ORDERING CESSATION OF COURT PROCEEDINGS TO PROTECT THE INTEGRITY OF ARBITRATION AGREEMENTS UNDER THE BRUSSELS I REGIME

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Abstract The CJEU judgment in *West Tankers* created much controversy on the question of whether issuing an anti-suit injunction in order to protect the integrity of arbitration agreements should fall within the scope of the arbitration exclusion in Article 1 of the Brussels I Regulation (2001). The negative answer of the Court has been since challenged many times by academics and practitioners and new approaches were proposed during the drafting of the Brussels I Recast. Although the Court had not since considered whether the Recast modified the legal regime, in *Gazprom* the Advocate General gave his opinion on the basis that it had. The Court in *Gazprom*, however, saw the enforcement of an arbitral award ordering cessation of court proceedings to be a distinct issue which is not covered by the Brussels I Regulation. This article discusses first the applicability of the Brussels I Regulation to the enforcement of arbitral awards ordering anti-suit injunction as a final relief. Secondly, it examines anti-suit injunctions issued by Member State courts in the post-Recast era. It aims to reveal the extent to which an order for cessation of court proceedings (or an anti-suit injunction) to protect the integrity of arbitration agreements is permissible under existing law.

Keywords: anti-suit injunction, Brussels I Regulation, Brussels I Regulation (Recast), enforcement of arbitral awards, Gazprom, New York Convention, West Tankers.

I. INTRODUCTION

The extent to which arbitration is excluded from the scope of the Brussels Convention[1] and Regulation 44/2001 (Brussels I Regulation (2001))[2] has been uncertain for many years.[3] Since the statement that the Brussels I

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[1] Art 1(4) of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

[2] Art 1(2)(d) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

[3] See also J Harris and E Lein, 'A Neverending Story? Arbitration and Brussels I: The Recast' in E Lein (ed), *The Brussels I Review Proposal Uncovered* (BIICL 2012) 31, 32–5.

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Regulation[4] *shall not apply* to arbitration is not a clear-cut exclusion,[5] the consequences of this provision are unclear.

The scope of application of this exception for arbitral proceedings has been interpreted by the Court of Justice of the European Union (CJEU) by only taking the subject matter of the dispute into account. The Court has refused to consider any preliminary issues that the domestic court might have to resolve (such as the validity of the arbitration agreement) when examining whether the dispute falls within the Brussels I regime.[6] Yet the CJEU later acknowledged that the Brussels I regime may be applicable when proceedings that do not come within its scope nevertheless have consequences which undermine its effectiveness.[7] The Court then decided that an anti-suit injunction ordered by a Member State court, which is an *in personam* order to a party to a dispute, to withdraw court proceedings which it has initiated in another country,[8] is incompatible with the Brussels I Regulation (2001) even if this restraining order is taken in relation to an arbitration agreement.[9]

Attempts to resolve the problems created by the exclusion of arbitration from the scope of the Brussels I Regulation resulted in several reports and proposals during the process leading to the adoption of the new regulation.[10] These attempts involved proposals for *partial* abolition of the exclusion and the introduction of some rules for 'annex proceedings to arbitration' into the Brussels I Regulation,[11] maintaining the *status quo*,[12] the extension of the

[4] The phrase 'Brussels I Regulation' is used to refer to the applicable European instrument on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. In other words, 'Brussels I Regulation' refers to the instrument *in force* in the Brussels I regime. When this article is specifically referring to a single instrument, namely to either Brussels Convention, Brussels I Regulation (2001) or Brussels I Recast, it will indicate this. Unless stated otherwise, a comment concerning the 'Brussels I Regulation' would be applicable to both Brussels I Regulation (2001) and Brussels I Recast.

[5] A Briggs, *Private International Law in English Courts* (OUP 2014) 199.

[6] *Marc Rich and Co AG v Società Italiana Impianti PA*, CJEU Case No C-90/89, Judgment of the Court, 25.7.1991, para 26.

[7] *Allianz SpA & Generali Assicurazioni Generali SpA v West Tankers Inc*, CJEU Case No C-185/07, Judgment of the Court, 10.2.2009, para 24.

[8] On anti-suit injunctions, see T Raphael, *The Anti-Suit Injunction* (OUP 2008); R Fentiman, *International Commercial Litigation* (2nd edn, OUP 2015) ch 16.

[9] *West Tankers* (n 7) para 32 and Operative Part, see also paras 29–30.

[10] For the analysis of these proposals, see Harris and Lein (n 3) 36–55; A Dickinson and E Lein (eds), *The Brussels I Regulation Recast* (OUP 2015) 57–61; A Nuyts, 'La refonte du règlement Bruxelles I' (2013) 102(1) Revue critique de droit international privé 1, 11–13; LG Radicati di Brozolo, 'Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?' (2011) 7(3) JPrivIntL423; M Illmer, 'Brussels I and Arbitration Revisited: The European Commission's Proposal COM(2010) 748 final' (2011) 75(3) Rabels Zeitschrift für ausländisches und internationales Privatrecht 645.

[11] B Hess, T Pfeiffer and P Schlosser, *Report on the Application of Regulation Brussels I in the Member States (Heidelberg Report)* September 2007, available at <http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf> paras 131–136; Commission of the European Communities, *Green Paper on the Review of Council Regulation (EC) No 44/2001*, COM(2009) 175 final, 21.4.2009, 9.

[12] Option 1 at European Commission, *Impact Assessment: Accompanying document to the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and*

exclusion of arbitration to any court proceedings related to arbitration proceedings,[13] and enhancing the effectiveness of arbitration agreements by including common rules for certain aspects of arbitration.[14] Regulation 1215/2012 (Brussels I Recast or Recast)[15] was published in the Official Journal of the European Union on 20 December 2012. In the end, the Brussels I Recast kept the same wording in Article 1(2)(d), but provided a lengthy explanation on the arbitration exception in Recital 12.

Another recent development is the CJEU's judgment in *Gazprom*.[16] Following the Advocate General's Opinion, which discussed mostly the applicability of the Recast to the case and its effects on *West Tankers*,[17] the Court decided that the Brussels I Regulation was not applicable to the enforcement of an arbitral award by a Member State court, even if the award ordered withdrawal of court proceedings.[18] One may consider this development as the closure of the discussion triggered by the *West Tankers* case.[19]

This article is not 'a tale of two judgments', *West Tankers* on the one hand, and *Gazprom* on the other. It aims to consider whether the arbitration exception applies to relief in the form of cessation of court proceedings which might be granted by arbitral tribunals or by domestic courts when exercising their supervisory or supporting role in an arbitration. Such an order, whether issued in the form of an interim relief or as a part of the final decision, is intended to protect the integrity of the arbitration agreement in question. This analysis requires a discussion on the effects of Recital 12 and of the *Gazprom* judgment and also consideration of whether *West Tankers* still reflects the general rule under the Recast.

This article proceeds in three sections. The first section looks at the enforcement of injunctions ordered by arbitral tribunals requiring the cessation of court proceedings as a part of the final award. After analysing the power of tribunals to order such remedies, it discusses the enforcement regime of these awards. Finally, it addresses the question of the compatibility

the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) SEC (2010) 1548 final, 14.12.2010, 36.

[13] Option 2 at European Commission, *Impact Assessment* (n 12) 36–7.

[14] Option 3 at European Commission, *Impact Assessment* (n 12) 37. This option reflects the proposal at the Heidelberg Report and Green Paper. See also European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)* COM (2010) 748 final, 14.12.2010, which adopted this option.

[15] 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.

[16] *Gazprom OAO v Lietuvos Respublika*, CJEU Case No C-536/13, Judgment of the Court, 13.5.2015.

[17] *Gazprom*, Opinion of Advocate General Wathelet, 4.12.2014, paras 74–157.

[18] *Gazprom* (n 16) para 41 and Operative Part.

[19] See M Moses, 'Will Antisuit Injunctions Rise Again in Europe?' *Kluwer Arbitration Blog* on 20.11.2013.

of such awards with the public policy of the country where the enforcement is sought. The second section deals with orders to withdraw court proceedings which are given as an interim measure. Such measures aim to protect the integrity of the arbitration agreement and can be made either by the arbitral tribunal hearing the case itself or by supporting domestic courts. The third section looks at measures taken by the domestic courts of EU Member States, which trigger the application of some European law principles. This section will first analyse the case law on this issue and then discuss the effects of the new Regulation (Recast) upon it.

