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Litigation & Arbitration Group Client Alert: Anti-Suit Relief in Arbitration: A Small Step in the Right Direction

In December 2014, an opinion issued by Attorney General Wathelet in *Gazprom* (C-536/13) appeared to pave the way for the return of the anti-suit injunction in European arbitration (click [here](#) for our briefing note on this). It also provided the Court of Justice of the European Union (the “CJEU”) with an opportunity to provide welcome clarification on the arbitration exception in the Recast Brussels Regulation.

However, at the end of last week, the CJEU published an anti-climactic judgment in which it confirmed that parties shall be bound by anti-suit injunctions issued by tribunals with jurisdiction over the disputing parties, but stopped short of clarifying whether the courts of Member States would similarly be bound by an anti-suit injunction issued in support of arbitration by the courts of another Member State.

By way of brief reminder, in 2009, the CJEU held in the *West Tankers*¹ case that it would be inconsistent with the Brussels I Regulation (44/2001) (the “**Brussels 1 Regulation**”) for the English courts (or, indeed, the court of any Member State) to issue an anti-suit injunction which deprived the courts of another Member State of the ability to rule on its own jurisdiction. Notwithstanding the arbitration exception in the Brussels 1 Regulation, the CJEU took the view that the consideration of the validity of an arbitration agreement was an ‘incidental’ question that fell within the scope of the Brussels 1 Regulation and opened the door for the ‘Italian Torpedo’ tactic - stalling and frustrating arbitration proceedings by initiating proceedings in the courts of another Member State, knowing that the court in question may take a significant amount of time to decide the issue of which forum has jurisdiction.

The Recast Regulation, which came into effect on 10 January 2015, attempts to reinforce the arbitration exception by clarifying that proceedings that are ancillary to arbitration agreements are excluded from the Recast Regulation. Additionally, it provides that Member State courts are not bound by another Member State court’s decision on the validity of an arbitration clause (so there could potentially be parallel proceedings if two Member States took opposing views on the validity of the arbitration agreement)². However, the Recast Regulation does not directly address the anti-suit

¹ *West Tankers Inc v Allianz SpA* (formerly RAS Riunione Adriatica di Sicurta) (Case – 185/07, [2009] 1 AC 1138

² However, a court’s decision on the substantive issues will still be binding on other Member States in accordance with the Recast Regulation.

injunction question that was decided in *West Tankers* and which appeared to legitimise the Italian Torpedo.

In his *Gazprom* opinion (which considered the effect of anti-suit relief granted by a tribunal, rather than a Member State court, under the scope of the Brussels 1 Regulation), AG Wathelet concluded that the tribunal's anti-suit award fell within the arbitration exception (so Member State courts should recognise the award in accordance with the terms of the New York Convention, unfettered by the Brussels 1 Regulation). However, more controversially, his opinion went beyond the immediate question by also concluding that the Recast Regulation (as opposed to the Brussels 1 Regulation, which his opinion was intended to consider), on a proper interpretation, permits anti-suit injunctions granted by Member State courts as they fall within the ancillary proceedings that are excluded from its scope (thus, in his view, *West Tankers* would have been decided differently if it had been considered under the Recast Regulation rather than the Brussels 1 Regulation).

AG Wathelet's opinion was not binding, so the arbitration community has waited expectantly since December to see if the CJEU would agree with him.

Disappointingly, the CJEU confined its judgment to the narrow question of whether the tribunal's anti-suit award fell within the scope of the Brussels 1 Regulation. The CJEU agreed with AG Wathelet on this point (in that the courts of a Member State are not restrained by the Brussels 1 Regulation in deciding whether to enforce an anti-suit arbitral award). However, the arbitration community would have welcomed clarification from the CJEU as to whether the Recast Regulation does, on a proper interpretation, mean that the courts of a Member State are bound by anti-suit injunctions in aid of arbitration issued by the courts of another Member State.

Therefore, the spectre of the Italian Torpedo continues to hover over European-seated arbitrations, albeit parties can at least now seek anti-suit relief from the tribunal with the reassurance that, subject to the terms of the New York Convention, a Member State court will recognise and enforce the tribunal's award.

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