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Litigio o arbitraje: ¿una competencia? Disputa comercial transfronteriza de adjudicación en un mundo globalizado bajo el dominio del reglamento de la Unión Europea 1215/2012

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LITIGATION OR ARBITRATION: A COMPETITION? – CROSS-BORDER COMMERCIAL DISPUTE ADJUDICATION IN A GLOBALIZING WORLD UNDER THE REIGN OF EU REGULATION 1215/2012*

LITIGIO O ARBITRAJE: ¿UNA COMPETENCIA? DISPUTA COMERCIAL TRANSFRONTERIZA DE ADJUDICACIÓN EN UN MUNDO GLOBALIZADO BAJO EL DOMINIO DEL REGLAMENTO DE LA UNIÓN EUROPEA 1215/2012

LITÍGIO OU ARBITRAGEM: UMA COMPETIÇÃO? ADJUDICAÇÃO DE LITÍGIOS COMERCIAIS TRANSFRONTEIRIÇOS NUM MUNDO GLOBALIZADO SOB O REINADO DO REGULAMENTO DA UE 1215/2012

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ABSTRACT

Cross-border civil and commercial conflicts can be adjudicated by courts of sovereign states or in a private setting, namely by arbitration panels. Against the background of a globalizing world and an increase in popularity of arbitration as a means of dispute resolution 'Europe' (the European Union) faces the challenge to demarcate borderlines as litigation in court and arbitration tend to get in conflict more often. Conflicts may relate to the jurisdiction of courts versus the competence of arbitration panels (inter alia resulting in anti-suit court orders or even arbitral awards), as well as to the recognition of foreign court orders being capable of frustrating arbitral awards or vice versa. This contribution attempts to analyze how these clashes ought to be resolved under the reign of 'new' cross-border civil and procedural law in Europe (EU Regulation 1215/2012, or 'Recast') on Jurisdiction and Recognition of Foreign Judgments in Civil and Commercial Matters' (in force January 15, 2015). Two preliminary rulings of the Court

** Artículo de reflexión*

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of Justice of the European Union (CJEU) though still interpreting EU Regulation 44/2001 (i.e. the legislative predecessor of the Recast), remain important to the law regime of the Recast. The final conclusion is that, even though the Recast respects the international law framework of notably the 1958 New York Convention on the recognition and enforcement of arbitral awards, a considerable amount of legal uncertainty remains, as Recital 12 of the Recast Preamble contains 'open-ended' parameters leaving discretionary room for national law of each individual EU Member State and calling for further interpretative rulings of the CJEU.

KEY WORDS

Arbitration, Competence, Anti-suit injunctions, Arbitration panels, Awards, EU Law, Primary EU Law (TfEU), Secondary EU Law (see: Regulations), EU Regulation 44/2001, EU Regulation 1215/2012 (Recast), Interpretative rulings CJEU, Jurisdiction, Private International Law, recognition and enforcement - court judgments, - arbitral awards.

RESUMEN

Los conflictos civiles y comerciales transfonterizos pueden ser adjudicados por las cortes de los estados soberanos o en una instancia privada, específicamente por paneles de arbitraje. En el contexto de un mundo globalizado y de un incremento de la popularidad del arbitraje como un medio de resolución de litigios; Europa (la Unión Europea) se enfrenta al reto de demarcar límites en la medida en que los litigios en las cortes y el arbitraje tienden a entrar en conflicto más seguido. Los conflictos pueden estar relacionados a la jurisdicción de las cortes o a la competencia de los paneles de arbitraje (entre otros que resultan en amparos contra litigios extranjeros o incluso en laudos arbitrales), así como también el reconocimiento de órdenes judiciales exranjeras que son capaces de frustrar un fallo arbitral y viceversa. Esta contribución hace el intento de analizar cómo deben ser resueltos estos altercardos bajo la influencia de la nueva ley civil y de procedimiento transfronterizo en Europa (reglamento de la Unión Europea 1215/2012 o Reforma) acerca de la jurisdicción y reconocimiento de sentencias extranjeras en cuestiones civiles y comerciales (en vigencia desde enero 15 de 2015). Dos decisiones prejudiciales de la corte de la Corte de Justicia de la Union Europea (CJEU) aunque todavía interpretan el Reglamento de la Unión Europea 44/2001 (es decir el predecesor de la Reforma), siguen siendo importantes en el regimen jurídico de la Reforma. La conclusion final es que, a pesar de que la Reforma respeta el marco legal internacional en particular de la Convención de Nueva York de 1958 sobre el reconocimiento y entrada en vigencia de los laudos arbitrales, queda una parte considerable de incertidumbre legal, como el considerando 12 del preámbulo de la Reforma que contiene parámetros indefinidos, dejando un espacio discrecional para las leyes nacionales de cada individuo de los estados miembros de la Unión Europea y llamando a resoluciones interpretativas más profundas del CJEU.

PALABRAS CLAVE

Arbitraje, competencia, amparo contra litigios extranjeros, paneles de arbitraje, laudos, ley de la Unión Europea, derecho primaro de la Unión Europea, derecho secundario de la Unión Europea (ver normas), Reglamento 44/2001 de la Unión Europea, Reglamento 1215/2012 de la Unión Europea (Reforma), resoluciones interpretativas del CJEU, jurisdicción, derecho internacional privado, reconocimiento y puesta en vigencia, sentencias judiciales, laudos arbitrales.

RESUMO

Os conflitos civis e comerciais transfronteiriços podem ser julgados por tribunais de Estados soberanos ou em um ambiente privado, especificamente por painéis de arbitragem. No contexto de um mundo globalizado e um aumento na popularidade de arbitragem como um meio de resolução de litígios "Europa" (a União Europeia) enfrenta o desafio de demarcar fronteiras por quanto litígio em tribunal e arbitragem tendem a entrar em conflito com mais frequência. Os conflitos podem relacionar-se com a jurisdição dos tribunais versus a competência dos painéis de arbitragem (que resultam, entre outros, em decisões judiciais ou mesmo em sentenças arbitrais), bem como ao reconhecimento de ordens de tribunais estrangeiros capazes de frustrar sentenças arbitrais ou vice-versa. O considerando 12 do preâmbulo contém parâmetros "abertos", deixando margem de manobra para o direito nacional de cada Estado-Membro da UE e solicitando novas decisões Esta

contribuição procura analisar a forma como estes conflitos devem ser resolvidos sob o reinado do "novo" direito civil e processual transfronteiriço na Europa (Regulamento 1215/2012 da UE, ou "Reformulação") sobre a competência judiciária e o reconhecimento de decisões estrangeiras em matéria civil e processual Comercial (vigente em 15 de janeiro de 2015). Dois acórdãos prejudiciais do Tribunal de Justiça da União Europeia (TJUE), embora continuem a interpretar o Regulamento 44/2001 da UE (ou seja, o antecessor legislativo da reformulação), continuam a ser importantes para o regime jurídico da reformulação. A conclusão final é que, embora a Reformulação respeite o quadro do direito internacional, nomeadamente a Convenção de Nova Iorque de 1958 sobre o reconhecimento e a execução de decisões arbitrais, subsiste uma considerável incerteza jurídica, uma vez que interpretativas do TJUE.

PALAVRAS-CHAVE

Arbitragem, competência, Ordens Judiciais Anti-suit, painéis de Arbitragem, Sentenças arbitrais, Direito da UE, Direito Primário da União Europeia (TJEU), Legislação Secundária da UE (ver: Regulamentos), Regulamento EU 44/2001, Regulamento UE 1215/2012 (Reformulação) decisões interpretativas de TJUE, Jurisdição, Direito Internacional Privado, Reconhecimento e execução - decisões judiciais.

METHODOLOGY PURSUED

LIn view of the research question – Litigation versus arbitration: conflicts related to (i) jurisdiction of courts and competence of arbitration panels and (ii) recognition and enforcement of court orders (including anti-suit injunctions) and arbitral awards – the following research methodology is adhered to:

At the junction of ius constitutum and ius constituendum (i.e. EU Regulation 1215/2012 substituting EU Regulation 1215/2012, the Recast) primary and secondary EU law are explored. Intertemporal law effects of European Private International Law (more in particular: cross-border civil and commercial procedural law) require a binary analysis of the law-making process of 'new' secondary EU law whilst taking into account case law relating to the conflicts as described above, notably the interpretative rulings of the CJEU, as these rulings foreshadow the aforementioned 'new' law and, to the extent possible and on a tentative (hypothetical) reasoned base, doctrine comments thereto.

