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DOES THE JUDGMENT OF THE CJEU IN *GAZPROM* BRING ABOUT CLARITY ON THE GRANT OF ANTI-SUIT INJUNCTIONS UNDER THE BRUSSELS I REGULATION?

Gazprom OAO v Republic of Lithuania (Case C-536/13) [2015] WLR (D) 212

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1. INTRODUCTION

On 13 May 2015 the CJEU delivered the much anticipated judgment in *Gazprom OAO v Republic of Lithuania*.¹ The CJEU had before it issues relating to the grant of anti-suit injunctions by member state courts/arbitral tribunals to enforce arbitration agreements, and also, most importantly if the Brussels I Regulation would apply to the case at hand. The case gains in significance, as the Advocate General (AG) had in December 2014, while giving his opinion on the matter had proceeded to apply a “future law” on a matter pending before the courts, strongly recommended that the CJEU reconsider its judgment handed down in *Allianz v West Tankers (The Front Comor)*.² Earlier, in the *West Tankers* case the CJEU ruled that it was incompatible with the Brussels Regulation for the court of a 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 CJEU held that if proceedings were to come within the scope of the Brussels I Regulation, then a preliminary issue concerning the validity of an arbitration agreement also came within the scope of the Regulation.

On 10 January 2015 the Recast Brussels Regulation,³ which was aimed at clarifying the position on the application of the Brussels

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¹ *Gazprom OAO v Republic of Lithuania* (Case C-536/13) [2015] WLR (D) 212.

² *Allianz SpA v West Tankers Inc (The Front Comor)* (C-185/07) [2009] 1 All ER (Comm) 435.

³ The Recast Brussels Regulation repealed and replaced the Brussels I Regulation in respect of proceedings commenced in the EU on or after 10 January 2015. The

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Convention to arbitral agreements, came into force in the European Union. In the lead up to the CJEU's judgment in the *Gazprom* case, it became important for UK practitioners and those actively engaged in cross-border commerce to know if the English courts will in future be allowed to grant anti-suit injunctions to enforce English arbitration agreements, and thereby uphold the principle of freedom of contract within the EU. Did the CJEU deliver? Was the Recast Brussels Regulation applied to the case at hand, especially when the AG had proceeded to base his opinion using the Recast Brussels Regulation? Is there clarity on the position of granting anti-suit injunctions to enforce agreements within the EU? This article will firstly, analyse the opinion expressed by the AG in the matter, secondly analyse the judgement of the CJEU in the *Gazprom* case, briefly touch upon the relevant provisions of the Recast Brussels Regulation, and seek answers to the questions posed above.

2. FACTS IN GAZPROM OAO V REPUBLIC OF LITHUANIA

In 1999, Gazprom, a Russian company entered into a long-term agreement with the Lithuanian company Lietuvos Dujos AB (Lietuvos) for the supply of gas to the Lithuanian state. Lietuvos was later privatised, where Gazprom, E.ON Ruhrgas and the Republic of Lithuania took equity stakes in accordance with a shareholders agreement. Under the terms of the shareholders agreement, from 2004, the parties were obligated to maintain “fair prices” following the formula set out in the long-term supply agreement. The Lithuanian Ministry of Energy (MoE) was of the view that it was being overcharged by Gazprom, much higher than the prevailing prices in the EU. Suspecting collusion between members of the board of directors, the MoE commenced proceedings in March 2011 against Lietuvos and the Gazprom appointees. The legal action was brought in Vilnius, under Lithuanian laws, seeking a direction from the regional courts requiring Lietuvos to enter into renegotiations to fix a revised price for the gas supplied. The MoE also sought to initiate an investigation under Lithuanian domestic laws.

primary objective of the Recast Brussels Regulation is to remedy some of the perceived defects in the Brussels I Regulation (EC 44/2001). While some provision of the Brussels I Regulation remain (rule on domicile), key changes have been made to rules relating to jurisdiction agreements, to related actions (*lis pendens*), third state (non-EU states) matters, an enhanced arbitration exclusion, etc.

The shareholders agreement between the three principal parties also contained an arbitration clause, which provided for Stockholm Chamber of Commerce arbitration with the seat in Stockholm. Invoking the above arbitration clause, Gazprom, in August 2011 initiated proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce. One of the reliefs sought for was the immediate withdrawal of the legal proceedings brought by the Lithuanian MoE before the national courts in Vilnius in breach of the arbitration agreement. Following a hearing, in July 2012 the Stockholm tribunal declared that the arbitration clause in the shareholders agreement was breached and directed the Lithuanian MoE to withdraw such legal proceedings brought before the courts in Vilnius. Gazprom duly applied to the Lithuanian Court of Appeal for the recognition and enforcement of the arbitral award of July 2012 under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention 1958). The Lithuanian MoE took the stance that recognition of the arbitral tribunal's award would be contrary to Regulation 44/2001. In December 2012, the Court of Appeal rejecting Gazprom's application held that the Stockholm arbitral tribunal did not have the power to rule on an issue *sub judice* before the court in Vilnius, while observing that the arbitral award had the effect of limiting the Lithuanian MoE's capacity to initiate proceedings which was contrary to public policy.