II. CESSATION OF COURT PROCEEDINGS AS A FINAL REMEDY IN AN ARBITRAL AWARD

A. Power of Arbitral Tribunals to Order Cessation of Court Proceedings

A relief ordering the cessation of court proceedings granted by arbitral tribunals functions as specific performance of the contract, ie, the arbitration agreement. Parties to an arbitration agreement have undertaken to resolve their disputes through arbitration and to avoid instituting proceedings before domestic courts for such disputes. If a party violates this obligation, the tribunal having jurisdiction to hear the dispute may require the party in breach to comply with this obligation. Specific performance of the obligation not to seise domestic courts will be in the form of an injunctive remedy compelling the breaching party to cease pursuing the domestic court proceedings.

The availability of this remedy might be questioned. There are no specific provisions on remedies that can be ordered by arbitral tribunals in most national legislation on arbitration. This is not very surprising, for a comparable gap also exists in terms of the remedies that can be ordered by domestic courts. National legal orders do not explicitly grant domestic court judges separate or additional powers to order specific remedies to resolve all possible conflicts. Such an authorization is unnecessary when a case is being adjudicated in accordance with the applicable substantive law of the relevant national legal order.[20] Having the authority to resolve the dispute brought before them, arbitrators also benefit from a wide range of remedies available under the substantive law applicable to the dispute[21] even in the absence of any special provision empowering them to order specific remedies.[22]

[20] PF Schlosser, 'Right and Remedy in Common Law Arbitration and in German Arbitration Law' (1987) 4 JIntlArb 27, 28.

[21] Remedies having a public law character are not however generally available in international commercial arbitration. One example is punitive damages. It is argued that an award granting punitive damages may not be enforced due to public policy considerations. See JDM Lew, LA Mistelis and SM Kröll, *Comparative International Commercial Arbitration* (Kluwer 2003) 651; K Hober, 'Remedies in Investment Disputes' in AK Bjorklund, IA Laird and S Ripinsky (eds), *Investment Treaty Law: Current Issues III* (BIICL 2009) 3, 13.

[22] See Lew, Mistelis and Kröll (n 21) 649.

The United Kingdom Arbitration Act (1996), section 48 is, in this sense, an exception. It is a special provision concerning the remedies that can be granted by arbitrators. Under this provision, an arbitral tribunal has the power to order a party, among others, 'to do or refrain from doing anything'.[23] An order to cease court proceedings is an injunction of this type, which requires the party against whom it is made to refrain from continuing the proceedings.[24]

Leaving aside the exceptional instance of the UK Arbitration Act (1996), it should be noted that, as a general rule, the absence of an express provision concerning remedies under the relevant national legal system does not deprive arbitral tribunals from having power to order some specific remedies. The remedies listed in the UK Arbitration Act (1996), section 48 are generally deemed to be available in international commercial arbitration. There is, however, no legal principle or provision that enjoins arbitral tribunals from ordering cessation of court proceedings. Therefore, this remedy should in principle be accepted as being available in international commercial arbitration regardless of the law applicable to the arbitration.

The only counterargument could be that injunctions are not suitable for the well-balanced mechanism established under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), since this requires a system where domestic courts are more involved in the enforcement of the award. A similar argument has been raised as regards the enforcement of an arbitral award granting the relief of specific performance.[25] Yet international practice has shown that this is not a real problem: domestic courts have until now regularly upheld arbitral tribunals' awards ordering an injunctive relief or specific performance of the contract.[26]

An example of this would be the success of the Ministry of Defence of Iran in proceedings brought before the US courts for the enforcement of an award of the Iran–US Claims Tribunal. The Iran–US Claims Tribunal ordered the specific performance of the contract that required an American company to return equipment which belonged to the Ministry.[27] During the enforcement proceedings, the US courts held that an order of specific performance is enforceable under the New York Convention.[28] Hence, the argument based on the well-balanced mechanism of the New York Convention that features a low level of involvement of domestic courts in the enforcement of arbitral awards is not reflected in practice. It seems therefore that there is no plausible

[23] UK Arbitration Act 1996, section 48(5)(a).

[24] Raphael (n 8) 196–8.

[25] TE Elder, 'The Case against Arbitral Awards of Specific Performance in Transnational Commercial Disputes' (1997) 13(1) ArbIntl 1.

[26] GB Born, *International Commercial Arbitration* (2nd edn, Kluwer 2014) 3071–5.

[27] *Gould Marketing, Inc* as successor to *Hoffman Export Corporation v Ministry of Defence of the Islamic Republic of Iran*, Iran–US Claims Tribunal Case Nos 49 and 50, Award, 22.6.1984, (1984/II) 6 *Iran-US CTR* 272.

[28] *Ministry of Defence of Islamic Republic of Iran v Gould Inc*, 887 F.2d 1357; *Ministry of Defence of Islamic Republic of Iran v Gould Inc*, 969 F 2d 764.

argument against injunctive reliefs such as cessation of court proceedings being available in international commercial arbitration.

In the investment arbitration context, cessation of court proceedings as a relief has already found application.[29] This remedy was granted in the *ATA v Jordan* case.[30] ATA was a party to an arbitration agreement with a Jordanian entity. An arbitration award rendered pursuant to this agreement was annulled. Under the Jordanian arbitration law, annulment of an arbitral award led to the extinguishing of the arbitration agreement pursuant to which the award had been rendered. Therefore, the Jordanian courts declared the agreement to have been extinguished and proceeded to hear the claims of ATA's counterparty. After having found the extinguishing of the agreement to be a breach of the New York Convention and of the relevant bilateral investment treaty, the investment tribunal (a different tribunal from the one whose award was annulled) ordered the termination of the ongoing court proceedings.[31] Nevertheless, there is an important difference between this remedy as a form of relief in investment arbitration and in international commercial arbitration. Whereas in commercial arbitration cessation of court proceedings is ordered against the party who has initiated such a proceeding in breach of the arbitration agreement, in investment arbitration this remedy is granted against the State party to the investment arbitration proceeding. It is the decision of the courts of that State which hear the dispute, which might itself amount to a breach of international law (more particularly, the New York Convention).[32] Nevertheless, the *ATA* case demonstrates that arbitral tribunals are entitled to grant a variety of remedies, including orders requiring the cessation of domestic court proceedings.

B. Enforcing the Award Granting Cessation of Court Proceedings

It is beyond doubt that either the New York Convention[33] or national law provisions on arbitration[34]—depending on whether the award is a foreign or non-foreign award—will apply to the enforcement of arbitral awards. The question is, however, whether the Brussels I Regulation affects or prevents the enforcement of an award requiring one party to withdraw court proceedings that it has initiated against another. This was the question that was referred to the CJEU by the Lithuanian court in the *Gazprom* case.[35]

[29] For the applicability of injunctive remedies in investment arbitration, see B Demirkol, 'Remedies in Investment Treaty Arbitration' (2015) 6(2) JIDS 403, especially 421–2.

[30] *ATA Construction v The Hashemite Kingdom of Jordan*, ICSID Case No ARB/08/2, Award, 18.5.2010.

[31] *ATA* (n 30) paras 132 and 133(4).

[32] B Demirkol, 'Enforcement of International Commercial Arbitration Agreements and Awards in Investment Treaty Arbitration' (2015) 30(1) ICSID Review 56, 65–8.

[33] Art III of the New York Convention states '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them'.

[34] eg UK Arbitration Act 1996, section 66; art 192(2) of the Swiss Private International Law Act; art 1514 of the French Code of Civil Procedure.

[35] See *Gazprom* (n 16) para 26.

