ANTISUIT INJUNCTIONS IN SUPPORT OF ARBITRATION: *WEST TANKERS* STILL AFLOAT

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Abstract In its eagerly awaited judgment in *Gazprom*, the CJEU declined to follow the Opinion of Advocate General Wathelet that *West Tankers* is no longer good law. The *West Tankers* case decided that the courts of one Member State are precluded from granting antisuit injunctions directed at proceedings in the courts of another Member State, even if the proceedings in which the injunction is granted fall outside the scope of the Brussels Regulation by reason of the fact that they are concerned with arbitration. The *Gazprom* case confirms that *West Tankers* is still good law.

Keywords: antisuit injunctions, arbitration, Brussels I Regulation, *West Tankers*.

I. BACKGROUND

This note is concerned with the extent to which the Brussels Regulation[1] restricts the power of courts in EU Member States to grant antisuit injunctions in support of arbitration proceedings.[2]

The story starts with *Turner v Grovit*,[3] in which the CJEU held that antisuit injunctions directed against court proceedings in another Member State were contrary to the Brussels Convention (now the Brussels Regulation 2012). It said:[4]

> However, a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute. Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.

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[1] The phrase 'Brussels I Regulation' is used in this note to cover both Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12, 1 ('Brussels 2000') and 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, OJ 2012, L 351, 1 ('Brussels 2012').

[2] For a full discussion of the law as it stood before the *Gazprom* case, see TC Hartley, 'The Brussels I Regulation and Arbitration' (2014) 63 ICLQ 843.

[3] Case C-159/02 [2004] ECR I-3565.

[4] Para 27 of the judgment.

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From this, it will be seen that the objection to antisuit injunctions is that they permit the courts of one Member State to impose their views on the courts of another Member State regarding the right of the latter to hear a case. They do this by supporting the injunction with the threat of contempt proceedings, which could result in the party concerned being fined, having his or her assets sequestrated or even being put in prison. As a result, the proceedings are discontinued, and the court in which they were pending never gets the opportunity to decide the matter for itself.

Since the prohibition against antisuit injunctions is derived—at least at this stage in the development of the law—from the Brussels Regulation, its scope must be limited to that of the Regulation. How this is to be done came before the CJEU in *West Tankers*.[5] The case arose when a ship belonging to West Tankers hit a jetty in Syracuse, Italy, causing considerable damage. The jetty was owned by Erg, an Italian company. Erg claimed against its insurance company, Allianz, for the damage to the jetty. Allianz compensated Erg up to the limit of the coverage under the policy. Erg then claimed against West Tankers for the remainder of the loss. Since the ship had been on charter to Erg at the time of the accident, and since the charterparty contained an English arbitration clause, Erg began arbitration proceedings against West Tankers in London.

However, because Allianz had partly indemnified Erg, Allianz was subrogated to Erg's rights against West Tankers to the extent to which it (Allianz) had paid Erg.[6] Allianz brought proceedings against West Tankers before a court in Syracuse to recover this amount. It claimed that the court had jurisdiction to hear the case under Article 5(3) of Brussels 2000 (the relevant provision at the time). This confers jurisdiction, with regard to a claim in tort, on the courts for the place where the 'harmful event' occurred. The harmful event had occurred in Syracuse, where the jetty was located.

West Tankers took the view that, since Allianz's right to bring the claim derived from Erg, the claim was subject to the same conditions as applied between it (West Tankers) and Erg. As the arbitration agreement applied as between West Tankers and Erg, West Tankers considered that it also applied as between it (West Tankers) and Allianz. So it contested the jurisdiction of the court in Syracuse; it also brought proceedings before the High Court in London for a declaration that the arbitration agreement covered the claim, and for an antisuit injunction restraining Allianz from pursuing the claim before the court in Syracuse. These were granted by the High Court. Allianz appealed, and the House of Lords made a reference to the CJEU to ascertain whether the prohibition against antisuit injunctions applied when the injunction was granted on the ground that the foreign proceedings were contrary to an arbitration agreement.