Shortly thereafter, the regional court in Vilnius in the proceedings initiated by the Lithuanian MoE held that investigative measures sought for in the proceedings were clearly within its own jurisdiction and not arbitrable. Lietuvos and the board of directors appointed by Gazprom appealed the above decision of the Vilnius court. The Court of Appeal dismissed Lietuvos' appeal on the ground that an arbitral award limiting the Lithuanian MoE/government's powers was incompatible with the Lithuanian Constitution. Needless to say Lietuvos and Gazprom challenged the appeal court's decision before the Supreme Court of Lithuania. In the proceedings before it, the Lithuanian Supreme Court identified the Stockholm arbitral award to an anti-suit injunction, as it directed the MoE to withdraw some of its claims brought before its domestic courts. The Supreme Court of Lithuania referred the following questions to the CJEU:

- i. Where an arbitral tribunal issues an anti-suit injunction and thereby prohibits a party from bringing certain claims before a court of a Member State, which under the rules on jurisdiction in [Regulation No 44/2001] has jurisdiction to hear the civil case as*

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to the substance, does the court of a Member State have the right to refuse to recognise such an award of the arbitral tribunal because it restricts the court's right to determine itself whether it has jurisdiction to hear the case under the rules on jurisdiction in [Regulation No 44/2001]?

ii. Should the first question be answered in the affirmative, does the same also apply where the anti-suit injunction issued by the arbitral tribunal orders a party to the proceedings to limit his claims in a case which is being heard in another Member State and the court of that Member State has jurisdiction to hear that case under the rules on jurisdiction in [Regulation No 44/2001]?

iii. Can a national court, seeking to safeguard the primacy of EU law and the full effectiveness of [Regulation No 44/2001], refuse to recognise an award of an arbitral tribunal if such an award restricts the right of the national court to decide on its own jurisdiction and powers in a case which falls within the jurisdiction of [Regulation No 44/2001]?

After receipt of the opinion from the AG, and hearing the arguments of parties to the dispute, the CJEU delivered its judgement on the matter on 13 May 2015. It is also to be noted that in the interregnum, on 10 January 2015 the Recast Brussels Regulation⁴ came into force in the EU.

The Advocate General's Opinion

In December 2014, Advocate General Wathelet⁵ presented his opinion in response to the three questions referred to the CJEU by the Supreme Court of Lithuania, in the *Gazprom* case. The Advocate General⁶ (herein

⁴ Council Regulation (EC) 1215/2012 of 12 December 2012.

⁵ Advocate General, Melchior Wathelet was a judge of the ECJ between the years 1995 and 2003.

⁶ The functions of the Advocate General is set out in Article 166 EEC Treaty, as follows: *It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it in Article 164.* See JW Bridge, 'The Court of Justice of the European Communities and the Prospects for International Adjudication' in MW Janis (ed.) *International Courts for the Twenty First*

after AG) in his opinion to the CJEU, sought to strike a right balance between the Brussels I Regulation and the New York Arbitration Convention 1958 in matters relating to recognition of awards passed by arbitral tribunals which are in the nature of anti-suit injunctions. Although not binding, the AG's opinion is seldom rejected by the CJEU in practice.⁷ The three questions referred to the CJEU by the Supreme Court of Lithuania, and the opinion of the AG can be summarised as follows:

Question 1: The first question “whether a EU Member State court can refuse to recognise an arbitral award on the grounds that it would restrict its right to determine itself if it has jurisdiction to hear the case under the Regulation No 44/2001” required an analysis of whether under the scheme of the Brussels I Regulation it was permissible to enforce an arbitral award. The AG was not in agreement with the Lithuanian Supreme Court's reliance on Article 71⁸ of the Regulation, which gives the

Century' (Kluwer 1992) 87-104, 96. The AG's office is an institution modeled on French legal procedure with the AG having a function in relation to the ECJ, similar to that of the *Commissaire du Gouvernement* to the *Conseil d'Etat*. Most importantly, an AG is expected to possess the same professional qualifications as the judges and is appointed by common accord of the Governments of the Member States on the same terms as the judges.

⁷ The key function of the AG, in practice, is to assist the judges of the ECJ by offering a reasoned opinion on the case before it. The AG's opinion is purely personal and does not represent the views of the Community, the Member States, or the Court. Further, the Court is not obliged to follow the opinion of the AG and can disregard them. See DAC Freestone & JS Davidson, *The Institutional Framework of the European Communities* (Routledge 2005) 135-136. The authors also point out that the office of AG has had a significant impact upon the style of the ECJ, and the opinions presented by the AGs have proved to be a fruitful source for the development of the Court's jurisprudence. See also JW Bridge (n 6). The AG acts as a defender of law and justice in the context of the Community Treaties. The author points out that the AG's professional competence, and the nature of the opinions submitted before the courts, makes the office comparable to that of a judge of the first instance, whose opinions are never binding but are always subject to review by the ECJ.