INTRODUCTION

A prerequisite for any Single Market aiming at facilitating, if not stimulating cross-border business and commerce within that Market is that the enforcement of contractual rights is adequately safeguarded by cross-border civil procedural legislation. In respect of litigation in court this goal was accomplished in 1973, a 'Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters' having entered into force in at that time still six EEC Member States.[1] Ever since, this Convention, and, in a later stage, its 'successor' EU Regulation carrying the same title got reputed for being a highly efficiently functioning European Private International Law instrument regulating cross-border civil and commercial proceedings.

But forty-odd years later economical and legal developments call for a fundamental re-orientation on cross-border commercial dispute adjudication: in an increasingly globalizing business world cross-border commercial conflicts are no longer mainly, let alone exclusively adjudicated in court, arbitration proceedings gaining popularity. The tendency is one of a competition between both ways of adjudicating cross-border commercial conflicts.

This contribution aims at defining and clarifying, to the extent possible, the interrelationship between litigation in court on one hand and adjudication of commercial conflicts in private, namely via arbitration on the other in 'Europe' in a globalizing world and under the reign of the still quite 'new' EU Regulation 1215/2012 on Jurisdiction and Recognition of Foreign Judgments in Civil and Commercial Matters' (in force January 15, 2015).[2]

For a proper understanding, first a brief historical and methodological oversight of cross-border civil and commercial procedural law

1. Germany, France, Italy, Belgium, Luxemburg, and the Netherlands.

2. In the following this Regulation will alternatingly be referred to briefly as 'Regulation 1215/2012', or as 'Recast'.

in court proceedings in the European Union is provided for. Subsequently the focus will be on how over the past decade arbitration in affected litigation in court 'EU wide' and vice versa. In view of this reciprocal relationship, two landmark interpretative rulings of the Court of Justice of the European Union (CJEU 'West Tankers' and CJEU 'Gazprom') serve as a starting point for further investigation. Both judgments are of pivotal importance: whilst providing for tools to demarcate borderlines between litigation in court on one hand and arbitration on the other under the reign of EU Regulation 44/2001, at the same time these rulings foreshadowed 'new' EU civil procedural law (EU Regulation 1215/2012). The inquiry ends with a final conclusion on cross-border commercial litigation and arbitration in 'Europe'.

1. LITIGATION VERSUS ARBITRATION BEFORE JANUARY 10, 2015 – EU REGULATION 44/2001

1.1 Litigation: Primary and Secondary EU Law Framework

As already mentioned in the introductory lines a Single Market cannot flourish if commercial world would not be able to enforce legal rights in case business counterparts are established in different Member States of that Market. This is why in the fifties of last century article 220 of the initial Treaty of the European Economic Community already assigned the EEC Member States to enter into negotiations with each other 'as far as necessary' in respect of, inter alia, the 'recognition and enforcement of judgments in civil and commercial matters'.

Setting ambitions higher though, the draftsmen relinquished the concept of a 'Traité simple' (i.e. a single-sided convention solely governing recognition and enforcement of judgments). Instead another legal concept, namely a 'Traité double', was elaborated: a double-sided convention *not only* providing for the *recognition and enforcement* of foreign judgments but also enshrining a meticulously defined set of *jurisdiction rules.*[3] Conceivably, this methodology strengthens the adhesive power of such a convention, as Member States will be far more willing to 'acknowledge' judgments from other Member States in the awareness that courts in all Member States will accept (or deny) jurisdiction on the basis of identical competence rules. Full 'mutual trust' in cross-border civil proceedings[4] of what became the so called 'Brussels' 1973 Convention on jurisdiction and recognition and enforcement of judgments in civil and commercial matters was even further enhanced by two additional, equally essential 'tools'. First, with a view to safeguarding uniform interpretation in each of the Member States' courts this Convention was enriched with a Protocol attributing interpretative power to the European Court of Justice (CJEU). Second, by no means may a Member State where recognition and enforcement of a judgment from another Member State is sought start a 'revision au fond' (i.e. a general review on the substance of that judgment), the grounds for non-recognition and enforcement being extremely strictly formulated. Understandably, in the interest of fully-fledged legal certainty in advance (before commencing proceedings) both legislative tools are tremendously important for cross-border civil *procedural* law.

Until this very day these methodological fundaments of the 'Brussels Convention' are strongly adhered to. In 1999 the Amsterdam Treaty, notably the then inserted Articles 61 and 65 ECT, provided for an even more solid Treaty basis for 'European' PIL. The then reigning provision of Article 65 EC (which since December 2009 is covered by article 81 TfEU) read:

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Articles 67 and insofar as necessary for the proper functioning of the internal market, shall include:

a) improving and simplifying

(…)

- the recognition and enforcement of decisions in civil and commercial cases;

b) promoting *the compatibility of the rules applicable in the Member States concerning the conflicts of laws and of jurisdiction* (emphasis added).

3. In the following this coherent set of jurisdiction rules shall only be dealt with inasmuch relevant for solving conflicts between litigation in court on one hand and arbitration on the other.

4. As will be seen, this basic principle also holds a key position in view of the legal relationship between court litigation and arbitration.

Thanks to this pivotal institutional change commonly known as 'pillar change',[5] the 'traditional' but devious way of harmonizing European PIL via international Conventions requiring time-consuming ratifications by each individual Member State was no longer needed.[6] This legislative simplification *a fortiori* appeared to be convenient in view of the continuous enlargement of the European Union[7] of, today, 28 Member States.

Way before, in 2001, the so called 1989 Third Accession Treaty to the 1973 'Brussels' Convention was transformed into EU Regulation 44/2001, the latter having been succeeded January 10, 2015 by EU Regulation 1215/2012. The latter European PIL instrument carrying the same 'title' as its predecessors is commonly referred to in short as 'Brussels I Recast' or, alternatively, 'Brussels I *bis*'.

1.2. Arbitration – Legal Positioning of Private Dispute Adjudication in the EU

1.2.1. Arbitration – Exclusion from Substantive Scope of EU Regulation 44/2001

The preceding lines do not imply, however, that in the European Union it is exclusively for courts to adjudicate cross-border commercial disputes.[8] This is already shown by the fact that most if not all EU Member States are also contracting states to the 1958 UN Convention of New York on the recognition and enforcement of arbitral awards.[9]

For many years clashes between litigation in court and arbitration at least theoretically speaking hardly seemed possible, as in conformity with its predecessors article 1 subsection 2 (d) of EU Regulation 44/2001 explicitly excluded 'arbitration' from its substantive reach.

But litigation and arbitration are not per se fully separate 'tracks': in two CJEU interpretative rulings ('West Tankers' and 'Gazprom')[10], though still having regard to EU Regulation 44/2001, the Court of Justice of the EU (CJEU) had to adjudicate preliminary questions concerning a clash between jurisdiction of courts and competence of arbitration panels, as well as recognition and enforcement related conflicts, both cases as will be demonstrated remaining highly relevant for the interpretation of EU Regulation 1215/2012 (the Recast).

1.2.2 Anti-suit Injunction ordered by Court: CJEU C-185/07 (West Tankers)

The facts in CJEU West Tankers[11] can be depicted as follows. A vessel owned by West Tankers chartered by Erg Petroli SpA collided with a jetty located at the isle of Sicily, Italy, and belonging to Erg. Having subrogated in Erg's rights, Allianz insurance initiated court proceedings against West Tankers in an Italian court on the basis of ex article 5.3 of EU Regulation 44/2001 (*forum delicti*: court of state where damages from the harmful event arose) Allianz claimed recovery of damages from West Tankers paid to Erg. West Tankers however raised an objection of lack of jurisdiction on the basis of the existence of an arbitration agreement between West Tankers and Erg, and, in parallel proceedings, requested an anti-suit injunction from a UK court as Erg initially agreed to have disputes decided over in arbitration.

5. In the ECT, and from 2009 onwards TfEU, European PIL was transferred from the so called 'third' pillar to the very 'first'. For a critical in-depth view of this widely-drafted Treaty provision: J. Israel, 'Conflicts of Law and the EC after Amsterdam. A Change for the Worse?', MJ 2000, p. 1, 81; C. Bauer/M. Fornasier, 'Discussion Report: The Communautarisation of Private International Law – Max Planck Institute for Comparative and Private International Law, Hamburg, 7 June 2008', RabelsZ 2009,, p. 660; J. Basedow, 'The Communautarisation of Private International Law' (2009), RabelsZ, p. 455; K. Kreuzer, Zu Stand und Perspektiven des Europäischen Internationalen Privatrecht – Wie Europäisch soll das Europäische Internationale Privatrecht sein?' RabelsZ. 2006, p. 1.

6. One advantage, out of many, is that toilsome and time-consuming ratification procedures in each single Member State could be left behind.

7. May 2004, ten European countries acceded to the EU 'group wise', followed by Bulgaria and Rumania (2007), and Croatia (2013).