This raised the question whether the exclusion of arbitration from the scope of the Regulation[7] insulated the antisuit injunction from the effects of the rule in *Turner v Grovit*. The argument in favour of this view was based on the premise that the proceedings in which the injunction was granted were outside the scope of the Regulation. The CJEU agreed that they were;[8] nevertheless, it ruled that the prohibition against antisuit injunctions still applied. Its reason was that, since the objection to antisuit

[5] *Allianz and Generali Assicurazioni Generali v West Tankers*, Case C-185/07, [2009] ECR I-663 (EU:C:2009:69) (Grand Chamber).

[6] This right was based on art 1916 of the Italian Civil Code. There are similar provisions in other legal systems, including English law.

[7] Art 1(2)(d) of both Brussels 2000 and Brussels 2012.

[8] Para 23 of the judgment.

injunctions is that they prevent the court against which they are directed from determining for itself whether it has jurisdiction under the Regulation, the prohibition should apply whenever the proceedings against which the injunction is directed fall within the scope of the Regulation.[9] On this approach, it is irrelevant whether or not the proceedings in which the injunction is granted are covered by the Regulation. Consequently, an antisuit injunction granted in support of arbitration and, as a result, granted in proceedings which fall outside the scope of the Brussels Regulation will nevertheless be contrary to the prohibition if it is directed against proceedings which fall within the scope of the Regulation.

II. THE FACTS IN *GAZPROM*

The facts in *Gazprom*[10] were as follows. Lietuvos dujos ('LD') was a Lithuanian company which bought gas from Gazprom in Russia and distributed it in Lithuania. The main shareholders were E.ON Ruhrgas International GmbH, a company incorporated under German law which held 38.91 per cent of the share capital, Gazprom, which held 37.1 per cent, and the Lithuanian State, which held 17.7 per cent. In 2004 Gazprom concluded a shareholders' agreement with E.ON and the Lithuanian Government. The agreement contained an arbitration clause.

In 2011, the Government of Lithuania brought certain proceedings in Lithuania concerning LD and various individuals, including the general manager of LD. Gazprom claimed that these were contrary to the shareholders' agreement and moved to commence arbitration in Stockholm. In 2012, the arbitral tribunal declared that the arbitration clause contained in the shareholders' agreement had been partially breached and ordered the Government of Lithuania to withdraw or limit some of the claims which it had brought in Lithuania.

Gazprom then brought proceedings to have the award recognized and enforced in Lithuania. The Lithuanian Court of Appeal refused to do so on the ground that the award infringed the sovereignty of Lithuania. It also held that recognition would be contrary to public policy, invoking Article V(2)(b) of the New York Convention. Gazprom appealed to the Supreme Court of Lithuania, which made a reference to the CJEU. The Supreme Court of Lithuania characterized the award as an antisuit injunction and considered that its recognition would therefore be contrary to the prohibition against such injunctions derived from the Brussels I Regulation. It thereby hoped to gain the support of the CJEU in its efforts to block enforcement of the award in Lithuania. It asked the CJEU whether the courts of Lithuania were permitted or required by the Regulation to refuse to recognize the award.

II. ADVOCATE GENERAL WATHELET'S OPINION

Advocate General Wathelet wrote an unusually long Opinion,[11] clearly the product of much thought and research; nevertheless, it reads more like the brief of counsel for a

[9] Paras 24 and 29 of the judgment.

[10] *Gazprom v Lithuania (Lietuvos Respublika)*, Case C-536/13, ECLI:EU:C:2015:316 (Grand Chamber); Opinion of Advocate General Wathelet: ECLI:EU:C:2014:2414. The order for reference was accepted by the CJEU on 27 November 2013; the judgment was given on 13 May 2015, approximately 18 months later.

[11] It was 42 pages.

party than the opinion of an advocate general. In it, he sought to demolish the judgment of the CJEU in *West Tankers*. He put forward two main arguments.