⁸ Article 71 of Council Regulation 44/2001 reads as follows:

1. *This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.*

2. *With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:*

(a) *this Regulation shall not prevent a court of a Member State, which is a party*

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Member States the freedom to assume jurisdiction according to another international Convention to which it is a party to, even where the defendant is domiciled in a Member State, which is not a party to that convention. In this case the “other convention” was the New York Convention 1958, which was incorporated into the agreement by the parties. Also in the opinion of the AG, Article 71(2) was not applicable, as the award under question cannot be considered a “judgement” within the definition of the Regulation. In the AG’s opinion, recognition and enforcement of the arbitral award should only be governed by the 1958 Convention, as arbitration was clearly excluded from the scope of the Brussels I Regulation. In his opinion, the position of the Lithuanian courts was comparable to that of the English courts in the *West Tankers* case,⁹ as it was seised of a matter, which was outside the scope of the Regulation. Also, the Brussels Regulation excluded arbitration from its ambit, and that any recognition of an arbitral award should be subject to the 1958 New York Convention.

The AG opined that on a proper interpretation of the Brussels Regulation, the courts of a Member State could not be compelled to refuse to recognise and enforce an anti-suit injunction awarded by an arbitral tribunal. While concluding as above, the AG had applied the provisions of the Recast Brussels Regulation, which was only to come into force on 10 January 2015. This was a peculiar view, as the Recast Brussels Regulation can apply neither retrospectively, nor to any pending matters before a

to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Regulation;

(b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation. Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied.

⁹ *Allianz SpA v West Tankers Inc (West Tankers Case)* (n 2). In the AG’s opinion, had the *West Tankers Case* been subject to the Recast Brussels Regulation, the outcome would have been different, with the validity of the arbitration agreement being excluded as an ‘incidental question’ by virtue of Recital 12, while the anti-suit injunction which formed the subject matter of the dispute being viewed as incompatible with the Brussels Regulation.

court of law.¹⁰ The particular provision of the Recast Brussels Regulation, which the AG based his opinion on, is to be found in Recital 12.¹¹ The relevant provision in principle lays down that the Regulation should not apply to arbitration.

Question 2: The second question in effect raised the more thorny issue of anti-suit injunctions, which had been plaguing the law courts in EU for some time, and was cast as “can a EU Member State court refuse to enforce an arbitral award that contained an anti-suit injunction, and which also further restricts the party to limit their claims in another EU

¹⁰ The AG’s justification to apply the Recast Brussels Regulation to a pending matter is to be found in paragraph 91 of his opinion which runs as, ‘...*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 *infra* (n 37).

¹¹ Recital 12 of the Recast Brussels Regulation provides as follows:

“This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court’s judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 (‘the 1958 New York Convention’), which takes precedence over this Regulation.

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.”

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Member State court?” Drawing from the earlier conclusion to question 1, that a court of a EU Member State cannot refuse to recognise and enforce an arbitral anti-suit injunction, the AG felt it unnecessary to analyse this question.

Question 3: The third question, similar to the second one, involved the grant of anti-suit injunctions by arbitral tribunals and their recognition by EU courts, and was worded as “can a EU Member State court refuse to recognise an arbitral award that limits the right of the national court to rule on its own jurisdiction, while seeking to safeguard the primacy of the EU law and full effectiveness of the Regulation No 44/2001?” Article V.2(b)¹² of the 1958 New York Convention permits a state’s domestic court to refuse recognition and enforcement of an arbitral award where it to be viewed as being contrary to public policy to recognise or enforce the award. In the AG’s view, the fact that an arbitral award contained an anti-suit injunction did not constitute sufficient grounds for refusing to recognise and enforce it on the basis of Article V.2(b) of the 1958 Convention, as the provisions of the Regulation were not essentially the provisions of the EU law to warrant elevation to the status of public policy provisions.

As mentioned earlier, the AG’s opinion takes into account the Recast Brussels Regulation, even though it was not in force at the time the opinion was presented to the CJEU, and was only to come into force on 10 January 2015. For those engaged in cross-border commerce, and commercial legal practice, the decision of the CJEU in the *West Tankers* case presented an unwanted conflict of law situation in international commercial arbitration and spelled the death knell of the anti-suit injunctions within the EU. In the AG’s view, the Recast Brussels Regulation goes a long way to correct some of the wrongs of the decision in the *West Tankers* case. It was also the AG’s view that the incidental question of the validity of an arbitration agreement is outside the scope of the Recast Brussels Regulation. He also was of the opinion that until a court of a Member State has decided on the issue of the validity of the arbitration agreement, it is not seised of the substantial matters of the dispute, which falls within the scope of the Recast Brussels Regulation. In

¹² Article V.2(b) of the New York Convention 1958 reads as follows: 2. *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); or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.*

the AG's opinion, an anti-suit injunction granted by an arbitral tribunal did not compare to a similar order granted by a court of a Member State. The AG's opinion can be clearly viewed as an attempt to warn the CJEU to avoid a repeat of the *West Tankers* case situation under the Recast Brussels Regulation. It will not be an understatement to conclude that the AG's opinion in this matter reopened the debate on the grant of anti-suit injunctions by arbitral tribunals to restrain proceedings before Member State Courts.

