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Are Anti-Suit Injunctions Back on the Menu? The AG's Opinion in Gazprom

Stephen Lacey (Linklaters) · Tuesday, December 16th, 2014

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. 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.

Gazprom 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. 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 (SCC arbitration, 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 LD.

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 such an award.

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.

Before the Lithuanian Court of Appeal, 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. Recognition was thus refused under Articles V(2)(a) and (b) of the New York Convention 1958 (the "**NYC**").

This decision was appealed to the Lithuanian Supreme Court. There, the MoE relied on the NYC but also argued that recognition of the tribunal's award would be contrary to the Brussels I

Regulation, in particular the CJEU's decision in *West Tankers* (In West Tankers, the CJEU outlawed the grant of an anti-suit injunction by an EU court against proceedings in "breach" of an arbitration clause in another EU court. This was because although the injunction proceedings fell within the scope of the arbitration exclusion in the Brussels I Regulation, the court proceedings elsewhere were regarded as proceedings within the scope of the Regulation which could not be interfered with in such a way).

Consequently, 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? 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?

As to the first issue, the AG considered that the Brussels I Regulation did *not* require the court to refuse to recognise the award. That question, in his view, fell to be determined by reference to the NYC (paragraph 157 of his opinion – numbers in brackets which follow are 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 EU Regulation 1215/2012 (the "**Recast**").

(The Recast is, of course, replacing the Brussels I Regulation in respect of proceedings commenced in the EU on or after 10 January 2015 and Recital 12 aims to strengthen the arbitration exclusion in order to address a number of the wider problems raised by *West Tankers*).

His reasoning in this regard was that:

First, although the case fell within the Brussels I Regulation, Recital 12 of the *Recast* still applied. This was because its function (there being no change to any relevant *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 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*) excluded from the scope of the Brussels I Regulation; at least until that court has ruled that there is no arbitration agreement (125-133). Accordingly, up until then there can be no objection to an anti-suit injunction being granted by another EU court against the same (134-136). Further, Recital 12 states 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 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).

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.

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 debatable, 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 (as 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 allowed. The CJEU will no doubt realise this and so the opinion may stir 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's decision? 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 pressure to stay the matter, or even refer the questions to the CJEU, given *Gazprom* is pending. There is also the risk that whatever the CJEU says in that case could render such an application 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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