (2015); Jennifer Lavelle, *The rebirth of anti-suit injunctions in support of arbitration*, 15(1) SHIPPING AND TRADE LAW 1-3 (2015).

<sup>46</sup> The AG rejected the Lithuanian Court's reliance on Article 71(2) of the Regulation. Article 71(2) deals with, among other things, the application of the provisions of the Regulation which concern the procedure for recognition and enforcement of judgments, where there is a convention between the Member State where a judgment originated and the Member State in which it is sought to be enforced, which lays down conditions for the recognition and enforcement of judgments. The provision was not applicable as the arbitral award was not a 'judgment' within the definition in the Regulation. Furthermore, arbitration was clearly excluded from the scope of the Regulation. Recognition and enforcement of the award should be governed by the New York Convention alone.

- in the state of enforcement, including incorporation of any international obligations under, say, the New York Convention.<sup>47</sup>
- 4.63.** The CJEU recalled *West Tankers* and explained that the reason for the prohibition on intra-EU court anti-suit injunctions established by that case is that the EU courts are to be left to determine their jurisdiction for themselves. Review of one's decision by another is therefore generally prohibited. However, in the CJEU's view this type of conflict was simply not in issue here as the order originated from an arbitral tribunal, not a court.<sup>48</sup>
- 4.64.** In addition, the CJEU pointed out that a further reason for the prohibition on anti-suit injunctions between the EU courts is that they run counter to the mutual trust between them. Further, they are also liable to bar an applicant who challenges the validity of an arbitration clause from access to the EU court in which it has brought proceedings. In the CJEU's view, again, there was no violation of these principles in the *Gazprom* case. This is true firstly because an arbitral tribunal, not a court, had made the order. Additionally, it is true because the litigant remains free to contest the recognition and enforcement of that award before the relevant court.<sup>49</sup>
- 4.65.** Finally, unlike a court-ordered injunction, the consequence of non-compliance with the arbitral award would not be court-ordered penalties. This difference in legal effect, in the CJEU's view, provided another basis upon which to distinguish its judgment in *West Tankers*.<sup>50</sup>

## VIII. Observations and Conclusions

- 4.66.** It can be rightly concluded that the CJEU's judgment in the *Gazprom* case is a positive one for EU seated arbitrations. The immediate result is to confirm that the Brussels I Regulation

<sup>47</sup> As noted by the CJEU in *Gazprom*:

'proceedings for the recognition and enforcement of an arbitral award such as that at issue in the main proceedings are covered by the national and international law applicable in the Member State in which recognition and enforcement are sought, and not by Regulation No 44/2001. Thus, in the circumstances of the main proceedings, any potential limitation of the power conferred upon a court of a Member State — before which a parallel action has been brought — to determine whether it has jurisdiction would result solely from the recognition and enforcement of an arbitral award, such as that at issue in the main proceedings, by a court of the same Member State, pursuant to the procedural law of that Member State and, as the case may be, the New York Convention, which govern this matter excluded from the scope of Regulation No 44/2001; paragraphs 41-42.

<sup>48</sup> *Gazprom*, paragraphs 32-33 and 35-36.

<sup>49</sup> *Gazprom*, paragraphs 34, 37-39.

<sup>50</sup> *Gazprom*, paragraph 40. See also Jae Sundaram, *Does the judgment of the CJEU in Gazprom bring about clarity on the grant of anti-suit injunctions under the Brussels I Regulation?* 27 THE DENNING LAW JOURNAL 303-322 (2015); Trevor C. Hartley, *Antisuit injunctions in support of arbitration: West Tankers still afloat*, 64(4) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 965-975 (2015).

does not tie an EU court's hands with respect to the effect to be given to an anti-suit award issued by a tribunal seated elsewhere in the EU. Of course, whether or not such an award has any effect in that court will depend on an application of that court's own arbitration law, but taking the Brussels I Regulation out of this equation is an endorsement of the primacy of, in particular, the New York Convention.<sup>51</sup>

- 4.67.** The *Gazprom* judgment had clearly reinforced the arbitration exception of the Brussels Regulation. The CJEU had agreed with Gazprom's position that arbitral tribunals are not courts of a State and the latter had also enabled the CJEU to reject the mutual trust argument of the Supreme Court of Lithuania. The CJEU emphasized that as the order has been made by an arbitral tribunal there can be no question of an infringement of that principle by the interference of a court of one Member State in the jurisdiction of the court of another Member State. What is of significant importance to anti-suit injunctions in general is that the CJEU had specifically noted that an 'arbitral tribunal's prohibition of a party from bringing certain claims before a court of a Member State cannot deny that party judicial protection.' The latter is also a clear rejection of the arguments presented by the Lithuanian courts. Further to that point, the CJEU's acknowledgment that 'the legal effects of an arbitral award such as that at issue in the main proceedings can be distinguished from those of the injunction' is a clear agreement with the argument that the SCC award in question was not an anti-suit injunction at all.
- 4.68.** Furthermore, although the judgment is, strictly speaking, about the effect to be given to such an award, it also confirms that any power the arbitral tribunal itself has to grant such relief is not fettered by the Brussels I Regulation. This is clear from the parts of the CJEU's ruling, cited above, which, in short, reject any argument that the CJEU jurisprudence concerning concurrent court proceedings and mutual trust and confidence under the Brussels I Regulation finds any application when considering

