

ANTISUIT INJUNCTIONS AND ARBITRATION

Gazprom, Case C-536/13

ECLI:EU:C:2015:316

AG: ECLI:EU:C:2014:2414

What is an antisuit injunction?

CJEU in *Turner v. Grovit*:

“... a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court’s jurisdiction to determine the dispute...

Continued ...

“Any injunction prohibiting a claimant from bringing such an action must be seen as constituting interference with the jurisdiction of the foreign court which, as such, is incompatible with the system of the Convention.”

Paragraph 27 of the judgment

So ...

To constitute an antisuit injunction for this purpose, the order must be:

- Imposed by a court
- Backed by a penalty

Why is it wrong?

It is wrong because

- It interferes with the jurisdiction of the other court

West Tankers

Argument by West Tankers:

- Arbitration is excluded from the subject-matter scope of the Regulation
- The prohibition on antisuit injunctions is derived from the Regulation
- Therefore, an antisuit injunction given in support of arbitration is not subject to the prohibition

CJEU's judgment

The CJEU **rejected** this. It held that the question whether the prohibition against antisuit injunctions applies in a given instance depends

- not on whether the proceedings in which it is granted are within the scope of the Regulation
- but on whether the proceedings against which it is directed are within its scope

Result

- An antisuit injunction given in support of arbitration will be contrary to EU law if the proceedings against which it is directed are within the scope of the Regulation

Advocate General Wathelet

4 December 2014

He said:

- Brussels 2012 reverses *West Tankers*
- Antisuit injunctions in support of arbitration are not against the Regulation
- This applies retroactively to Brussels 2000

His reasons

1. He said Recital 12 of Brussels 2012 excludes proceedings on the validity of an arbitration agreement from the scope of the Regulation.
2. The applicability of the prohibition against antisuit injunctions depends on whether the proceedings against which the injunction is directed fall within the scope of the Regulation.

His conclusion

- Therefore, the prohibition against antisuit injunctions does not apply to an injunction directed against proceedings concerning the validity of an arbitration agreement
- He assumed that this covers all proceedings to which it is claimed that an arbitration agreement applies

The problem with this

- Recital 12 does not say that proceedings concerning the validity of an arbitration agreement are outside the scope of the Regulation.
- It says they are not subject to the rules on recognition and enforcement in the Regulation.
- This is not the same thing

What Recital 12 says

“A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.”

Second problem

- The people negotiating Brussels 2012 did not intend to reverse *West Tankers*
- The UK tried to get it reversed by proposing that proceedings should be outside the scope of the Regulation if they are covered by an arbitration agreement
- This was rejected

CJEU JUDGMENT

- The CJEU did not discuss Wathelet's Opinion
- But it implicitly rejected it
- It treated West Tankers as good law

CJEU's judgment

- It held that the order of the arbitrators was not an antisuit injunction under EU law because
 - (1) It was not backed by a penalty; and
 - (2) it had not been granted by a court of a Member State

Judgment (continued)

- EU law neither prohibited nor required its recognition
- This was a matter for Lithuanian law and international law
- The CJEU had no jurisdiction to interpret or apply the NY Convention

My opinion

- I think it is good that the CJEU did not extend the prohibition against antisuit injunctions to cover awards by arbitrators that have no penalty.

What next?

- After the CJEU's judgment in *West Tankers*, West Tankers asked the arbitrators to award it damages against the defendants (Allianz) for breach of contract by suing in Italy.
- The idea is that an arbitration agreement is a contract like any other and that it includes an undertaking not to sue in any court.

- The arbitrators refused on the ground that this would be tantamount to an antisuit injunction and would be contrary to EU law.
- West Tankers appealed to the English court (possible under English law)
- Flaux J held that EU law does not preclude an award of damages
- No reference to CJEU

Latest ploy: sue the lawyer!

- *AMT Futures Ltd v. Marzillier* [2015] EWCA Civ 143; [2015] 3 WLR 282
- AMT: an English execution-only broker for the purchase and sale of derivative instruments
- Marzillier: a German law firm

- AMT had a lot of German clients
- Contracts with the clients had an English choice-of-court clause
- Some clients lost money
- They sued in Germany
- Marzillier was their lawyer
- Most actions settled

Then ...

- AMT sued Marzillier in England in tort for inducing a breach of contract
- The contract was the choice-of-court agreement
- Damages claimed:
 - i. money paid to German clients in settlement
 - ii. Lawyer fees
 - iii. Loss of profits, etc.

Did English courts have jurisdiction?

- Trial court: YES, under Brussels I 2000, Art. 5(3)
- The “harmful event” occurred in England where they should have sued
- Court of appeal: NO: the “harmful event” occurred in Germany where they did sue

Is such an action inherently contrary to Brussels I as having the same effect as an antisuit injunction?

- Court of Appeal rejected the argument that such an action is contrary to EU law
- Case now going to UK Supreme Court
- Will there be a reference to CJEU?

Application to arbitration

Although this case concerned a choice-of-court agreement, the issues involved could apply equally to an arbitration agreement