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Liu, M.

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Chapter ??

The Impact of BREXIT on Anti-Suit Injunctions

by

Dr. Margaret Liu*

As a result of British BREXIT referendum in 2016, the UK is currently negotiating its exit from the EU and this will have a significant effect on arbitration in London. Anti-suit injunctions are often sought in the English courts to exercise their supervisory role over arbitration and restrain foreign proceedings in favour of arbitration. The impact of BREXIT on anti-suit injunctions of arbitration will depend almost entirely on the terms of the BREXIT negotiations. To this end, this chapter will critically analyze the jurisdictions advanced by the UK courts for issuance of anti-suit injunctions and the effect the decisions of the European Court of Justice in Turner v Grovit1, West Tankers2 and Gazprom.3 It then examines whether the UK courts will revert back to the full practice of anti-suit injunctions and depart from the CJEU decision in West Tankers case and how this will affect the arbitration of dispute after BREXIT and the possible options available for the UK regarding the scope of the CJEU decision in the UK.

Introduction

It was widely held that the lengthy of debate on the use of anti-suit injunctions had been ended by the Court of Justice of European Union (hereinafter CJEU) in the Turner and West Tankers cases, the Gazprom case reignited the new wave of debate in the context of arbitration. The Gazprom case sheds light on whether a court of Member States is obliged to recognize and enforce or refuse the recognition and enforcement of an arbitral award, so-called an ‘anti-suit award’.

* Dr Margaret Liu is a senior lecturer in law at Coventry University, United Kingdom.
The anti-suit injunction is a procedural mechanism utilized by most common law courts to give effect to choice of court or arbitration agreements, aiming to prohibit vexatious and abusive manipulations of forum by malicious parties. Arbitral anti-suit orders have a same purpose as the anti-suit injunctions – they are injunctive relief device granted by arbitrators to prevent a party from commencing and/or pursuing proceedings before a forum, other than the chosen arbitral tribunal. Anti-suit injunctions and anti-suit orders are a device granted in order to lock proceedings in a specific forum thereby preventing a risk of parallel proceedings and conflicting judgments.

It is noted that the issuance of anti-suit injunctions has been banned by the CJEU in West Tankers and Turner cases. However, it has been suggested that the granting of anti-suit injunctions may be permissible in the context of arbitration under the Brussels I Recast Regulation. One of the contentious issues during the recasting of the Brussels I Regulation was the scope of the arbitration exclusion contained in Article 1(2)(d). Although arbitration is excluded from the scope of the Brussels I Regulation, the interface between it and the international commercial arbitration fall within the material scope of the Brussels I Regulation. Recital 12 clarifies the scope of the arbitration exclusion by addressing: i) Recital 12 does not only exclude arbitration in line with the arbitration exclusion in the main provision of Article 1(2)(d) of Brussels I Recast Regulation, it also allows the courts of Member States the liberty to rule on the existence and validity of arbitration agreements without the judgment being subject to the rules of recognition and enforcement laid down in Brussels I Recast Regulation, regardless whether the Member State’s court decided the scope of the arbitration agreement as a principal issue or as an incidental question.

This chapter firstly examines the relationship of anti-suit injunctions and the Brussels Conventions before considering the rationale for the prohibition of anti-suit injunctions within the EU judicial areas. It then critically assesses the prohibition of anti-suit injunctions in Turner and West Tankers cases. Consideration will then shift to whether anti-suit injunctions are permissible under the Brussels I Recast Regulation through Gazprom case. Finally this chapter will explore the BREXIT effect on anti-suit injunctions.

Anti-suit injunctions and the Brussel Regulations

Anti-suit injunctions, in Anglo-Saxon law, rather than continental law, are orders directing a party not to initiate or pursue legal action in a different jurisdiction, or if they had already initiated it, that they withdraw it. Failure to do so would place them in contempt of court and may carry pecuniary penalties.8