3. *GAZPROM* JUDGMENT AND ANALYSIS

Besides presenting some crucial questions on the validity of granting anti-suit injunctions by arbitrators to uphold arbitration agreements under the Brussels I Regulation, the setting of the case before the CJEU also became politically charged, as the Russian state had a majority stake in Gazprom. In order to understand the importance of the *Gazprom* judgment, one will have to visit earlier decisions of the CJEU on the subject of anti-suit injunctions, the differing approaches to the grant of anti-suit injunctions in the UK and Continental Europe, and what exactly does the Brussels Regulation exclude when it states "*This Regulation shall not apply to.... Arbitration?*"¹³ The Brussels Convention 1968, the precursor to the Brussels Regulation, also containing similar provisions, excluded arbitration from its operation, as it was thought that the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)¹⁴ and the 1961 European Convention on International Commercial Arbitration¹⁵ had already regulated

¹³ Article 1(2)(d) in both Brussels Regulation 2000, and the Recast Brussels Regulation 2012 state the same. See, TC Hartley, 'The Brussels I Regulation and Arbitration' (2014) 63 ICLQ 843.

¹⁴ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention 1958, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The New York Convention, which is viewed as a key instrument for international arbitration, requires the courts of contracting states to give effect to private agreements to arbitrate, and to recognize and enforce arbitration awards made in other contracting states.

¹⁵ The 1961 Geneva Convention on International Commercial Arbitration (Geneva Convention), which was concluded in Geneva on 21 April 1961 under the aegis of the Trade Development Committee of the UN Economic Commission of Europe. The Convention applies to international arbitrations to settle trade disputes between parties from different states, whether European or not. See A

international arbitration. In this regard, the Jenard Report from 1968¹⁶ identified two potential reasons for the exclusion of arbitration from the ambit of the Brussels Convention, *viz.*, the existence of other international agreements on international arbitration and the preparation of a European Convention providing for a uniform law on arbitration and a Protocol on recognition and enforcement of arbitral awards. When the UK became a party to the Convention, a report on the accession to the Convention was tabled by Professor Schlosser,¹⁷ which covered the arbitration exception in more detail.¹⁸ Schlosser identified the view put forward by the UK in the negotiations, which was that the exclusion covered court proceedings concerning any dispute that the parties agreed would be settled through arbitration. He also identified the view held by the original Member States, which was that the exclusion covered court proceedings only if they relate to arbitration proceedings.¹⁹

i) Earlier Outings of the CJEU on the Exclusion of Arbitration:

For a period of over two decades, there had been a number of occasions (under different circumstances) where references have been made by the courts of the Member States to the CJEU requisitioning for

Redfern and M Hunter, *Law and Practice of International Arbitration* (Sweet & Maxwell 2005) 69-70. The authors opine that the 1961 Geneva Convention did not live up to its expectations, as its approach was more theoretical rather than practical. Also it did deal with the recognition and enforcement of awards, which was left for other Conventions such as the 1958 New York Convention to deal with.

¹⁶ The Report on the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1968 [OJ No C 59, 5.3.1979]. The Jenard Report further quotes that the Brussels convention does not apply to the recognition and enforcement of arbitral awards, to the jurisdiction of courts in respect of litigation relating to the arbitration (for example proceedings to set aside an arbitral award) and to the recognition of judgments given in such proceedings. See also K Svobodova, 'Arbitration Exception in the Regulation Brussels I' (2008) <<https://www.international-arbitration-attorney.com/wp-content/uploads/arbitrationlawsvobodova.pdf>> accessed 18 July 2015.

¹⁷ The Schlosser Report 1978 [OJ No C 59, 5.3.1979].

¹⁸ In Schlosser's view the Convention did not cover court proceedings ancillary to arbitration proceedings, and also did not cover court proceedings to determine the validity of an arbitration agreement. See Hartley (n 13).

