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# Anti-suit injunctions issued to protect arbitration agreements – a remedy against parallel proceedings?

## *Reviewing Gazprom Case*

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## I. INTRODUCTION

[1] Nowadays litigation is becoming increasingly international in nature. More and more often parties choose arbitration as an alternative dispute resolution method especially when it comes to international commercial disputes. Admittedly, international commercial arbitration has a great impact and importance worldwide. In this context, numerous issues arise and challenge the European Union (EU) which is putting efforts to resolve them in the name of international cooperation. One of these issues is parallel arbitration and court proceedings and the possible remedies against them.

[2] To illustrate the main topic of our paper and the problems it addresses, let us imagine the following scenario. A (incorporated in Italy) and B (incorporated in England) are traders. They have a written agreement according to which A will supply B with goods and B will pay the respective price. In addition, they also have an arbitration agreement stating that in case of dispute an arbitral tribunal in London will hear the case. B's allegations are that the goods are damaged. Instead of observing the arbitration clause A starts proceedings before the court in its home country – Italy, seeking a declaration that it was not liable to the purchaser B. B, on its turn, undertakes a counter step and initiates arbitration in the country chosen by the parties (England), thus creating parallel proceedings. In order to prevent duplicative litigation B requests an anti-suit injunction from the English court.

[3] The described scenario gives rise to multiple questions. How should the respective courts and arbitral tribunal react? Should the court in Italy being the court first-seised dismiss the case, stay the proceedings or assume jurisdiction? Does the court have the authority to grant such an anti-suit injunction, and respectively is the party allowed to protect itself by requesting an anti-suit injunction?

[4] In order to address the questions posed, our work proceeds according to the following steps. First, we examine the description of parallel proceedings, the nature of anti-suit injunctions and the *lis alibi pendens* rule as remedies to avoid such proceedings **(I)**. Second, we discuss the legal framework and fundamental case-law of the European Court of Justice<sup>1</sup> in regards to arbitration and anti-suit injunctions **(II)**. Then, an analysis on the highly anticipated and debated *Gazprom* case follows, accompanied by answers that are expected to be given by the Court of Justice **(III)**. Finally, some concluding remarks will be made **(IV)**.

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<sup>1</sup> The European Court of Justice (ECJ), officially just the *Court of Justice*, is the highest court in the European Union in matters of European Union law. As a part of the Court of Justice of the European Union (CJEU) it is tasked with interpreting EU law and ensuring its equal application across all EU Member States.

## II. ANTI-SUIT INJUNCTIONS AND *LIS ALIBI PENDENS* RULE

### 1. Parallel proceedings

[5] Parallel proceedings in civil matters are a phenomenon which gives rise to various challenges in terms of legal issues. It is not an overstatement to say that they have become commonplace.

[6] The term parallel litigation (or duplicative litigation) includes different concepts such as reactive and repetitive litigation, related litigation and derivative litigation.<sup>2</sup> Briefly, proceedings are parallel when substantially the same parties are litigating substantially the same issues in another forum.<sup>3</sup> Parallel proceedings are an undesirable event. Along with delays, financial burden, and waste of judicial resources, the risk of contradictory decisions remains their most sensible deficiency.

[7] The focus of our paper is parallel proceedings initiated in breach of an arbitration agreement. It is fundamental to protect arbitration agreements and not to undermine the effectiveness of arbitration. Parties choose arbitration because of its flexibility, confidentiality, and speedy hearings. It is their free will to decide whether their dispute to be resolved by a court or by an arbitral tribunal. And their choice has to be honoured. However, abuses are possible when one of the contracting parties initiates court proceedings in violation of the arbitration clause, while the other one proceeds with arbitration before the agreed arbitral tribunal. This is a typical example of parallel proceedings.

[8] As one may see, preventing parallel proceedings initiated in bad faith is of paramount importance since it is clear that this is an undesirable situation that jeopardises the effectiveness of arbitration. Therefore, it is only natural to ask what the possible remedies against parallel proceedings are.

### 2. The *lis alibi pendens* rule

[9] The concept of *lis alibi pendens* (Latin for “*dispute elsewhere pending*”) is a well-known principle which generally operates with a first-in-time rule – priority is given to the court first-seised and the court second-seised has no right whatsoever to decide whether it has

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<sup>2</sup> *Repetitive actions* are multiple suits on the same claim by the same plaintiff against the same defendant; *reactive suits* are a separate suit filed by a defendant in the first action against the plaintiff in the first action, seeking a declaratory judgment that he is not liable under the conditions of the first action or asserting an affirmative claim that arises out of the same transaction or occurrence as the first suit; *related litigation* refers to separate suits involving similar parties or issues to which claim preclusion may not apply, but eligible for issue preclusion and to a lesser extent, subject to the same arguments as to wasteful litigation; *derivative litigation* will ordinarily not qualify for parallel litigation remedies but could in some circumstances. See *James P. George*, Parallel litigation, Baylor law review, [Vol.51:4 1999], p.774-776.

<sup>3</sup> *Interstate Material Corp.v.Chicago*, 847 F.2d 1285, 1288 (7<sup>th</sup> Cir.,1988) quoting *Calvert Fire Ins.Co.v.American Mutual Reinsurance Co.*, 600 F.2d 1228, 1229 n.1 (7<sup>th</sup> Cir., 1979).

jurisdiction or not and therefore has to decline jurisdiction. This rule is pretty simple, understandable and may serve as a tool to avoid parallel proceedings. However, it suffers from some deficiencies which can be illustrated by the so-called “torpedo claims” (or ‘Italian torpedo’). The torpedo claim is a claim where a party brings an action before a court to impede the other party from starting procedures before another court or an arbitration tribunal. Very often a party will choose a court which is known for its slow jurisdiction.<sup>4</sup> Thus, the court first-seised may take several years to decide on its jurisdiction and render a decision which effectively “torpedoes” the possibility for a reasonable and timely resolution of the action. Sometimes a party will choose a court for being hostile towards arbitration agreements thus barring the other party from the possibility to have the dispute resolved by the appropriate court. Therefore, it may be concluded that this rule puts in danger the sanctity of choice-of-court and arbitration agreements and leaves room for abuse.

### **3. Anti-suit injunctions**

#### **3.1. Nature of anti-suit injunctions**

[10] The anti-suit injunction is a court order rendered against a private party with the aim either of preventing that party raising an action in another forum, or forcing that party to discontinue such an action if already started. If the party disregards the anti-suit injunction and continues with the foreign action, it will face sanctions in the enjoining forum<sup>5</sup> (a contempt of court order may be issued by the domestic court against that party). Sanctions can be very heavy and they vary from seizure of the defendant’s assets to imprisonment. Moreover, there is an inherent risk that judgments in breach of anti-suit injunctions will not be recognised or enforced in England.