First Argument

The first argument[12] was that *West Tankers* conflicted ('contrasted sharply' in the words of the Advocate General) with three earlier decisions of the CJEU, *Hoffmann v Krieg*,[13] *Marc Rich and Co. v Società Italiana Impianti*,[14] and *Van Uden v Deco-Line*.[15]

Hoffmann v Krieg concerned a married couple who were originally both domiciled in Germany.[16] The husband left the wife and settled in the Netherlands. The wife remained in Germany. She brought proceedings before the German courts for a maintenance order. This was granted. However, after the husband had obtained a divorce in the Netherlands, he argued that it should not be enforced. He said it was incompatible with the divorce.

The complication in the case was that, while the maintenance order was within the subject-matter scope of the Convention as it stood at the time, the divorce decree was not. So the German courts were not required to recognize the divorce and had not done so when they granted the maintenance order. The Germans had regarded the couple as married and had granted the maintenance order on that assumption; the Dutch regarded them as no longer married. Both points of view were legitimate under the Convention.

The CJEU held that the Dutch courts were not required to recognize the German maintenance order once the divorce had become final. Although the CJEU considered a number of matters (in response to questions asked by the Dutch court) its main ground was Article 27(3) of the Convention. This stated that a court of a Contracting State was not required to recognize a judgment from another Contracting State if it was incompatible with a judgment given in a dispute between the same parties in the Contracting State in which recognition was sought. This provision was based on the idea that, in the event of incompatibility, a forum judgment should prevail over a foreign judgment, irrespective of which was given first. The actual ruling of the CJEU was:[17]

> A foreign judgment ordering a person to make maintenance payments to his spouse by virtue of his conjugal obligations to support her is irreconcilable within the meaning of Article 27(3) of the Convention with a national judgment pronouncing the divorce of the spouses.

The fact that the divorce was outside the subject-matter scope of the Convention was not regarded as relevant.

This judgment could be regarded as incompatible with *West Tankers* only if one interprets it as laying down the general rule that whenever there is a conflict between proceedings covered by the Regulation and proceedings outside its scope, the latter

[12] Paras 99–112 of the Opinion. This argument seems to have originated with Adrian Briggs and Peter Rees, *Civil Jurisdiction and Judgments* (5th edn, Informa 2009) 62–3 (para 2.30), though Briggs and Rees do not mention *Van Uden* as a case with which *West Tankers* conflicts.

[13] Case 145/86 [1988] ECR 645.

[14] Case C-190/89 [1991] ECR I-3855.

[15] Case C-391/95 [1998] ECR I-7091.

[16] This case is discussed at paras 100–103 of the Opinion.

[17] At 672 of the ECRs.

should never be affected by the former.[18] However, there is no reason to interpret it so widely. It was based on Article 27(3).

The next case to consider is *Marc Rich*.[19] In this case, an action within the subject-matter scope of the Regulation was brought in Italy. The defendant (Marc Rich) argued that the Italian court could not hear the case because the claim was covered by an arbitration agreement. The claimant (Impianti) argued that the arbitration agreement was invalid. This required the Italian court to consider the validity of the arbitration agreement as a preliminary issue.

While it was doing this, Marc Rich moved to commence arbitration proceedings in London. Impianti refused to appoint its arbitrator; so Marc Rich asked the High Court to appoint one on its behalf. Impianti argued that the High Court could not proceed with the matter because the Italian court had been seised first, and the same issue—the validity of the arbitration agreement—arose in both sets of proceedings. Under the *lis pendens* rule in the Brussels Convention (the relevant instrument at the time),[20] if the same claim is pending between the same parties in the courts of two different Member States, the court seised second must suspend the proceedings before it. The CJEU, however, held that this rule did not apply to the High Court because the proceedings to appoint the arbitrator were outside the scope of the Convention: they concerned arbitration. So the Convention did not stop the High Court from hearing the matter.

It is hard to see why *West Tankers* should be regarded as being in conflict with this case. It is true that in *Marc Rich* the CJEU looked to the proceedings in which the remedy relating to arbitration was sought, and decided that, since those proceedings were outside the subject-matter scope of the Convention, the Convention did not prevent that court from granting the remedy. In *West Tankers*, the CJEU did not look to the proceedings in which the remedy relating to arbitration was sought (the English proceedings) but held that the decisive question was whether the proceedings *affected* by the injunction were within the subject-matter scope of the Regulation. These were the Italian proceedings. However, this makes perfect sense given that the purpose of the prohibition against antisuit injunctions is to protect the court against which they are directed from interference by a foreign court.