¹⁹ Interestingly for Schlosser, the Convention in no way restricted the freedom of parties to submit their disputes to arbitration. See Hartley (n 13).

an interpretation of Article 1(2)(d) of the Brussels Regulation. One of the earliest references to the CJEU from the English court was the *Marc Rich*²⁰ case, where the Court of Appeal referred the matter to the CJEU, with the question “*if Article 1(2)(d) must be interpreted in such manner that the exclusion provided for therein extended to proceedings pending before a national court concerning the appointment of an arbitrator and, if so, whether that exclusion also applied where in those proceedings a preliminary issue was raised as to whether an arbitration agreement existed or was valid.*” The CJEU ruled that the proceedings before the English courts were outside the scope of the Brussels Convention, as they were ancillary to arbitration proceedings,²¹ and observed that “*In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.*” The judgment to a certain degree shed some light on the meaning of Article 1(4) of the Brussels convention, by determining that it applied not only to arbitration proceedings but also to court proceedings where the subject matter is arbitration. The effect of the CJEU’s ruling was that the English court proceedings were not barred by the *lis pendens* rule, and that in determining whether a matter falls within the scope of the Convention, regard must be had solely to the subject matter of the

²⁰ *Marc Rich and Co v Società Italiana Impianti (The Atlantic Emperor)* Case C-190/89, [1992] 1 Lloyd’s Rep 342 (ECJ). The matter arose out of a contract for sale of crude oil between a Swiss buyer (Marc Rich) and an Italian seller (Impianti). Marc Rich sought to introduce, besides other clauses, an English choice-of-law clause and an English arbitration clause into the contract through a telex message, but Impianti did not respond to the same. Upon receipt of the cargo, Marc Rich claimed serious contamination, which led to Impianti bringing proceedings before a court in Genoa, Italy, for a declaration that it was not liable to Marc Rich. Needless to say, Marc Rich challenged the Jurisdiction of the Genoese court on the basis of the London Arbitration clause, and also duly commenced arbitration proceeding in London. Impianti maintained that the arbitration clause was not part of the contract. The English High Court held that the Brussels Convention did not apply to the matter.

²¹ This establishes, as stated in the Jenard and Schlosser Reports that court proceedings ancillary to arbitration proceedings are outside the scope of the Convention. See Hartley (n 13).

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proceedings, and not to any incidental question raised by either of the parties.²²

In *Turner v Grovit*,²³ a case which involved an anti-suit injunction (and did not involve an arbitration agreement), the CJEU held that a court of one Contracting State cannot restrain proceedings brought before another Contracting State as the Brussels Convention does not allow for subjecting the court of one Contracting State to be reviewed by the court of another Contracting State, and that as a result, any anti-suit injunction granted by the court of a Contracting State was an unacceptable interference with the jurisdiction of a foreign court and was incompatible with the Convention. On the above reasoning the CJEU proceeded to observe that the Brussels Convention “...is to be interpreted as precluding the grant of an injunction 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, even where that party is acting in bad faith,” and proceeded to set aside the anti-suit injunction granted by the English Court of Appeal. It should not be forgotten that the *Turner v Grovit* case was yet another instance of the “Italian Torpedo” action.²⁴ This decision of the CJEU in *Turner v*

²² Hartley (n 13). It is also to be noted that when the English proceedings resumed, Marc Riche’s application for an anti-suit injunction to preclude Impianti from taking further steps in the Italian proceeding was rejected on the grounds that by pleading to the merits of the case before the Genoese court in Italy, it had submitted to the Genoese court’s jurisdiction. This decision of the High Court was upheld on appeal.

²³ *Turner v Grovit* (Case C-159/02) [2005] 1 AC 101. Turner was an employee of Chequepoint (an English company), which operated *bureaux de change*. It also had a Spanish sister concern called Changepoint, which operated in Spain, and another company called Harada. As requested, Turner was transferred to Spain (Changepoint) in 1997. This transfer was to last for a very short period, as he was yet again transferred to Harada in the same year. Turner brought a claim before the employment tribunal in London against Mr Grovit (the director of all three companies) claiming constructive dismissal, and also for being made to engage in illegal conduct whilst working in Spain. Around the same time the Spanish company, Changepoint, commenced proceedings against Turner in Spain alleging professional misconduct. Against this background, Turner applied to the English courts for an anti-suit injunction, pleading that the Spanish proceedings had been brought in bad faith with a view to obstructing the claim brought by him before the employment tribunal in London.

²⁴ Maro Franzosi first coined the expression ‘Italian Torpedo’ in the late 1990s in an article that highlighted the ‘torpedo’ litigation strategy, which originated in

Grovit, in effect, took away the ability of a party to enforce a contractual clause to submit disputes to a chosen court through the mechanism of anti-suit injunctions.

In his reference in the *West Tankers*²⁵ case, Lord Hoffman highlighted that the CJEU had in its two previous decisions,²⁶ demonstrated a strong aversion to one Contracting State's court restricting in any way the jurisdiction of another Contracting State.²⁷ For Lord Hoffman the anti-suit

intellectual property actions brought before courts in Italy to delay proceedings. See M Franzosi, 'Worldwide Patent Litigation and the Italian Torpedo' *European IP Rev*, Vol. 19 [1997] 382-385.