[11] Anti-suit injunctions are traditionally associated with the common law system because they are a tool often used by English courts to safeguard the sanctity of agreements (in particular arbitration agreements) between parties in case of dispute. If a contracting party starts foreign proceedings in breach of an arbitration agreement with the sole intent of obstructing the arbitration procedure and harassing the other party, the other party needs protection and therefore can ask the court to issue an anti-suit injunction. Once the injunction

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<sup>4</sup> e.g. Italian courts from where the term ‘Italian torpedo’ stems.

<sup>5</sup> *J J Barceló III*, *Anti-foreign suit Injunctions to Enforce Arbitration Agreements in a Rovine* (ed), *Contemporary Issues in International Arbitration and Mediation* (2007), 107,108 as cited by *Neil A Dowers*, *The Anti-suit Injunction and the EU: Legal Tradition and Europeanisation in International Private Law*, *Cambridge Journal of International and Comparative Law* (2)4:960-973(2013), p.961.

is issued, the party has to forfeit the foreign proceedings and thus, the intended effect will be avoided and the substantive interest<sup>6</sup> of the contracting party will be safeguarded.

[12] It is debatable whether anti-suit injunctions can be ordered by an arbitral tribunal. Allegedly, arbitrators also have the authority to issue anti-suit injunctions under certain prerequisites, where it appears necessary to protect the arbitral proceedings, namely where a party is fraudulently attempting to undermine the arbitral tribunal's jurisdiction.<sup>7</sup> Certain arbitral rules, for example the UNCITRAL rules<sup>8</sup>, give power to arbitrators to issue interim measures which have a similar effect to an anti-suit injunction. The arbitral practice also confirms arbitrators' power to grant anti-suit injunctions.<sup>9</sup> It is argued that the basis for the arbitral tribunal's jurisdiction to issue anti-suit injunctions are the following principles of international arbitration law: the jurisdiction to sanction violations of the arbitration agreement and the power to take any measure necessary to avoid the aggravation of the dispute or to protect the effectiveness of the final award. Arbitrators have the power to sanction a contractual breach either by an award of damages or by ordering specific performance.<sup>10</sup> In that context, anti-suit injunctions ordered by arbitrators are regarded as nothing more than an order given to the party acting in breach of the arbitration agreement to comply with its contractual undertaking to arbitrate the dispute it has submitted to domestic court.<sup>11</sup> Therefore, the view that arbitral tribunals possess the inherent power to issue anti-suit injunctions sounds quite convincing.

[13] Anti-suit injunctions raise certain issues and discussions. In contrast to English courts, the courts in civil law countries typically refuse to grant anti-suit injunctions. But why do common law and civil law courts have a different understanding and approach? And more importantly, in regard to international judicial cooperation in civil matters, should the use of anti-suit injunctions be allowed or not?

### **3.2. Common law and civil law approaches**

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<sup>6</sup> In the context of arbitration agreements the substantive interest is the right to have all disputes determined by arbitration, see *Patrizio Santomauro*, Sense and Sensibility: Reviewing *West Tankers* and Dealing with its Implications in the Wake of the Reform of EC Regulation 44/2001, *Journal of private international law*, Vol. 6, No. 2, p.282.

<sup>7</sup> See *Laurent Lévy*, Anti-suit Injunctions Issued by Arbitrators, LAI International Arbitration Series No. 2, Anti-suit Injunctions in International Arbitration, 2005, p.128-129

<sup>8</sup> See Article 26 of the U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL ARBITRATION RULES (UNCITRAL), available at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

<sup>9</sup> *Emmanuel Gaillard*, Anti-suit Injunctions Issued by Arbitrators, *International Arbitration 2006: Back to Basics?*, p.239.

<sup>10</sup> *Ibid.* p.237.

<sup>11</sup> *Ibid.* p.239.

[14] To get to the crux of the matter one should understand that civil law courts are disturbed by the fact that anti-suit injunctions are directed against the foreign proceedings and thus they represent an indirect interference with the judicial sovereign state and the ability of the court to decide jurisdiction on its own. In other words, anti-suit injunctions permit the courts of one country to impose their views on the court of another country regarding the right of the latter to hear a case.<sup>12</sup> Moreover, anti-suit injunctions are regarded as being in contradiction to the concept of mutual trust which in principle does not permit any court to access the jurisdiction of a court in another EU Member State.<sup>13</sup> This is also strictly related to the *Kompetenz-Kompetenz* principle.<sup>14</sup> Last but not least, anti-suit injunctions may be perceived as a violation of the right of access to justice since they can basically restrain a party from bringing an action before a court. Therefore, most civil courts and practitioners object to the use of anti-suit-injunctions because they consider that the liberty to resort to anti-suit injunctions is a recipe for chaos.<sup>15</sup>

[15] On the contrary, common law courts put the emphasis on the importance of protecting the contractual rights and obligations and the undeniable power of the court to defend them. They do not consider that there is interference with the foreign court's jurisdiction because anti-suit injunctions are granted only *in personam*, i.e. they are always directed at the party and not at the other court.<sup>16</sup>

[16] As for the right to access to justice, the common law view is that by concluding the arbitration agreement the parties waive their right to use the jurisdictional rules and access the court. Along with the positive obligation to arbitrate, a sort of a negative obligation arises

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<sup>12</sup> Trevor C. Hartley, The Brussels I Regulation and Arbitration, *International and Comparative Law Quarterly*, 2014, 63 (4).

<sup>13</sup> Petr Briza, Choice of Court Agreements: Could the Hague Choice of Court Agreements Convention and the Reform of the Brussels I Regulation Be the Way Out of the *Gasser-Owusu* Disillusion?, *Journal of Private International Law*, Vol. 5, No. 3 (Dec., 2009), p. 541.

<sup>14</sup> *Kompetenz-Kompetenz* is a jurisprudential doctrine whereby a legal body, such as a court or arbitral tribunal, may have competence, or jurisdiction, to rule as to the extent of its own competence on an issue before it.