In England and Wales, the Court of Appeal, the High Court of Justice and the Crown Court (hereinafter senior courts) have a ‘general power’ to issue an anti-suit injunction under s 37(1) of the Senior Court Act 1981 in cases in which it appears for the courts to be “convenient” to do so. The Supreme Court in Ust-Kamenogorsk Hydropower Plant9 made it clear that the source of the power of the English Senior courts to grant anti-suit injunctions in support of arbitration agreements is enshrined in Section 37 of the Senior Court Act 1981. However, these courts exercise this general power cautiously and “sensitively” in the arbitration context “with due regard for the scheme and terms” of the Arbitration Act 1996.10 Under section 44(2) of the Arbitration Act 1996, senior courts are empowered a supervisory role to grant interim injunctions in support of arbitration proceedings. The English courts will usually grant anti-suit injunctions where there is a breach of an arbitration agreement or a choice of court agreement.11 In Angelic Crace,12 the Court of Appeal held that an anti-suit injunction will be granted where there is a breach of an arbitration agreement provided the application is sought expeditiously and before the foreign proceedings have advanced.13 The indication shows the English courts’ willingness to grant anti-suit injunctions in order to safeguard an arbitration agreement.14 The reason for granting anti-suit injunctions is because the defendant had earlier promised not to commence them by consenting to the jurisdiction agreement.15 The purpose of granting an anti-suit injunction, in breach of a jurisdiction agreement, is to prevent the claimant

8 Elvira Benayas, M. J., “Is there any possibility, however, small, of saving our own? The anti-suit injunction and the Brussels Convention on the subject of the STJCE of 27 April 2004 m C-159/02”, Electronic Journal of International Studies.
in the foreign proceedings from putting the other party through the cost and inconvenience of a wrongly initiate set of proceedings.\textsuperscript{16} This means that a defendant who violates the order of an anti-suit injunction may be held liable for contempt of court,\textsuperscript{17} imprisoned, fined or his property seized,\textsuperscript{18} and any judgment obtained by the defendant from a foreign court in breach of the order of an anti-suit injunction granted against him may not be enforced.\textsuperscript{19} In other words, where there are two parallel actions, one of the actions commenced in England and the other brought in a foreign country with the intention of vexing the defendant, the English senior courts have the power to restrain the party pursuing foreign proceedings.\textsuperscript{20}

Within the EU the jurisdictional concerns are exacerbated by the existence of the Brussels regimes of allocating jurisdiction. In 1968 the European legislators began to set out a series of guidelines to determine jurisdiction in case that affect citizens resident in the European Union. It also established channels to facilitate the recognition and enforcement in Member States of judgments issued in another Member State. This path began with the Brussels Convention 1968 and had crystalized in Regulation 44/2001 of 22 December 2000 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Hereinafter Brussels I Regulation), which serving to clarify some points and taking a step towards procedural harmonization, with its ultimate milestone to date being the enactment of Regulation 1215/2012, known as Brussels I Recast.

Manifestly, this has been maintained in subsequent amendments that the Convention in its common Article 1\textsuperscript{21} established that the arbitration was excluded from its scope. Along the way, the Supreme Court\textsuperscript{22} echoed this doctrine, declaring that Brussels I Regulation was not applicable to the incidental control of an arbitration agreement since arbitration was a matter of excluded thereof. \textit{Turner v Grovit}\textsuperscript{23} is a case in point in which the House of Lords ruled that anti-suit injunction do not infringer upon the Brussels I Regulation. In particular, Lord Hobhouse, explained that the \textit{ratio decidenedi} for the judgment was that anti-suit injunctions

\begin{itemize}
  \item \textsuperscript{16} \textit{West Tankers Inc v Ras Riunione Adriatica Di Sicurta “The Front Comor”} [2005] 2 Llyod’s Rep 257, 268[50].
  \item \textsuperscript{17} \textit{West Tankers Inc v Allianze SpA} [2009] ECR 1-00663, [14] (Advocate General Kokott).
  \item \textsuperscript{19} M Black and R Reece, “Anti-suit injunctions and Arbitration Proceedings” (2006) \textit{Arbitration} 207-16, 211.
  \item \textsuperscript{21} See Art. 1(2)(d) of both Brussels I Regulation and Brussels I Recast.
  \item \textsuperscript{22} Judgment of the Supreme Court of 17 May 2007.
  \item \textsuperscript{23} \textit{Turner v Grovit} [2001] UKHL 65; [2002] W. L. R. 107.
\end{itemize}
“come into the picture at an earlier stage and involve not a decision upon the jurisdiction
of the foreign court but an assessment of the conduct of the relevant party in invoking that
jurisdiction. English law makes these distinctions. Indeed, the typical situation in which a
restraining order is made is one where the foreign court has or is willing to assume
jurisdiction; if these were not so, no restraining order would be necessary and none should
be granted”.24

