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EU - The *Gazprom* decision: CJEU upholds the ability of arbitral tribunals to defend their own jurisdiction

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On 13 May 2015, the CJEU handed down judgment in the *Gazprom* case (C-536/13). The case concerns the compatibility, with the EU jurisdiction rules, of an anti-suit award made by an EU arbitral tribunal against EU court proceedings. In a judgment with positive consequences for EU seated arbitrations, the CJEU has affirmed that such a measure is not incompatible with those rules.

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

Jurisdiction in civil and commercial matters before the EU courts is primarily governed by EU legislation. In proceedings commenced up until 10 January this year the principal statute is EU Regulation 44/2001 (the "**Brussels I Regulation**"), whilst in proceedings commenced on or after that date it is EU Regulation 1215/2012 (the "**Brussels I Recast**"), the latter instrument being an evolution of the former. The *Gazprom* decision fell to be decided under the Brussels I Regulation, but also has some relevance for the Brussels I Recast.

A feature of both instruments is that arbitration is excluded from their scope. This is necessary to permit EU courts to give effect to arbitration clauses and arbitration awards free of their scheme.

Under the Brussels I Regulation there have been some practical difficulties, following the CJEU's ruling in *West Tankers,*[1] in the relationship between EU seated arbitrations and EU court proceedings. In that case, 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 that case – Italy) allegedly in breach of an arbitration clause.

[1] Case C-185/07

In its reasoning, the CJEU's judgment also raised broader issues. Although the proceedings for the injunction fell within the arbitration exclusion, the CJEU stopped them because it considered they undermined the operation of the Brussels I Regulation in the (Italian) court proceedings. That being so, what other actions in support of arbitration might be prohibited?

Reform of this situation became a priority. The Brussels I Recast therefore strengthened the arbitration exclusion by way of a new Recital 12 therein. This was intended to reinstate a clearer separation between arbitration and court proceedings and better insulate the former against tactical litigation in the EU.

The facts of *Gazprom*

The *Gazprom* case concerns the supply of gas by that company to Lithuania via a Lithuanian company, Lietuvos dujos AB ("**LD**"). LD was, at the relevant time, owned by Gazprom, E.ON and the Lithuanian State. A shareholders' agreement between Gazprom, E.ON and the Lithuanian Ministry of Energy ("**MoE**") contained an arbitration clause providing for SCC arbitration with Stockholm seat.

In 2011 the MoE commenced Lithuanian court proceedings against LD, its managing director and two board members appointed by Gazprom. In those proceedings, the MoE 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 such matters and so should withdraw its local 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 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 Article 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, in essence, asked whether the Brussels I Regulation precluded an EU court from giving effect to such an award (since such a measure might restrict its ability to determine whether it had jurisdiction to hear the case under that instrument).

The opinion of the Advocate General ("AG")

In an opinion handed down in December 2014, the AG considered that there was nothing in the Brussels I Regulation which required the court to refuse to recognise the tribunal's award.

In reaching this view he deployed two, separate, lines of reasoning. The first was surprising. He stated that, although the case fell to be decided under the Brussels I Regulation, Recital 12 of the Brussels I Recast was still relevant (as it showed how the arbitration exclusion must and always should have been interpreted).On his view, Recital 12 of the Brussels I Recast made it clear that, contrary to the CJEU's decision in *West Tankers*, an EU court could grant an anti-suit injunction against court proceedings elsewhere in the EU in support of arbitration. That being the case, there was also nothing in the tribunal's award which offended the Brussels I Regulation.

This reasoning, if followed by the CJEU, would not only support the power of an EU seated tribunal to grant an anti-suit award against court proceedings elsewhere in the EU, but would also permit an EU court to do the same.

The AG's second line of reasoning was more conventional. He said that, in any event, the matters in dispute were simply untouched by the Brussels I Regulation and should be left to national arbitration law to decide; arbitral tribunals not being bound by the Brussels I Regulation, and, likewise, recognition and enforcement of an award simply not being subject to it.

The CJEU's judgment

The CJEU effectively followed the AG's second line of reasoning and held that there was nothing in the Brussels I Regulation that precluded an EU court from giving effect to an arbitral award prohibiting a party from bringing claims before it. This should be left to be determined by the national arbitration law applicable in the state of enforcement (including incorporation of any international obligations under, say, the NYC). Its reasoning was as follows.

