The primary purpose of an anti-suit injunction is to enable a court or arbitral tribunal to prevent a respondent from commencing or continuing legal proceedings in another jurisdiction or forum, and thereby violating the sanctity and frustrating the intended effects of an arbitration or jurisdiction agreement.

In previous years, various decisions of the Court of Justice of the European Union have diminished the availability of this instrument. The *Gasser*[1] and *Turner*[2] cases, underpinned by the Brussels I Regulation,[3] provide authority for the principle that the member state court first seized of a dispute shall determine whether it has jurisdiction to resolve it, even in circumstances where the proceedings have been issued in breach of a jurisdiction agreement in favor of the court of another member state. As a result of these landmark decisions, it became impermissible for the court of a chosen forum to grant anti-suit injunctions restraining the proceedings before the court first seized, as this was seen to constitute an inadmissible interference with the ability of the first-seized court to rule on its own jurisdiction.

Nevertheless, member state courts continued for some time to grant anti-suit injunctions in connection with arbitrations by relying on the provision contained in Article 1(2)(d) of the Brussels I Regulation, which excludes arbitration from its scope. This was the case until the ECJ extended the effect of *Turner* and *Gasser* in the West *Tankers* case[4] by ruling that it is inconsistent with the Brussels I Regulation for a member state court to grant an anti-suit injunction restraining a party from commencing or continuing proceedings in breach of an arbitration agreement. Despite the fact that the arbitration proceedings fell within the arbitration exclusion in Article 1(2)(d), the decision was reached in deference to the principles of mutual trust and jurisdictional comity at the core of the regulation, and on the reasoning that to allow the grant of an anti-suit injunction in those circumstances "necessarily amounts to stripping [the court first seized] of the power to rule on its own jurisdiction."[5]

On Dec. 6, 2012, the EU Council approved a new regulation, the Recast Regulation,[6] which
has replaced the Brussels I Regulation and now applies to any proceedings commenced in the EU on or after Jan. 10, 2015.

In late 2014, the opinion of Advocate General Melchior Wathelet in the Gazprom[7] case sparked a lively debate on the potential for wider availability of anti-suit injunctions, and whether the decision in West Tankers would be reversed, under the Recast Regulation. Gazprom concerned a referral from the Lithuanian Supreme Court, asking the CJEU whether it might refuse to recognize an anti-suit injunction issued by an arbitral tribunal on the grounds that it would restrict its "right to determine itself whether it has jurisdiction to hear the case under the rules on jurisdiction in the Brussels I Regulation."[8]

On Dec. 4, 2014,[9] AG Wathelet concluded that intra-EU court anti-suit injunctions in support of arbitration were permissible and that there is nothing in the Brussels Regulation regime to the contrary. Despite the Recast Regulation only applying to proceedings commenced on or after Jan. 10, 2015, AG Wathelet opined that the Recast Regulation is a statement of the law as it should always have been interpreted; in effect, a "retroactive interpretative law."[10] He relied, in particular, on paragraph four of Recital 12 which retains and strengthens the arbitration exclusion in Article 1(2)(d);[11] "this Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award." While the Recast Regulation does not explicitly refer to anti-suit injunctions, AG Wathelet considered that the scope of the term "ancillary proceedings" necessarily included anti-suit injunctions issued by member state courts in support of arbitration.

His opinion went on to criticize the decision in West Tankers for having extended the scope of the Brussels I Regulation to arbitration in a way that could undermine the effectiveness of the Brussels Regulation regime as a whole.