Evidently, Turner v Grovit25 was understood not to apply to arbitration clauses. Further, such
anti-suit injunctions are not issued against the court of another EU Member State, but rather
against the party in breach of an arbitration clause. It is an in personam order26 preventing a
party from commencing and/or continuing proceedings in a foreign jurisdiction other than in
accordance with the choice of court or arbitration agreements.27 But this reassurance went
awry when the Court extended the incompatibility with the Brussels Regulation of the anti-suit
injunction in the West Tankers28 ruling, affirmed in Gazprom,29 which reiterated that anti-suit
injunctions are incompatible with the Brussels Regulation.

West Tankers Decisions

The West Tankers30 is a landmark case with significant impact on the fate of anti-suit injunctions.
In the case, the UK House of Lords and the European Court of Justice both directly ruled on the
arbitration exception in the Brussels I Regulation.31

Since 2001, the Brussels I Regulation has been the starting point when considering the
jurisdiction of a court in a Brussels Regulation Member State to hear a dispute. The Brussels I
Regulation in Article 27 provides that “where proceedings involving the same cause of action

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25 Ibid.
26 Turner v Grovit and Others [2002] 1 WLR 107, 117[23].
27 T Raphael, The Anti-suit injunction (OUP, 2008) 1.05; TC Hartley, “Comity and the Use of Antisuit
28 Judgment of the European Court of Justice of 10 February 2009.
29 Aggeliki Charis Compania Maritima ApA v Pagnan SpA (The Angelic Grace), [1995]1 Lloyd’s Rep 87, Court of
Appeal, Neil, Leggatt and Millett LJ.
30 West Tankers Inc v RAS Riunione Adriatica Di Sicurta ApA (The Front Comor) [2005] EWHC 454 (Comm);
31 The Regulation has since then amended, with consequential renumbering of its articles, by Regulation
(EU) No 1215/2012 on jurisdiction and recognition and enforcement of judgments in civil and
commercial matters (recast) (‘The Judgments Regulation’) which applies to legal proceedings instituted
on or after 10 January 2015.
and between the same parties are brought in the courts of different Member States, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.” The strict application of this article (even, for example, where the first proceedings were commenced in bad faith) has been repeatedly emphasized by the CJEU.\(^{32}\) The CJEU explained its approach as being predicted on the principles of uniformity of approach and “mutual trust” which buttress the Brussels Regulation. It requires that each EU Member State court rules only in its own jurisdiction and not to assume exclusive jurisdiction of another Member State court.\(^{33}\) The *Erich Gasser*\(^ {34}\) best confirmed where the ECJ held that under the Brussels Regulation

> “the court second seized is never in a better position than the court first seized to determine whether the latter has jurisdiction. That jurisdiction is determined directly by the rules of Brussels Regulation, which are common to both courts”.\(^ {35}\)

The case arose from an incident where the *West Tankers* owned by an English company collided with a jetty owned by an Italian company, Erg Petroli SpA. Erg claimed compensation and received money from its insurers, Allianz SpA, for damages relating to the collision but commenced an arbitration in London against *West Tankers* seeking payment of the excess. Sometime later, Allianz SpA started proceedings against *West Tankers* in an Italian court (under the same charterparty agreement by the right of subrogation) seeking to recover the amount it paid to Erg. *West Tankers* challenged the jurisdiction of the Italian court and applied to the English courts to issue an injunction restraining Allianz SpA from continuing the Italian proceedings, claiming that the dispute arose out of the charter party, and that it was governed by English law with any disputes to be resolved by arbitration in London. Allianz SpA was bound by the agreement.

In the Queen’s Bench Division\(^ {36}\) Colman J – following the approach taken by the Court of Appeal in *The Hari Buram*\(^ {37}\) - made an order for an anti-suit injunction restricting the insurers’ further steps in the Italian proceedings. During the proceedings, Allianz SpA questioned whether it would be consistent with the Brussels Regulation for an English court to grant an injunction

\(^{32}\) See, for example, *Erich Gasser GmbH v MISAT SRL* (C-116/02; [2004] 1 Lloyds Rep. 222); *Turner v Grovit* (C-159/02; [2004] 2 Lloyds Rep. 169.