8. Remarkably enough, as observed by J. Basedow, EU Law in International Arbitration: Referrals to the European Court of Justice, Max Planck Research Paper Series 15/16, p. 368, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642805 (last revised April 2016): no provision of the European Treaties - Treaty on European Union (TEU), consolidated version in 2012 O.J. (C 326) 13; Treaty on the Functioning of the European Union (TFEU), consolidated version in 2012 O.J. (C 326) 47- explicitly refers to arbitration.

9. For an updated oversight, cf. the UN website, in particular the 'status' of contracting states: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

10. For a more general and concise kaleidoscope overview of CJEU case law on arbitration under primary and secondary EU law, cf. J. Basedow, earlier referred to, notably p. 381 and ff.

11. CJEU Case C-185/07 [2009] ECR I-00663.

The UK House of Lords still considered the anti-suit injunction as initiated by West Tankers compatible with EU Regulation 44/2001 for, in a nutshell, the following reasons: (i) pursuant to the Court's strict reasoning in view of arbitration as excluded 'area' in its CJEU Rich judgment the exclusion in Article 1(2)(d) of Regulation No 44/2001 applies 'not only to *arbitration proceedings as such*, but also to legal proceedings the *subject-matter of which is* arbitration'[12] ; (ii) consequently, 'since all arbitration matters fall outside the scope of Regulation No 44/2001, an injunction addressed to Allianz and Generali restraining them from having recourse to proceedings other than arbitration and from continuing proceedings before the Tribunale di Siracusa *cannot* infringe the regulation'; (iii) Finally, 'the courts of the United Kingdom have for many years used anti-suit injunctions. That practice is, in its view, a valuable tool for the court of the seat of arbitration, exercising supervisory jurisdiction over the arbitration, as it promotes legal certainty and reduces the possibility of conflict between the arbitral award and the judgment of a national court. Furthermore, if the practice were also adopted by the courts in other Member States it would make the European Community more competitive vis-à-vis international arbitration centres such as New York, Bermuda and Singapore.'[13]

Contrary to the UK House of Lords' observations the CJEU observed: even though arbitration proceedings do not come within the scope of Regulation 44/2001, they may nevertheless have consequences which undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, inter alia, where such proceedings prevent a court of another Member State from exercising the jurisdiction conferred on it by Regulation No 44/2001. It is therefore appropriate to ascertain the effects of the anti-suit injunction on those proceedings. If, because of the subject-matter of the dispute, that is, the nature of the rights to be protected in proceedings, such as a claim for damages, those 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 its scope of application. Accordingly, an anti-suit injunction to prevent a court of a Member State, which normally has jurisdiction to resolve a dispute under Article 5(3) of the Regulation from ruling, in accordance with Article 1(2)(d) of that regulation, on the very applicability of the regulation to the dispute brought before it necessarily amounts to stripping that court of the power to rule on its own jurisdiction under the Regulation. Neither may a court of a Member State be reviewed by a court in another Member State.[14] That jurisdiction is determined directly by the rules laid down by the Regulation, including those relating to its scope of application. Lastly, if, by means of an anti-suit injunction, the Tribunale di Siracusa were prevented from examining itself the preliminary issue of the validity or the applicability of the arbitration agreement, a party could avoid the proceedings merely by relying on that agreement and the applicant, which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court before which it brought proceedings under Article 5(3) of the Regulation and would therefore be deprived of a form of judicial protection to which it is entitled. Consequently, an anti-suit injunction,

12. CJEU Case C-190/89 Rich [1991] ECR I 3855: CJEU: 'In order to determine whether a dispute falls within the scope of the Convention, reference must be made solely to the subject-matter of the dispute. If, by virtue of its subject-matter, such as the appointment of an arbitrator, a dispute falls outside the scope of the Convention, the existence of a preliminary issue which the court must resolve in order to determine the dispute cannot, whatever that issue may be, justify application of the Convention.' Emphasis, SR.

13. Observ. 14-18. Emphasis, SR.

14. Observ. 29, referring to CJEU Case C 351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 24, and its Turner judgment, paragraph 26.

15. Observ. 24-32, summarized.
16. Observ. 33, emphasis SR.

17. For a non-exhaustive (!) impression of the CJEU's appreciation: T.C. Hartley, The Brussels I Regulation and arbitration, ICLQ 2014, p. 843; C.A. Heinze, Arbitration and the Brussels Regulation, Cambridge Law Journal 2007, p.493; R. Fentiman, West Tankers: la Corte di Regolamento Giustizia conferma l'inammissibilità delle anti-suit injunctions anche in un ambito escluso dall'applicazione del Bruxelles, I, Diritto del commercio internazionale 2008, p. 729; M. Winkler, The Advocate General's opinion in The Front Comor: bad news for London arbitration?, Shipping and Trade Law 2008, p.1; N. Sifakis, Nikiforos,G Gemeinschaftswidriges gerichtliches Verbot der Klageerhebung wegen Schiedsvereinbarung, EWiR 2009 p.218; H.P Schroeder, Droit de l'arbitrage, Petites affiches. La Loi / Le Quotidien juridique 2009 nº 53 p.16-17; A.C. Bing, Arbitrage et droit européen: une désunion irrémédiable?, Recueil Le Dalloz 2009 p.983; C. Kessedjian, Arbitrage et "anti-suit injunction", Europe 2009, Avril Comm. nº 176 p.32; M.Becker, Anti-suit injunction: La prohibition du droit communautaire s'applique même en matière d'arbitrage, Le

such as that in the main proceedings, is not compatible with Regulation 44/2001.[15] The Court finally observes that 'This finding is supported by Article II(3) of the New York Convention, according to which it is the court of a Contracting State, when seised of an action in a matter in respect of which the parties have made an arbitration agreement, that will, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'[16]

The CJEU thus held that it was incompatible with Regulation 44/2001 'for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement.'

A flood of comments demonstrated the vast impact of the West Tankers ruling on the reciprocal interrelationship between litigation in court and arbitration.[17] Many of these comments were utterly critical, as de facto and de iure speaking pursuant to West Tankers any litigant was thus permitted to frustrate an anterior arbitration agreement legitimately by opting for the (delaying) 'strategy' to commence proceedings in any EU Member State court being attributed jurisdiction power under the reign of EU Regulation 44/2001.[18]

1.2.3 Anti-suit Injunction ordered by Arbitral Award: CJEU C-536/13 (Gazprom)

Another, more recent CJEU ruling - yet as well still concerning the interpretation of EU Regulation 44/2001 - demonstrates a competence conflict more or less mirroring the 'West Tankers' dispute: is it allowed for an *arbitration panel* to prohibit a 'Brussels I Member State court from commencing or continuing proceedings via an anti-suit injunction?

The facts and main proceedings in CJEU Gazprom[19] ruling unrolled as follows. Gazprom possessed 37.1 % stock in the Lithuanian company 'Lietuvos dujos' AB. A shareholders agreement