First, the CJEU recalled its judgment in *West Tankers* which held that an intra-EU court anti-suit injunction in support of arbitration is not compatible with the Brussels I Regulation. It explained that the reason for this is that the EU courts are to be left to determine their jurisdiction for themselves and that review of one's decision by another is generally prohibited. In the CJEU's view, however, this type of conflict was simply not in issue here - as the order originated from an *arbitral tribunal*, not a court.[2]

Second, the CJEU pointed out that a further reason for the prohibition on anti-suit injunctions as between the EU courts is that they run counter to the mutual trust between them. Further, they are also liable to bar an applicant who challenges the validity of an arbitration clause from access to the EU court in which it has brought proceedings. In the CJEU's view, again, there was no violation of these principles here. In the former case because an

[2] C-536/13 at paragraphs 32-33, 35-36.

arbitral tribunal, not a court, had made the order and, in the latter, because the litigant remains free to contest the recognition and enforcement of that award before the relevant court.[3]

Finally, unlike a court-ordered injunction, the consequence of non-compliance with the arbitral award would not be court-ordered penalties. This difference in legal effect, in the CJEU's view, provided another basis upon which to distinguish its judgment in *West Tankers*.[4]

Analysis and conclusions

The CJEU's judgment is a positive one for EU seated arbitrations. The immediate result is to confirm that the Brussels I Regulation does not tie an EU court's hands in respect of the effect to be given to an anti-suit award issued by a tribunal seated elsewhere in the EU. Of course, whether or not such an award has any effect in that court will depend on an application of that court's own arbitration law; but taking the influence of the Brussels I Regulation out of this equation is an endorsement of the primacy of, in particular, the NYC in this area.

Furthermore, although the judgment is, strictly speaking, about the effect to be given to such an award, it is also confirms that any power the arbitral tribunal itself has to grant such relief is not fettered by the Brussels I Regulation. This is clear from the parts of the CJEU's ruling, cited above, which, in short, reject any argument that the CJEU jurisprudence concerning concurrent court proceedings and mutual trust and confidence under the Brussels I Regulation finds any application when considering the interface between the actions of an arbitral tribunal and an EU court. This is an important finding for proceedings that fall under the Brussels I Regulation not only because it allows the tribunal to make the type of award in issue in the case but because, more generally, the ability of an EU seated tribunal to press on with its proceedings in the face of court proceedings elsewhere in the EU has provided an important antidote to the effect of the *West Tankers* ruling. The CJEU's position fortifies a tribunal's ability to do so free of the Brussels I Regulation.

Although *Gazprom* was decided under the Brussels I Regulation (given the timing of proceedings in the case) it is worth observing that the observations made above will remain good under the Brussels I Recast. This is not least because of the even clearer separation between arbitration and court proceedings established by Recital 12 of the Brussels I Recast, the thrust of which this decision is very much in line with.

[3] *ibid* at paragraphs 34, 37-39.
[4] *ibid* at paragraph 40.

As a final point, returning to Recital 12, what about the controversial issues that the AG's opinion raised? In particular; (i) whether Recital 12 is applicable in proceedings under the Brussels I Regulation and (ii) whether Recital 12's scope *permits* intra-EU court anti-suit injunctions in support of arbitration. In relation to (i), although the CJEU does not refer at all to the AG's opinion, nor any of the possible competing arguments, it seems clear that it regarded the case as falling to be determined by the Brussels I Regulation without reference to Recital 12 of the Brussels I Recast. Such a conclusion is supported by paragraphs 3-7 of its judgment where it confirms that the Brussels I Regulation is the applicable instrument and sets out the provisions of it which are relevant to the case with absolutely no mention of Recital 12 of the Brussels I Recast.

That being so, the CJEU did not address point (ii). This, in turn, would mean that in proceedings falling under the Brussels I Recast, in which Recital 12 does apply, the AG's opinion remains as at least persuasive authority upon which a litigant might argue that an EU court could contemplate resurrection of the anti-suit injunction in the face of court proceedings elsewhere in the EU in breach of an arbitration clause. How long it takes for the point to be taken remains to be seen.

Click here for the judgment.

Contacts

For further information please contact:

Ben Carroll
Partner

(++44) 20 7456 5406

ben.carroll@linklaters.com

Stephen Lacey
Senior PSL

(++44) 20 7456 5156

stephen.lacey@linklaters.com

Author: Stephen Lacey

One Silk Street
London EC2Y 8HQ

Telephone (+44) 20 7456 2000
Facsimile (+44) 20 7456 2222

Linklaters.com