The factual background of the case is as follows: Gazprom was a shareholder of a Lithuanian company. The shareholder agreement contained an arbitration clause.[36] One of the shareholders, the Lithuanian State represented by the Ministry of Energy, brought some claims against the company and its managers, arguing that they were unduly favouring Gazprom's interests.[37] Considering that the action brought by the Ministry of Energy before the Lithuanian courts was a breach of the arbitration agreement, Gazprom initiated an arbitral proceeding under the arbitration clause in the shareholder agreement. It requested that the arbitral tribunal order the Ministry of Energy to cease domestic court proceedings against the company and its managers.[38] The arbitral tribunal, finding partial breach of the arbitration agreement, upheld the claim and ordered the Ministry of Energy to cease court proceedings concerning the disputes falling under the arbitration agreement.[39]

The Advocate General Wathelet raised several arguments in his opinion suggesting that the CJEU should either refuse to reply to Lithuania's questions for reasons based on the jurisdiction of the Court and the admissibility of the questions, or to give a negative answer. Discussions on the CJEU judgment in *West Tankers* and the approach under the Recast underpinned the opinion of the Advocate General.[40] He criticized the outcome in *West Tankers* and found it in contradiction with previous CJEU judgments.[41] He also stated that Recital 12 of the Recast excludes incidental questions on arbitration-related issues from the scope of the Brussels I Recast and thus broadens the extent of the arbitration exclusion in Article 1(2)(d).[42] He even speculated what the outcome of *West Tankers* would have been, had the case been heard under the Recast.[43] This analysis led the Advocate General to the conclusion that arbitration is excluded from the scope of the Brussels I Recast in its entirety.[44]

Although the opinion of AG Wathelet has some useful comments, it was based on inaccurate premises. The Advocate General need not have considered the new regime under the Recast, nor whether *West Tankers* was still applicable at all, as these considerations are irrelevant to the dispute in *Gazprom*. As stated above, the question to be answered in *Gazprom* was different from that in *West Tankers*. There are two arguments in support of this approach.

First, the question in *Gazprom* concerns the enforceability of arbitral awards. In enforcement proceedings, the function of domestic courts is not to adjudicate the dispute on its merits, but to decide whether the award is enforceable. This is

[36] ibid, para 13. [37] ibid, paras 14–15. [38] ibid, paras 16–17. [39] ibid, para 18.
[40] See *Gazprom* (n 17) Opinion, paras 74–152. [41] ibid, paras 98–112. The argument that the CJEU judgment in *West Tankers* contradicts with previous CJEU judgments was not accurate. See TC Hartley, 'Antisuit Injunctions in Support of Arbitration: *West Tankers* Still Afloat' (2015) 64(4) ICLQ 965, 968–70.
[42] *Gazprom* (n 17) Opinion, para 130. See also para 127. This recital is analysed in Section IVB. [43] ibid, paras 133–135. [44] ibid, para 141 (emphasis in the original).

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different from the *West Tankers* case, which concerned the question of whether an anti-suit injunction could be issued by domestic courts to protect the integrity of a pre-existing arbitration agreement. Article 32 of the Brussels I Regulation (2001) and Article 2(a) of the Brussels I Recast clearly states that a 'judgment' which a party can seek to have recognized or enforced is a 'judgment given by a court or tribunal of a Member State'. An arbitral award is not a court judgment and thus its enforcement is not subject to the Brussels I Regulation.[45] This was not the situation in *West Tankers*, which did concern a judgment by a court of a Member State.

In an enforcement proceeding, a domestic court does not *issue* an injunctive remedy, but *enforces* a remedy that has been previously granted by a competent court or tribunal. Enforcement of an award does not have any decision-making dimension under the European legal regime, since the decision has already been rendered by the tribunal.[46] In the context of an anti-suit injunction issued by a domestic court, however, the decision is rendered by the court. Whether or not a court is entitled to grant this injunction depends on the extent of its inherent power. The legal regime under which a court operates might set some limits, either in the form of explicit rules or flowing from generally accepted principles.

One limitation on the court's power to grant remedies is the obligation to respect the jurisdiction of other courts under the Brussels I regime, which is known as *mutual trust* in the administration of justice between judicial institutions of EU Member States. *Mutual trust* is the essential basis of the Brussels I Regulation[47] and is recognized in the Recitals of the Brussels I Regulation.[48] Fentiman explains that the *trust* (or 'spirit of cooperation') requires that 'no court may directly or indirectly question another court's decision in matters within the scope of either of the EU Regulations'.[49]

There is, however, no such cooperation or *mutual trust* between arbitral tribunals and domestic courts. Considerations based on *mutual trust*, which actually underpinned the CJEU's judgment in *West Tankers*,[50] do not constitute a hurdle for an arbitral tribunal deciding on the validity of an arbitration agreement and ordering the parties to act accordingly.[51] As a consequence of this lack of *mutual trust* between these two institutions, ie, an arbitral tribunal and a domestic court, the enforcement of arbitral awards is

[45] *Gazprom* (n 16) para 36.

[46] The Brussels I Regulation does not govern enforcement decisions by a court of a Member State so long as an arbitral award or a non-Member State court judgment is involved.

[47] See *West Tankers* (n 7) para 30.

[48] See Recital 16 of the Brussels I Regulation (2001) and Recital 26 of the Brussels I Recast.

[49] Fentiman (n 8) 295.

[50] *West Tankers* (n 7) para 29.

[51] See *Gazprom* (n 16) paras 38–40. While reaching this conclusion, the CJEU did not quash, or contradict with, its judgment in the *West Tankers*. As opposed to the suggestions of the Advocate General, it found a solution within the Brussels I Regulation (2001) without referring to Recital 12 of the Recast, which is on the exclusion of arbitration. It should be noted that the Advocate General suggested a solution based on the Brussels I Regulation (2001) only as a subsidiary argument (*Gazprom* (n 17) Opinion, paras 153–157). This would suggest that the CJEU still regards *West Tankers* as good law (Hartley (n 41) 973).

subject to a stricter scrutiny. Domestic courts may refuse to enforce an arbitral award for several reasons, not all of which constitute an impediment to the enforcement of a court judgment under the Brussels I Regulation.

This leads to the second argument. For an arbitral award to produce an effect, it needs to be enforced pursuant to this stricter regime. Only an arbitral award which satisfies certain criteria can be enforced. A domestic court may refuse to enforce an award, among other grounds, due to the invalidity of the arbitration agreement[52] or the *inarbitrability* of the dispute.[53] If the award is found to be enforceable, it means that there is a valid arbitration agreement. In other words, an arbitral award ordering cessation of court proceedings will be enforced in the country where the court proceedings are pending[54] only if the court enforcing the award finds that there is a valid arbitration agreement between the parties. A court which decides to enforce such an award automatically upholds the view that the court currently hearing the substance of the dispute does not have jurisdiction to do so due to the arbitration agreement. Should the arbitration agreement be found valid, the court hearing the dispute must desist from the case and refer the parties to arbitration for the settlement of the dispute.[55] As a matter of fact, it is not, under these circumstances, the arbitral tribunal which negates the jurisdiction of the court hearing the dispute; it is the court of that same country which has done so by upholding the validity of the arbitration agreement.

It should be noted that the enforcement of an arbitral award, even in the case where this award orders cessation of court proceedings, does not fall within the scope of the Brussels I Regulation. This is not because it constitutes a particular matter under Article 71 of the Brussels I Regulation (2001) and of the Recast, which prevents the application of the Regulation,[56] but rather because the subject matter of the dispute in the enforcement proceeding of an arbitral award does not trigger the application of the Brussels I Regulation at all.[57]

For the reasons stated, Hartley is correct to conclude that '[t]he Regulation neither requires nor precludes recognition of the award'.[58] The issue is to be decided by domestic courts pursuant to provisions entirely outside European law. Since the arbitral award ordering cessation of court proceedings is not an anti-suit injunction ordered by a Member State court, the approach in *West Tankers* is not to be followed.[59] Based on this conclusion, it should be accepted that the Brussels I Regulation is not applicable, even if there is a non-foreign arbitral award and the enforcement is not subject to the

[52] Art V(1)(a) of the New York Convention. [53] Art V(2)(a) ibid.

[54] For obvious practical purposes, the enforcement of the arbitral award ordering cessation of court proceedings will be sought only in the country where these court proceedings are pending. There would be a lack of legal interest to enforce this award in other countries where there are no pending court proceedings against the award holder. [55] Art II(3) of the New York Convention.

[56] *Gazprom* (n 16) para 43. [57] See Radicati di Brozolo (n 10) 452–3.

[58] TC Hartley, 'The Brussels I Regulation and Arbitration' (2014) 63(4) ICLQ 843, 857; Hartley (n 41) 974. [59] Hartley (n 41) 974–5.

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New York Convention. Recognition and enforcement of such awards still remain outside the scope of the Brussels I Regulation.

C. Cessation of Court Proceedings and Public Policy Considerations of European Law

The third question referred to the CJEU by the Lithuanian court was whether enforcing an arbitral award ordering cessation of court proceedings would harm the primacy of European law and the full effectiveness of the Brussels I Regulation.[60] This question is not answered by the CJEU in *Gazprom*.