<sup>15</sup> Luca G. Radicati Di Brozolo, Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?, *Journal of Private International Law*, Vol. 7, No. 3, 2011, p.432

<sup>16</sup> *Millet LJ* in *Aggeliki Charis Compania Maritima SA v Pagnan SpA* (The "Angelic Grace") – Court of Appeal (Neill, Leggatt and Millett LJJ) -17 May 1994 has succeeded perfectly to capture the common law view on anti-suit injunctions. He says: "If an injunction is granted it is not granted for the fear that the foreign court may wrongly assume jurisdiction...but on the surer ground that the defendant promised not to put the plaintiff to the expense and trouble of applying to that court at all...a jurisdiction which he had promised not to invoke and which was his own duty to decline. The justification of the grant is that...without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy... Moreover, if there should be any reluctance...far less offence is likely to be caused if an injunction is granted before that court has assumed jurisdiction".

*whereby both parties expressly or impliedly promise to refrain from commencing proceedings in any forum other than the forum specified in the arbitration agreement.*<sup>17</sup>

[17] In sum, one may see that fundamentally two different legal traditions clash with each other – the Anglo-American, which takes a private law perspective and the Continental-European, which takes a public law perspective.<sup>18</sup> Which one should prevail? Could there be a combined approach of the existing legal traditions?

[18] Thus, in this section we have set the main problems addressed by this paper – parallel proceedings and anti-suit injunctions in arbitration. In the next section we shall examine how these problems are set in the context of the European Union by outlining the so called Brussels Regime and by analysing the fundamental case-law of the ECJ in regards to the interpretation of the Brussels Regime in the light of arbitration and the use of anti-suit injunctions.

### **III. EU LEGISLATION AND CASE-LAW**

#### **1. The Brussels Regime – arbitration exclusion**

[19] The Brussels Regime is the set of rules regulating the matter of jurisdiction of courts and recognition and enforcement of judgments between individuals resident in different Member States of the European Union and the European Free Trade Association. This regime consists of four bodies of regulations – the Brussels Convention of 27 September 1968, the Lugano Convention of 16 September 1988, Regulation (EC) No. 44/2001 of 22 December 2000 (the Brussels I Regulation) and finally Regulation (EU) No. 1215/2012 of 12 December 2012 (the Brussels I Regulation<sup>19</sup> (the Recast)). The Recast Regulation has been in force since 10 January 2015 – the date on which it replaces Brussels I Regulation. So the original version of the Brussels Regime is the Brussels Convention and it has been developing through the years till the highly anticipated Recast Brussels Regulation.

[20] The Brussels Regime, however, does not regulate arbitration.<sup>20</sup> Arbitration was excluded from the original Brussels Convention in 1968 because it was believed that the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New

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<sup>17</sup> See *Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35.

<sup>18</sup> *Patrizio Santomauro*, supra note 6, p.288.

<sup>19</sup> Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in brief the Recast, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>.

<sup>20</sup> See Article 1 (4) of the Brussels Convention, Article 1 (2) (d) of the Regulation (EC) No. 44/2001 and Article 1 (2) (d) of the Regulation (EU) No. 1215/2012.

York Convention)<sup>21</sup> and the 1961 European Convention on International Commercial Arbitration<sup>22</sup> had already regulated international arbitration.

[21] Since arbitration is excluded from the scope of the Brussels Regime then we should focus on the foundational ECJ jurisprudence concerning anti-suit injunctions related to this exclusion.

## 2. Fundamental case-law of the ECJ until the Recast

### 2.1. The *Marc Rich* case<sup>23</sup>

[22] In this case<sup>24</sup> the ECJ by its judgment held that “*Article 1(4) of the Convention must be interpreted as meaning that the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation*”.

[23] The significance of this case is that the ECJ shed some light on the meaning of Article 1 (4) of the Brussels Convention by determining that it applied not only to arbitration proceedings themselves but also to court proceedings where the subject-matter is arbitration.<sup>25</sup> In other words, if the object of the proceedings is outside the scope of the Convention, the proceedings are not brought within its scope just because an incidental issue relates to a matter within its scope.<sup>26</sup> We can conclude that according to *Marc Rich case* only the subject-

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<sup>21</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention /NYC/, was adopted by a United Nations diplomatic conference on 10 June 1958 and entered into force on 7 June 1959. The Convention requires courts of contracting states to give effect to private agreements to arbitrate and to recognize and enforce arbitration awards made in other contracting states. It is widely considered as the foundational instrument for international arbitration. The NYC applies to arbitrations which are not considered as domestic awards in the state where recognition and enforcement is sought, available at: <http://www.newyorkconvention.org/texts>.

<sup>22</sup> 1961 Geneva Convention on International Commercial Arbitration (“Geneva Convention”) has been done at Geneva, April 21, 1961. It is promoting the development of European Trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries. From 28 EU Member States, only 11 are parties to the Convention. The Geneva Convention is not covering any specific areas that are not regulated by the NYC and domestic law of the EU Member States. It is available at: <http://www.jus.uio.no/lm/europe.international.commercial.arbitration.convention.geneva.1961/>.

<sup>23</sup> Judgment in *Rich* (C-190/89, EU:C:1991:319), available at: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-190/89&td=ALL>.

<sup>24</sup> The factual background of the case is: a sale purchase contract for crude oil between a Swiss company (Marc Rich) and an Italian company (Impianti). The contract was under the jurisdiction of English law and contained an arbitration clause. When the purchaser (Marc Rich) claimed contamination (that the cargo had seriously deteriorated), the seller (Impianti) brought an action before a court in Genoa (Italy), for a declaration of non-liability to the purchaser. In compliance with the agreed arbitration, the Swiss company commenced arbitration proceedings in London. Impianti refused to appoint its arbitrator. Then Marc Rich made an application before the High Court to appoint an arbitrator on Impianti’s behalf. The Italian company claimed that the real dispute between the parties is whether the contract did or did not contain an arbitration clause, and that such a dispute fell within the scope of the Brussels Convention. So the question which was set to the ECJ was whether the proceedings initiated before the English court regarding the appointment of an arbitrator fell within the scope of the Brussels Convention.

<sup>25</sup> See Case C-190/89, supra note 23, ¶ 29.

<sup>26</sup> *Trevor C. Hartley*, supra note 12.



matter of the dispute in the main proceedings should be taken into consideration and that arbitration as a subject-matter was excluded in its entirety from the scope of the Brussels Convention.<sup>27</sup>

## 2.2. The *Turner v Grovit* case<sup>28</sup>

[24] This is the first case<sup>29</sup> in which anti-suit injunctions were considered by the ECJ, but it is also a case which did not involve arbitration.<sup>30</sup> The Court held that the Brussels Convention “...is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith”.