droit maritime français 2009, p.217; R. Carrier, Arrêt "West Tankers Case": l'intentement ou la poursuite d'une procédure dans un Etat membre différent de celui désigné dans la convention d'arbitrage, Journal des tribunaux/droit européen 2009, p.100-102; C. Price, Arbitration and Antisuit Injunctions in Europe, The Cambridge Law Journal 2009 p.278-281; D.H. Sharma, Anti-suit injunctions - weg ermee! Arbtrage-exceptie - weg ermee!, Nederlands tijdschrift voor Europees recht 2009 p.161; J.J. Van Haersolte-van Hof, J.J., Jurisprudence européenne, Revue de l'arbitrage 2009 p.413; S. Bollée, Le juge communautaire face au "Common Law". Réflexions autour de l'arrêt "Allianz", Revue du droit de l'Union européenne 2009, p.291-303; A. Van Waeyenberge, A propos de la portée de l'exclusion de l'arbitrage dans le règlement nº 44/2001, notamment après l'arrêt West Tankers de la CJCE, Gazette du Palais 2009 nº 198-199 II Doct. p.208; A. Mourre/A. Vagenheim, Incompatibilité des anti-suit injunctions avec le règlement (CE) nº 44/2001 du 22 décembre 2000, La Semaine Juridique -édition générale 2009 nº 227 p.49-52; P.Callé, Revue critique de droit international privé 2009 p.379; H. Muir Watt, Aux frontières du règlement 44/2001: arbitrage, injonction et confiance mutuelle ..., Revue trimestrielle de droit civil 2009, p.357; M. Jánošíková, Les transports: activités, contrats et responsabilités. CJCE, 10 février 2009, aff. C-185/07, West Tankers: anti-suit injunctions et droit communautaire, La Semaine Juridique - entreprise et affaires 2009 nº 1973 p.33; C. Legros, Anti-suit injunctions zur Durchsetzung von Schiedsvereinbarungen in Europa - der letzte Vorhang ist gefallen, IPRax 2009, p.312; M. Illmer, Jurisprudencia del Tribunal de Justicia de las Comunidades Europeas, Revista Jurídica de Catalunya 2009, p.269; A. Borrás Rodríguez/C. Pellisé/M. Requejo Isidro, Arbitrato comunitario e anti-suit injunctions nella sentenza West Tankers della Corte di Giustizia, Diritto del commercio internazionale 2009, p.351; G. Papachristou, Anti-suit injuctions - Diaitisia kai Kanonismos "Vryxelles I" - Skepseis me aformi tin apofasi tou DEK epi tis ypotheseos Allianz/West Tankers, Dikaio Epicheiriseon & Etairion 2009, p.986; M. Avbelj, Arbitration and Anti-Suit Injunctions in the European Union, The Law Quarterly Review 2009, p.365; E. Peel, Proroghe pattizie e principio di "pari autorità" nell'accertamento della competenza internazionale nel Reg. CE 44/2001,Rivista di diritto processuale 2009, p.971; E.Merlin, Le anti-suit injunctions, anche "a protezione" dell'arbitrato internazionale, tra incompatibilità con il sistema processuale comunitario e riconoscimento quale legittimo rimedio a salvaguardia delle clausole di deroga alla giurisdizione, Int'l Lis 2009 p.123; F. Fradeani, Jurisprudencia española y comunitaria de Derecho internacional privado, Revista española de Derecho Internacional 2009, p.187; M. Requejo Isidro, Comment on West Tankers Inc. v. RAS Riunione Adriatica di Sicurta S.p.A. (The Front Comor), Journal of International Arbitration 2009, p.891; J. Grierson, Rozsudok "West Tankers", Výber z rozhodnutí Súdneho dvora Európskych spoločenstiev 2009 nº 6, p.21; J. Klučka. Zitimata symvatotitas tis anglosaxonikis antiagogikis diatagis (anti-suit injuction) me ton EK 44/2001, Efarmoges Astikou Dikaiou 2009, p.356; C. Michailidoua, Englische Prozessführungsverbote zum Schutz von Schiedsvereinbarungen im europäischen Zivilprozess, ZeUP 2010, p.170; S. Bourgois/V. Van Houtte, Het verloop van een arbitrage: de anti-suit injuction als instrument om voorrang te verlenen aan de beslechting van het geschil door arbitrage, Hommage à Guy Keutgen pour son action de promotion de l'arbitrage, Bruxelles) 2013, p.303.

18. Cf. ICLG Blog, http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2015/11-arbitration-in-the-eu-an-overview-of-recent-developments. (last visited late June 2016):
'In other words, arbitral proceedings were threatened to fall victim to "torpedo" proceedings, in which one party frustrates the effective resolution of a dispute by breaching an arbitration agreement and bringing proceedings before notoriously slow courts of a member state, which would then prevent other member state courts, including those at the seat of the arbitral tribunal, from supporting arbitral proceedings.'; Cf. also M. Aquilina, Lawsuits in the European Union: Disarming the „Italian Torpedo with the Recast Brussels Regulation", Business Lawyer (26 June 2015), http://hazlolaw.com/articles/law-suits-in-the-european-union-disarming-the-italian-torpedo-with-the-recast-brussels-regulation/.

19. CJEU Case C-536/13 Gazprom (not yet ECR reported).

was concluded in 2004, pursuant to which '[a]ny claim, dispute or contravention in connection with this Agreement or its breach, validity, effect or termination, shall be finally settled by arbitration'. Another substantial shareholder in Lietuvos dujos AB (Lietuvos Respublika, represented by the Ministry) applied for an investigation by the regional Vilnius court in respect of the company's activities and, inasmuch appropriate, take corrective measures under Lithuanian law against company mangers (two of them being Russian nationals). Gazprom stated that this application breached the arbitration clause and in parallel proceedings also filed a request for arbitration against the Ministry at the Arbitration Institute of the Stockholm Chamber of Commerce, claiming that the arbitral tribunal, constituted by the Arbitration Institute of the Stockholm Chamber of Commerce, should, in particular, order the Ministry to discontinue the proceedings pending before the regional court of Vilnius. By an award of 31 July 2012, the arbitral tribunal declared that the arbitration clause contained in the shareholders' agreement had been partially breached and ordered the Ministry, in particular, to withdraw or limit some of the claims which it had brought before that court.

However, by an order of 3 September 2012, the Vilnius regional court ordered that an investigation of the activities of Lietuvos dujos be initiated. The court further held that an application for investigation of the activities of a legal person fell within its jurisdiction and was not arbitrable under Lithuanian law.

Gazprom nevertheless applied to that court for recognition and enforcement in Lithuania of the arbitral award of 31 July 2012. By an order of 17 December 2012, the Vilnius regional court refused Gazprom's application. It held (i) that the arbitral tribunal which made the arbitral award could not rule on an issue already raised before and examined by the court, and (ii) that, in ruling on that issue, the arbitral tribunal had not observed Article V(2)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958 (United Nations Treaty Series, Vol. 330, p. 3; 'the New York Convention'). Furthermore, the court stated that, by the arbitral award of 31 July 2012 recognition and enforcement of which were sought, the arbitral tribunal not only limited the Ministry's capacity to bring proceedings before a Lithuanian court with a view to initiation of an investigation in respect of the activities of a legal person, but also denied that national court the power which it possesses to determine whether it has jurisdiction. In that way, the arbitral tribunal infringed the national sovereignty of the Republic of Lithuania, which is contrary to Lithuanian and international public policy. According to the court, the refusal to recognise the award was also justified by Article V(2)(b) of the New York Convention.

Both court orders of 17 December 2012 and 21 February 2013 were the subject of an appeal on a point of law before the Supreme Court of Lithuania. That court decided to stay proceedings and refer the following questions to the CJEU for a preliminary ruling.

Having referred to its earlier judgment in West Tankers[20] the CJEU clearly distinguishes that case from Gazprom: '(I)n the present case, however, the referring court is asking the Court not whether such an injunction issued by a *court of a Member State* is compatible with Regulation No 44/2001, but whether it would be compatible with that regulation for a court of a Member State to *recognise and enforce an arbitral award* ordering a party to arbitration proceedings to reduce the scope of the claims formulated in proceedings pending before a court of that Member State.'[21] Thereafter, the Court reiterates its earlier observation that arbitration falls out the substantive scope of the Regulation, 'since the latter governs only conflicts of jurisdiction between courts of the Member States. As arbitral tribunals are not courts of a State, there is, in the main proceedings, no such conflict under that regulation. As here the order is made by an arbitral tribunal 'there can be no question of an infringement of that principle by interference of a court of one Member State in the jurisdiction of the court of another Member State.'[22] As 'an arbitral tribunal's prohibition of a party from bringing certain claims before a court of a Member State cannot deny that party the judicial protection referred to in paragraph 34 of the present judgment, since, in proceedings for recognition and enforcement of such an arbitral award, first, that party could contest the recognition and enforcement and, second, the court seised would have to determine,

20. Observ. 27-34.

21. Observ. 35, emphasis SR.

22. Observ. 36 and 37.

on the basis of the applicable national procedural law and international law, whether or not the award should be recognised and enforced.'[23] Finally, unlike (West Tankers, SR) failure on the part of the Ministry to comply with the arbitral award of 31 July 2012 in the context of the proceedings relating to initiation of an investigation in respect of the activities of a legal person is not capable of resulting in penalties being imposed upon it by a court of another Member State. It follows that the legal effects of an arbitral award such as that at issue in the main proceedings can be distinguished from those of the injunction at issue in the case which gave rise to that judgment.[24] Proceedings on the recognition and enforcement of arbitral awards are therefore governed by international and national law applicable in the Member State where recognition is sought, 'pursuant to the procedural law of that Member State and, as the case may be, the New York Convention, which govern this matter excluded from the scope of Regulation No 44/2001.'[25] Since the New York Convention governs a field excluded from the scope of Regulation No 44/2001, it does not relate to a 'particular matter' within the meaning of Article 71(1) of that regulation. Article 71 governs only the relations between that regulation and conventions falling under the particular matters that come within the scope of Regulation No 44/2001.[26]

The CJEU thus interpreted EU Regulation 44/2001 as that it did 'not (preclude) a court of a Member State from recognising and enforcing, or from refusing to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court of that Member State, since that regulation does not govern the recognition and enforcement, in a Member State, of an arbitral award issued by an arbitral tribunal in another Member State.'

