

# Are Anti-Suit Injunctions Back on the Menu?

## Part 2: The CJEU's Decision in Gazprom

### Kluwer Arbitration Blog

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On 13 May 2015, the CJEU handed down judgment in *Gazprom* (C-536/13). As readers will recall, the case concerns whether an EU court must refuse to give effect to an anti-suit award granted by an EU seated arbitral tribunal on the basis that such a measure is incompatible with EU Regulation 44/2001 (the "**Brussels I Regulation**").

The CJEU's judgment has been much anticipated not only because that point is important, but also because, in December 2014, Advocate General Wathelet (the "**AG**") handed down a surprising opinion in which he (retrospectively) deployed Recital 12 of EU Regulation 1215/2012 (the "**Recast**") and argued that it overturned the *West Tankers* prohibition on intra-EU court anti-suit injunctions in support of arbitration. (Although *Gazprom* fell to be decided under the Brussels I Regulation, the Recast has, of course, replaced that instrument in respect of proceedings commenced in the EU courts on or after 10 January 2015. Recital 12 therein aims to strengthen the arbitration exclusion in order to address a number of the wider problems raised by *West Tankers*).

The following post offers a short recap of the AG's opinion before turning to consider the CJEU's judgment. For the facts of the case, and further background, readers are referred to my previous post on the AG's opinion [here](#).

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. The first was surprising. He stated that, although the case fell to be 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.

This reasoning, if followed by the CJEU, would not only support the power of an EU seated tribunal to grant an anti-suit award against court proceedings elsewhere in the EU, but would also permit an EU court to do the same.

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; arbitral tribunals not being bound by the Brussels I Regulation, and, likewise, recognition and enforcement of an award simply not being subject to it.

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 in the state of enforcement (including incorporation of any international obligations under, say, the New York Convention). Its reasoning was as follows.

First, 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. In the CJEU's view, however, this type of conflict was simply not in issue here as the order originated from an arbitral tribunal, not a court (see paragraphs 32-33 and 35-36 of its judgment)

Second, the CJEU pointed out that a further reason for the prohibition on anti-suit injunctions as 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 here. In the former case because an arbitral tribunal, not a court, had made the order and, in the latter, because the litigant remains free to contest the recognition and enforcement of that award before the relevant court (paragraphs 34,37-39).

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* (paragraph 40).

The CJEU's judgment is a positive one for EU seated arbitrations. The immediate result is to confirm that the Brussels I Regulation does not tie an EU court's hands in respect of 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.

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 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. The CJEU's position fortifies a tribunal's ability to do so free of the Brussels I Regulation (one does not have to look very far for an illustration of the potential mischief that could have been caused by subjecting arbitral tribunals to that instrument's influence, see [here](#)).

Although *Gazprom* was decided under the Brussels I Regulation (given the timing of proceedings in the case) it is worth observing that the observations made above will remain good under the Recast. This is not least because of the even clearer separation between arbitration and court proceedings established by Recital 12 of the Recast, the thrust of which this decision is very much in line with.

As a final point, returning to Recital 12, what about the controversial issues that the AG's opinion raised? In particular; (i) whether Recital 12 is applicable in proceedings under the Brussels I Regulation and (ii) whether Recital 12's scope *permits* intra-EU court anti-suit injunctions in support of arbitration. In relation to (i), although the CJEU does not refer at all to the AG's opinion, nor any of the possible competing arguments, it seems clear that it regarded the case as falling to be determined by the Brussels I Regulation without reference to Recital 12. Such a conclusion is supported by paragraphs 3-7 of its judgment where it confirms that the Brussels I Regulation is the applicable instrument and sets out the provisions of it which are relevant to the case with absolutely no mention of Recital 12.

That being so, the CJEU did not address point (ii). This, in turn, would mean that in proceedings falling under the Recast, in which Recital 12 does apply, the AG's opinion remains as persuasive authority upon which a litigant might argue that an EU court could contemplate resurrection of the anti-suit injunction in the face of court proceedings elsewhere in the EU in breach of an arbitration clause. How long it takes for the point to be taken remains to be seen.

Click [here](#) for the judgment.