Gazprom, anti-suit injunctions and arbitration: the debate goes on

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Since the ECJ’s ruling in *West Tankers* in 2009, the courts of EU member states have been unable to grant anti-suit injunctions as a means of enforcing arbitration agreements. Since then, the Brussels Regulation has been recast, reviving the debate about the scope of the arbitration exception and the availability of anti-suit injunctions in support of arbitration. In December 2014, the Advocate General of the CJEU delivered an Opinion in the *Gazprom* case which raised the possibility that the CJEU would overturn the decision in *West Tankers* and revive the anti-suit injunction in Europe as a means of enforcing arbitration agreements. The CJEU has now delivered its much anticipated judgment.

**Anti-suit injunctions and arbitration**

In *West Tankers* (C185/07), the ECJ (as was) ruled that it was incompatible with the Brussels Regulation for a court of an EU Member State to grant an injunction restraining a party from commencing or continuing court proceedings brought in breach of an arbitration agreement. In reaching this decision, the ECJ held that if proceedings came within the scope of the Regulation then a preliminary issue concerning the validity of an arbitration agreement also came within the scope of the Regulation.
The decision was criticised by the international arbitration community for extending the scope of the Brussels Regulation to arbitration in a way that undermined the effectiveness of arbitration agreements. Critics argued that the decision gave parties free rein to ignore arbitration agreements and to commence proceedings in their preferred court concerning the existence or validity of an arbitration agreement in order to delay or frustrate an arbitration: so-called “torpedo” actions.

**The recast Brussels Regulation and the arbitration exception**

The *West Tankers* decision highlighted the difficulties faced by the courts in applying the arbitration exception in Article 1(2)(d) of the Brussels Regulation and the EU Commission noted the criticism of the decision when recasting the Brussels Regulation.

The recast Brussels Regulation came into force on 10 January 2015. The recast Regulation retains the arbitration exception in Article 1(2)(d) but includes a new Recital 12, which is intended to clarify how the arbitration exception should be applied and interpreted.

Recital 12 makes it clear that:

1. 1. the Regulation should not prevent the courts of a member state from examining whether an arbitration agreement is null and void, inoperative or incapable of being performed in accordance with their own national law;

1. a ruling given by a court of a member state as to the validity or existence of an arbitration agreement falls within the arbitration exception and is not subject to the rules of recognition or enforcement set out in the Regulation regardless of whether the court decided this as a principal issue or as an incidental question; and

1. the Regulation does not apply to any ancillary proceedings relating to the conduct of the arbitration or any action concerning the recognition and enforcement of an award.

Recital 12 dealt in part with the *West Tankers* issue. Under the recast Regulation, a “torpedo”
action will not prevent the courts of another member state from considering the validity of an arbitration agreement and the courts of member states are not bound by the decision of the court of another member state on this question. However, it was not clear whether anti-suit injunctions in support of arbitration remained prohibited under the recast Regulation

**The Gazprom case**

The *Gazprom* case concerned an appeal brought by Gazprom against the refusal of the Lithuanian Court of Appeal to recognise and enforce an arbitral award declaring that an arbitration clause in a shareholders’ agreement had been breached and ordering the Respondent (the Ministry of Energy of the Republic of Lithuania) to withdraw or limit some of the claims that it had brought before the Regional Court in Vilnius.

The Supreme Court of Lithuania characterised the award as an anti-suit injunction as it ordered the Ministry of Energy to withdraw some of the claims it had submitted to the court. In that sense, the award resembled the English anti-suit injunction that formed the decision in *West Tankers*. The Supreme Court referred the question of whether an EU Member State can refuse to recognise and enforce an arbitral award that contains an anti-suit injunction on the grounds that it is inconsistent with the Brussels Regulation.

**The Opinion of the Advocate General**

In December 2014, the Advocate General handed down his Opinion. Interestingly, whilst the reference concerned the application of the Brussels Regulation, not the recast Regulation, the Advocate General expressed the view that the CJEU should take the recast Regulation into account because Recital 12, which he characterised as “*a retroactive interpretative law*”, explained how the arbitration exclusion “*must be and always should have been interpreted*.”

The Advocate General went on to deliver a thorough appraisal of the scope of Recital 12 before concluding that, had *West Tankers* been brought under the regime of the recast Regulation, the anti-suit injunction issued by the English courts would not have been held to be incompatible with the Brussels Regulation. His reasoning for this was that Recital 12
makes it clear that the verification of the validity of an arbitration agreement is excluded from the scope of the Regulation, regardless of whether the court decides this as a principal issue or as an incidental question. Further, the Regulation does not apply to any proceedings ancillary to arbitration which, in his view, covered anti-suit injunctions issued by the national courts in their capacity as the court supporting the arbitration.

The judgment of the CJEU

On 13 May 2015, the CJEU delivered its judgment. The court held that anti-suit injunctions issued by an arbitral tribunal are not prohibited by the Brussels Regulation. However, the CJEU did not address the wider arguments relating to the possible effects of Recital 12 on the interpretation of the Regulation and did not revisit the decision in *West Tankers*. Instead, the court based its decision on the fact that the Regulation only governs conflicts of jurisdiction between the courts of Member States and, as arbitral tribunals are not courts, there is no conflict. Further, the principle of mutual trust, which underlies the Regulation, is not infringed by an arbitral award.

The judgment did not address the impact of the recast Brussels Regulation on the decision in *West Tankers*. However, references in the judgment to the *West Tankers* decision and to the fundamental principle of trust which Member States accord to one another’s legal systems which underpins the Brussels Regulation, suggest that the prohibition on anti-suit injunctions issued by the EU member states courts will remain under the recast Regulation.

BLP View

A party faced with actual or threatened court proceedings in an EU Member State brought in breach of an arbitration agreement has two options: to seek relief from the court; and/or to commence the arbitration as soon as possible and seek relief from the arbitral tribunal. The effect of the *Gazprom* judgment is that anti-suit injunctions issued by arbitrators are not prohibited by the Brussels Regulation, whereas the prohibition on anti-suit injunctions issued by the courts of EU Member States remains. The decision allows arbitrators to act in order to protect their jurisdiction and, until such time as the CJEU reconsiders the *West Tankers*
decision, this may be the best option for parties seeking to enforce arbitration agreements.

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