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client alert

FIRST INDICATION OF THE IMPACT OF THE "RECAST BRUSSELS REGULATION"

The reversal of West Tankers, and the return of anti-suit injunctions in favour of arbitration proceedings?

A recent opinion delivered in the Court of Justice of the European Union (**"CJEU"**) has provided the first indication as to the impact on the arbitration landscape of the entry into effect of Regulation (EU) No 1215/2012 (the **"Recast Brussels Regulation"**), which replaced Regulation 44/2001 (the **"Brussels Regulation"**) on 10 January 2015.

Anti-suit injunctions, which are familiar in common law jurisdictions, but less common to those in civil law jurisdictions, are orders issued by a court or an arbitral tribunal which prevent an opposing party commencing or continuing proceedings in another jurisdiction or forum.

In 2009, the CJEU had controversially held in the *West Tankers* case that anti-suit injunctions issued by a court of a Member State in support of arbitration proceedings were incompatible with the Brussels Regulation.

In the case of *'Gazprom' OAO* (Case C536/13), AG Wathelet, delivered an opinion on 4 December 2014 in which he argues that anti-suit injunctions issued to prevent or remedy breaches of arbitration agreements do not fall within the scope of the Brussels Regulation or the Recast Brussels Regulation, and are not therefore incompatible with either.

Is this the first step leading to a reversal of the *West Tankers* decision, paving the way for the return of anti-suit injunctions issued to support arbitration proceedings within the EU?

BACKGROUND

Brussels I Regulation No. 44/2001 of 22 December 2000 (the "Brussels Regulation")

The Brussels Regulation enshrined the principle that every Member State court seised should be entitled to determine its own jurisdiction (Article 25).

The Brussels Regulation also contained a general *"arbitration exclusion"*, whereby Article 1(2)(d) purported to exclude arbitration from its scope.

This was intended to ensure the compatibility with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the **"New York Convention"**), which requires Contracting States to deny the parties access to court in contravention of their arbitration agreement.

The decision in *West Tankers*

In the case of *West Tankers*, the CJEU (then the ECJ) ruled that the arbitration exclusion did not extend to ancillary proceedings issued in support of arbitration proceedings.

In that case, the ECJ refused to permit an English court to grant an anti-suit injunction restraining a party from commencing or continuing proceedings in Italy on the grounds that such proceedings breached an arbitration agreement.

The ECJ based its decision on the view that such an anti-suit injunction was incompatible with the Brussels Regulation, and, more specifically, with the right of a court to determine its own jurisdiction and the principle of mutual trust between Member States.

This decision was much criticised. In particular, it was feared that this decision would encourage parties to strategically commence court proceedings in EU Member States in breach of arbitration agreements.

Recital 12 of the Recast Brussels Regulation

The Recast Brussels Regulation includes the same arbitration exclusion, as set out in Article 1(2)(d). However, this exclusion is now clarified by recital 12 of the Recast Brussels Regulation, which states:

"This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award."

Gazprom: the facts

The prohibition on anti-suit injunctions has been considered by AG Wathelet in the *Gazprom* case, following a reference by the Lithuanian Court to the CJEU for a preliminary ruling.

The case involved a dispute between Gazprom OAO ("**Gazprom"**) and the Ministry of Energy of the Republic of Lithuania (the **"Ministry of Energy"**), concerning a shareholders agreement subject to Lithuanian law, which contained an agreement providing for disputes to be resolved by arbitration in Sweden, under the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the **"Arbitration Agreement"**).

In 2011, the Ministry of Energy brought an action before a regional court in Lithuania. Being of the view that the action breached the Arbitration Agreement, Gazprom filed a request for arbitration against the Ministry of Energy in Stockholm, asking the Arbitral Tribunal to order the Ministry of Energy to withdraw the action brought in the Lithuanian Court.

The Arbitral Tribunal granted the request in part, ordering the Ministry of Energy to withdraw some of its requests before the Lithuanian Court, and to reformulate one of the requests in such a way as to conform to the Arbitration Agreement.

The Lithuanian Courts initially refused to recognise and enforce the award, notably on the basis that the award breached the principle of independence of judicial authorities, a principle of Lithuanian public policy.

Following a number of appeals by Gazprom, the matter was eventually referred to the CJEU for a preliminary ruling on a number of issues, including:

- does the court of a Member State have the right to refuse to recognise an arbitral award which includes an anti-suit injunction because it restricts the court's right to determine itself whether it has jurisdiction?

- can a national court refuse recognition of an award on public policy grounds of seeking to safeguard the primacy of EU law and the full effectiveness of the Brussels Regulation?

Opinion of Advocate General Wathelet

Despite the fact that the Recast Brussels Regulation had not yet come into effect at the time of publication of his Opinion, AG Wathelet considered that the Court should take it into account since the issue in question lay not so much in the actual provisions of the Recast Brussels Regulation, which continue to exclude arbitration from its scope, but rather in Recital 12 of its preamble, which, according to AG Wathelet, explains how the arbitration exclusion *"must be and always should have been interpreted"* (paragraph 91).

AG Wathelet emphasised the final paragraph of Recital 12, which he said (at paragraph 138):

"Not only […] exclude[s] the recognition and enforcement of arbitral awards from the scope of the [Recast Brussels Regulation] *[…], but it also excludes ancillary proceedings, which in my view covers anti-suit injunctions issued by national courts in their capacity as court supporting the arbitration."*

He concluded that the prohibition on anti-suit injunctions can no longer be justified on the basis of the Recast Brussels Regulation, since it is among measures which the court of the seat of the arbitration may order in support of the arbitration with the aim of ensuring the proper conduct of the arbitration proceedings.

AG Wathelet added that Arbitral Tribunals could not be bound by the principle of mutual trust in the Brussels Regulation, and that the recognition and enforcement of anti-suit injunctions issued by *Arbitral Tribunals* was instead governed by the New York Convention.

As a result, AG Wathelet considered that even if the CJEU were not to agree with his interpretation of the Recast Brussels Regulation, the *West Tankers* solution should be limited to cases where an anti-suit injunction is issued by a court of a Member State against proceedings pending before a court of another Member State.

AG Wathelet consequently proposed that the CJEU should hold that the court of a EU Member State does not have the right to refuse to recognise an award containing an anti-suit injunction on the ground that it would restrict the court's right to determine itself whether it has jurisdiction.

AG Wathelet also considered that, in any event, the fact that an arbitral award contains an anti-suit injunction is not a sufficient ground for refusing to recognise and enforce it on public policy grounds.

ANALYSIS

AG Wathelet's opinion represents a marked departure from the current interpretation of the scope of the arbitration exclusion set out in Brussels Regulation and the Recast Brussels Regulation.

Even if the case does not relate to anti-suit injunctions issued by courts of Member States of the EU, a decision which would follow the opinion of AG Wathelet would pave the way for the return of anti-suit injunctions issued to support arbitration proceedings within the EU.

Moreover, as AG Wathelet has remarked, the fact that there has been no change in the law may ensure that this decision is applicable to any anti-suit injunction issued by an arbitration tribunal prior to the entry into effect of the Recast Brussels Regulation.

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