\(^{33}\) *Turner v Grovit* (C-159/02) EU:C:2004:228; [2005] 1 A. C. 101; [2004] 3 W.L.R. 1193 at [20].


\(^{35}\) *Erich Gasser* (C-116/02)[2005] Q. B. 1; [2004] I. L. Pr. 7 at 164.


restricting proceedings in another Member State. Leave was granted to appeal on this issue directly to the then House of Lords.

Lord Hoffman upheld Justice Coleman’s decision and added that there is no ‘doctrinal necessity or practical advantage for the European Community to handicap itself by denying its courts the right to grant anti-suit injunctions’[^38] on the ground that such proceedings were in breach of an arbitration agreement. Despite giving the impression that the House of Lords was convinced by this approach, his Lordship also held that there were varying views on the issue and that was a matter of considerable importance. In this regard, Lord Hoffman referred the case to the CJEU for a preliminary ruling on whether it was consistent with the Brussels Regulation a Member State commencing proceedings in another Member State on the grounds that it was in breach of an arbitration agreement.[^39]

In fact, the CJEU did not follow the House of Lords decision, instead issued its judgment on 10 February 2009 preferring the opinion of Advocate General Kokott whose approach[^40] was that “an anti-suit injunction should not brought to restrain court proceedings in another EU Member State even where it is brought apparently in breach of an arbitration agreement.”[^41] Accordingly, the ECJ held that the prohibition on anti-suit injunctions set out in the ECJ decision in *Turner v Grovit*[^42] extends even where there is an arbitration agreement, and that “it is incompatible with Council Regulation (EC) No 44/2001...for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the court of another Member State.”[^43] The rationale for the CJEU’s decision was as follows, *inter alia*:

1) In order to determine whether a dispute falls within the scope of Brussels I Regulation, reference must be made solely to the subject matter of the proceedings – that is the subject matter of the Italian proceedings (a damages claim in tort) and the preliminary questions as to whether the arbitration agreement was applicable fell within the scope of the Brussels Regulation.

2) However, even proceedings which do not fall within the scope of the Regulation may have consequences which undermine its effectiveness. This is because the unification of

[^40]: Advocate General Opinion Kokott: Allianz SpA (fomrly Riunione Adriatica di Sicurtà SpA) v West Tankers Inc (C-185/07)ECLI:EU:C:2008:466 at [15].
[^41]: Case C-185/07, Judgment of the Court (Grand Chamber) of 10 February 2009).
[^43]: ‘ECJ hand down judgment in *West Tankers* confirming that anti-suit injunctions in support of arbitration agreements are incompatible with the Brussels Regulation’, LEXOLOGY, at http://www.lexology.com/library/detail.aspx?g=3c36c54-59c5-4f.
the rules of conflict of jurisdiction will be impeded where the use of an anti-suit injunction prevents a court in a Member State from ruling on the very applicability of the Brussels Regulation and strips that court's power to rule in its own jurisdiction as conferred by the Brussels Regulation.

3) There is no need for issuance of anti-suit injunction because the chances for a party to circumnavigate arbitration are minimal given that article II (3) of the New York Convention (NYC) requires Member State courts to refer parties' arbitration where there is a valid arbitration agreement.45

4) The mere fact there is an arbitration clause does not confer an exclusive right to the arbitral body to examine the clause.46 This is because such an approach would deny a claimant judicial protection because they would not have an opportunity to make a claim to the court that the arbitration agreement is invalid.47

Impact of the CJEU’s Ruling

This ruling has its pros and cons. On the one hand, the CJEU’s decision maintains the principle of mutual trust among EU Member State courts because it ensures that no Member State courts can interfere with the judicial sovereignty of another Member State courts by determining jurisdiction or reviewing a decision of another Member State court owing to its inconsistent with the aim of the Brussels Regulation.48 In this way, it can thus be argued that the CJEU puts EU law, and more importantly, judicial sovereignty above commercial interest.49

But, on the other hand, arbitration in England or any other Brussels Regulation jurisdiction will now have to wait until any proceedings brought in a foreign court in apparent breach of an arbitration agreement have been stayed or jurisdiction has been declined by another court. Potentially, this could protract a process, involving a full review and possible appeals depending on the procedural rules of the court in question.