[25] Although anti-suit injunctions have been used to protect choice of forum clauses for English courts where it was thought that the strict rules of the Brussels Convention were insufficient<sup>31</sup>, the Court of Justice accepted that anti-suit injunctions issued by a court are incompatible with the Convention. The European court built its response on the concept of mutual trust.<sup>32</sup>

[26] The answer on this preliminary ruling raises a lot of debates. One of these debates is of great importance to our research. What will happen in a similar situation if an arbitration agreement is involved?

## 2.3. The *West Tankers* case – making the problem even more controversial<sup>33</sup>

[27] In this case<sup>34</sup> the Court held that “it is incompatible with Regulation (EC) No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or

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<sup>27</sup> See Case C-190/89, supra note 23, ¶ 18 and ¶ 26.

<sup>28</sup> Judgment in *Turner* (C-159/02, EU:C:2004:228), available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-159/02>.

<sup>29</sup> Summary of the facts: an English employee (Mr. Turner) of a company incorporated in Ireland (with central management in England) initiated proceedings against the company in England for wrongful dismissal (which had happened in Spain, where he had been working temporarily in a Spanish company, but still as an employee of the English company). After proceedings in England had been done with a final judgment, the Spanish company commenced proceedings in Spain against the employee, trying to review England’s judgment. Then the English court of appeal granted an anti-suit injunction to restrain Grovit from continuing the Spanish proceedings. So the question which was set to the ECJ by the House of Lords was whether such an injunctions can be issued.

<sup>30</sup> *Trevor C. Hartley*, supra note 12.

<sup>31</sup> *Thalia Kruger*, *The Anti-suit Injunction in the European Judicial Space: Turner v Grovit*, *The International and Comparative Law Quarterly*, Vol. 53, No. 4 (Oct., 2004).

<sup>32</sup> See paragraph [14].

<sup>33</sup> Judgment in *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69), available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-185/07>.

<sup>34</sup> In brief, the factual background of the case is the following: in August 2000, a vessel owned by West Tankers and chartered by Erg Petroli SpA /Erg/, collided with a jetty owned by Erg in Italy and caused damage. Erg collected compensation from its insurers Allianz and Generali up to the limit of its insurance cover and commenced arbitration proceedings in London against West Tankers for the excess (on the agreed

*continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement”.*

[28] According to this decision, notwithstanding the exclusion of Article 1(2) (d), anti-suit injunctions as preliminary proceedings can be in the scope of the Regulation. It is said that if the subject-matter of the dispute, such as a claim for damages, should be protected in proceedings and these proceedings come within the scope of Regulation No 44/2001, a preliminary issue concerning the applicability of an arbitration agreement, including in particular its validity, also comes within the scope of the Regulation.<sup>35</sup> It is not clear why instead of determining the applicability of the Brussels I Regulation by reference to the dispute in the main proceedings, the Court examined the subject-matter of the dispute in the light of another dispute, namely the dispute brought before the Italian courts. This conclusion is opposite to the one held by the Court in the *Marc Rich* case.<sup>36</sup>

[29] Anti-suit injunctions have been sacrificed in the name of mutual trust.<sup>37</sup> Otherwise said, English courts have no right to issue an injunction or even if they have, the injunction will not fulfill its role – to prevent parallel proceedings. It is obvious that the ECJ adopted the Continental-European arguments<sup>38</sup> and approach. The judgment in *West Tankers* was indeed nothing but a predictable expansion of the judgment in *Turner*. The ECJ did not re-invent gunpowder; it had already formed an extensive arsenal, from where it could draw conclusions for this case.<sup>39</sup>

[30] However, the judgment of the ECJ placed certain risks – parties may be involved in time-consuming litigation<sup>40</sup>, there is a risk of parallel court and arbitration proceedings and of irreconcilable decisions, it endangers English arbitration since without the possibility of issuing injunctions, parties would not choose England as a seat of arbitration.

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arbitration). Erg’s insurers in Italy, Allianz and Generali brought proceedings against West Tankers before the Tribunale di Siracusa (Italy) in order to recover the sums they had paid to Erg. West Tanker raised an objection for lack of jurisdiction on the basis of the existence of the arbitration agreement and the subrogation of the insurers. In parallel, West Tankers brought proceedings before the High Court of Justice of England and Wales, seeking a declaration that the dispute between itself, on one hand, and Allianz and Generali, on the other, was to be settled by arbitration. Then the High Court of England granted an anti-suit injunction against the insurers, ordering them to stop the action in Italy. The insurers appealed against that judgment to the House of Lords. In spite of its point of view that arbitration was completely excluded from the scope of Regulation No 44/2001 by virtue of Article 1(2) (d) thereof, the House of Lords stayed the proceedings and referred a question to the ECJ for a preliminary ruling.

<sup>35</sup> See Case C – 185/07, supra note 33, ¶ 26.

<sup>36</sup> Case C-190/89, supra note 23, ¶ 26.

<sup>37</sup> *Daniel Rainer*, The Impact of West Tankers on Parties’ Choice of a Seat of Arbitration, Cornell Law Review, Vol. 95, Is. 2, January 2010, p. 460.

<sup>38</sup> See paragraph [17].

<sup>39</sup> *Carrier*, Convention de Bruxelles: le devoir de confiance, 27 Recueil Dalloz (2004), p. 1921 as cited by *Haris Meidanis, Apostolos Giannakoulis*, Case C-185/07, Allianz SpA, Generali Assicurazioni Generali SpA v. West Tankers Inc., Common Market Law Review 46, 2009, Kluwer Law International, p. 1719.

<sup>40</sup> *Ibid. Haris Meidanis, Apostolos Giannakoulis*, p. 1722.

[31] The lack of clarity in some aspects of *West Tankers* and the blurring of the interface between arbitration and litigation were to become highly debated topics.<sup>41</sup> In any case the most essential question is how the remaining uncertainties after *West Tankers* can be resolved?<sup>42</sup>

### 3. The Brussels I Regulation (the Recast): a new hope

#### 3.1. Preparation of the Recast: close to the solution or not

[32] Article 73 of the Regulation (EC) No. 44/2001 of 22 December 2000 provides that no later than five years after the entry into force of this Regulation (1 March 2002), the Commission shall present a report on the application of this Regulation. So the Heidelberg Report on the application of the Brussels I Regulation<sup>43</sup> was published in 2007. Proposals about the relationship between the Judgment Regulation and arbitration and its extension to ancillary proceedings were included in the Report.<sup>44</sup> It advocated abolition of the arbitration exclusion or at least inclusion of specific rules to deal with the problems. Due to the large amounts of proposals for possible adaptation and modification and because of the principles of continuity and development enshrined in the Brussels Regime a work for creating a better version of the Regulation was initiated. For the aims of our research we shall observe in brief the process of preparation of the Recast.