In the eagerly awaited decision of the CJEU on May 12, 2015,[12] the CJEU agreed with AG Wathelet that there is nothing in the Brussels I Regulation that precludes a member state court from giving effect to an anti-suit injunction made by an arbitral tribunal. Instead, member states courts should recognize and enforce arbitral awards, including any anti-suit injunctions thereunder, under their national arbitration laws and the New York Convention.[13]

However, the CJEU did not share AG Wathelet's view that the Recast Regulation should be
used to interpret the Brussels I Regulation and did not consider the Recast Regulation as applicable in its judgment. The CJEU noted that its decision was consistent with *West Tankers* because, while the anti-suit injunction in *Gazprom* had been issued by an arbitral tribunal, *West Tankers* had concerned conflicts of jurisdiction between courts of member states: "the referring court is asking the Court not whether such an injunction issued by a court of a Member State is compatible with Regulation No 44/2001, but whether it would be compatible with that regulation for a court of a Member State to recognise and enforce an arbitral award ordering a party to arbitration proceedings to reduce the scope of the claims formulated in proceedings pending before a court of that Member State."[14]

By making it clear that this case fell to be determined by the Brussels I Regulation and without reference to the Recast Regulation, and by failing to take the opportunity to revisit *West Tankers* in light of Recital 12 of the Recast Regulation, the CJEU avoided addressing the most controversial aspect of AG Wathelet's opinion - whether Recital 12's scope permits intra-EU court anti-suit injunctions in support of arbitration. In doing so, the CJEU has undoubtedly created future problems for itself. By leaving the point open as to whether anti-suit injunctions fall within the definition of the term "ancillary proceedings" as excluded from the scope of the Recast Regulation, the CJEU has done nothing to douse the debate on the compatibility of anti-suit injunctions with the Recast Regulation. This will provide an attractive opportunity for litigants in proceedings falling under the Recast Regulation, which includes the expanded provisions of Recital 12, to attempt to use AG Wathelet's opinion as a tool to reopen *West Tankers* and to argue that the revival of the anti-suit injunction should be contemplated.

However, when the inevitable occasion arises for the CJEU to provide clarification on this point, these hopeful litigants may very well be disappointed. The question as to whether the Recast Regulation provides for the reintroduction of anti-suit injunctions in an EU context will depend on how its scope is determined. The likelihood that the CJEU will share AG Wathelet's reading of the Recast Regulation and, in particular, his interpretation of Recital 12, is low. While Recital 12 does provide a more elaborate and defined arbitration exclusion than that previously in the Brussels I Regulation, and while the fourth paragraph of Recital 12 expressly states that "ancillary proceedings" related to an arbitral process fall outside the scope of the Recast Regulation, it does not appear to go far enough to resurrect anti-suit injunctions in the EU context and reverse *West Tankers*. In order for it to have, and have been intended to have, this effect explicit language permitting anti-suit injunctions would be expected within the recital.
It should firstly be borne in mind that the CJEU has already confirmed in *West Tankers* that even where proceedings leading to an anti-suit injunction fall outside the scope of the regulation, this will not necessarily preclude the involvement of the regulation where the effect of that anti-suit injunction is to obstruct another member state court's right to determine its own jurisdiction.

Furthermore, given that the principles of mutual trust and jurisdictional comity are just as central to the Recast Regulations as they were to the Brussels I Regulation, any attempt to reverse *West Tankers* seems set to fail.

Despite the flicker of hope ignited by AG Wathelet's opinion in *Gazprom*, it seems likely on all analyses that the CJEU will maintain the *West Tankers* position that anti-suit injunctions where issued by the court of another member state will remain impermissible under the Recast Regulation. The CJEU's decision in *Gazprom* makes clear that the best solution for a party subject to foreign proceedings in breach of an agreement to arbitrate will be to seek an injunction from its arbitral tribunal, or under the emergency procedures available to them under the applicable rules, and then enforce that award before the court of the member state.

By Serena Cooke (Associate) and Nicola Conway (Trainee Solicitor) in Bryan Cave's London office.

*This article was first published by Law360.*

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[7] Case C-536/13 'Gazprom' OAO [2015]

[8] Case C-536/13 'Gazprom' OAO [2014], Opinion of Mr Advocate General Wathelet,
[9] Case C-536/13 'Gazprom' OAO [2014], Opinion of Mr Advocate General Wathelet

[10] Case C-536/13 'Gazprom' OAO [2014], Opinion of Mr Advocate General Wathelet, paragraph 91


[12] Case C-536/13 'Gazprom' OAO [2015]


[14] Case C-536/13 'Gazprom' OAO [2015], paragraph 35

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