²⁵ *Allianz SpA v West Tankers Inc (The Front Comor)* (n 2). In August 2000, the *Front Comor* a vessel chartered to Erg Petroli Spa (Erg) and owned by West Tankers collided with a jetty at Erg's refinery. Erg's insurers Ras Riunione Adriatica di Sicurtà (RAS) paid approximately €15.5 million under the insurance policy for the damage suffered to the jetty. Erg commenced arbitration proceedings in London against West Tankers for the uninsured loss. RAS subrogating for Erg brought proceedings against West Tankers before the *Tribunale di Siracusa* (Italy) to recover €15.5 million paid to Erg under the policy of insurance, making it the court 'first seised' of the matter under the Convention. West Tankers objected to the proceedings in London on the basis of the existence of the arbitration agreement contained in the charterparty contract. West Tankers also sought for a declaration before the High Court in London that the dispute between the parties was subject to an arbitration clause. The English High Court granted an anti-suit injunction against the insurers as regards the proceedings in Italy. The insurers appealed. In spite of its point of view that arbitration was completely excluded from the scope of Regulation No 44/2001 by virtue of Article 1(2) (d) thereof, the House of Lords stayed the proceedings and referred a question to the ECJ, requisitioning a preliminary ruling.

²⁶ *Gasser GmbH v MISAT Srl* (Case C/116/02) [2004] 1 Lloyd's Rep 222; *Turner v Grovit* (Case C-159/02) [2005] 1 AC 101.

²⁷ According to Lord Hoffman, going by the decision of the ECJ in *Marc Rich and Co v Società Italiana Impianti (The Atlantic Emperor)* Case C-190/89, [1992] 1 Lloyd's Rep 342 (ECJ), and *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line* (Case C-391/95) [1999] 2 WLR 1181, arbitration was altogether excluded from the scope of the Brussels Regulation by Article 1(2)(d). For Lord Hoffman, the *Van Uden* case provided a strong basis for the legality of anti-suit injunctions to enforce arbitration agreements, as it held that in a proceeding intended to protect the parties' choice to have a dispute settled by arbitration, arbitration is the subject matter. For a discussion on *West Tankers* case and its impact on parties' choice of seat of arbitration, see D Rainier, 'The Impact of *West Tankers* on Parties' Choice of a Seat of Arbitration' (2010) 95 *Cornell L Rev* 431.

injunctions served as an important weapon to promote legal certainty and help reduce the possibility of conflict between the arbitration award and the judgment of a national court.²⁸ The question that was referred to the CJEU by the House of Lords was whether a Contracting State court could grant an injunction against a person bound by an arbitration agreement to restrain them from commencing or pursuing proceedings in the courts of another Contracting State in breach of the arbitral agreement. In response, the CJEU held that granting anti-suit injunctions on the grounds that such proceedings would be contrary to an arbitration agreement was incompatible with the Regulation 44/2001. This decision had come under severe criticism, with some writers even expressing the view that the CJEU in the *West Tankers* case had sacrificed anti-suit injunctions in the name of mutual trust,²⁹ while forgetting its importance in bringing about certainty in commercial matters through the freedom of choice of law and forum. The judgement of the CJEU in the *West Tankers* case, to a certain degree, put at risk the reputation of the English arbitral forum, as without the safeguards of an anti-suit injunction, parties may not be inclined to choose England as their seat of arbitration.³⁰

ii) Recast Brussels Regulation and the Gazprom Decision:

There have been concerns about certain aspects of the application of the Brussels I Regulation, particularly in relation to its *lis pendens* provisions. Article 27 of the Brussels I Regulation³¹ provides that in the

²⁸ Lord Hoffman was also apprehensive that London could fast lose its attractiveness as a seat of international commercial arbitration if the ECJ were to lose sight of the fact that the courts are there to serve the business community rather than the other way round. He further pointed to New York, Singapore and Bermuda as jurisdictions willing and prepared to issue such anti-suit injunctions to preserve arbitration agreements. See also Rainier (n 27) 440.

²⁹ See Rainier (n 27) 460.

³⁰ Although this argument is not substantiated by statistical evidence some authors have opined that the judgement of the ECJ could make the English arbitral proceedings less attractive. See Rainier (n 27) 436. The author observes that following the ECJ's decision in the *West Tankers* case the US could potentially become more attractive as a seat of arbitration for international commercial arbitration. See also M Moses, 'Arbitration/Litigation Interface: The European Debate,' *Nw J Int'l L & Bus* Vol.35, No. 1 (2014) 1-47, 12-13. The author notes that there was a negative reaction to the decision of the ECJ in the *West Tankers* case, particularly amongst the English arbitration community.

³¹ Article 27 of the Brussels I Regulation reads as follows:

event proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting States, the court second seised of the matter must stay its proceedings until the court first seised has determined whether it has jurisdiction to hear the claim. It is well known that Article 27(1)³² of the Brussels I Regulation had been repeatedly exploited by debtors to commence proceedings in courts of jurisdictions with slow moving judiciary to protract proceedings in violation of jurisdiction (and arbitral) agreements.³³ As discussed earlier, it was also widely thought that the decision in the *West Tankers* case would render a London arbitration agreement vulnerable to “torpedo” actions and make it worthless. Responding to such apprehensions the European Parliament and the European Commission in December 2010, published proposals for reform of the Brussels I Regulation primarily aimed at improving judicial co-operation within the EU and enhancing the autonomy of arbitration. The Recast Brussels Regulation³⁴ seeks to address a number of concerns raised by Member States, including the above. Following a detailed consultation, the UK opted into the Recast Brussels Regulation, which came into force on 10 January 2015.