<sup>51</sup> It is noted that in its judgment of the 23 October 2015 the Supreme Court of Lithuania had granted recognition and enforcement of the SCC award by which the Ministry was obliged to withdraw certain claims from Lithuanian courts against Gazprom's former officials. The Lithuanian Supreme Court had noted that when a party concludes an arbitration agreement, it voluntarily limits its right to refer to the court. The measures taken by the arbitration tribunal in this case just protected the will of the parties regarding the method of dispute resolution chosen by them and the arbitration procedure itself. The Supreme Court had also held that recognition and enforcement of an arbitration award in the Republic of Lithuania, by which a party is precluded from litigation in a court, has no impact on the courts' right to decide on their jurisdiction or to examine the merits of the case. See the judgment of the 23<sup>rd</sup> of October 2015 the Supreme Court of Lithuania, available at:

[http://res.cloudinary.com/lbresearch/image/upload/v1446738164/2015\\_10\\_23\\_gp\\_enmin\\_scl\\_ruling\\_scc\\_award\\_recognition\\_en\\_002\\_510115\\_1542.pdf](http://res.cloudinary.com/lbresearch/image/upload/v1446738164/2015_10_23_gp_enmin_scl_ruling_scc_award_recognition_en_002_510115_1542.pdf) (accessed on 27 December 2017).

the interface between the actions of an arbitral tribunal and an EU court. This is an important finding for proceedings that fall under the Brussels I Regulation not only because it allows the tribunal to make the type of award in issue in the case but because, more generally, the ability of an EU seated tribunal to press on with its proceedings in the face of court proceedings elsewhere in the EU has provided an important antidote to the effect of the *West Tankers* ruling.<sup>52</sup> Importantly, *West Tankers* was particularly distinguished on the basis that in the facts at issue, there was no competing court in another Member State, and hence no scope for the principle of mutual trust to be violated.

- 4.69. However, it should be mentioned that the *Gazprom* judgment does not solve all issues. The Court suggested that where competition with a court in another Member State is at issue the Brussels I Regulation might take the upper hand, as it did in *West Tankers*. Further, it must be remembered that the award still has to go through the national court's standard recognition and enforcement process, outside the framework of the Regulation, and is instead governed by national residual law as well as the New York Convention. Both of these, including through a public policy arena, might still offer quite a remit for the relevant courts to refuse recognition.



### Summaries

**FRA** [*Les « anti-suit injunctions » émises par les tribunaux arbitraux et le droit de l'Union européenne : les affaires West Tankers et Gazprom*]

*Le présent article examine les relations entre le droit national, le droit de l'Union européenne et la procédure d'arbitrage au regard des « anti-suit injunctions » émises par les tribunaux arbitraux. Il analyse et compare les conclusions de la Cour de justice de l'Union européenne (CJUE) dans les affaires West Tankers et Gazprom, en se concentrant sur la relation entre l'« anti-suit injunction » et la procédure d'arbitrage. Nous sommes d'avis que l'arrêt rendu dans l'affaire Gazprom a fortement contribué*

<sup>52</sup> See Stephen Lacey, Are Anti-Suit Injunctions Back on the Menu? Part 2: The CJEU's Decision in *Gazprom*. 15 May 2015. At: <http://kluwerarbitrationblog.com/2015/05/14/are-anti-suit-injunctions-back-on-the-menu-part-2-the-cjeus-decision-in-gazprom/>, EU - The *Gazprom* decision: CJEU upholds the ability of arbitral tribunals to defend their own jurisdiction, available at: [http://www.linklaters.com/pdfs/mkt/london/130515\\_gazprom\\_szlacey.pdf](http://www.linklaters.com/pdfs/mkt/london/130515_gazprom_szlacey.pdf) (accessed on 27 December 2017).