From the point of view of policy, the two decisions are perfectly compatible: in *Marc Rich*, the effect of Impianti's argument would have been to prevent the English court from hearing a claim brought before it. This would have prevented the arbitration from ever getting started. The CJEU's ruling ensured that the English court could proceed. In *West Tankers*, the effect of the antisuit injunction would have been to prevent the Italian court

[18] See para 103 of the Opinion, where Advocate General Wathelet said that in *West Tankers* the CJEU restricted the extent to which arbitration is excluded from the scope of the Regulation by holding that the English courts could not apply their national law to its full extent and issue an antisuit injunction in support of an arbitration.

[19] Discussed at paras 104–112 of the Opinion. The Advocate General's statement of the facts of *Marc Rich*, at para 104 of his Opinion, was far from neutral. He said that the contract was 'subject to English law and contained an arbitration agreement'. In fact, both these issues were hotly contested. In the end, the Italian *Corte di Cassazione* held that the arbitration clause was *not* part of the contract. This ruling was accepted by the English courts: *Marc Rich & Co. AG v Società Italiana Impianti pA (No 2)*, [1992] 1 Lloyd's Rep 624 (CA). So Marc Rich lost the case in the end: the arbitration never got under way.

[20] Art 21 of the Convention. Equivalent provisions are to be found in Brussels 2000 (art 27) and Brussels 2012 (art 29).

from hearing a claim brought before it. The CJEU's ruling ensured that the Italian court could proceed. Both these judgments gain support from Recital 12 to Brussels 2012 (a measure which was not, of course, applicable in either case), which makes clear that a ruling on the validity of an arbitration agreement given by a court in one EU Member State does not have to be recognized under the Regulation in another Member State, regardless of whether it arose as the main issue or as a preliminary issue. Each Member State must be free to decide the question for itself. Neither should be able to force its view on the other. If *West Tankers* had been decided differently, the English courts would have been able to force their view of the matter on to the Italian courts.

The last case to consider is *Van Uden*. Although Advocate General Wathelet claimed that this was one of the three cases with which *West Tankers* conflicted, he discussed it only in a footnote.[21] In *Van Uden*, arbitration proceedings had been commenced in the Netherlands by a Dutch company, Van Uden, against a German company. Van Uden then went to the Dutch courts to request an interim payment order, requiring the German company to pay it, as an interim measure, part of the money in dispute in the arbitration. It was argued that these proceedings were outside the scope of the Brussels Convention because they related to arbitration. The CJEU rejected this: it held they were covered by the Brussels Convention. It is hard to see how *West Tankers* could in any way be regarded as in conflict with this case. In fact, the opposite is true: it shows that, in some cases, proceedings relating to arbitration can nevertheless be covered by the Convention/Regulation.

Although there is no incompatibility, these three cases—together with *West Tankers* itself—raise a more general question: the relationship between two bodies of law which apply within different areas. Even though their areas of application may be different, situations could arise in which a decision taken in one area—and legitimately taken under the law applicable in that area—has an adverse impact on proceedings in the other. In such a situation, one or other body of law will necessarily suffer impairment.

Arbitrators, at least in England, think that the ability of the courts to grant antisuit injunctions in support of arbitration is an important factor in strengthening arbitration. The fact that English courts grant such injunctions almost automatically is regarded as enhancing the position of London as a centre of international arbitration. However, though such injunctions are legitimate in terms of English arbitration law, they necessarily have an adverse impact on the court proceedings against which they are directed. The latter come to an abrupt end. Arbitrators regard this as right: they say that the parties to an arbitration agreement should honour their agreement. However, this begs the question: was the arbitration agreement valid? Moreover, who should decide this question—the courts of the seat of the arbitration or those of the country where litigation is pending?

This problem does not arise only in the relationship between the Brussels Regulation and Member-State arbitration law. It could also arise as between international law and national law, or between federal law and state law in a federation.[22]

[21] Fn 50 to para 110 of the Opinion.