This subsection, from a more general perspective, addresses the question of whether the enforcement of an arbitral award ordering one party to withdraw pending court proceedings may be refused on grounds of public policy considerations.

The answer is to be found within the regime applicable to the enforcement of the award. National and international instruments laying down conditions for the enforcement of arbitral awards mostly allow domestic courts to refuse enforcement if, *inter alia*, it would be contrary to the public policy of the country where the enforcement is sought.[61] Policy considerations, such as concerns related to ensuring full effectiveness of the Brussels I Regulation, can thus be taken into account only within the framework of public policy. Since the ground for refusing enforcement refers to the public policy of the *relevant* country, there is no single or universally applicable answer to the question of whether public policy considerations prevent a court from enforcing an award ordering the cessation of court proceedings. Since 'public policy may vary from country to country'—described as an arbitration 'truism' by a leading commentator[62]—there can only be answers on a case-by-case and country-by-country basis.

In his opinion in *Gazprom*, AG Wathelet, after having indicated that public policy considerations are to be interpreted strictly, argued:

> [T]he emphasis should be placed not essentially on the legal nature of the interests protected by public policy, but rather on whether the rules and values involved are among those *breach of which cannot be tolerated* by the legal order of the place in which recognition and enforcement are sought because such a breach would be unacceptable from the viewpoint of a free and democratic State governed by the rule of law.[63]

The question is, then, whether an order of cessation of court proceedings amounts to something which is incompatible with the rules and values to the extent that it is considered intolerable by the relevant legal order. It might be

[60] See *Gazprom* (n 16) para 26.
[61] eg art V(2)(b) of the New York Convention; art 1514 of the French Code of Civil Procedure.
[62] Born (n 26) 3653.
[63] *Gazprom* (n 17) Opinion, para 177 (emphasis added).

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suggested that private international law rules, and especially provisions of the Brussels I Regulation, would never constitute a part of the public policy within a given legal system.[64] Such a suggestion would, however, undermine the role of private international law rules within the judicial system and the legal order. These norms allow individuals access to justice in disputes involving foreign elements and protects them from the adverse effects of adjudications in multiple jurisdictions.[65] The interests embedded in these rules directly relate to a number of fundamental rights, such as the principles of natural justice and due process. Therefore, one may infer that respecting rules of conflict of jurisdiction, which is a part of procedural rules, is of paramount importance for due process and European public policy.[66]

An order compelling one party to withdraw pending court proceedings does not, however, intrinsically contradict principles of due process or procedural justice. True, such orders prevent parties to a jurisdictional or arbitration agreement from having access to a domestic court, and this is closely connected with the human right to a fair trial. Yet, given the availability of the courts or tribunals in the proper forum, it does not preclude access to *justice* and violate the right to a fair trial.[67] This order requires parties to honour their contractual obligations under the jurisdictional or arbitration agreement. Ordering the parties not to continue the court proceedings is a means of instructing them to adjudicate their dispute in accordance with the terms they have agreed on. In fact, it is not the award of the arbitral tribunal ordering cessation of the court proceedings which precludes parties from resorting to domestic courts for the disputes that fall within the scope of this agreement: it is of course the arbitration agreement.

If the arbitral tribunal exceeded its powers by ordering cessation of court proceedings, or the dispute is *inarbitrable*, or the arbitration agreement is invalid, the award will be challenged anyway on grounds other than public policy considerations which may prevent its enforcement. Under such circumstances, the award will not be enforced and the party will not be compelled to withdraw court proceedings. Therefore, resort to public policy considerations should not bring further limitations against the enforcement of arbitral awards ordering cessation of court proceedings.

To conclude, reference to public policy considerations of each country where enforcement is sought implies that there cannot be a general or universal answer to questions concerning the compatibility of an arbitral award with the public

[64] In this line of thought, see *Gazprom* (n 17) Opinion, para 181.

[65] On the justification of conflict of laws rules, see L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) 4–5; JJ Fawcett and JM Carruthers, *Cheshire, North & Fawcett Private International Law* (14th edn, OUP 2008) 4–5.

[66] Compliance with fundamental procedural rules are of European public policy and the Brussels I regime specifically protects procedural public policy. See JK Skerl, 'European Public Policy (With an Emphasis on *Exequatur* Proceedings)' (2011) 7(3) JPrivIntL 461, 462.

[67] See also Collins (n 65) 592–3; Fawcett and Carruthers (n 65) 455.

policy of a particular country. Nevertheless, it does not seem that there would be a logical explanation based on public policy considerations to reject the enforcement of an arbitral award granting cessation of pending court proceedings.

III. CESSATION OF COURT PROCEEDINGS AS AN INTERIM MEASURE TO PROTECT THE INTEGRITY OF THE ARBITRATION AGREEMENT

A. Cessation of Court Proceedings as an Interim Measure Ordered by Arbitral Tribunals

Several sets of rules governing arbitration or related to arbitral procedure envisage that arbitral tribunals have the power to order interim measures.[68] Under these rules, an arbitral tribunal may grant a measure that aims to maintain the *status quo* or to prompt one party to refrain from acting in a way that might cause prejudice to the arbitral process itself.[69] Within this framework, cessation of court proceedings may be ordered in the form of an anti-suit injunction by an arbitral tribunal if one of the parties to the arbitral proceeding has already initiated abusive court proceedings in violation of the arbitration agreement.[70] Indeed, the adjudication of the same dispute by both the domestic court and the arbitral tribunal may lead to conflicting outcomes and this may affect the enforceability of the arbitral award.

The problem with anti-suit injunctions issued by arbitral tribunals as an interim measure is not the tribunals' power to do so, but the enforcement of such measures.[71] And whether enforcement will be allowed depends on each jurisdiction where the enforcement is sought.

Without specifically referring to interim anti-suit injunctions, the UNCITRAL Model Arbitration Law suggests that interim measures issued by an arbitral tribunal are to be recognized as binding and enforced regardless of whether the seat of arbitration is where the enforcement is sought.[72] In pursuance of the Model Law, an arbitral tribunal's order granting an interim measure requiring a party to withdraw domestic court proceedings becomes

[68] See eg art 17(1) of the UNCITRAL Model Arbitration Law; art 28(1) of the ICC Rules of Arbitration; art 26(1) of the UNCITRAL Arbitration Rules (2010).

[69] Art 17(2)(a)–(b) of the UNCITRAL Model Arbitration Law; art 26(2)(a)–(b) of the UNCITRAL Arbitration Rules (2010).

[70] O Vishnevskaya, 'Anti-suit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?' (2015) 32(2) JIntlArb 173. cf L Lévy, 'Anti-Suit Injunctions Issued by Arbitrators' in E Gaillard (ed), *Anti-Suit Injunctions in International Arbitration* (Juris 2005) 115; Raphael (n 8) 303. For an example of arbitration proceeding where an anti-suit injunction was issued by the sole arbitrator P Tercier, see ICC Arbitration Case No 8307/FMS/KGA, 14.5.2001 (published partially in E Gaillard (ed), *Anti-Suit Injunctions in International Arbitration* (Juris 2005) 307).

[71] On the enforcement of anti-suit injunctions, see A Yeşilırmak, *Provisional Measures in International Commercial Arbitration* (Kluwer 2005) 245–71.

[72] Art 17-H(1) of the UNCITRAL Model Arbitration Law.

binding and enforceable upon the application of the other party to the relevant court. In addition, an arbitral tribunal having its seat elsewhere may also order as an interim measure the cessation of court proceedings pending in another country.