[33] The European Commission presented a Report<sup>45</sup> and a Green Paper<sup>46</sup> in 2009. These documents were influenced by the Heidelberg Report. Partial abolition of the exclusion of arbitration from the scope of the Regulation was proposed by the Green Paper. This proposal alarmed the arbitration community, which was oppressed that the extensive regulation of arbitration would jeopardise the body of arbitration law of some of the States.<sup>47</sup>

[34] In 2010 the European Commission issued an accompanying document to the Report from 2009.<sup>48</sup> This paper indicates three possible options for the interface between the regulation

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<sup>41</sup> *Margaret Moses*, Arbitration/Litigation Interface: The European Debate, *Northwestern journal of International law & business*, Vol. 35, Is. 1, 2014.

<sup>42</sup> See *Patrizio Santomauro*, supra note 6, p. 298.

<sup>43</sup> See *Burkhard Hess, Thomas Pfeiffer, and Peter Schlosser*, Report on the Application of Regulation Brussels I in the Member States, available at: [http://ec.europa.eu/civiljustice/news/docs/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf).

<sup>44</sup> See *ibid.* p. 51.

<sup>45</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009), 174 final, 21 April 2009.

<sup>46</sup> See Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters COM (2009) 175 final).

<sup>47</sup> *Luca G. Radicati Di Brozolo*, supra note 15, p. 433-434.

<sup>48</sup> Impact Assessment, Accompanying document to the 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

and arbitration in the new Regulation – status quo<sup>49</sup>, extend the exclusion of arbitration from the scope<sup>50</sup> or enhance the effectiveness of arbitration agreements.<sup>51</sup>

[35] During the same year (2010) the Commission Proposal<sup>52</sup> for the Recast was issued. The Commission offer was a compromise. It was based on the last option of the accompanying document to the report (enhance the effectiveness of arbitration agreements). The Commission proposed arbitration exclusion to remain but it also offered a special rule to be implemented by Article 29 (4).<sup>53</sup> This article provided a remedy against parallel court and arbitration proceedings. Even more, this Proposal could actually strengthen the local EU arbitration market making it more attractive to seat arbitrations. Thus, the Commission Proposal was overall a satisfactory compromise to the quandary of the interface between arbitration and the European jurisdictional space.<sup>54</sup>

[36] The Legislative Action Committee of the European Parliament presented a Draft Report in June 2011, which followed the Commission Proposal.<sup>55</sup> At the first reading of the bill the Council of Justice and Home Affairs maintained the absolute exclusion of the arbitration and the deletion of Article 29 (4).

[37] This long process of preparation ended in December 2012 with the acceptance of the Recast Regulation. The result was far different from the original proposals by the European Commission in its Green Paper and from the carefully constructed compromise in the Commission Proposal of December 2010, which was rejected by the Parliament and the Council.<sup>56</sup> As a result, in the final version of the Recast the arbitration exclusion remains the same and Article 29 (4) is deleted. Therefore, the problem with parallel arbitral and court proceedings still persists.

### 3.2. The Brussels I Regulation (the Recast): the amendments

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matters (Recast), SEC (2010) 1547 final, available:[http://ec.europa.eu/justice/policies/civil/docs/sec\\_2010\\_1547\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/sec_2010_1547_en.pdf).

<sup>49</sup> Ibid. p. 36.

<sup>50</sup> Ibid. pp. 36-37.

<sup>51</sup> Ibid. p. 37.

<sup>52</sup> 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), COMb (2010), 748 final, available at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/com/com\\_com%282010%290748\\_/com\\_com%282010%290748\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282010%290748_/com_com%282010%290748_en.pdf).

<sup>53</sup> Article 29 (4) of the Commission Proposal provided that “where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement”.

<sup>54</sup> *Luca G. Radicati Di Brozolo*, supra note 15, p. 460.

<sup>55</sup> See Draft Report of the Committee on Legal Affairs of the European Parliament, COM (2010), 748 final, avail. at: [http://www.europarl.europa.eu/meetdocs/2009\\_2014/documents/juri/pr/869/869709/869709en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/pr/869/869709/869709en.pdf)

<sup>56</sup> *Margaret Moses*, supra note 41.

[38] The only amendments connected to arbitration in the final, renewed version of the Brussels I Regulation are Article 73 (2), which provides that the Brussels I Regulation shall not affect the application of the 1958 New York Convention, and the extensive Recital 12. Article 73 (2) is a brief and clear text and does not unveil any difficulties. More problematic are the four paragraphs of Recital 12, which try to explain how the arbitration exclusion should be apprehended in relation to the Recast.

[39] First of all, it is important to understand how recitals relate to operative provisions in general and what their effect is. Although a recital is not an operative provision of the legislation, in law if an operative provision is ambiguous, it is interpreted in light of the recital.<sup>57</sup> Since the operative provisions of the Regulation about arbitration are so thrifty there is much to be learned from Recital 12.

[40] Another difficulty appears when we try to interpret the Recital. The first paragraph of Recital 12 provides that when any court is seised of a matter regarding which the parties have entered into an arbitration agreement, nothing in the Recast will prevent that court from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law. It clarifies that a decision of a court regarding an arbitration agreement is outside the scope of the Recast. That basically allows parallel proceedings to go forward as it gives right to a court to continue proceedings, although another court was first-seised.

[41] In the next paragraph Recital 12 goes further by explaining that a decision of a court on the validity of an arbitration agreement is not subject of the Recast rules even when it is an incidental question related to the principal issue. That is an exception to the rule laid down in the *Marc Rich case* that, for the purpose of determining the scope of the Regulation, incidental questions must be characterised on the basis of the object of the proceedings /subject-matter/.<sup>58</sup>

[42] Paragraph three of Recital 12 examines in details the question about the enforcement of the court's judgment on the substance of the matter when the same court has determined that an arbitration agreement is null and void and completes Article 73 (2) of the Recast giving the New York Convention precedence over the Recast.

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<sup>57</sup> T. Klimas, J. Vaiciukaite, The Law of Recitals in European Community Legislation, 15 ILSA Journal of International and Comparative law, L. 61, 73 (2008), as cited by Margaret Moses, supra note 41.

<sup>58</sup> Case C-190/89, supra note 23, ¶ 26.

[43] The final paragraph clarifies that ancillary proceedings connected with arbitration are excluded from the scope of the Recast. The text contains enumeration of the ancillary proceedings – establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award. The used phrases “or any other aspects” and “any action” mean that the enumeration of ancillary proceedings is not exhaustive.