[22] An analogous problem can arise with regard to treaty making by a federal State. In almost all federations, the power to conclude international agreements is given to the federal government, but what if the subject matter of the treaty falls within an area in which legislative competence lies with the states? Should the federation be able to do by means of a treaty what it cannot do through legislation? Compare the decision of the US Supreme Court in *Missouri v Holland* 252 US 416

In *Gazprom*, Advocate General Wathelet appeared to believe that Member-State arbitration law should automatically, and in all situations, prevail over EU rules of jurisdiction. He thought that arbitration should be able to carry on exactly as before, unaffected and unconstrained by anything done under the Regulation, irrespective of the impact that this might have on litigation in other Member States. This is going too far. One should rather take account of both sets of interests by ensuring that neither form of dispute resolution unduly prejudices the other. To do this, one should favour the solution which, in each individual case, would do the least harm to the combined interests of both.

On this basis, the decisions of the CJEU seem to have found the right balance. In *Marc Rich*, a decision to the effect that the *lis pendens* doctrine applied to proceedings to appoint an arbitrator would have stopped the English court in its tracks. Likewise, in *West Tankers*, a decision permitting the English courts to grant an antisuit injunction would have had a devastating effect on the Italian proceedings. The more moderate approach adopted by the CJEU in both cases allowed both sets of proceedings to continue. The decision in *Hoffmann v Krieg* could also be supported on this basis. The Dutch courts were not prevented from granting the divorce, but the German courts were not required to recognize it; the German courts were not prevented from granting the maintenance order, but the Dutch courts were not required to enforce it. If the husband ever acquired assets in Germany, the maintenance order could be enforced against them. Though not perfect, this solution was the best possible in the circumstances.

Second Argument

The Advocate General's second argument was that Recital 12 of Brussels 2012 has the effect of excluding all proceedings concerning the validity of an arbitration agreement from the scope of the Regulation.[23] Since the prohibition against antisuit injunctions applies only if the proceedings against which the injunction is directed fall within the scope of the Regulation, this meant (he said) that the prohibition no longer applies in such cases.[24] He also said that Recital 12 applied retroactively to Brussels 2000, the applicable instrument in the case.[25]

The problem with this argument is that Recital 12 does not say that proceedings concerning the validity of an arbitration agreement are outside the scope of the Regulation. It could have said, 'This Regulation shall not apply to proceedings concerning the validity of an arbitration agreement, regardless of whether this arises as a principal issue or as an incidental question.' This would have been simple to do, but it is not what Recital 12 says. What it says is:

> 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.

(1920) with that of the British Privy Council in *Attorney General for Canada v Attorney General for Ontario* (*Labour Conventions* case) [1937] AC 326.

[23] Para 125 of the Opinion.

[24] Para 128 of the Opinion. For the origin of this view, see A Nuyts, 'La refonte du réglement Bruxelles I' (2013) 102 *Revue critique du droit international privé* 1 at 15.

[25] Para 91 of the Opinion. He said that Recital 12 to Brussels 2012 explains how the exclusion of arbitration must be, and always should have been, interpreted.

That is different. It means that the provisions of the Regulation on recognition and enforcement of judgments do not apply to such a ruling. It does not mean that such proceedings are entirely outside the scope of the Regulation. They are subject to the other provisions of the Regulation, in particular those on jurisdiction. Since the reason for the prohibition against antisuit injunctions is to protect the right of the courts of each Member State to determine their jurisdiction under the Regulation for themselves, the provisions on jurisdiction are the relevant ones for this purpose.

Not only is the Advocate General's argument contrary to what the Regulation says; it is also contrary to what was intended in the negotiations. The United Kingdom tried to get *West Tankers* reversed. It did this by proposing a provision to the effect that all proceedings to which an arbitration agreement applies would be outside the scope of the Regulation. If accepted, this would have had the effect for which the Advocate General was contending: it would have applied to the substantive proceedings before the foreign court, and it would have excluded such proceedings from the whole of the Regulation, not just from the provisions on recognition and enforcement. However, it was not accepted.