In order for this mechanism of enforcement to work in the context of interim measures, the national legislation of the State where the enforcement is sought should contain a provision similar to the one suggested by the UNCITRAL Model Arbitration Law. In the absence of such legislation, another way would be for arbitral tribunals to issue the measure in the form of an award so that the requesting party can enforce it as an arbitral award. Despite contrary practice in some jurisdictions, it is generally accepted that interim awards ordering provisional measures are enforceable under the New York Convention or national arbitration laws.[73] For this reason, a number of institutional arbitration rules also allow arbitral tribunals to grant interim measures in the form of an award.[74]

European law and the Brussels I Regulation do not apply in this context. The legal regime under which the interim measure is enforced is the national law on arbitration. The same line of reasoning on the non-applicability of the Brussels I regime to final awards of arbitral tribunals applies here as well.[75] One may not therefore contest the enforcement of the interim measure granted by an arbitral tribunal by making reference to the Brussels I Regulation and to concepts such as *mutual trust*. An argument suggesting that the interim measure restricts domestic court's jurisdiction under the Brussels I Regulation would make no sense either. Under national laws, only the grounds for refusing enforcement of arbitral awards would support an objection against the enforcement of such interim measures.[76]

B. Cessation of Court Proceedings as an Interim Measure Ordered by Domestic Courts: Framework

Alongside arbitral tribunals, domestic courts also have the power to issue interim measures in relation to arbitration proceedings. Article 17-J of the UNCITRAL Model Arbitration Law attributes to State courts the same power to issue interim measures with respect to arbitral proceedings, as in the case of court proceedings. It also allows domestic courts to issue interim measures even if the arbitral proceeding does not take place in that country.[77] Some institutional arbitration rules limit the power of domestic courts. For instance, Article 28(2) of the ICC Rules of Arbitration allows parties to request interim measures from domestic courts only '[b]efore the file is transmitted to the

[73] Born (n 26) 2511–15, 3020.
[74] eg art 28(1) of the ICC Rules of Arbitration.
[75] See Section IIB.
[76] See eg art 17-I of the UNCITRAL Model Arbitration Law.
[77] M de Boisséson, 'Anti-Suit Injunctions Issued by National Courts at the Seat of the Arbitration or Elsewhere' in E Gaillard (ed), *Anti-Suit Injunctions in International Arbitration* (Juris, 2005) 65; Collins (n 65) 865–6.

arbitral tribunal, and in appropriate circumstances … thereafter'. This provision does not completely remove the power of a domestic court to order an interim measure after the transmission of the file to the arbitral tribunal; it requires the circumstances justifying this request from domestic courts rather than from the arbitral tribunal.

Under a provision such as Article 17-J of the UNCITRAL Model Arbitration Law, domestic courts have the same power to issue interim measures ordering the cessation of proceedings pending before another court in the interest of arbitral proceedings as they have in the interest of court proceedings. Namely, a domestic court that is entitled to issue an anti-suit injunction for the purpose of protecting the integrity of a choice-of-court agreement can also order an anti-suit injunction, as an interim measure, to protect the integrity of an arbitration agreement.[78] The power to issue anti-suit injunctions for the sake of arbitral proceedings depends thus on the relevant national law and especially on the rules under the national legal regime regulating whether the domestic courts are permitted to issue this injunction in general. Hence the English courts that are entitled to issue anti-suit injunctions under the Senior Courts Act (1981), section 37(1) are also entitled to issue anti-suit injunctions in the interest of arbitral proceedings since the Arbitration Act (1996), especially section 44, does not expressly preclude them from doing so.[79]

The most controversial part of this discussion is the case where a Member State of the European Union issues such an injunction against a party who has initiated court proceedings in another Member State. Due to the fact that this situation involves the specific legal regime under EU law, this issue will be dealt with separately under Section IV. On the other hand, anti-suit injunctions that order the withdrawal of court proceedings in a non-Member State are not within the scope of the discussion which will be held in Section IV.[80] English courts, for instance, have confirmed that they are still entitled to issue such anti-suit injunctions.[81] Indeed, the principal of *mutual trust* does not apply to injunctions ordered with respect to proceedings pending before the courts of non-Member States as there is no cooperation with these courts amounting to a *mutual trust* in the sense of the term used within the context of the Brussels I regime.[82]

[78] Collins (n 65) 865. See also JDM Lew, 'Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings' in E Gaillard (ed), *Anti-Suit Injunctions in International Arbitration* (Juris 2005) 25, 27–30.

[79] Raphael (n 8) 193–6. See also ibid, 301–3; Collins (n 65) 865–9; R Fentiman, 'Antisuit Injunction and Arbitration Agreements' (2013) 72(3) CLJ 521, 523.

[80] Collins (n 65) 872 n 266. cf Raphael (n 8) 271–4.

[81] *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.

[82] Fentiman (n 8) 534–5.

IV. EUROPEAN LAW DISCUSSIONS ON ANTI-SUIT INJUNCTIONS ORDERED BY DOMESTIC COURTS

A. Anti-Suit Injunctions under the Brussels I Regulation (2001) and the West Tankers *Case*

The jurisdiction of a Member State court in civil and commercial matters involving foreign elements is established under Article 1(1) of the Brussels I Regulation (2001). Therefore, the jurisdiction of a Member State court to issue anti-suit injunctions against a party who has initiated court proceedings in another Member State will be governed by the Brussels I Regulation (2001), unless the subject matter of the dispute is excluded from the scope of the Regulation as per Article 1(2) or constitutes a 'particular matter' within the meaning of Article 71.

In the first CJEU case on anti-suit injunctions, *Turner*, an anti-suit injunction was issued by an English court against the party that had initiated domestic court proceedings in Spain on the basis that the proceedings in Spain were brought in bad faith.[83] In this case, the anti-suit injunction issued by the English court did not purport to protect the integrity of an arbitration agreement, but the integrity of the court proceedings in England. The CJEU started its analysis by referring to the concept of *mutual trust* 'which the Contracting States accord to one another's legal systems and judicial institutions' and 'which has enabled a compulsory system of jurisdiction to be established, … and as a corollary the waiver by those States of the right to apply their internal rules on recognition and enforcement of foreign judgments in favour of a simplified mechanism for the recognition and enforcement of judgments [of Member State courts]'.[84] The Court explained that an order that prevents one of the disputing parties from continuing proceedings before the courts of another Member State would constitute interference with the jurisdiction of these courts.[85] The Court arrived at the conclusion that this interference would be incompatible with the system based on *mutual trust*.[86]

As mentioned earlier, domestic courts have the same power to issue an interim measure for the benefit of arbitral proceedings as they have for the benefit of court proceedings. This should not, however, automatically be taken to suggest that issuing an anti-suit injunction in favour of arbitration proceedings would be incompatible with the Brussels I Regulation (2001) since Article 1(2)(d) of the Brussels I Regulation (2001) may be applicable. The exclusion in Article 1(2)(d) may prevent the Regulation from precluding the court from issuing an anti-suit injunction in the interest of arbitration proceedings. Therefore, it is essential to determine to what extent the Brussels I Regulation (2001) governs domestic court proceedings initiated in

[83] *Gregory Paul Turner v Felix Fareed Ismail Grovit and Others*, CJEU Case No C-159/02, Judgment of the Court, 27.4.2004, para 12. [84] ibid, para 24. [85] ibid, para 27. [86] ibid, para 27.

relation to arbitral proceedings and whether the Regulation somehow bears upon injunctions ordered in such domestic court proceedings. A positive answer to the latter question would prevent the courts of Member States from issuing anti-suit injunctions to the detriment of the jurisdiction of a court of another Member State under the Brussels I Regulation (2001).

This was discussed by the CJEU in *West Tankers*. The CJEU first determined that domestic court proceedings do not, in principle, fall under the scope of the Brussels I Regulation (2001) if the subject matter of the proceedings involves the exercise of supervisory jurisdiction of the court over arbitration.[87] In other words, as a general rule, the Brussels I Regulation (2001) does not govern domestic court proceedings the subject matter of which is related to arbitration proceedings.