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45 Allianz SpA (C-185/07) EU: C:2009: 69; [2008] 2 Lloyd's Rep. 661 at [33].
47 Advocate General Opinion Kokott Allianz SpA (formly Riunione Adriatica di Sicurta SpA) v West Tankers Inc (C-185/07)ECLI:EU:C:2008:466 at [58].
Undoubtedly, this undermines the concept of party autonomy as regards choice of arbitration seat, denying some of the benefit of 'arbitration-friendly' jurisdiction where courts limit any pre-award review to a minimum. It is also incompatible with the concept of competence-competence - allowing arbitrators primarily to determine their jurisdiction. The CJEU decision is problematic as it is easy to envisage a situation where an opportunist potential defendant could exploit the position created by the CJEU’s decision by commencing tactical proceedings in a Member State court which have the effect of delaying the resolution of the substantive dispute. Furthermore, the CJEU’s decision is also inconsistent with Article 1(2)(d) of the Brussels Regulation, which contained an arbitration exception by virtue of which Turner v Grovit was understood not to apply to arbitration clauses. The English Court has replied by concluding that there is nothing to prevent it from granting an injunction to restrain proceedings which are (or would be) in breach of an arbitration clause.

At the heart of the concerns, is the effect of this decision on arbitration in London, and this concern was highlighted by Lord Hoffman in the then House of Lords when he claimed that the ability to issue anti-suit injunctions is one of the advantages that London is able to offer as it is an “important valuable weapon” in the hands of the English courts to exercise their supervisory role over arbitration. Such an effective tactical weapon in management of international commercial arbitration was deprived by the CJEU’s decision in the West Tankers case. In this regard, Lord Mance stated that it is commercial practice of “no or little comfort or use” for the only remedy for the parties is to be engaged in foreign proceedings pursued in disregard of the arbitration clause, because this is exactly what the party aimed and bargained to avoid.

However, these comments were dismissed by the Advocate General as being of a “purely economic nature” and therefore could not justify infringement of Community Law. The Advocate General also added that from the point of view of procedural economy, an anti-suit injunction may lead to an unsatisfactory result that “runs counter” to the principle of mutual trust between courts of Member States. Therefore, the CJEU prohibits use of anti-suit injunctions in support of arbitration agreements in the EU that the principle endorsed by case

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52 See, for example, the Court Appeal’s judgment in Through Mutual Insurance Association (Eursia) Ltd v New India Assurance Co Ltd (The Hari Bhum) (No 1) [2005] 1 Lloyd’s Report 67).  
53 West Tankers [2007] UKLH 4 at[19].  
55 Advocate General Opinion Kokott Allianz SpA (C-185/07) ECLI:EU:C:2008:466 at [66].  
such as *Turner v Grovit*\(^{57}\) in the context of proceedings being brought in apparent breach of exclusive jurisdiction clauses, given the specific exclusion of arbitration from the scope of the Brussels I Regulation.

The decision was criticized by the international arbitration community for extending the scope of the Brussels I Regulation to arbitration in a way that undermined the effectiveness of the arbitration agreements. Critics argued that the decisions gave parties free rein to ignore arbitration agreements and commence proceedings in their preferred court concerning the existence and validity of an arbitration in order to delay or frustrate an arbitration: so-called “torpedo” actions.

**Does the Brussels I Recast Regulation reverse the West Tankers decision?**

The Brussels Recast was adopted in 2012 and came into force on 10 January 2015, which clarified the scope of the arbitration exception by adding Recital 12 and Article 73(2), along with retaining Article 1(2)(d), seems to have swept away the *West Tankers* decision thus allowing anti-suit injunctions to be issued.