The Commission made a proposal which would have gone in the same direction but would not have gone as far. It would have said that a ruling on the validity of an arbitration agreement by the courts of the seat of the arbitration would be binding on the courts of all other Member States. This too was not accepted.

Instead, it was decided to maintain the *status quo*, but to clarify certain issues. The only change of substance was to state that the 1958 New York Convention prevails over the Regulation,[26] something which was almost certainly the case under Brussels 2000.[27] Recital 12 restated the position as laid down in the Jenard and Schlosser Reports and in the judgments of the CJEU.[28] There was no intention to reverse *West Tankers*. To interpret Recital 12 as having this effect would be perverse.

The New York Convention

The Advocate General concluded his Opinion by considering other grounds on which the Lithuanian courts could refuse recognition of the award, in particular Article V(2)(b) of the New York Convention.[29] He examined the meaning of 'public policy' under this provision, and under the equivalent provision of Brussels I, and concluded that it

[26] Art 73(2) of Brussels 2012.

[27] Art 71(1) of Brussels 2000 provides: '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.' The New York Convention applies with regard to a particular matter: arbitration. It could govern the jurisdiction of courts because it provides that when a court of a Contracting State is seised of an action in respect of which the parties have concluded an arbitration agreement, the court must, at the request of one of the parties, refer the parties to arbitration (unless the arbitration agreement is null and void, inoperative or incapable of being performed). It could also affect the recognition or enforcement of judgments. It requires an arbitral award to be recognized and enforced (subject to exceptions). If the award is irreconcilable with a judgment, this necessarily precludes recognition of the judgment. To this extent, it governs the recognition and enforcement of judgments.

[28] For a full discussion, see Hartley, 'The Brussels I Regulation and Arbitration' (n 2).

[29] He said that it was not necessary for the Lithuanian courts to have recourse to art V(2)(b) in order to refuse recognition: it could be refused on the basis of art V(2)(a); nevertheless, he went on to consider the interpretation of art V(2)(b).

should be interpreted restrictively. Since the CJEU has no jurisdiction to interpret the New York Convention,[30] it is hard to understand why he did this.

IV. THE JUDGMENT

The case was heard by a Grand Chamber consisting of 13 judges, thus emphasizing the importance attached to the matter. In contrast to the Advocate General's Opinion, the judgment was short and to the point. It was characterized more by what it did not say than by what it did. There was no mention of the Advocate General's Opinion[31] and no mention of Brussels 2012 and any retroactive effect it might have on proceedings to which Brussels 2000 applies. However, the CJEU treated *West Tankers* as the leading case on the matter and based its reasoning on it. Clearly, the CJEU still regards it as good law.

The CJEU summarized its ruling in *West Tankers* as holding that 'an injunction issued by a court of a Member State restraining a party from having recourse to proceedings other than arbitration and from continuing proceedings brought before a court of another Member State, which has jurisdiction under Regulation No 44/2001, is not compatible with that regulation'.[32]

This bases the prohibition against antisuit injunctions on the Brussels Regulation. However, in the next paragraph of its judgment, the CJEU said:[33]

> An injunction issued by a court of a Member State requiring a party to arbitration proceedings not to continue proceedings before a court of another Member State is contrary to the general principle which emerges from the case-law of the Court that every court seised itself determines, under the applicable rules, whether it has jurisdiction to resolve the dispute before it.

This changes the basis of the prohibition: it is no longer based solely on the Brussels Regulation, but is now contrary to a general principle which emerges from the case-law of the CJEU.

Since the early days of the European Union, general principles of law have been recognized as an independent source of EU law, as they are of international law.[34] They may be derived either from an extension of the principles embodied in provisions of written EU law or from principles applied in the law of the Member States.[35] The significance of the court's move in changing the basis of the prohibition against antisuit injunctions from the Brussels Regulation to a general principle of law is that it opens the door to a ruling by the CJEU in a future case that the prohibition applies to protect proceedings in the courts of Member States even if they are outside the subject-matter scope of the Brussels Regulation.