Whereas West Tankers involved a 'competence clash' (anti-suit court order prohibiting commencement or continuation of arbitration proceedings), in Gazprom the focus was on the *(non)recognition and enforcement of foreign arbitral awards by an EU Member State court*.[27]

Rather than substantively 'commenting comments' to both CJEU rulings the following will concentrate on the interrelationship 'litigation-arbitration' under the regime of the 2015 Recast.

23. Observ. 38.

24. Observ. 39.

25. Observ. 41 and 42.

26. Observ. 43, referring to its earlier case law in TNT Express Nederland, C 533/08, EU:C-2010:243, paragraphs 48 and 51.

27. For comments to the CJEU Gazprom interpretative ruling: M. Burianski/D.Eckstein, New York, Brüssel, oder beide?, V. Pickenpack, EWiR 2016, p. 61; T. Pfeiffer/H. Wais, Die Stärkung von Gerichtsstandsvereinbarungen in der Neufassung der EuGVO, Ed., Zeitschrift für Gemeinschaftsprivatrecht (GPR) 2015, p. 142; D. Wiegandt, Kommentar zu EuGH (Große Kammer), 13.05.2015 - Rs. C 536/13 Gazprom OAO, Recht der internationalen Wirtschaft 2015, 430 – 432; B. Demirkol, Ordering cessation of court proceedings to protect the integrity of arbitration agreements under the Brussels I regime, ICLQ 2016, p. 379; T.C. Hartley, Anti-suit injunctions in support of arbitration: West Tankers still afloat, ICLQ 2015, p. 965; C.P. Ojiegbe, From West Tankers to Gazprom: anti-suit injunctions, arbitral anti-suit orders and the Brussels I Recast, Journal of Private International Law 2015, p. 267; A. Williams, Anti-suit injunctions, West Tankers survives judicial challenge – for now, Int.Arb.Quarterly 2015, p. 2; P. Ortolani, Anti-suit injunctions in support of arbitration under the Recast Brussels I regulation, Max Planck Institute Luxembourg for international, European and regulatory procedural law – Working paper series 2015, available at www.mpi.lu.; C. Ambrose, Recast Brussels I Regulation, and V. Selvaratnam QC, Anti-suit injunctions and the Gazprom case. The enforcement of London arbitration agreements – London Shipping Law Centre Maritime Business Forum, 2015 conference, http://www.shippinglbc.com/content/uploads/members_documents/Enforcement_Arb_Agreements_161115.pdf.; J. Sundaram, Does the judgment in CJEU Gazprom bring about clarity on the grant of anti-suit injunctions under the Brussels I Regulation?, Denning Law Journal 2015, p. 303. Cf. also contributions (non-exhaustive overview) on line: S. Lacey, Kluwer arbitration blog, http://kluwerarbitrationblog.com/2015/05/14/are-anti-suit-injunctions-back-on-the-menu-part-2-the-cjeus-decision-in-gazprom/.; J. von Hein, http://conflictoflaws.net/2015/the-protection-of-arbitration-agreements-within-the-eu-after-west-tankers-gazprom-and-the-brussels-i-recast/.; I. Haramati, http://www.google.nl/t&rct=j&q=&esrc=s&source=web&cd=5&ved=0ahUKEwiSwIK8uZXNAhVjFMAKHYrTCL4QFggqMAQ&url=http%3A%2F%2Fwww.gtlaw.com%2Fportalresource%2Flookup%2Fwosid%2Fcontentpilot-core-401-27635%2FpdfCopy.name%3D%2FGT%2520Alert%2520-%2520CJEU%2520Judgment%2520on%2520Gazprom%2520Offers%2520No%2520Guidance%2520Revised%2520Brussels%2520I%2520Regulation.pdf%3Fview%3Dattachment&usg=AFQjCNF_NaI4rIfkfY_zhvUppav_kq052A.; E. Poulton/M. Totman/D. Bruce-Smith, What the Gazprom ECJ judgment means for the arbitration community, http://www.globelawandbusiness.com/blog/Detail.aspx?g=40b9f60e-9a14-425e-9478-9870c5d285e1.; A. Doudko/V. Astashonak, "Thou shall not sue!"- Who decides, YoungICCA blog, 2015, http://www.youngicca-blog.com/thou-shall-not-sue-who-decides/. ; H. de Verdelhan, Chronique de jurisprudence – Arret de Gazprom, Revue Internationale de droit économique 2016, p. 35; E. Guichard, arret dans l'affaire Gazprom, Justice Civile Européenne, 2015, https://justicecivileeuropeenne.wordpress.com/2015/05/13/arret-dans-laffaire-gazprom/.; A-C Bing, Arbitrage et droit de l'Union Européenne – Rapport de recherche, Annee 2014-2015, http://www.lepetitjuriste.fr/wp-content/uploads/2015/07/Rapport-de-recherche-CEJI-2014-2015-Anne-C%C3%A9cile-BING.pdf. A Nuyts, 'La refonte du règlement Bruxelles I' (2013) 102(1) Revue critique de droit international privé 1, 11.

2. LITIGATION VERSUS ARBITRATION IN THE EU AFTER JANUARY 10, 2015 – EU REG. 1215/2012 (RECAST)

2.1 Arbitration – Legal Continuity of EU Law Framework in Substance and Time

The wording of article 1 subsection 2 (d) Recast is identical to that of the corresponding proviso of EU Regulation 44/2001 earlier referred to *ratione materiae* excluding arbitration from the Recast.[28] The conclusion that 'nothing's gonna change' would if not incorrect at least be premature, as contrary to its predecessor the Preamble to the Recast explicitly devotes some contemplations envisaging the relationship between the Regulation and arbitration pursuant to the EU cross-border civil procedural law reform.

The literal wording of Recital 12 of the Preamble, to start with, is as follows:

'(12) This Regulation should not apply to arbitration. Nothing in this Regulation should (however, SR) prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, *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.*

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.

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an *arbitration agreement is null and void, inoperative or incapable of being performed*, this should *not preclude that court's judgment on the substance of the matter from being recognised* or, as the case may be, *enforced* in accordance with this Regulation. This should be *without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards* in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), *which takes precedence over this Regulation.*

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an 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.'[29]

Crucial, in the first place, is the intertemporal relationship (i.e. the aspect of transitory law) between EU Regulation 44/2001 and its successor, the Recast, as extensively explored by AG Wathelet's in his Opinion preceding the Gazprom ruling. Notwithstanding the Spanish Government's view that, 'for temporal reasons, the Court should not take the Brussels I Regulation (*recast*) into account in its answer to the present request for a preliminary ruling (…) the Court should take it into account in the present case, since the main novelty of that regulation (i.e. the Recast, SR), which *continues to exclude arbitration from its scope*, lies *not so much in its actual provisions but rather in recital 12 in its preamble,* which in reality, somewhat in the manner of a retroactive interpretative law, explains how that exclusion *must be and always should have been* interpreted.'[30]

Second, permissive as Recital 12 may seem towards EU Member States' national laws, it locks the door to the CJEU 're-introducing' arbitration in the Recast via the backdoor again.[31]

28. For an extensive overview of academic writings showing in favour of including arbitration cf. Ortolani (previous footn.), p. 5, footn. 6.

29. Emphasis, SR.

30. Opinion AG Wathelet, Observ. 90 and 91, preceding the Gazprom judgment (emphasis, SR). These observations are sustained by extensive referral to the 'legislative history' of Recital 12 (Observ. 94 – 124 on inter alia the 'Heidelberg Report' on the Recast (cf. following footn.), the positions taken by the Commission, the Council and Parliament). The CJEU refused to address the impact of Recital 12 of Recast Brussels I in the Gazprom case, but only for the reason that it did not apply in light of the facts, cf. Haramati (footn 27), and, in the same sense, Doudko/Astashonak (footn. 27).

31. Bing (footn. 27), p. 9: 'Tout d'abord, le considérant 12 vient confirmer l'exclusion des exceptions d'arbitrage. En d'autres termes, la Cour de Justice n'a plus la possibilité d'étendre le champ du Règlement Bruxelles I bis.'

Third: pointing at yet a slight change in course in respect of the substantive scope, 'Recital 12 provides in its last section that the arbitration exception *includes ancillary proceedings,* such as the constitution of an arbitral tribunal, etc. It thereby expressly rejects the *partial* abolition of the arbitration exception (which was still) suggested in the Heidelberg Report (…).'[32]

2.2. First Limb – Jurisdiction (Competence): Courts versus Arbitration Panels

2.2.1 Formal Scope

While mainly concentrating on the substantive reach ('scope') of the Recast one might easily overlook all 'geographical' ramifications of the 'new' Recast law regime in an ever globalizing commercial world. As will be demonstrated below, the draftsmen were well aware of this development, as 'third country proceedings' are given explicit notice in brand new Regulation provisions.