It is accepted that the Brussels I Regulation under Article 1(2)(d) excludes arbitration from its scope. But a lack of clarity on how this exclusion is to apply in practice by national courts in support of arbitration

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

2. *Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.*

³² Article 27 (1) of the Brussels Regulation reads as follows: *Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.*

³³ See M Aquilina, ‘Lawsuits in the European Union: Dismantling the ‘Italian Torpedo with the Recast Brussels Regulation’ Business Lawyer (26 June 2015) <<http://hazlolaw.com/articles/law-suits-in-the-european-union-dismantling-the-italian-torpedo-with-the-recast-brussels-regulation/>> (accessed 29 July 2015). *Gasser GmbH v MISAT Srl* (Case C/116/02) [2004] 1 Lloyd’s Rep 222; *Turner v Grovit* (Case C-159/02) [2005] 1 AC 101; and *Allianz SpA v West Tankers Inc (The Front Comor)* (C-185/07) [2009] 1 All ER (Comm) 435, can all be seen as instances of ‘Italian Torpedo’ action.

³⁴ Recast Brussels Regulation (n 3).

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clause, and their jurisdiction to act under the Brussels Regulation have made the application of the provision extremely difficult, resulting in unnecessarily protracted parallel litigation. Unfortunately, the CJEU's judgment in the *West Tankers* case failed to bring about any clarity and only succeeded in muddying the waters further. As discussed earlier, the AG in his opinion on the *Gazprom* case referred to the provisions of the Recast Brussels Regulation, although the said Regulations would not have applied to a pending case before the CJEU. This article briefly touches upon one of the areas covered under the Recast Brussels Regulation, namely, the arbitration exception covered under Recital 12. The changes made to the regulation is referred to as the Recast Brussels Regulation, which came into effect in January 2015, while the *Gazprom* case was still pending before the CJEU. Recital 12 seeks to clarify the arbitration exception contained in Article 1(2)(d) of the Brussels I Regulation. Paragraph 1 of Recital 12³⁵ states that the Recast Brussels Regulation should not apply to arbitration, and should not prevent courts of Member States from referring parties to arbitration, or from staying or dismissing proceedings in favour of arbitration. It also recognises the courts powers to determine if the arbitration agreement is valid and enforceable under domestic laws.

Paragraph 2 of Recital 12³⁶ provide that a ruling given by a court of a member state as regards the validity of an arbitration agreement should not be subject to the rules of recognition and enforcement laid down in the Recast Brussels Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question. Paragraph 3, Recital 12³⁷ provides that a decision of a Member State court not to recognise an

³⁵ Paragraph 1, Recital 12 reads as follows: *“This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.*

³⁶ Paragraph 2, Recital 12 reads as follows: *A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.*

³⁷ Paragraph 3, Recital 12 reads as follows: *On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative*

arbitration agreement should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with the Recast Brussels Regulation. It is worth noting that the Recast Brussels Regulation does not expressly deal with anti-suit injunctions. Under the Recast Brussels Regulation the parties will have little or no incentive to bring proceedings in a member state with a view to obtaining an order that their arbitration agreement is invalid, as such an order will not be recognised in another member state. In short it almost manages to outlaw the "torpedo" actions.

4. IS THERE CLARITY AFTER *GAZPROM* AS REGARDS ANTI-SUIT INJUNCTIONS?

Due to the CJEU's earlier decisions, and "torpedo" actions, the English courts have been constrained to adopt a dual policy with regards to the grant of anti-suit injunctions - one inward facing towards Continental Europe where it was almost taboo to issue an anti-suit injunction, and the other outward facing, towards the international community outside EU, where it may issue an anti-suit injunction to protect the rights of a party relying on an English law arbitration agreement. All along, the central philosophy of the CJEU had been couched on the Continental-European tradition – *i.e.*, taking a public law approach to issues relating to "freedom of contract," which is a commercial/private law matter. The Common law, as opposed to the Continental-European traditions takes a very pragmatic approach³⁸ to such

or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

³⁸ See J Harris, 'The Brussels I Regulation and the Re-Emergence of the English Common Law,' (2008) 4 The European Legal Forum (E) 181-189. The author observes that anyone defending '...the English methodology would describe it as being pragmatic, flexible and designed to ensure that litigation is expedient, efficient and conducted in good faith.' The author, commenting on the decisions of the ECJ including *Gasser GmbH v MISAT Srl*; and *Turner v Grovit*, notes that the ECJ's interpretations of the Regulation have been consistently literalistic,

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commercial matters and seeks to uphold the sanctity of freedom of contract,³⁹ and in this instance the agreement to arbitrate in Stockholm. In the *Gazprom* case, one notices that based on the reasoning that arbitration and arbitral tribunals fall outside the scope of Brussels Regulation, the CJEU has held that the Regulations do not prevent an EU member's court from recognizing and enforcing an anti-suit injunction granted by arbitrators.