[30] See *TNT Express Nederland BV v AXA Versicherung AG*, Case C-533/08, EU:C:2010:243, paras 60 and 61 of the judgment.

[31] Although the CJEU sometimes refers to the Advocate General's Opinion when it agrees with a particular point, it does not normally make adverse criticism of it.

[32] Para 32 of the judgment.

[33] Para 33 of the judgment, first sentence.

[34] See Article 38(1)(c) of the Statute of the International Court of Justice.

[35] For a full discussion, see TC Hartley, *The Foundations of European Union Law* (8th edn, Oxford University Press 2014) ch 5.

After confirming that antisuit injunctions, even if issued in support of arbitration, are contrary to EU law, the CJEU then said that the question asked by the Lithuanian court was not whether such an injunction is compatible with Brussels 2000, but whether it would be compatible with the Regulation for a court of a Member State to recognize and enforce an arbitral award ordering a party to reduce the scope of the claims brought before a court of that Member State.[36]

Its next step was to say that the Brussels Regulation is concerned only with solving conflicts between the courts of Member States. Since arbitral tribunals are not courts of a Member State, it said, there was no conflict under the Regulation.[37]

It then turned to the principle of mutual trust, which it had previously held to underlie the prohibition against antisuit injunctions.[38] It regarded this principle as applying only as between the courts of the Member States. Since arbitration tribunals are not courts, there could be no infringement of the principle in proceedings for the recognition of an award.[39]

It next said that an arbitration award prohibiting a party from bringing claims before the courts of a Member State does not deprive that party of the right to contest the validity of the arbitration agreement since, when proceedings are brought to recognize the award, the party can contest recognition, and the court will determine, on the basis of national and international law, whether or not the award should be recognized.[40] From this the CJEU concluded that there was no infringement of the principle of mutual trust.[41]

The CJEU then took the final step in the argument. It said that, unlike the injunction in *West Tankers*, failure by the Government of Lithuania to comply with the award could not result in penalties being imposed on it by the court of another Member State.[42] This meant that the award was not an antisuit injunction as understood in *West Tankers*. Consequently, the recognition of the award was governed by the law of Lithuania and by international law, not by the Brussels Regulation. The final ruling was that Brussels 2000 neither prohibits nor requires the recognition of an arbitral award prohibiting a party from bringing claims before the courts of a Member State. The Regulation is simply inapplicable.

V. CONCLUSIONS

The court's judgment can be summed up in a few words. *West Tankers* still stands;[43] however, it was not applicable in the *Gazprom* case because the award was not an antisuit injunction as understood in that case. This was because it was not granted by

[36] Para 35 of the judgment.
[37] Para 36.
[38] Para 34.
[39] Para 37.
[40] Para 38.
[41] Para 39.
[42] Para 40.
[43] The judgment represents a rejection of the first argument put forward by the Advocate General. It also represents a rejection of his second argument insofar as it applied retroactively to proceedings governed by Brussels 2000. In theory, this leaves open the question whether his second argument might be correct when the proceedings are governed by Brussels 2012. However, since his argument was contrary to both the clear words of the provision and the intent of the drafters, it is hard to believe that it would be accepted.

a court of a Member State and contained no penalty.[44] So the Lithuanian courts could decide for themselves whether or not they would recognize the award and, as a result, whether or not they had the jurisdiction which the arbitrators sought to deny to them.

The relationship between arbitration and the Brussels Regulation has never been easy. With its large arbitration industry, the United Kingdom has always been pushing to give arbitration a privileged position. This has not been accepted by the other Member States, and the *Gazprom* case shows that the CJEU is continuing its policy of trying to maintain a reasonable balance between the two forms of dispute resolution. Although it has not retreated from its position in *West Tankers*, it has not extended the prohibition against antisuit injunctions to cover awards by arbitrators that lack a penalty. To have done so would have constituted an interference with arbitration that was not needed in order to protect the objectives of the Regulation.

[44] It is doubtful whether arbitrators can, by themselves, impose and enforce penalties for disobedience to their orders. If a court of a Member State were to enforce a penalty of this nature imposed by arbitrators, that would constitute an antisuit injunction as understood in *West Tankers.*

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