As regards the '*formal*' (i.e. geographical) scope of that Recast it must be recalled first and for all that in conformity with its predecessors this EU private International Law instrument is a so called '*Traité double*', that is a *double*-sided convention not only containing a 'catalogue' of jurisdiction rules for EU Member State courts but also regulating the recognition and enforcement of 'foreign' court judgments. Analyzing the formal scope therefore justifies separate treatment of both 'limbs'.

Starting with the first limb[33], the 'catalogue' of jurisdiction rules enshrined in the Recast[34] it is important to note that article 4 subsection 1 delineates the geographical 'reach' of Chapter II on jurisdiction in general: (s)ubject to this Regulation, persons *domiciled in a Member State*[35] shall, whatever their nationality, be sued in the courts of that Member State.[36] On the occasion however this general principle is superseded by article 25 subsection 1 on prorogation (choice of forum). This proviso which is of crucial importance for an increasingly globalizing commerce and business world states: 'If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction (…).' Thus, even when neither party is residing in EU territory, EU Member States courts can be attributed jurisdiction by the parties themselves.

What are the implications of the thus (considerably widened) geographical radius of the Recast's jurisdiction rules on (actions in court frustrating) *arbitration* agreements? How, in other words, must – or may – Member States courts under the Recast regime respond to future jurisdiction (competence) clashes between litigation in court and arbitration?[37]

Various factual constellations may unroll[38], and as the above cited Recital 12 is quite 'permissive'[39] the reasoning below cannot be but of a highly tentative nature.

2.2.2 Competence Clash – CJEU West Tankers Re-contemplated

(i) The 'standard' factual situation of West Tankers (the plaintiff initiates court proceedings

32. ICLG Blog, http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2015/11-arbitration-in-the-eu-an-overview-of-recent-developments, last visited June 2016. In depth, cf. 'Heidelberg' Report on the Application of the Regulation Brussels I in the Member States, Study JLS/C4/2005/03 (Final Version 2007), notably Ch. II 2 (c), p. 49-65, http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf. Cf. also Legal Instruments and Practice of Arbitration in the EU STUDY (EP) for the Jury Committee, 2014, providing for an in-depth examination of the practice and the laws relating to arbitration in each Member State of the European Union and Switzerland, as well as an examination of the involvement of Member States and the European Union in arbitration.

33. The second limb will be given notice below, under 3.3.

34. For the purpose of this contribution there is no need to depict the catalogue of jurisdiction rules contained in the Recast Regulation in its entirety. In short, the Regulation demands exclusive jurisdiction for certain disputes (e.g. courts where immovable goods are located have exclusive jurisdiction as regards rights in rem). Furthermore weaker party protecting rules for insurance, employment and consumer relationships, etc. were elaborated. In the following jurisdiction rules will be highlighted only in so far they may affect commercial relationships.

35. Vermeld artt 62 en 63

36. Emphasis, SR.

37. Any legal order will likely decide dominus litis in favour of arbitration (legal expertise in the field; reputation in commerce and business world) or not. In past days a more or less comparable discussion arose in view of prorogation in court if either or even neither of the parties had any contact with the forum state.

38. In a non-exhaustive way just some of them are rendered here.

39. Cf. Bing (footn. 27), p. 12: 'Les Etats sont donc libres de se référer à la Convention de New-York mais aussi à leurs droits nationaux. Ainsi, en cas de saisine parallèle d'un tribunal étatique et d'un tribunal arbitral, le droit français privilégiera la procédure arbitrale, en vertu du principe de « compétence-compétence.'

in EU Member State A, thus frustrating an arbitration agreement between the plaintiff and the defendant envisaging arbitration proceedings in Member State B) seems clear: Recital 12 refrains from an autonomous and uniform 'solution' under the Recast regime as it clearly empowers EU Member State courts '*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.*' One might conclude that any EU Member State court may thus order – at least the literal wording of Recital 12 seems to suggest so – an anti-suit injunction giving preference[40] to arbitration proceedings[41]. If this conclusion would be right, at least there would be no more need for 'English courts (…) to adopt a dual policy with regards to the grant of anti-suit injunctions - one inward facing towards Continental Europe where it was almost taboo to issue an anti-suit injunction, and the other outward facing, towards the international community outside EU, where it may issue an anti-suit injunction to protect the rights of a party relying on an English law arbitration agreement.[42];

(ii) How to deal with a case where there is a clash between arbitration and litigation involving a choice of forum? It is important to recall that in West Tankers there was an arbitration agreement as well… but no *choice of court arrangement*.[43] At first glance a contract allowing for both litigation and arbitration as a means of dispute resolution may seem contradictory but it is not: as shown by legal practice 'optional clauses' may allow either of the parties to commence proceedings in court or via arbitration. Two 'variations' may be contemplated, namely: court and arbitration panel are 'seated' in the same or in different legal orders.[44] Despite the fact that the wording of article 12 of the Recast does not provide for real guidance one may well reason that competence clashes in a way are neutralized beforehand already: it seems logical to give preference to court proceedings if the plaintiff (or, in case of arbitration, requesting party), after all explicitly entitled to by the contractual arrangement binding both parties, opts for litigation in court rather than for arbitration[45];

(iii) Commercial relationships (cf. distribution or franchise relationships) may involve a plurality of parties 'either side' of the contractual relationship. A plurality of either plaintiffs or defendants, each of them residing in different EU Member States, does not a *prima vista* change the outcome under (i), provided that the agreement is binding all parties – domiciled in 'Europe' or elsewhere – in a similar manner indeed[46];

(iv) In a globalizing world jurisdiction (competence) clashes between courts and arbitration panels from EU Member States and third legal orders are likely to show more often in the (near) future. Understandably, the Recast does not and cannot envisage the whole range of situations involving (potential) jurisdiction (competence) conflicts 'crossing EU borders'. Any anti-suit injunction from a court of a third

40. For any action 'vice versa' (i.e. an anti-suit injunction, not to stop court proceedings but to stop arbitration) no room seems to be left, cf. J. Sandaram, Does the judgment of the CJEU in Gazprom bring about any clarity on the grant of anti-suit injunctions in the Brussels I Regulation?, Denning Law Journal 2015,p. 319: 'It is worth noting that the Recast Brussels Regulation does not expressly deal with anti-suit injunctions. Under the Recast Brussels Regulation the parties will have little or no incentive to bring proceedings in a member state with a view to obtaining an order that their arbitration agreement is invalid, as such an order will not be recognised in another member state. In short it almost manages to outlaw the "torpedo" actions.' Emphasis, SR.

41. Cf. Lacey, (footn. 27): 'Recital 12's scope permits intra-EU court anti-suit injunctions in support of arbitration'
This view is not generally subscribed to though, cf. I. Haramati (footn. 27),
However, given Gazprom's limited holding, it remains to be seen whether the CJEU will reconsider the application of West Tankers in light of the changes in Recast Brussels I; J. Sandaram, p. 321. As well as e.g. the ICLG Blog, http://www.iclg.co.uk/practice-areas/international-arbitration-/international-arbitration-2015/11-arbitration-in-the-eu-an-overview-of-recent-developments. (last visited June 2016): 'Maybe the most important question is whether West Tankers is still good law, at least in relation to anti-suit injunctions, or whether anti-suit injunctions are "back on the menu", as it was put by commentators', under the addition that the CJEU 'let the opportunity pass' to provide for more clarity in that respect. Cf. further A. Williams, Anti-suit injunctions: West Tankers survives judicial challenge – for now, IntArbQ 2015, p.2.

42. J. Sandaram, p. 319.

43. In West Tankers the Member State's court's jurisdiction 'merely' resulted from the former proviso of article 5.3 (forum delicti: court of the Member State where the harmful event occurred), currently article 7.2 Recast.

44. Where conflicting parties may reside in different legal orders even this situation doesn't 'cease' to have ties with more than one legal order, therefore remaining of an international nature.

45. The plaintiff may have reasons to opt for litigation in court, notably in view of recognition and enforcement after, assets being available - and enforceable - in any other EU (Recast) Member State (cf. also below).