Subsequently, the CJEU considered that once domestic court proceedings lead to consequences which undermine the effectiveness of the jurisdictional rules in the Brussels I Regulation (2001), it would be more appropriate to have regard to the jurisdiction of the court that is affected by the anti-suit injunction.[88] The CJEU then referred to the *Gasser* case, where the Court held that it is incumbent on the court first seised to decide on its jurisdiction.[89] It finally reached the conclusion that an anti-suit injunction issued by a Member State court affecting proceedings pending before the court of another Member State is incompatible with the Regulation.[90]

Although the finding in *West Tankers* seems to be plausible under the law in force,[91] the approach of the CJEU raises some controversial issues. The application of a jurisdictional rule depends on its satisfying the conditions for the applicability of that rule. To be more precise, the discussion of whether or not a specific measure can be taken by a court should focus, at least in the first instance, on the conditions for taking the measure itself rather than the effects of this measure on other court proceedings. Before concluding that the measure was incompatible with the Regulation, the Court in *West Tankers* should have analysed the characteristics of the measure of the English court. Instead of this, it drew attention directly to the jurisdiction of the Italian court. Although the Italian court's jurisdiction is relevant for the legality of the English Court's measure under the Brussels I Regulation (2001), it is not conclusive for such finding. Indeed, other measures having an impact on a Member State court's jurisdiction may not be incompatible with the Regulation. For example, as demonstrated above, the Brussels I regime does not apply to the enforcement of an arbitral award ordering the withdrawal of proceedings before a Member State court. This measure is not incompatible

[87] *West Tankers* (n 7) para 23.
[88] ibid, paras 24–25.
[89] *E Gasser GmbH v Misat Srl*, CJEU Case No C-116/02, Judgment of the Court, 9.12.2003, para 49.
[90] *West Tankers* (n 7) paras 32 and 34.
[91] Hartley states, '[a]lthough this decision met with a hostile reception in England, it is not lacking in legal logic' (footnote omitted) (Hartley (n 58) 855).

with the Regulation, even if it affects the jurisdiction of a Member State court under the Regulation.[92]

The CJEU in *West Tankers* relied on the Evrigenis-Kerameus Report. This report differentiated between court proceedings in which the court performs its supervisory or supporting functions for arbitral proceedings and ordinary court proceedings in which incidental issues concerning arbitration may arise. Whereas the former is excluded from the scope of application of the Brussels I Regulation (2001), the latter is not. For example, the report acknowledged that the verification of the validity of an arbitration agreement might fall within the scope of the Brussels I Regulation (2001) if the question arose as an incidental question in domestic court proceedings. Such an incidental question may also arise when one of the parties objects to the jurisdiction of the court on the basis of an arbitration agreement.[93]

The CJEU's reference in *West Tankers* to this report is not however plausible. The distinction introduced in the report is not applicable in the context of this case. The CJEU did not need to address the specific issue of whether the incidental question concerning the verification of the validity of the arbitration agreement by the Italian court fell within the scope of the Brussels I regime. It should have rather dealt with the question of whether an anti-suit injunction would affect the jurisdiction of the Italian court over the dispute in its entirety. Indeed, an anti-suit injunction issued by a Member State court would not only require the party to withdraw from the part of proceedings concerning the incidental question but also from the remaining part of the proceedings which fall within the scope of the Brussels I regime.

More importantly, the fact that the Italian court had jurisdiction under the Brussels I regime to consider the incidental question does not mean that it had exclusive jurisdiction on the question of the validity of the arbitration agreement.[94] The verification, as an incidental or principal question, of the validity of an arbitration agreement by a Member State court should not, under the Brussels I Regulation (2001), prevent other Member State courts or arbitral tribunals from analysing this issue as an incidental or principal issue.[95] As stated in the Evrigenis-Kerameus Report, there is no question that the verification of the validity of the arbitration agreement is excluded from the scope of the Brussels I regime when arbitration is the subject matter of the principal issue in domestic court proceedings.[96] From this standpoint, it

[92] See Section IIB.

[93] Report on the Accession of the Hellenic Republic to the Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 24.11.1986, 1986(29) (C 298) Official Journal of the European Communities 1 (Evrigenis-Kerameus Report) §35.

[94] cf *West Tankers* (n 7) para 27.

[95] DT Hascher, 'Recognition and Enforcement of Judgments on the Existence and Validity of an Arbitration Clause under the Brussels Convention' (1997) 13(1) Arbitration International 33, 40 and 42. But see *National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397. It seems that the misinterpretation of the report by the CJEU in *West Tankers* misled the Court of Appeal of England and Wales.

[96] Evrigenis-Kerameus Report (n 93) para 35.

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would not be reasonable to arrive at a conclusion which suggests that a Member State court's decision on the validity of an arbitration agreement would be treated as being within the scope of the Brussels I regime in cases where this issue constitutes an incidental question.

An example may help clarify this. A court enforcing an arbitral award would verify the validity of the arbitration agreement under the New York Convention and not under the Brussels I Regulation (2001). Similarly, a court having supervisory jurisdiction over an arbitration may appoint arbitrators after having verified the existence of an arbitration agreement. In that context, the CJEU itself once reached the conclusion that treating the existence or validity of an arbitration agreement as a preliminary issue does not justify the application of the Brussels I regime.[97] As stated by Collins in his analysis of the CJEU's judgment in *Rich*, '[the CJEU] did expressly reject the argument that the exclusion in respect of arbitration did not apply where the existence or validity of an arbitration agreement was being disputed before different courts'.[98] Accordingly, the English court could have, in the scenario of the *West Tankers* case, appointed an arbitrator considering that the arbitration agreement was valid, even though another Member State's court had rejected its validity. Therefore, the court hearing the substance of the dispute does not have an exclusive jurisdiction over the verification of the existence and validity of an arbitration agreement.[99]

With a more coherent analysis, the CJEU in *West Tankers* could have still reached the same outcome. The CJEU should not have justified its decision on the basis that the characterization of the arbitration agreement was an incidental issue before the court hearing the substance of the dispute. It was not because the anti-suit injunction issued by the English court affected the jurisdiction of the Italian court over this incidental question that the injunction was incompatible with the Brussels I regime. Rather, the incompatibility with the regime arose because the issuing court's measure had an impact on the jurisdiction of another Member State's court to hear the dispute in its entirety. As the Evrigenis-Kerameus Report indicates, even if it is necessary to determine as an incidental question that the arbitration agreement exists, this does not withdraw the application of the Brussels I Regulation (2001) to the entire claim.

In the light of these principles, the reasoning of the CJEU in *West Tankers* ought to be as follows. First, proceedings in which a court exercises its supervisory role for arbitral proceedings are not governed by the Brussels I regime. Since the subject matter of the dispute would be arbitration, the jurisdiction of the court would remain outside the scope of application of the Brussels I Regulation (2001).[100] Second, even in a case where a different

[97] *Rich* (n 6) para 26.
[98] Collins (n 65) 764.
[99] See Collins (n 65) 389. See also the discussion on Recital 12, para 2 of the Recast in Section IVB.
[100] Fentiman (n 8) 533; Briggs (n 5) 200.

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regime is applicable, the powers of a Member State court will be limited by European law principles if the measure taken by this court were to interfere with other Member States' courts' jurisdiction under the Brussels I regime. Briggs agrees with this approach and states, 'even in matters excluded from the Regulation, a court is bound by a broader and more general principle of European law requiring mutual respect for the judicial institutions of the Member States'.[101] Third, an anti-suit injunction granted by a Member State court ordering the withdrawal of court proceedings pending before another Member State court is a measure that interferes with the latter's jurisdiction. Fourth, if the jurisdiction of the latter court is established under the Brussels I Regulation (2001), the anti-suit injunction would be in breach of the Brussels I regime and this would be incompatible with the European law principles. Fifth, the Italian court in *West Tankers* was hearing the substance of the dispute pursuant to the jurisdictional rules under the Brussels I Regulation (2001). The fact that the defendant objected to the court's jurisdiction on the basis of an arbitration agreement did not remove the dispute from the scope of the Brussels I Regulation (2001). For all these reasons, the English court did not have the power under the Brussels I regime to grant an anti-suit injunction even if the measure was taken in relation to an arbitral proceeding.

B. Applicability of the Brussels I Recast to Anti-Suit Injunctions Issued in Relation to Arbitration Proceedings

The provisions of the Brussels I Recast do not offer any specific solution as regards anti-suit injunctions issued by Member State courts in relation to arbitration proceedings. In other words, the European Parliament and Council have not modified any of the relevant provisions of the Brussels I Regulation (2001). Yet this should not suggest that the Brussels I Regulation (2001) remained completely intact concerning the applicability of the Regulation to court proceedings related to arbitral proceedings. The new Recital 12 of the Recast clarifies how the exclusion of arbitration in Article 1(2)(d) should be construed.

The first point is that the determination of the validity of an arbitration agreement made by a domestic court does not constitute a ruling or judgment within the scope of the Regulation regardless of whether this issue has been dealt with as a principal issue or an incidental question.[102] In other words, the decision of a Member State court on the validity of an arbitration agreement cannot be recognized or enforced under the Regulation.

Another point in Recital 12 reads as:

> 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,

[101] Briggs (n 5) 200–1. See also ibid, 1003. [102] Recital 12, para 2 of the Brussels I Recast.

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> 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.[103]

This sentence emphasizes that any proceeding involving the exercise of supervisory jurisdiction of a Member State court over arbitration should be deemed to be within the scope of the exclusion of arbitration in Article 1(2)(d).

Against this background, the question of the compatibility of court-ordered anti-suit injunctions relating to arbitration proceedings with European law should be revisited when the Recast entered into force.

