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Are anti-suit injunctions back on the menu? The AG's opinion in *Gazprom*

On 4 December 2014, the Advocate General ("**AG**") of the CJEU handed down an opinion in the *Gazprom* case (C-536/13) which will surprise many. The case concerns the compatibility with EU Regulation 44/2001 (the "**Brussels I Regulation**") of an anti-suit award made by an EU seated arbitral tribunal against EU court proceedings elsewhere. In approving this, the AG has, however, also opined that the CJEU's decision in *West Tankers* (C-185/07) is now to be regarded as incorrect and that intra-EU anti-suit injunctions in support of arbitration are generally permissible. The opinion is not binding on the CJEU but looks set to reignite debate over such measures.

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The legal background: the arbitration exclusion, the Brussels I Regulation and the Brussels I Recast

Arbitration is, of course, excluded from the scope of the Brussels I Regulation. This is necessary to permit EU courts to give effect to arbitration clauses and arbitration awards free of its scheme.

In recent years, difficulties have been created by the CJEU's ruling in *West Tankers*. There, the CJEU prohibited the use of an anti-suit injunction by an EU court (being the court of the arbitral seat – in that case England) to restrain court proceedings brought before another EU court in "breach" of an arbitration clause (in that case – Italy).

More issues were created by the detail of the CJEU's reasoning. It decided that although the proceedings for the injunction fell within the exclusion, they, nonetheless, were impermissible because they undermined the Brussels I Regulation in the (Italian) court proceedings (which the CJEU regarded as within that Regulation).

Further, the CJEU held that any decision by the "wrongly seized" court on the arbitration clause was a judgment within the Brussels I Regulation for the purposes of recognition elsewhere in the EU. This raised the possibility that such a ruling would also bind the courts of the arbitral seat.

Reform of this situation became a priority. Accordingly, Regulation 1215/2012 (the "**Recast**") which will shortly replace the Brussels I Regulation (it applies to any proceedings instituted in the EU on or after 10 January 2015) retains the arbitration exclusion but strengthens it through a new Recital 12. This reinstates a clearer separation between the arbitration process and court proceedings and better insulates the former against tactical litigation within the EU.

The facts of *Gazprom*

The *Gazprom* case concerns the supply of gas by Gazprom to Lithuania via a Lithuanian company, Lietuvos dujos AB ("**LD**"). LD was, at the time of the facts of the case, owned by Gazprom, E.ON and the Lithuanian State. Under certain agreements the price LD paid for gas was set by a formula which had been renegotiated a number of times. Further, a shareholders' agreement between Gazprom, E.ON and the Lithuanian Ministry of Energy ("**MoE**") obliged those parties to safeguard this gas supply and contained an arbitration clause providing for SCC arbitration with Stockholm seat.

In 2011 the MoE commenced domestic court proceedings against LD, its managing director and two board members appointed by Gazprom. In these, the MoE alleged that the setting of the gas price had been contrary to LD's interests and sought an investigation, under the Lithuanian Civil Code, into how LD had been run.

In response, Gazprom commenced an arbitration in Stockholm under the shareholders' agreement. It sought an order that the MoE should have arbitrated these matters and that it should withdraw its court proceedings. In July 2012 the tribunal made an award to that effect.

Meanwhile, in September 2012, the first instance Lithuanian court found that the matter was within its jurisdiction and granted the MoE's request for an investigation.

This was appealed to the Lithuanian Court of Appeal where Gazprom entered the fray and sought recognition of the tribunal's award. This was rejected. The Court of Appeal held that the statutory investigation was, under Lithuanian law, non-arbitrable and that the award was contrary to public policy (in denying the Lithuanian courts the ability to rule on their jurisdiction over an action brought by the Lithuanian State). Recognition was thus refused on the basis of Articles V(2)(a) and (b) of the New York Convention 1958 (the "**NYC**").

This decision was appealed to the Lithuanian Supreme Court. In that appeal the MoE relied on the NYC but also argued that recognition of the tribunal's award would be contrary to the Brussels I Regulation. As a result, the Supreme Court referred a number of questions to the CJEU which essentially raised two issues:

- First, should the court refuse to recognise the arbitral tribunal's award on the basis that it is incompatible with the Brussels I Regulation in restricting the right of the court to determine its jurisdiction under that instrument? and
- Second, did the award otherwise violate the concept of "public policy" in Article V(2)(b) NYC in limiting the court's right to decide on its own jurisdiction under the Brussels I Regulation?