46. Noem pluraliteit verweerders (bep Recast)

(non-EU) legal order prohibiting commencement or continuation of court proceedings and favouring arbitration proceedings shall have to be dealt with either on the basis of bilateral Treaties concluded between the EU Member State where court proceedings take place, or, subsidiarily, national laws. The same approach likely applies, mutatis mutandis, to conflicts vice versa (anti-suit injunction from EU Member State court prohibiting arbitration proceedings in non-EU legal orders;

(v) Although this contribution concentrates on situations involving cross-border litigation and arbitration conflicts under the reign of the EU cross-border civil and commercial procedural law it is important, in a globalizing world, to refer briefly to the Hague Convention of June 30, 2005 on the Choice of Forum, in force since October 2015.[47]

While getting back to West Tankers once more, the view has been advocated that anti-suit injunctions are not banned from the Recast any longer, as allegedly (i) the ruling on the existence and validity of the arbitration agreement is not entitled to 'circulation' under the Recast. An anti-suit injunction *could* therefore not possibly undermine the effectiveness of Brussels I, since it aims at preventing a court judgment which is in any case covered by the new, reinforced and complete arbitration exclusion. Besides, (ii) paragraph 4 of Recital 12 excludes ancillary proceedings in support of arbitration from the scope of application of Brussels I. Since an anti-suit injunction aims, in this context, at preserving the effectivity of an arbitration agreement, it could be argued that Paragraph 4 extends the scope of the arbitration exclusion, thus ruling out the applicability of West Tankers to the Recast Regulation.[48] Ortolani however considers these 'arguments' as too 'drastic', even more if on realizes that such conclusions can only be derived 'indirectly', namely from the Recital, and not from the Recast provisions. As a matter of fact, the Recital doesn't even mention anti-suit injunctions.[49] This is why some believe that 'the Recast Regulation (solely, SR) seeks to maintain and clarify the *status quo* with regard to the arbitration exclusion'.[50]

Consequently, it doesn't seem illogic to conclude from the foregoing that '(t)he only logical explanation to such omission is that the EU lawmaker did not intend Recital 12 as having revolutionary effects on the *West Tankers* interpretation of the relationship between Brussels I and anti-suit injunctions issued in favour of arbitration.'[51] Further clarification by future CJEU preliminary rulings must be awaited.

2.2.3 Competence Clash – CJEU Gazprom Re-contemplated

As already set out above, Gazprom involved a mirroring image of the factual constellation in West Tankers: to which extent may, in particular under the Recast regime, in a cross-border context arbitral awards 'interfere' by prohibiting commencement or continuation of *court proceedings*?[52]

Contrary to West Tankers where it was asked whether or not a Member State *court's* jurisdiction could be 'taken away' by another Member State's *court* and 'reattributed' to arbitration proceedings, in Gazprom the *competence of arbitration panels* could not even be derived from either provision of Regulation 44/2001: the Court simply had

47. For a recent status of ratifications, cf. the table, June 2016: https://www.hcch.net/en/instruments/conventions/status-table/?cid=98. Most recent development: 'on Thursday 2 June 2016, Ms Thian Yee Sze, Director-General of the Legal Group, Ministry of Law of Singapore, deposited Singapore's instrument of ratification to the Convention of 30 June 2005 on Choice of Court Agreements. The deposit took place during the meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments. The ratification of the 2005 Convention by Singapore is a milestone. Singapore is the 30th State/REIO to be bound by the Convention and the first Asian State to join the Convention. The Convention, which entered into force on 1 October 2015, will apply between Singapore and the other Contracting States as from 1 October 2016.'

48. Ortolani, p. 6.

49. Idem, p. 7, footn. 10, invoking the 'Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions'. <http://www.eesc.europa.eu/resources/docs/joint_practical_guide_en.pdf> (accessed 20 January 2015).

50. L.H. Wilhelmsen, The Recast Brussels I Regulation and Arbitration: Revisited or Revised? Arb Int'l 2014, p. 169, 184.

51. Ortolani, p. 8.

52. Research object of this contribution is how Gazprom is likely to work out autonomously '...under the Recast regime': cf. the Opinion of AG Wathelet preceding the Gazprom ruling, Observ. 62-67: any non-compliance with an anti-suit award cannot and does not entail sanctions. Another question, more in general, is whether strictly methodologically speaking an arbitral award can or cannot be capable of functioning as (quasi?) anti-suit injunction. In that respect cf. Ortolani, p. 11 unfolding two potential theories to answer this question: negative, as due to procedural nature of an arbitration agreement an arbitration panel may claim to have competence but it cannot prohibit parties to breach the arbitration agreement by going to court; positive: the contractual nature of arbitration agreement empowers arbitration panel also to 'order the performance of that agreement' by anti-suit injunction award.

no other option than to assess that arbitration falling out the substantive scope of the Regulation, 'the latter governs *only* conflicts of *jurisdiction* between *courts* of the Member States. As *arbitral tribunals are not courts* of a State, there is, in the main proceedings, *no such conflict* under that Regulation.[53] As in Gazprom the order was made by an arbitral tribunal 'there *can* be no question of an infringement of that principle by interference of a court of one Member State in the jurisdiction of the court of another Member State.'[54] The first line of Recital 12 of the Recast more or less 'copies' this legal standpoint.

A positive effect of an overall exclusion of arbitration in the Recast is that arbitral tribunals and even courts of the Member States – in their capacity as courts supporting arbitration – may take the necessary measures to ensure the effectiveness of the arbitration without being prevented from doing so by the Brussels I Regulation.[55] As the French Government observes in its written answer to the questions put by the Court, the consequence of that paragraph of recital 12 is that, unless the arbitration agreement is null and void or manifestly incapable of being performed, the parties must be required to comply with it and therefore be referred to the arbitral tribunal, which will decide on its own jurisdiction. This principle is known as 'competence competence': it is not for courts but for arbitration panels to decide autonomously on their own competence, at least in first instance.[56]

Even so, the foregoing lines having regard to competence clashes cannot ward off another complication: a 'foreign' arbitral award, in case it would, or on the basis of a Convention *even would have to be recognized and held enforceable*, could be capable of undermining the effectiveness of both EU Regulation 44/2001[57] and, from January 10, 2015 onwards, its successor, the Recast. This is where the second 'limb', recognition and enforcement, not of court judgments but of arbitral awards in the European Union, comes into play.

2.3 Second Limb – Recognition and Enforcement: Court Orders versus Arbitral Awards

2.3.1 Coercive Powers of Arbitration Award in 'Closed-end' Recast Concept

As set out above, the Recast is a double-sided EU Regulation attributing jurisdiction power to courts of EU Member States and providing for the recognition and enforcement of court judgments from other EU Member States. The logical consequence of this 'complementary' concept is that notice must be paid here to the second 'limb' as well, for the simple reason that, as has been observed above, any positive response to such a foreign award 'moving in' in the legal order any EU Member State would inevitably frustrate the 'effectiveness' and the full 'mutual trust' of, after all, the 'closed-end' and all-embracing litigation concept as strived for by the Recast.

It must be stressed that the occurrence of foreign arbitral awards 'breaking in from the outside' in a fully-fledged *court litigation* concept is by no means just an academic issue, as arbitration panels are endowed with coercive power, not only in the jurisdiction stage[58], but also 'afterwards', i.e. in the recognition and enforcement stage (i.e. the second 'limb'). Parties may seek *enforcement*, not only of the positive[59] but also of the *negative* dimension of an a*rbitration agreement* in the 'European' hemisphere.[60] Two 'strategies' may be

53. As the Recast ratione materiae does not even cover court proceedings, there is no further need to cast an eye on its 'formal' (i.e. geographical) scope as was done in the preceding paragraph in view of competence related clashes.

54. CJEU Gazprom, Observ. 36 and 37, emphasis SR.

55. Opinion AG Wathelet, Observ. 148.

56.In case a dispute covered by an arbitration agreement is brought before a French court, that court is to declare that it has no jurisdiction unless the arbitral tribunal has not yet been seised and the arbitration agreement is manifestly null and void or manifestly incapable of being performed: articles 1448 and 1506-A of the Code of Civil Procedure. Cf. E.Gaillard/P. de Lapasse, Le nouveau droit français de l'arbitrage interne et international', Recueil Dalloz, 2011, vol. 3, pp. 175 to 192.

57. Cf., again, CJEU West Tankers, Observ. 29, referring to CJEU Case C 351/89 Overseas Union Insurance and Others [1991] ECR I-3317, paragraph 24, and Turner, paragraph 26, as referred to earlier (2.2.2.).

58. Briefly recalled: a party being summoned in court proceedings may (i) request that this court will stay or dismiss proceedings while referring parties to arbitration, or (ii) may request another court to restrain the other party from commencing or continuing court proceedings (anti-suit injunction, the West Tankers strategy).

59. Enforcement of the positive dimension of an arbitration agreement: a party may be ordered to pay compensation for mal performance of commercial duties arising from the contractual relationship.