[44] Thus, we can conclude that the new legislation is a new step forward. The Recast establishes, mainly by the Recital 12, new approaches: **1/ the New York Convention takes precedence over the Recast; 2/ incidental questions related to arbitration cannot be in any circumstances in the scope of the Recast; 3/ implementation of a special rule about enforcement of the court’s judgment on the subject-matter when the same court has pronounced on the validity of an arbitration agreement.**

[45] Although the Recast solves the mentioned issues, there is still more to be done. The main problem with these new rules is that they cannot prevent parallel court and arbitration proceedings. The deletion of Article 29 (4) of the European Commission Proposal in 2010 leaves room for abusive tactics and initiation of more than one proceedings, when there is an arbitration agreement.

[46] Besides the abovementioned there is more to be done by the ECJ, too. Actually the new legislative changes do not give a clear answer to the question whether a court or an arbitral tribunal is able to grant injunctive relief under the Recast Regulation in support of arbitration? Therefore, it depends on the ECJ if anti-suit injunctions shall be reinstated. And the first tribulation for the ECJ is the *Gazprom* case, which could be the beginning of the end of the *West Tankers*.

#### **IV. GAZPROM V LITHUANIA CASE<sup>59</sup>**

##### **1. Facts of the case<sup>60</sup>**

[47] The case arose as a dispute between Gazprom OAO and the Lithuanian state, acting in their capacity as two of the major shareholders in the Lithuanian gas supply company Lietuvos Dujos.<sup>61</sup> The internal relations between the shareholders were subject to

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<sup>59</sup> Case C-536/13 *Gazprom* (EU:C:2014:2414), available at: <http://curia.europa.eu>.

<sup>60</sup> These facts are relevant to the time of the dispute appearance /2011-2013/. Many facts which occurred later (e.g. shareholding changes in Lietuvos Dujos, amendments in Lithuanian legislation, etc.) or which are found irrelevant to the essential legal problem, analysed herein, are excluded from the present paper.

<sup>61</sup> At the time of the case the shareholders Lietuvos Dujos were: the German company E.ON Ruhrgas International GmbH (38.91%), Gazprom (37.1%), the Republic of Lithuania (17.7 %), other minor shareholders (6.3%).

shareholders' agreement that contained an arbitration clause (Article 7.14), providing arbitration.<sup>62</sup>

[48] In addition to its influence as a shareholder in Lietuvos Dujos, Gazprom also used to play a vital role in the Lithuanian gas sector because of its favorable position of a main importer of gas and a key contractor to Lietuvos Dujos. Combining the role of a shareholder with that of a main gas supplier<sup>63</sup>, Gazprom had entered into a long-term gas agreement with Lietuvos Dujos, which agreement provided that Gazprom undertakes to sell and supply natural gas to Lietuvos Dujos. Gas shall be paid to Gazprom according to a price formula, included in this long-term gas agreement. This formula had been amended many times.

[49] The dispute between Gazprom and the Lithuanian state appeared after Lithuania found that the gas price, contained in the consecutive amendment of the price formula, is not fair and against the interests of Lietuvos Dujos. As a reaction of this amendment, the Republic of Lithuania, through its Ministry of Energy, filed a claim in its national court in Vilnius, insisting on an investigation to be conducted under the rules of Chapter X */Investigation of legal person's activities/* of Book Two of the Lithuanian Civil Code. By this claim, the Ministry of Energy asked the court to require Lietuvos Dujos to enter into negotiations with Gazprom in order to fix a fair and correct price for the purchasing of gas.

[50] Gazprom argued the action before the Lithuanian courts was in breach of the arbitration agreement (Article 7.14. of the Shareholders' agreement). Holding up this position, Gazprom filed a request before the Arbitration Institute of the Stockholm Chamber of Commerce (Arbitration Institute of SCC), asking the arbitral tribunal to order the Ministry of Energy to withdraw its action from Lithuanian courts. The Arbitral Institute found that the Republic of Lithuania had partially breached the arbitration agreement and ordered the Ministry of Energy to withdraw the request for entering into negotiations with Gazprom.<sup>64</sup> Shortly afterwards, Gazprom sought recognition of the award in Lithuanian state courts.

[51] Trying to put the case in a nutshell, we may conclude that *Gazprom v Lithuania* is nothing more than a situation in which an anti-suit injunction of an arbitral tribunal has been

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<sup>62</sup> Article 7.14. of the shareholders' agreement provides that "any disputes or disagreements related to this agreement or its breach, validity, entry into force or termination, shall be finally settled by arbitration in accordance with the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce; arbitration shall take place in Stockholm, Sweden; there shall be three arbitrators (all appointed by the Arbitration Institute); the arbitral proceedings shall be held in the English language".

<sup>63</sup> About the different roles of Gazprom in the Lithuanian gas market, see *Anastassia Safonova*, Efficiency of the Third Energy Package: Gazprom v Lithuania, case study, available at: [https://dspace.utlib.ee/dspace/bitstream/handle/10062/27718/safonova\\_anastassia.pdf?sequence=1](https://dspace.utlib.ee/dspace/bitstream/handle/10062/27718/safonova_anastassia.pdf?sequence=1).

<sup>64</sup> The whole text of the award of the Arbitral Institute of SCC is available at: [http://www.globalarbitrationreview.com/cdn/files/gar/articles/Gazprom\\_v\\_Lithuania\\_Final\\_Award.pdf](http://www.globalarbitrationreview.com/cdn/files/gar/articles/Gazprom_v_Lithuania_Final_Award.pdf).

issued in order a party of an arbitral agreement to avoid parallel proceedings pending before a state court and an arbitral tribunal.

[52] Thus, can we say that the ECJ judgment on the given case will give the answer to the main question of this paper, namely “*Are anti-suit injunctions really a remedy against parallel proceedings*”? This answer is predetermined by the response to the request for preliminary ruling pending before the ECJ, namely “*Does a court of a Member State have the right to refuse to recognise such an award of an arbitral tribunal*”? Two possible answers of this request could be given.

## **2. Possible answers of the request for a preliminary ruling**

[53] **Courts HAVE the right to refuse to recognise the award.** If the ECJ admits that courts in Member States have such right, this would reject anti-suit injunctions as a remedy against parallel proceedings, because the unrecognised anti-suit injunction issued by the arbitral tribunal would have no legal effect on the state court that hears the parallel proceeding. Two most considerable arguments could be outlined to accept that courts have the right to refuse to recognise an arbitral award that constitutes an anti-suit injunction.