The CJEU has failed to clearly consider the most important aspect that had come to haunt cross-border commerce within the EU and the legal practitioners in some parts of the EU, whether the prohibition of anti-suit injunction issued by member's courts as regards parallel proceedings within the EU should remain or lifted. This question gains in significance, especially with the coming into force of the "recast" Brussels Regulation from 10 January 2015. The CJEU confined itself to an analysis of the compatibility of Regulation 44/2001 to anti-suit injunctions ordered by arbitral tribunals. The English law position is simple and clear in this regard. In the event a party to the contract, in breach of an exclusive English law jurisdiction agreement were to commence court proceedings in a foreign jurisdiction, the aggrieved party may lodge an objection before the foreign court, where the proceedings have been so commenced. If in the event the foreign court were to go into the merits of the case, as opposed to first answering its competence to entertain the case, the defendant will be entitled to damages for any losses suffered.⁴⁰ The other

with very little evidence of the Common law's role being preserved under the Regulation, and failing to protect the sanctity of commercial agreement.

³⁹ TC Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813, 814. The author notes that lawyers with 'civil law' background are more concerned with the structure of the law, as opposed to lawyers with 'common law' training who are more concerned with its operation.

⁴⁰ *Swissmarine Services v. Gupta Oil* [2015] EWHC 265 (Comm). Here, the contract of affreightment entered into between the parties contained an exclusive English law and jurisdiction clause, and the defendant in violation of the above clause had brought proceedings before the courts in Nagpur, India for defamation and an anti-suit injunction. The proceedings before the Indian court was dismissed on the grounds of absence of jurisdiction, which was confirmed on appeal before the Mumbai High Court, India in May 2014. In the proceedings brought before the English courts by the claimants, it was held that the costs the claimant incurred in relation to the Indian proceedings, and those incurred in relation to the anti-suit injunction in England, were losses they had suffered as a

option available to the innocent party would be to approach the English court for an anti-suit injunction, seeking to restrain the party in breach of the exclusive jurisdiction agreement from continuing with the foreign proceedings. Here, the jurisdiction agreement would also include arbitration agreement. As discussed earlier, in recent years the powers of the English courts with regard to the grant of anti-suit injunctions within the EU have come to be undermined. This again raises the question, if the CJEU missed the chance by not having considered the validity of its judgement in *West Tankers* case?

The AG in the *Gazprom* case expressed the opinion that if only *West Tankers* were to be decided under the Recast Brussels Regulation the result would have been significantly different.⁴¹ In his view, application for anti-suit injunctions in support of arbitration agreements would have fallen within the “ancillary proceedings” permitted by Recital 12 of the Recast Brussels Regulation. In the *Gazprom* case, an arbitration tribunal had handed down an anti-suit injunction against the claimants who had commenced an action before the Lithuanian courts in breach of a London arbitral agreement. As the opinion of the AG is non-binding, the CJEU in the *Gazprom* case did not consider it necessary to clarify the above issue while delivering the judgment. The CJEU was able to hold that recognition of an arbitral anti-suit injunction fell outside the Recast Brussels Regulation, without the need to clarify whether or not the same would have been said had a court in a member state issued the anti-suit injunction. The CJEU noted that an anti-suit injunction issued by an arbitral tribunal does not give rise to issues regarding conflict of jurisdictions as between the courts of Member States, and as a result the mutual trust upon which the Regulation 44/2001 is based will not apply. The CJEU also noted that any anti-suit injunction issued by an arbitral tribunal will not fall within the scope of the Regulation 44/2001, and any recognition and enforcement by a court of a Member State of an anti-suit injunction will result from the applicable rules under the New York Convention 1958. It is to be noted here that a similar, if not the same conclusion would have been reached if the Recast Brussels Regulation had been applied to the *Gazprom* case.

result of the breach of the English jurisdiction clause, and was recoverable as damages.

⁴¹ The Recast Brussels Regulation will not apply to the *Gazprom* case as per Article 66(1), which runs as follows: ‘*This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.*’

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In summary the decision of the CJEU in the *Gazprom* case makes it clear that i) arbitration is outside the Brussels I Regulation, that ii) an arbitral tribunal's powers to issue anti-suit injunctions is unfettered by the Brussels I Regulation, and that iii) the courts of the Member States while dealing with the recognition and/or the enforceability of an arbitral award are to do so with reference to their domestic laws, which in most cases would be the New York Convention 1958. As mentioned earlier, the CJEU did not consider one of the important questions, whether the prohibition of anti-suit injunction issued by member's courts as regards parallel proceedings within the EU should remain in place or lifted. One can also conclude from the above that arbitration is not only outside the Brussels I Regulation but also outside the Recast Brussels Regulation. Interestingly, the CJEU was not keen on embarking on a round of discussions on the *West Tankers* judgment and made no reference to the AG's opinion on the matter.