The Advocate General, in his opinion on *Gazprom*, considered that the novelty in the Recast, laid down in Recital 12, constitutes a 'retroactive interpretative law' and 'explains how that exclusion must be and always should have been interpreted'.[104] This has left room for some observations on the applicability of anti-suit injunctions under the Recast before the instrument became applicable.

After having analysed the legislative history of the Recast, the Advocate General argued that the second paragraph of Recital 12 attempts to 'exclude from the scope of the regulation any proceedings in which the validity of an arbitration agreement was contested'.[105] He affirmed that the CJEU in *West Tankers* assumed that 'the verification, as an incidental question, of the validity of an arbitration was included in the scope of that regulation'.[106] Since, he thought, Recital 12 rejected this, he argued that it would have an effect on the outcome of the case.[107] He also took the view that the EU legislature aimed to correct in the Recast the consequences of the *West Tankers* decision.[108] He even stated that if the Recast were applicable to the case instead of the Brussels I Regulation (2001), the Italian court 'could have been seised on the substance of the case on the basis of that regulation only from the time when it held that the arbitration agreement was [invalid]'.[109] This infers that the jurisdictional rules under the Brussels I regime would not apply at all until the validity of the arbitration agreement has been verified. Accordingly, the jurisdiction of the court at this first stage would be established under a different rule outside the scope of the Brussels I regime.

The Advocate General considered that the fourth paragraph of Recital 12 also supported the conclusion that anti-suit injunctions in relation to arbitration proceedings are allowed by the Recast.[110] He was of the opinion that Recital 12 excludes ancillary proceedings, which covers anti-suit injunctions issued by domestic courts when acting in their capacity as court supporting the

[103] ibid, para 4. [104] *Gazprom* (n 17) Opinion, para 91. [105] ibid, para 125.
[106] ibid, para 128 (emphasis omitted) referring to *West Tankers* (n 7) para 26.
[107] *Gazprom* (n 17) Opinion, para 130.
[108] ibid, para 132. See also the European Parliament resolution of 7 September 2010 on the implementation and review of Council Regulation (EC) No 44/2001 (2009/2140(INI)) para 10; Dickinson and Lein (n 10) 57. [109] *Gazprom* (n 17) Opinion, para 133.
[110] ibid, para 137.

arbitration.[111] Furthermore, the Advocate General interpreted the new Articles 31(2) and (3) of the Recast, which grant a jurisdictional priority to the court designated in the choice-of-court agreement over the court first seised, in a way that meant they could also apply when supporting courts take measures in relation to arbitral proceedings.[112]

It seems that the opinion of the Advocate General involves some far-fetched conclusions on the Brussels I Recast. To start with, Articles 31(2) and (3) of the Recast pertain solely to exclusive choice-of-court agreements and form an exception to the general *lis pendens* rule.[113] By definition, these provisions do not bear upon the jurisdiction of domestic courts in cases where there is an arbitration agreement between the parties. In other words, Articles 31(2) and (3) do not prevent the application of the Brussels I regime to measures taken by domestic courts in relation to arbitral proceedings.[114]

As to the interpretation of paragraph 2 of Recital 12, it should be noted that this paragraph merely stresses that the courts' ruling on the validity of an arbitration agreement is not subject to the rules of *enforcement* under the Regulation. Contrary to the analysis of the Advocate General, this paragraph does not directly concern a court's jurisdiction under the Regulation but the law on enforcement of foreign judgments. Hence, Recital 12 does not say that a ruling on the validity of an arbitration agreement is completely outside the scope of the Recast.[115]

Besides, it was not the Italian court's jurisdiction to decide on the validity of the arbitration agreement, but rather its jurisdiction to hear the substance of the dispute which prevented the English court from issuing an anti-suit injunction. Therefore, even if Recital 12 had excluded the application of the Recast for rulings on the validity of an arbitration agreement, this would not directly suggest that the court hearing the dispute concerning the validity of the arbitration agreement would have the power to interfere with the other Member State's court's jurisdiction to hear the merits of a dispute by issuing an anti-suit injunction. In other words, even this solution would not have reversed *West Tankers*.

Paragraph 2 of Recital 12 has a much more limited meaning than that assumed by the Advocate General. It only suggests that a ruling on the validity of an arbitration agreement is not enforceable under the Brussels I regime.[116] The enforceability, under the Brussels I regime, of a judgment on the validity of an arbitration agreement was indeed open to discussion prior to introduction of the clear approach in the new Recital 12.[117] This issue,

[111] ibid, para 138. [112] ibid, para 148.
[113] See Recital 22 of the Brussels I Recast. See also Dickinson and Lein (n 10) 336–43.
[114] cf Fentiman (n 8) 536. [115] Hartley (n 41) 971–2. [116] See also Briggs (n 5) 1000–1.
[117] Prior to the publication of the Recast, the Court of Appeal of England and Wales reached an opposite outcome (*National Navigation Co v Endesa Generacion SA* [2009] EWCA Civ 1397). For the discussion on the regime prior to the Recast, see Hascher (n 95) 40; R Fentiman, 'Arbitration Agreements in Europe' (2010) 69(2) CLJ 242; P Rogerson, *Collier's Conflict of Laws* (CUP 2013)

however, differs from the question of whether anti-suit injunctions in relation to arbitral proceedings are enjoined under the Brussels I regime.

There are some commentators who disagree with this analysis and argue that it would be 'incoherent' and 'hard to justify rationally' if paragraph 2 of Recital 12 is interpreted as excluding decisions on the validity of arbitration agreements from the enforcement regime of the Recast, and at the same time as including the same issue within the scope of application of jurisdictional rules in the Recast.[118] Yet there is a simple justification for doing so this being whether there is any interference with another Member State's court's jurisdiction. As per paragraph 2 of Recital 12, a domestic court may act as a supporting court and refer parties to arbitration or appoint their arbitrators despite another Member State's court's judgment declaring the arbitration agreement invalid.[119] In such a case, the supporting court's act does not interfere with the jurisdiction of the Member State court which has ruled the arbitration agreement invalid. The situation is different, however, when a Member State court issues an anti-suit injunction, even if this measure has been taken in relation to an arbitral proceeding.[120] In that case, the court indirectly restrains another Member State's court from enjoying its jurisdiction to which it is entitled to under the Brussels I regime. Therefore, the anti-suit injunction would interfere with the Member State court's jurisdiction. This explains why paragraph 2 of Recital 12 does not exclude court-ordered anti-suit injunctions related to arbitral proceedings from the scope of application of the Regulation.

Thus the current state of the law has not changed: *mutual trust* still precludes the *power* of domestic courts from issuing anti-suit injunctions to the detriment of the jurisdiction of another Member State court acting under the Brussels I regime. Those are the European law principles which impose on Member State courts the obligation to respect the jurisdiction of other Member State courts.[121] Therefore, the conclusion of the CJEU in *West Tankers* below survives paragraph 2 of Recital 12:

> The use of an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under [the Brussels I Regulation], from ruling on the very applicability of the regulation to the dispute brought

68 and 222; Hartley (n 58) 846. For the effect of the Recital, see Rogerson (n 117) 138; Dickinson and Lein (n 10) 78–9; Nuyts (n 10) 18; N Dowers and ZS Tang, 'Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal' (2015) 3(1) Groningen Journal of International Law 125, 138.

[118] See eg Fentiman (n 8) 536.

[119] This has been already confirmed in *Rich* (n 6) paras 19 and 26.

[120] For the distinction between these two scenarios and an analysis on the interaction between the two CJEU cases, ie, *Rich* and *West Tankers*, see Hartley (n 41) 969–70.

[121] This argument convinces even authors who consider that para 2 of Recital 12 excludes completely the verification of the validity of arbitration agreements from the scope of the Regulation and by doing so reverses a part of the considerations in the *West Tankers* judgment. See Nuyts (n 10) 17; SP Camilleri, 'Recital 12 of the Recast Regulation: A New Hope?' (2013) 62(4) ICLQ 899, 904. cf S Bollée, 'L'arbitrage et le nouveau Règlement Bruxelles I' (2013) (4) Revue de l'Arbitrage 979, 983.