[54] Courts have the right to refuse **under the rule of Article V(2)(b) of the New York Convention.**<sup>65</sup> This argument had formed the standpoint of the Lithuanian Court of Appeal to refuse the recognition of the award of the Arbitral Institute of the SCC<sup>66</sup>, stating that if it enforced the award, the tribunal’s requirements “*would become mandatory in the territory of the Republic of Lithuania and would directly influence the legal capacity of legal entities participating in the proceedings and limit the jurisdiction of national courts. This would not only breach several constitutional principles related to the right of an individual to the hearing of his case in an objective, impartial and fair court ... but also affect the sovereignty of the state ... which would undoubtedly be contrary to the public policy of the Republic of Lithuania as well as to international public policy*”.<sup>67</sup> Apparently, this first argument is based on the civil law approach to anti-suit injunctions.<sup>68</sup>

[55] Courts have the right to refuse **under the Brussels I Regulation and its interpretation in the *West Tankers* case.** Provided that the Recast shall apply from 10 January 2015 (Article 81), this second argument derives from the inapplicability of this new regulation to the

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<sup>65</sup> See Article V(2)(b) of the New York Convention: “*Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country*”.

<sup>66</sup> The whole text of the Lithuanian Court of Appeal ruling is available at [www.newyorkconvention.org/userfiles/documenten/news/722\\_valithuania-ca-and-sc-gazprom-sb-as-sb-for-ds-1-.pdf](http://www.newyorkconvention.org/userfiles/documenten/news/722_valithuania-ca-and-sc-gazprom-sb-as-sb-for-ds-1-.pdf).

<sup>67</sup> *Margaret Moses*, supra note 41.

<sup>68</sup> See paragraph [14].



*Gazprom v Lithuania* case. Therefore, the applicable law should be the Brussels Regime in its version, contained in Regulation 44/2001. This submission draws the conclusion that it would be hard for the ECJ to avoid its own interpretations of the Brussels I Regulation in the *West Tankers* case, where the ECJ practically did not place great value on anti-suit injunctions as a remedy against parallel proceedings.<sup>69</sup>

[56] In *West Tankers*, the ECJ did not permit a court to issue an anti-suit injunction that restrains a party from settling a dispute before another court. As the ECJ did not permit this to happen in litigation, *per argumentum a fortiori* it should not be permitted to happen in arbitration as well. According to Lithuania “a contrary ruling would establish the supremacy of arbitration over courts; this would disturb the balance of justice between these two dispute settlement mechanisms”. The result of this position is that anti-suit injunctions issued by arbitral tribunals could limit the right of national courts to rule on their own jurisdiction to examine a certain case.<sup>70</sup>

[57] **Courts DO NOT have the right to refuse to recognise the award.** If the ECJ admits that state courts in Member States would not have the right to refuse to recognise the award, anti-suit injunctions issued by arbitral tribunals would be mandatory for state courts. At first sight, such an assumption supports the positive answer to the main question, analysed herein, but in the interim it raises a lot of new significant questions, which shall be presented below. But firstly, it is important to outline the two basic arguments for assuming that conclusion:

[58] **The Brussels I (Recast) does not provide the right to refuse.** This argument is a counterargument to par. [55] herein. The idea is that the Recast does not grant state courts the right to refuse recognition of anti-suit injunctions. Even though the Recast seems to be inapplicable to the *Gazprom v Lithuania* case, it is likely that the ECJ would take Recital 12 into consideration to assume that arbitration had always been excluded from the Brussels Regime.<sup>71</sup> This approach would undercut the Lithuanian Supreme Court’s arguments that an arbitral anti-suit injunction should be governed by the Brussels Regime.<sup>72</sup> Therefore, the reason why the Recast does not provide the right to state courts to refuse recognition of anti-suit injunctions is that the Recast does not deal with arbitration and it is completely irrelevant to this matter.

[59] **The New York Convention (1958) does not provide the right to refuse.** This argument struggles with the argument in par. [54] regarding the application of Article V(2)(b)

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<sup>69</sup> See paragraph [29].

<sup>70</sup> *Margaret Moses*, supra note 41.

<sup>71</sup> See paragraph [20].

<sup>72</sup> *Margaret Moses*, supra note 41.

of the NYC. According to the argument analysed herein, a state court in a Member State cannot rely on Article V(2)(b) of the NYC because anti-suit injunctions are not “arbitral awards”, which are the only subject of the NYC. In other words, anti-suit injunctions do not fall into the scope of the NYC and, therefore, a state court cannot refuse recognition on the grounds of Article V(2)(b) of the NYC.

[60] This argument, however, is not persuasive because the reason why the NYC does not provide the right to state courts to refuse recognition of anti-suit injunctions is just because anti-suit injunctions are outside the scope of the NYC. This means that the recognition (or refusal of recognition) of anti-suit injunctions would be subject to domestic laws, but as a legal institute with common law origin, it may safely be concluded that civil law systems /like the Lithuanian one/ would not have an explicit legislation about anti-suit injunctions.

### **3. Advocate General’s opinion<sup>73</sup>**

[61] Some of these arguments were discussed by Advocate General (AG) Wathelet who grounded his opinion on the criticism of the *West Tankers* judgment and the interpretation of the Recast. The AG based his conclusion on **two main factors**:

#### **3.1. The exclusion of arbitration from the scope of the Recast<sup>74</sup>**

[62] Notwithstanding the case is expected to be decided under Brussels I /in its version before the Recast/, Recital 12 of the Recast should be taken into consideration because there is no supplemental amendment in any relevant article in the two instruments. Recital 12 was only to explain how the arbitration exclusion “*must be and always should have been interpreted*”.

[63] Recital 12 showed that any court proceedings concerning the existence of an arbitration agreement<sup>75</sup> were 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. Accordingly, up until that point there could be no objection to an anti-suit injunction being granted by an EU court against another EU court in support of an arbitration agreement. This was further supported by Recital 12 stating that the Recast does not apply to “*ancillary proceedings*” relating to arbitration.<sup>76</sup> Thus, as intra-EU court anti-suit injunctions in support of arbitration are permissible under Recital 12, *a fortiori* there was also nothing in the tribunal’s award which offended that instrument.

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<sup>73</sup> The Opinion of Advocate General Wathelet on Case C-536/13 (EU:C:2014:2414) is available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160309&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=106211>.

<sup>74</sup> Ibid. ¶ 90 -152.

<sup>75</sup> See paragraph [41].

<sup>76</sup> See paragraph [43].