The AG's opinion

As to the first issue, the AG considered that there was nothing in the Brussels I Regulation which required the court to refuse to recognise the tribunal's award. That question, in his view, fell exclusively to be determined by reference to the NYC (paragraph 157 of his opinion – numbers in brackets which follow are, likewise, references to such paragraphs).

The AG rested his conclusion on two, independent, bases. The first, and more controversial, was the impact of Recital 12 of the Recast. His reasoning in this regard was that:

First, even though the case fell to be decided under the Brussels I Regulation, Recital 12 of the *Recast* fell to be taken into account. This was because its function (there being no change to any relevant, operative, articles in the two instruments) was to explain how the arbitration exclusion must and always should have been interpreted (91). Second, Recital 12 showed that any EU court proceedings concerning, even as an incidental matter, the existence of an arbitration agreement were (contrary to the CJEU's view in *West Tankers*) to be regarded as excluded from the scope of the Brussels I Regulation; at least until the "wrongly seised" court has ruled that there is no arbitration agreement (125-133). Accordingly, up until that point there could be no objection to an anti-suit injunction being granted by an EU court against the same (134-136). This was further supported by Recital 12 stating that the Recast does not apply to *"ancillary proceedings"* relating to an arbitration (137-140). Thus, as intra-EU court anti-suit injunctions in support of arbitration are permissible under Recital 12, as applied to the Brussels I Regulation, *a fortiori* there was also nothing in the tribunal's award which offended that instrument (187).

The second basis was narrower and less controversial – it being that an arbitral tribunal is not bound by the Brussels I Regulation (and so there was no objection to the grant of such an award), and that, likewise, recognition and enforcement of a tribunal's award is simply not subject to that Regulation (153-156).

Of course, the AG's conclusion that the Brussels I Regulation was not relevant in respect of the first issue would still leave the Lithuanian courts free to decide whether to recognise the award under the NYC.

In that event, however, the second issue then became relevant as it sought to ask whether the public policy exception of Article V(2)(b) NYC was engaged by any such interference with a court ruling on its own jurisdiction under the Brussels I Regulation. In this respect the AG's view was that it was not; that instrument being incapable of being characterised as public policy provisions under EU Law (180-188).

Conclusions

Before focussing on the AG's conclusions on *West Tankers* and intra-EU court anti-suit injunctions in support of arbitration, it should not be forgotten that, ultimately, *Gazprom* does not directly concern such measures. It is about the effect of an anti-suit award by a tribunal and, in this respect, the AG's support of such an award is to be welcomed. It is hoped that the CJEU reaches the same ultimate result.

By contrast, the AG's wider observations on *West Tankers* are more radical. *If* followed by the CJEU the consequence would be that intra-EU court anti-suit injunctions in support of arbitration would be permissible *both* under the Recast and in respect of proceedings remaining governed by the Brussels I Regulation regime.

What will the CJEU do? In the light of *Turner v Grovit* (C-159/02) the extent to which Recital 12 of the Recast permits such injunctions remains highly debateable, as does the separate issue of it having retroactive application, and it seems unlikely that the CJEU will follow the AG on this point. Moreover, it does not actually need to touch the issue. First, there exists a far more orthodox ground for deciding the case, namely the AG's second basis for his opinion on the first issue discussed above. And, second, it could hold that the entire reference is simply unnecessary to determine the case (on the basis that the Lithuanian Court can, in any event, as it has done, refuse to recognise the award on the basis of Article V(2)(a) NYC).

However, there is a dilemma for the CJEU. If it leaves the point open the AG's opinion will remain as ammunition for litigants, before EU courts with a tradition of anti-suit injunctions, to try to reopen *West Tankers* or even (particularly in proceedings wholly within the temporal scope of the Brussels I Recast where Recital 12 undoubtedly applies) to argue that the measures that case outlawed are simply back on the table. The CJEU will no doubt realise this and so there is a risk that the AG's opinion stirs it into not only reaffirming the position under the Brussels I Regulation but also a pre-emptive strike against matters under the Recast.

Finally, what might happen if a litigant tried such an application *before* the

CJEU rules in *Gazprom.* That is difficult to predict. The AG's opinion is not law, the relevant legal points differ considerably whether the Brussels I Regulation or the Recast are involved and no doubt a national court would feel additional pressure to stay the matter, or even refer the questions to the CJEU, given *Gazprom* is pending. Of course, there is also the risk that whatever the CJEU says in that case could render such an application entirely nugatory. In short, it would not be something to be done without careful consideration beforehand.

Click here for a copy of the AG's opinion.

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