> before it necessarily amount to stripping that court of the power to rule on its own jurisdiction under [the Brussels I Regulation].
>
> … in obstructing the court of another Member State in the exercise of the powers conferred on it by [the Brussels I Regulation], … such an anti-suit injunction also runs counter to the trust which the Member States accord to one another's legal systems and judicial institutions and on which the system of jurisdiction under [the Brussels I Regulation] is based.[122]

For all these reasons, paragraph 2 of Recital 12 does not preclude the application of the principle of *mutual trust* to anti-suit injunctions despite the measure being related to the validity of an arbitration agreement. An anti-suit injunction is indeed not only a ruling on the validity of an arbitration agreement, but also a measure which prevents one party from seising domestic courts that might be competent to hear the substance of the dispute. The latter characteristic of anti-suit injunctions is— still—incompatible with some European law principles in the Brussels I regime. In conclusion, it is unlikely that paragraph 2 of Recital 12 could be interpreted to reinstitute the power of domestic courts to take measures that interfere with the jurisdiction of other Member State courts under the Brussels I Recast in cases where these measures are related to the validity of an arbitration agreement. On the contrary, this paragraph supports the CJEU's judgment in *West Tankers* in that it allows each Member State to make its own decision on the validity of an arbitration agreement and does not permit one Member State to force its view on the other on this particular question.[123]

Another argument in favour of reinstituting anti-suit injunctions in relation to arbitral proceedings might be based on paragraph 4 of Recital 12. This paragraph concerns the applicability of the Regulation to domestic court proceedings when a Member State court exercises its supervisory jurisdiction over arbitration. This paragraph confirms that the Brussels I Recast does not apply 'to any action or ancillary proceedings relating to' arbitration. It enumerates certain issues excluded from the scope of the Recast, such as, the establishment of an arbitral tribunal, the powers of arbitrators, the way an arbitral process is conducted, annulment, review or enforcement of arbitral awards. This paragraph restates the obvious. This list contains uncontroversial issues that come to mind when Article 1(2)(d) excludes arbitration from the scope of the Regulation.[124] The only relevant part of paragraph 4 to domestic courts' power to issue anti-suit injunctions is where it states that the Recast is not applicable to 'any other aspects of [arbitration] procedure'. Nonetheless, this statement is too generic and does not shed any further light on the application of the provision, which already states that

[122] *West Tankers* (n 7) paras 28 and 30.
[123] Hartley (n 41) 970.
[124] See Briggs (n 5) 200 and 1003; Rogerson (n 117) 66–7; Dickinson and Lein (n 10) 74; Nuyts (n 10) 14; Dowers and Tang (n 117) 140.

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'[t]his Regulation shall not apply to … (d) arbitration'.[125] This part of the paragraph does not thus modify the meaning of the arbitration exclusion as interpreted within the context of the Brussels I Regulation (2001).

One might also find some support from the use of the term 'ancillary proceedings' in paragraph 4. It could be possible to argue that issuing anti-suit injunctions constitutes an ancillary service in aid of the arbitral process and hence, it should remain outside the scope of the Brussels I Recast.[126] Yet, again, this paragraph does not fill the gap between some distant dots. One needs more guidance to interpret such terms, as they may completely exclude domestic courts' power to issue anti-suit injunctions from the scope of the Recast.

Paragraph 4 of Recital 12 is not clear enough to answer the implicit question raised in the *West Tankers* case. The question is still whether the *power* of a domestic court to issue an anti-suit injunction in relation to arbitral proceedings is a separate matter from the same court's jurisdiction in its capacity as a supporting court to arbitration. Paragraph 4 restates in a general manner that the court's function as a supervisory court over arbitration is not subject to the Brussels I Recast.[127] Should it mean that the court's *power*, as a supporting court, to issue anti-suit injunctions in relation to arbitral proceedings is excluded from the scope of the Recast and, more generally, from the scope of the Brussels I regime? Should it mean that these anti-suit injunctions are no longer incompatible with the *mutual trust* between the judicial institutions of Member States? The reading of paragraph 4 does not allow for reaching a different answer from that already reached in the context of the arbitration exclusion in the Brussels I Regulation (2001).

If one assumes that EU organs aimed to *correct* the approach of the CJEU in *West Tankers* by introducing the new Regulation, it would seem appropriate to expect some clearer and more relevant explanations, at least in Recitals, which would allow the CJEU in future to reverse its case law.[128] In the absence of such a clear explanation in paragraph 4 and a relevant explanation in paragraph 2, it is hardly possible for the CJEU to find in the Recast grounds to change its case law on anti-suit injunctions in relation to arbitration proceedings.[129]

[125] Art 1(2) of the Brussels I Regulation.

[126] See also Camilleri (n 121) 903–4.

[127] See Section IVA.

[128] See also G Carducci, 'The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration' (2013) 29(3) ArbIntl 467, 488; Dowers and Tang (n 117) 140.

[129] Briggs, for example, still rejects the power of an English court to issue an anti-suit injunction in relation to arbitration proceedings within the framework of the Brussels I Recast. See Briggs (n 5) 200 and 1003. Other authors concurring with this approach are Dickinson and Lein (n 10) 78; Nuyts (n 10) 17; Camilleri (n 121) 906; P Ortolani, 'Anti-Suit Injunctions in Support of Arbitration under the Recast Brussels I Regulation' MPILux Working Paper 6, available at <www.mpi.lu> 10; Dowers and Tang (n 117) 140. cf F Cadet, 'Le nouveau règlement *Bruxelles I* ou l'itinéraire d'un enfant gâté' (2013) 140(3) Journal du Droit International 765, 786; Carducci (n 128) 490.

V. CONCLUSION

In its Impact Assessment, the European Commission indicated that maintaining the *status quo* would allow parallel proceedings and 'enabl[e] a party seeking to escape from an arbitral agreement to ''sabotage'' the arbitral proceedings'.[130] It is unfortunate that the drafters of the Recast compel recourse to preposterous arguments to achieve their outcome, if they actually wanted to change the *status quo*. Notwithstanding that, an analysis of the legislative history of the Recast demonstrates that its text aims to preserve the *status quo* followed in the *West Tankers* case due to a failure to reach mutual agreement on an alternative model for reform.[131] Some commentators describe this as 'a surrender rather than a well-founded solution'.[132]

The surrender to the settled case law means that a court-ordered anti-suit injunction in relation to arbitration proceedings requiring the withdrawal of court proceedings in another Member State is incompatible with European law principles because it interferes with the jurisdiction of the court of that other Member State. This surrender should not, however, be taken to mean that all the remarks of the CJEU in the *West Tankers* case must be supported. First, it is not because anti-suit injunctions conflict with the incidental question on the validity and existence of the arbitration agreement before the affected court that they are incompatible with the Brussels I Regulation. Rather, the reason is that they interfere with the jurisdiction of the affected court to hear the entire dispute pursuant to the jurisdictional rules under the Regulation. This interference with a Member State court having jurisdiction under the Brussels I Regulation is in breach of the Brussels I regime, in particular of the European law principle of *mutual trust* between the judicial institutions of Member States. Second, a measure taken by a Member State court acting as a supporting court to arbitration does not become incompatible with the Brussels I regime because another court has jurisdiction to hear the dispute. What should be examined first is not the jurisdiction of the affected court, but the measure itself. Only such an analysis would take into account the author of the measure: if the measure is taken by an arbitral tribunal, the Brussels I regime would not apply and it would not be incompatible with this regime, even if such measure might have the same impact on the jurisdiction of the affected court. The Brussels I regime would only apply if the measure is taken by a Member State court in its adjudicatory function.

This clarification supports the opinion that court-ordered anti-suit injunctions being incompatible with European law principles is not in conflict with the non-applicability of the Brussels I regime to the enforcement of arbitration-ordered anti-suit injunctions even when there is a pending dispute before a Member State courts. As mentioned above, the test to apply to restrictions

[130] European Commission, *Impact Assessment* (n 12) 36.
[131] See Dickinson and Lein (n 10) 60. See also Hartley (n 41) 972.
[132] Dickinson and Lein (n 10) 60.

under the Brussels I regime should not be based on the source of the jurisdiction of the affected court, but on the characteristics of the measure. Enforcement of an arbitration-ordered anti-suit injunction is not an adjudicatory measure, but results in an enforcement ruling. The Brussels I regime and European law principles, such as *mutual trust*, do not apply to the enforcement of arbitral awards. This procedure is governed by other rules. Therefore, enforcement of an arbitration-ordered anti-suit injunction would not be precluded by the principle of *mutual trust* or of respecting the jurisdiction of another Member State's court.

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