*à l'exclusion de la procédure d'arbitrage du champ d'application du règlement « Bruxelles I ». Comme les tribunaux d'arbitrage ne sont pas des juridictions étatiques, la CJUE a réfuté l'argument de la confiance mutuelle entre les juridictions nationales. En outre, la CJUE a expressément déclaré que l'interdiction faite par un tribunal arbitral à une partie de présenter certaines demandes devant une juridiction d'un État membre ne saurait priver cette partie de la protection juridictionnelle ; cette constatation est d'une grande importance pour la problématique des « anti-suit injunctions ». La compétence du tribunal arbitral pour émettre une telle décision n'est pas limitée par le règlement « Bruxelles I ». En même temps, la Cour a constaté que la sentence doit être soumise à une procédure habituelle de reconnaissance et d'exécution devant une juridiction nationale. Cette procédure ne tombe pas sous le coup du règlement en question, mais doit respecter les dispositions du droit national, ainsi que la Convention de New York.*

**CZE** [Institut „anti-suit injunctions“ vydávaný rozhodčími soudy v právu Evropské unie – případy *West tankers & Gazprom*]

Tento článek pojednává o vztahu mezi vnitrostátním právem, právem Evropské unie a rozhodčím řízením ve vztahu k tzv. „anti-suit injunctions“ vydávaným rozhodčími soudy. Článek analyzuje a srovnává závěry Soudního dvora Evropské unie (SDEU) v případech *West Tankers* a *Gazprom*, konkrétně v kontextu vztahu mezi anti-suit injunction a rozhodčím řízením. Autoři zastávají názor, že rozsudek ve věci *Gazprom* jednoznačně posílil vyloučení rozhodčího řízení z věcného rozsahu Nařízení Brusel. Rozhodčí soudy nejsou soudy státu, přičemž obecné soudy rovněž umožnily SDEU odmítnout argument vzájemné důvěry. Důraz je kladen na skutečnost, že pro anti-suit injunctions obecně je velmi významné to, že SDEU výslovně poznamenal, že zákaz vznášet určité nároky u soudu členského státu vyslovený rozhodčím soudem ve vztahu ke straně řízení nemůže této straně upřít soudní ochranu. Bylo zjištěno, že pravomoc, kterou je rozhodčí soud nadán k vydání takového rozhodnutí, není Nařízením Brusel I omezena. Bylo však rovněž zjištěno, že nález musí i tak projít standardním procesem uznání a výkonu u vnitrostátního soudu, mimo rámec Nařízení, a místo něj se

*musí řídit ostatními ustanoveními vnitrostátního práva, jakož i Newyorskou úmluvou.*



**POL** [*Instrument anti-suit injunctions wydawany przez sądy polubowne w prawie Unii Europejskiej – sprawa West tankers & Gazprom*]

*Artykuł omawia relację między prawem krajowym, prawem Unii Europejskiej i postępowaniem sądowym w odniesieniu do tzw. „anti-suit injunctions“ wydawanych przez sądy polubowne. Artykuł analizuje i porównuje wnioski TSUE w sprawie West Tankers i Gazprom, konkretnie zaś w kontekście relacji między anti-suit injunction i postępowaniem arbitrażowym.*

**DEU** [*Das Institut des Prozessführungsverbots in der Form von seitens Schiedsgerichten unter EU-Recht verhängten „Anti-suit Injunctions“ – die Fälle West tankers und Gazprom*]

*Dervorliegende Beitrag handelt die Wechselbeziehungen zwischen innerstaatlichem Recht, EU-Recht und Schiedsverfahren ab, die im Falle der Verhängung von sog. „Anti-Suit Injunctions“ durch Schiedsgerichte zum Tragen kommen. Dazu analysiert und vergleicht der Beitrag die vom EuGH in den Fällen West Tankers und Gazprom gezogenen Schlüsse, konkret innerhalb des Kontexts der Beziehung zwischen Prozessführungsverbot einerseits und Schiedsverfahren andererseits.*

**RUS** [*Институт «anti-suit injunctions», выносимых арбитражными судами в законодательстве Европейского союза — дела West Tankers и Газпрома*]

*В этой статье рассматривается взаимосвязь между национальным законодательством, законодательством Европейского союза и арбитражем по отношению к т. н. «anti-suit injunctions», выносимым арбитражными судами. В статье анализируются и сравниваются выводы Суда Европейского союза в делах West Tankers и Газпрома, в частности, в контексте отношения «anti-suit injunction» - арбитраж.*

**ESP** [*Instituto “anti-suit injunctions” dictado por los tribunales de arbitraje en la legislación de la Unión Europea: los casos de West tankers & Gazprom*]

*El artículo trata de la relación entre la legislación interna del Estado, la legislación de la Unión Europea y el procedimiento arbitral con respecto a los llamados “anti-suit injunctions”*

*dictados por los tribunales de arbitraje. Se analizan y se comparan las conclusiones del TJUE en los casos West Tankers y Gazprom en el contexto de la relación entre el anti-suit injunction y el procedimiento arbitral.*



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