60. Enforcement of the negative dimension of an arbitration agreement: in case a party commits breach of the arbitration agreement by going to court instead, the contractual counterpart has legal weapons to fight that breach.

considered, namely: '(…) an action for damages to recover the loss incurred due to the litigation, or (…) apply for the foreign (court) judgment not to be recognized and enforced.'[61]

2.3.2 International Law ('New York'), Supra-national Law (Recast) or National Law?

While making an attempt to formulate parameters having regard to recognition and enforcement related conflicts Chapter III of the Recast on 'Recognition and enforcment' serves as a point of departure for further debate. Article 36 reads: '(a) *judgment* given in a Member State shall be recognised in the other Member States without any special procedure being required').[62]

As pointed out several times, the Recast fundamentally adheres to the principle of full 'mutual trust' amongst EU Member States: for that very reason article 45 subsection 3 unequivocally states: '(w)ithout prejudice to point (e) of paragraph 1, the jurisdiction of the court of origin may not be reviewed. The test of public policy referred to in point (a) of paragraph 1 may not be applied to the rules relating to jurisdiction.'

It has been observed that courts from any EU Member State may invoke article 45 subsection 3, sustaining the principle of (absolute) mutual trust in other Member States courts, to *deny* recognition and enforcement of an anti-suit *arbitral award* and whilst invoking the public policy exception as enshrined in article V2(b) of 'New York'.[63] Correct as this line of reasoning at first glance may seem, it is redundant, as after all (i) article 45 subsection 3 Recast remains silent on arbitral awards anyway as it only speaks of the *court*[64] (i.e. not arbitral bodies), and, even more, the court of origin, that is a court of another (Recast) Member State. So, arbitration panels from having had their 'seat' in the EU, and, a *fortiori outside* the EU, have no intrusive power whatsoever under the Recast.[65]

Can further guidance be taken from the Recast in view of situations involving a conflict of enforcement (court order versus arbitral award)? Recital 12 preceding the Recast, as observed being in line with the CJEU Gazprom ruling, deserves to be recalled here:

'*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.'[66]

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, *has* determined that an *arbitration agreement is null and void, inoperative or incapable of being performed,* this should *not preclude that court's judgment on the substance of the matter from being recognised* or, as the case may be, *enforced* in accordance with this Regulation.'[67]

Understandably though, as acknowledged explicitly by Recital 12:

'This should be *without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards* in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), *which takes precedence over this Regulation.*[68]

Article II(3) of the 1958 New York Convention provides: 'The *court* of a Contracting State, when

61. J. Von Hein, commenting West Tankers and Gazprom, Conflict of laws.net, July 2015, (for referral in full, cf. http://conflictoflaws.net/2015/the-protection-of-arbitration-agreements-within-the-eu-after-west-tankers-gazprom-and-the-brussels-i-recast/.

62. Emphasis, SR. As arbitration is clearly taken out of the substantive scope of the Recast there is obviously no reason to analyze the formal scope of Ch. III of that Recast.

63.b Ortolani, p. 16. For in depth treatment on 'ordre public'at the junction of EU and UN law (New York Convention) cf. Bing, (footn.) 27, p. 13 and ff.

64. Emphasis SR.

65. Unless in case of bilateral treaties concluded between individual EU Member States and third states.

66. Idem.

67. Recital 12, emphasis SR. It goes without saying that the discretionary margins left to the Member States even a fortiori apply in case the arbitral award was rendered under the law of a third (i.e. non-Recast) State.

68. Idem. It must be underscored that here the Recital is not the sole 'authority' for guidance, as the newly inserted article 73 subsection 2 explicitly respects 'New York'.

seised of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, *refer the parties to arbitration, unless* it finds that the said agreement is null and void, inoperative or incapable of being performed.'[69] As provided in Article III of that convention: 'Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles (…)' Article V sets out the conditions under which recognition and enforcement of an arbitral award may be refused. Briefly summarized, these conditions boil down to the incapacity of either party, invalidity of the arbitration agreement, improper notice of appointment of arbitrators or arbitration proceedings, matters not covered by the scope of the arbitration agreement, composition of arbitration panel, the award not being binding yet, the conflict is non-arbitrable or it is contrary to notions of public policy of the country where recognition and enforcement of the award is sought.

The aim underlying 'New York' is to ensure the 'circulation of awards which adjudicate in a *final* and binding way on claims brought by the parties and relating to their *substantive* rights. By contrast (however, SR), an award cannot be considered final in the sense of the New York Convention when it merely serves the ancillary function of preserving the *status quo*, but does not resolve any dispute relating to substantive rights which has arisen between the parties.'[70] Tentative reasoning may justify the conclusion that an anti-suit award not resolving the (commerce related) substance of the dispute would thus falls outside the scope of 'New York'[71], even apart from the debate whether or not such an award would be compatible with the Recast regime.

2.3.3 'Residual' Powers of Arbitration Panels

Does the foregoing reasoning mean that anti-suit arbitral awards are forceless, therefore entirely meaningless? Not necessarily so. Where article 45 subsection 3 prohibits Member States to refuse *court* judgments from other *Member States* for 'erroneously' having accepted jurisdiction, Member States at least seemingly remain free to '(recognise and enforce), or (refuse) to recognise and enforce, an arbitral award prohibiting a party from bringing certain claims before a court…'[72] Furthermore, even though if under the Recast arbitration panels cannot by issuing an anti-suit award coercively prevent a Member State court from ruling on the substance of the dispute, they still can provide for a penalty (fine) on the party ignoring both the arbitration agreement and (after) the anti-suit award.[73] Any such 'negative but binding' obligation may even gain a strong(er) legal status under the *lex loci arbitri*.[74]

FINAL CONCLUSIONS

January 10, 2015, 'new' European cross-border civil and procedural law entered in force, as EU Regulation 44/2001 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters was substituted by EU Regulation 1215/2012 (the 'Recast'). In conformity with its predecessors the functional reach of the Recast is restricted to litigation in court, arbitration proceedings altogether being excluded from the substantive scope of this Regulation. But due to an increase in popularity of arbitration in, moreover,

69. Emphasis SR.

70. Ortolani, p. 13, referring to case law and doctrine in footn. 22. Emphasis, SR.

71. In the absence of interpretative rulings at 'international' law level reasoning remains tentative.

72. Once more it must be called to mind the intertemporal aspect referred earlier to (in Gazprom the CJEU obviously interpreted Regulation 44/2001, however also with a view to the Recast, cf. the observations made under 3.1. above).

73. In view of Von Hein, '(i)t certainly is surprising that (…) damages for the breach of an arbitration agreement, has yet to be subject to a decision of the ECJ – and has neither been affected by any paragraph of the new recital (12). As English courts may no longer issue anti-suit injunctions – a remedy expressly admitted to prevent that "the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy" (Lord Millett in The Angelic Grace [1995] 1 Lloyd's Rep 87) – it seems very likely that damage awards will become much more prevalent in English courts. They have thus been allowed by the High Court after the ECJ's decision in West Tankers ([2012] EWHC 854 (Comm)) and awarded by the Court of Appeal in The Alexandros T [2014] EWCA Civ 1010.'

74. Ortolani, p.14. More doubtful: Doudko/Astanashak (footn. 27): 'The CJEU only said that Member State courts cannot rely on the Brussels Regulation in order to deny recognition and enforcement of awards issued by an arbitral tribunal, but they still can rely on other grounds, such as domestic or international public policy.' For in depth treatment, cf. S. Gault, Do the LMAA Terms 2012 give tribunals enough powers to enforce their jurisdiction?, in: The enforcement of London arbitration agreements – London Shipping Law Centre Maritime Business Forum, 2015 conference, http://www.shippinglbc.com/content/uploads/members_documents/Enforcement_Arb_Agreements_161115.pdf. , p. 60.

a globalizing economy, conflicts show, not only in respect of matters having regard to jurisdiction of courts versus competence of arbitration panels, but also in view of the recognition and enforcement of arbitral awards in European Union territory, as is clearly demonstrated by two CJEU interpretative rulings – West Tankers and Gazprom. Though still adjudicated under the reign of Regulation 44/2001 these cases undeniably showed 'intertemporal' ramifications for the Recast.

As regards the reciprocal relationship between litigation in court and arbitration today, the Recast provides for a bottom line in that in view of the 'competition' between both international conventions must be respected, even more under the newly inserted proviso of article 73 subsection 2 Recast explicitly paying homage to the 1958 UN Convention of New York on the recognition and enforcement of arbitral awards. Nevertheless, a considerable amount of legal uncertainty as remains: Recital 12 of the Preamble preceding the Recast contains 'open-ended' parameters leaving discretionary room for national law of each individual EU Member State in both the 'jurisdiction stage' and the 'recognition and enforcement stage', at the legal cost though of uniformity and legal certainty throughout 'Europe'. Moreover, Recital 12, not being a provision of the Regulation itself, has the status of 'indirect' law and conceivably lacks 'full' legal authority. It is foreseeable that at short notice the CJEU may be expected to be requested to come up with further guidance in preliminary proceedings.

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