Following the prohibition of anti-suit injunctions by the CJEU in the *West Tankers* case, the question arises as to whether this prohibition extends to the arbitral tribunals. This is because, as it was affirmed in *Nordsee*,\(^{58}\) for the purposes of the EU law, arbitral tribunals do not fall within the meaning of “court or tribunal” to the effect that they cannot even make a direct reference to the CJEU through Article 267 of the Treaty of the Functioning of the European Union 2009 (hereinafter TFEU). In *Gazprom*,\(^{59}\) the Lithuanian Supreme Court made a reference to the CJEU on this issue. The CJEU held that the Brussels Regulation only governs conflicts of jurisdiction between Member States’ court and tribunals as arbitral tribunals are neither, the principle of mutual trust under the Brussels Regulation is not infringed by an arbitral tribunal anti-suit injunction/orders.\(^{60}\)


Importantly, *Gazprom* \(^{61}\) raised the questions on the compatibility of the anti-suit injunctions in Brussels I Recast Regulation, which came into force on 10 January 2015 with the aim of revising the Brussels Regulation. Simply, in the Brussels I Recast arbitration exclusion at Article 1(2)(d) of Brussels I Regulation survives. Indeed, the exclusion is amplified and reinforced by a new Article 73(2) and Recital 12 which expressly state that the Regulation should not apply to arbitration. Of particular interest in the Brussels Recast is the fourth paragraph of Recital 12 which clarifies that the Regulation should not apply to

> any action or ancillary proceedings relating to, in particular, the establishment of the tribunal, the powers of arbitrator, the conduct of the arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

It is noted that in *Nori Holding b Bank Ottritie*, \(^{62}\) Justice Males in the High Court issued an anti-suit injunction to restrain court proceedings commenced in Russia in breach of an arbitration clause, but refused to issue an anti-suit injunction to restrain similar court proceedings commenced in Cyprus on the ground that he was bound by the CJEU’s decision in *West Tankers*, reaffirmed in *Gazprom*, which prevented the grant of such anti-suit injunctions.

The *Gazprom* case arose out of a shareholder dispute between Russian energy giant, Gazprom, and Lithuania’s energy ministry over the management of gas provider Lietuvos Dujos.

In 2012, Gazprom obtained an arbitration award against Lithuania’s energy ministry from a Stockholm Chamber of Commerce (Hereinafter SCC) tribunal ordering the ministry to ‘withdraw or limit’ some of the claims pending before local courts. However, the Lithuanian courts refused to enforce this anti-suit award, leading to the Lithuanian Supreme Courts’ referral of the matter to the CJEU in 2013. Simply The *Gazprom* case brought out parallel claims in the Lithuanian Courts and in an arbitration conducted under SCC rules in Sweden.

Interestingly, while delivering his opinion in *Gazprom*, Advocate General Wathelet relied heavily on the Brussels I Recast \(^{63}\) and explained that if *West Tankers* was decided under the Brussels I Recast, in those circumstances of the case with anti-suit injunction forming the subject-matter

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\(^{63}\) Opinion of the Advocate General Wathelet in Gazprom (C-536/13) EU:C:2014:2414.
of the judgment, it would not have been held to be incompatible with the Brussels I Regulation.\textsuperscript{64} His argument was affirmed by the fourth paragraph of Recital 12 of the Brussels I Recast (above) on the ground that

"not only does that paragraph exclude the recognition and enforcement of arbitral awards from the scope of that (Brussels I Recast) regulation...but it also excludes ancillary proceedings, which in my view covers anti-suit injunctions issued by national courts in their capacity as court supporting the arbitration."\textsuperscript{65}

Clearly, the Advocate General's Opinion triggers the debate of the compatibility of anti-suit injunctions in the arbitration context of Brussels I Recast and also raises the possibility that CJEU would overturn the decision in \textit{West Tankers} in the future.\textsuperscript{66} However, although the CJEU judgment did not address the impact of the Brussels I Recast on the anti-suit injunctions, the CJEU made references to the \textit{West Tankers} decision and buttressed the principle of mutual trust among EU Member State courts. The CJEU, however, did not engage with AG Wathelet's Opinion in the Brussels Recast Regulation. Instead, the CJEU decided the case on the Brussels I Regulation and left the position of anti-suit injunctions under the Brussels I Recast entirely open.