### **3.2. Arbitral tribunals cannot be bound by the principle of mutual trust in the Brussels I Regulation<sup>77</sup>**

[64] According to the AG, even in case the ECJ decides to apply the Brussels I Regulation, without taking into consideration the Recast, an anti-suit injunction is the only effective remedy in favour of a party that considers that the arbitration agreement has been breached.

[65] Thus, the AG finds the judgment in *West Tankers* irrelevant, having in mind that in this case the anti-suit injunction had been issued by a state court of another Member State, which is bound by the principle of mutual trust applicable between the Member States courts. In comparison with that case, in *Gazprom v Lithuania* the anti-suit injunction had been issued by an arbitral tribunal, which is not bound by the principle of mutual trust. In addition, its awards are not recognised in accordance with the provisions of the Brussels I Regulation. It seems that this second, conditional, factor for the AG's proposal relies on the concept of mutual trust.<sup>78</sup>

[66] On these grounds, the judgment in *West Tankers* could be applicable only in case of an anti-suit injunction issued by a state court of a Member State, while an injunction issued by an arbitral tribunal falls within the scope of the New York Convention.<sup>79</sup>

[67] Along these lines, the AG found that there are no grounds for Lithuanian courts to refuse to recognise the arbitral award under the rules on jurisdiction in the Brussels I Regulation, which the AG found irrelevant to the case. According to him, recognition and enforcement of the arbitration falls exclusively within the scope of the New York Convention.

[68] Taking into consideration these basic arguments and the AG's opinion, several predictions for the ECJ judgment could be made.

#### **4. Predictions for the ECJ judgment**

[69] **The ECJ not to follow the AG's opinion.** While the ECJ usually follows an AG's opinion, in this case it would not be completely surprising for the Court to refuse to do so, because the AG's opinion relies on the Recast, which did not apply at the time. If followed by the ECJ, 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

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<sup>77</sup> The Opinion of Advocate General Wathelet, *supra* note 73, ¶ 153-157.

<sup>78</sup> See paragraph [14].

<sup>79</sup> This argument accepts the idea explained in paragraph [54].

remaining governed by the Brussels I Regulation regime. Such a conclusion would be highly debatable, and it seems unlikely that the ECJ would follow the AG on this point.<sup>80</sup>

[70] **The ECJ to follow the AG's opinion.** It is likely the ECJ to accept the AG's proposal that anti-suit injunctions issued by an arbitral tribunal are outside the scope of the Brussels Regime. The arguments that these awards fall within the scope of the New York Convention are reasonable and try to find the middle way in the net of inapplicable regulations. After the highly criticised judgment in *West Tankers*, it could be expected that the ECJ would try to establish a new guideline for state courts in case of anti-suit injunctions.

[71] **The ECJ to decide the question is not admissible.** It is very likely the ECJ to decide the question is not admissible on the basis that the Lithuanian Court can, in any case, as it has done, refuse to recognise the award on the basis of Article V(2)(b) of the NYC. Such an answer “*would leave the point open and the AG's opinion would 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*”.<sup>81</sup> It is highly predictable that, despite the risk, the ECJ would prefer not to answer to the referred question and to leave the topic open for further discussions.<sup>82</sup>

## **5. The recap: would *Gazprom v Lithuania* reveal anti-suit injunctions as a remedy against parallel proceedings**

[72] Going back to the main question in this paper, one could see that all the problems of parallel proceedings and its blurred EU framework discussed in this research interact in *Gazprom v Lithuania* case. The Recast would contribute to provide some certainty as to the aspects of the interface between arbitration and litigation.<sup>83</sup> At the same time, it is obvious that the risk of inconsistent judgments between courts and arbitral tribunals remains a problem even after the Recast. Since the Brussels I (Recast) entered into force, *Gazprom v Lithuania* has showed that EU legislation had not made a big step forward in using anti-suit injunctions as a remedy against parallel proceedings.

[73] Eight years after *West Tankers*, the ECJ is again challenged to determine the future of anti-suit injunctions, but this time by the context of the Brussels I Regulation (Recast). The ECJ is again in a position to reconcile the two opposing approaches regarding anti-suit

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<sup>80</sup> *Stephen Lacey*, Are Anti-Suit Injunctions Back on the Menu? The AG's Opinion in *Gazprom*, December 2014.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Trevor C. Hartley*, *supra* note 12.

<sup>83</sup> *Margaret Moses*, *supra* note 41.

injunctions (civil law and common law). While the Recast is not ready to find the balance between these approaches, the ECJ would have the final word.

## V. CONCLUSION

[74] Going back to the scenario presented in the introduction of this paper, neither the actual EU framework, nor ECJ's jurisprudence could provide a clear solution to this scenario. Even if the ECJ follows the AG's opinion on the *Gazprom v Lithuania* case, the only essential conclusion would be that anti-suit injunctions as ancillary proceedings are outside the scope of the Recast. In this situation the issue of anti-suit injunctions under the Recast would turn into a problem of their recognition and enforcement under the NYC and the domestic laws of Member States.

[75] That being said, B (from the scenario) would not be able to find a clear way to protect the arbitration clause and would be compelled to participate in parallel proceedings – both before the Italian state court and the English Arbitral Tribunal. Is the near future going to resolve the issues in question?

[76] The idea of separating entirely arbitration from European procedural law seems to be an illusion. Since the EU Parliament and the EU Council rejected the EU Commission Proposal for a special rule concerning parallel court and arbitration proceedings<sup>84</sup>, we find that the only possible way for an overall answer to the problematic NYC-EU law interface is international cooperation. Probably the time for a special EU Regulation has come. A future legal framework covering the gaps between the Brussels Regime and the NYC should serve the harmonisation of arbitral regulation within the EU and thus reduce the scope for potentially duplicative actions at EU level. In other words, the EU has to strike a careful balance in maintaining the sovereignty of its Member States to regulate arbitration, while at the same time protecting party autonomy and *Kompetenz-Kompetenz*, which form the cornerstone of international arbitration, in endeavouring to regulate this area.<sup>85</sup> This new EU Regulation concerning arbitration should find the middle way between the civil and common law traditions to anti-suit injunctions. Only the new approach to the interface between the EU law and the NYC could reinstate anti-suit injunctions as a remedy against parallel proceedings.

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<sup>84</sup> See paragraph [35].

<sup>85</sup> *John Gaffney, Do We Need Separate European Regulation of Arbitration?*, The European Branch of the Chartered Institute of Arbitrators Conference, 2014, Warsaw, available at: <http://www.ciarb-europeanbranch.com/Conference/Presentations/2014%20Warsaw%20Do%20we%20need%20separate%20European%20legislation%20for%20Arbitration%20by%20John%20Gaffney.pdf>.