Justice Males held that the CJEU in \textit{Gazprom} was 'crystal clear' that anti-suit injunction was incompatible with the Brussels Regulation. He considered Recital 12 of the Brussels I Recast and observed that nothing in it undermines the principles affirmed in \textit{West Tankers} and \textit{Gazprom}. He thus held that that 'the opinion of the Advocate General on this issue was fundamentally flawed' and that if the EU legislation had wanted to reserve \textit{West Tankers} through the Brussels Recast it 'chose an odd way in which to do so'. He reiterated 'there is nothing in (the Recast) to cast doubt on the continuing validity of the (CJEU) decision in West Tankers case'.\textsuperscript{67}

Justice Males therefore did not grant an anti-suit injunction to stop Cyprus court proceedings commenced in breach of the arbitration agreement, and left it either to the Cyprus to stay the proceedings, or to the claimants to apply to the arbitrators to issue such an anti-suit injunction (as \textit{Gazprom} allows).

\textsuperscript{64} Opinion of the Advocate General wathelet in Gazprom (C-536/13)EU:C:2014:2414 at [133].

\textsuperscript{65} Opinion of the Advocate General Wathelet in Gazprom (C-536/13)EU:C:2014:2414 at [138].


\textsuperscript{67} \textit{West Tankers Inc v Allianz SpA} (Case C-185/07) [2009] AC.
This decision reaffirms the CJEU’s decision on West Tankers as good law and in doing so clears up most of the confusion that had been brought up by the AG opinion in the Gazprom case in relation to the arbitration exception in the Brussels Recast Regulation. It must be emphasized that the Brussels I Recast does not reserve West Tankers that anti-suit injunctions cannot be issued by courts to restrain court proceedings in other EU Member States.

The BREXIT Effect

Having assessed the prohibition of anti-suit injunctions by the CJEU in the Turner v Grovit, the West Tankers and Gazprom cases, this paper now focuses on the unique position of the UK. This is because the UK will be leaving the EU (BREXIT) two years after Article 50 of the Treaty on the Functioning of the European Union (TFEU) to echo a result of the EU referendum vote in 23 June 2016. In doing so, it is necessary to examine the potential effect of post Brexit on arbitration – the granting of anti-suit injunctions as an “independent” State.

One of the main issues that led to the BREXIT vote was to take back control of the UK law and bring an end to the jurisdiction of the CJEU when Britain leaves the EU on 29 March 2019.68 At present, as a Member of the EU, the UK courts have to adopt the CJEU decisions in West Tankers, Turner v Grovit and Gazprom, although the highest Court in the UK, the then House of Lords (now the UK’s Supreme Court) as discussed above, did not share the same views. However, if after BREXIT, EU law and CJEU decisions no longer apply in the UK, the UK courts may regain their power to issue anti-suit injunctions. As the British Prime Minister Mrs May put in in her Lancaster House Speech in January 2017, that “juridical independence is a totemic issue for Brexiteers” and “leaving the European Union will mean that our laws will be made in Westminster, Edinburgh, Cardiff and Belfast. And those laws will be interpreted by judges not in Luxembourg but in courts across this country.”69

However, despite Prime Minister May's declaration it must be emphasized that the impact of BREXIT on anti-suit injunctions will depend on the terms of the BREXIT negotiations.70 If the UK

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negotiates to opt out of all EU law, including the Brussels Regulations, the UK courts will revert back to the full power of granting anti-suit injunction, which might increase London’s competitiveness as an arbitral seat and spark a rise in London-seated arbitrations.\textsuperscript{71} English companies would also be given a competitive edge as they can go to the English courts which would not be bound by the Brussels Regulations, to seek anti-suit injunctions. If this would be the case, all the restrictions associated with the ECJ decisions in \textit{West Tankers} will be evaded and all the positives of anti-suit injunctions including preventing parallel proceedings would apply \textit{mutatis mutandis}.

It must be admitted that even if the UK adopts such an approach, the power to grant an anti-suit injunction would not be completely unfettered on the grounds: i) the UK anti-suit injunction can only be issued by the senior courts; ii) Anti-suit injunctions under the English law are used as a fault remedy which requires the defendant to prove his actions are \textit{inter alia} unconscionable, an abuse of justice, vexatious or oppressive in the eyes of English law. In principal, English courts would not issue an anti-suit injunction where it is not appropriate to do so even if the seat of arbitration is London. The \textit{U & M Mining}\textsuperscript{72} further strengthens the above assertion. In this case, undoubtedly, the agreed seat of arbitration was London and thus the claimant sought an anti-suit injunction in the English court to stop Zambian proceedings started against it by the defendant. However, upon careful consideration of the facts, Blair J refused to grant an anti-suit injunction because this dispute concerned the operation of a copper mine in Zambia between two Zambian companies. Blair upheld that:

\textit{"The matter is of national as well as local importance since, as I have been told, the mine contributes a substantial proportion of Zambia’s total GDP. So far as judicial assistance by way of interim measures pending the appointment of the arbitrators is required, in my view the natural forum for such proceedings is in Zambia, not in England."}\textsuperscript{73}

Although Blair’s decision in \textit{U & M Mining}\textsuperscript{74} may be seen as anti-arbitration and/or interference with the parties’ choice to select the seat of arbitration, there is a rationale behind this decision of the English court which is clearly justifiable as it is commercially sound and pragmatic. It is because in certain circumstances, practical factors may make it more convenient

\textsuperscript{74} \textit{U & M Mining} [2013] 2 Lloyd’s Rep. 218; [2013] 1. C. L. C. 456 at [72].
and effective to proceed in another jurisdiction although the seat of arbitration is the natural forum for seeking an anti-suit injunction in ordinary circumstances.\textsuperscript{75}

**Conclusions and beyond**

However, from the analysis provide in this chapter, the rest of the EU Member State courts would be equally free to grant anti-suit injunctions to restrain a party from pursuing a claim before the English courts. Furthermore, there is also a risk that where an anti-suit injunction is granted to stop proceedings in another Member State’s court, those courts might later refuse to recognize and enforce the arbitral award owing to it being contrary to the country’s public policy by virtue of Article V2(b) of the New York Convention, which allows national courts to refuse an arbitral award where the “recognition or enforcement of the award would be contrary to the public policy of that country.”

If it is not what is negotiated for, the UK could negotiate to sign up to the Lugano Convention 2007 on the jurisdiction and the recognition and enforcement of judgments, which extends the effect of the Brussels Regulation to Iceland, Switzerland and Norway. If such an approach is taken, although it is still unclear what terms of the agreement would be, it is unlikely that the UK would still bound by the Brussels Regulation and not the CJEU decisions on the Brussels Regulation. Therefore, the advantage of such an approach is that UK judicial sovereignty would be protected through *West Tankers* and the mutual trust principle from anti-suit injunctions in EU Member State courts.

In conclusion, the UK might alternatively negotiate for a Denmark-like approach. As per Article 21 of the Brussels I Regulation, Denmark opted out of the Brussels Regulation, however, the EU concluded an agreement on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters which ensures the application of the provisions of the Brussels Regulation in Denmark from 1 July 2007.\textsuperscript{76} In this way, therefore the UK and the rest of the EU Member States will negotiate an agreement either to duplicate or “keep but amend”, or one that will completely replace the Brussels Regulation. As the UK will be negotiating while leaving the


EU and thus from a different position to that of Denmark, it is more likely that it would prefer a “keep but amend” agreement. This is also a possibility because the CJEU decisions in *West Tankers* and *Turner v Grovit* clearly expose the weaknesses of the current UK regulatory framework relating to anti-suit injunctions.

As international commercial arbitration is increasingly becoming a preferred method for disputes resolution internationally, so are national courts increasingly issuing anti-suit injunction. In a judgment delivered on 13 February 2018, the Grant Court of the Cayman Islands granted an anti-suit injunction to restrain the joint official liquidators of Argyle Funds SPC (Argyle) from continuing litigation commenced in the Supreme Court of the State of New York against Argyle’s former statutory auditor (BDO Cayman) and three related parties.\(^77\) The Court enforced “sole recourse” provisions in the engagement letters between Argyle and BDO that disputes were “to be resolved via arbitration in the Cayman Islands”.\(^78\) Although anti-suit injunctions have undeniable extra-territorial effects, they are granted on the basis of the court’s *in personam* jurisdiction over party enjoined. Their grant has not direct effect on the foreign proceedings, but the defendant will be personally liable for contempt of court if it breaches the terms of the order. The impacts of issuing anti-suit injunction in favour of arbitration is accelerating in Caribbean countries upholding the primacy of arbitration agreement.

ENDS

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\(^78\) For details of the case, see *Petroleum Company of Trinidad and Tobago Limited and Samsung Engineering Trinidad Co. Limited*, Case No. HT-2017-000235, Neutral Citation Number: [2017] EWHC 3055 (TCC).