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**ANTI-SUIT INJUNCTIONS IN SUPPORT OF ARBITRATION  
UNDER THE RECAST BRUSSELS I REGULATION**

**PIETRO ORTOLANI**  
Max Planck Institute Luxembourg

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**ABSTRACT:** The article investigates whether, under the Recast Brussels I Regulation, anti-suit injunctions should still be regarded as incompatible with EU law. The paper proceeds in three parts: firstly, it analyses the problem of the compatibility of anti-suit injunction with the Recast Regulation in general. It is argued that anti-suit injunction should still be regarded as incompatible with EU law since they hinder the unification of the rules of conflict of jurisdiction, thus undermining the effectiveness of the Brussels I system. Secondly, the article addresses the specific case where the anti-suit injunction has been issued by arbitrators in the form of an arbitral award. The article contends that the same problems of compatibility with Brussels I arise, irrespective of whether the injunction has been issued by a State court or by an arbitral tribunal. Thirdly, the relevance of the principle of mutual trust is scrutinized: in this context, it is argued that Member State courts can deny recognition and enforcement of an anti-suit injunction issued in the form of an arbitral award on grounds of public policy.

**KEYWORDS:** Brussels I Regulation (recast); Anti-suit Injunctions; Arbitration; *West Tankers*; *Gazprom*

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## 1. Introduction

Anti-suit injunctions are commonly regarded as an effective means to preserve an arbitration agreement.<sup>1</sup> However, in *West Tankers*<sup>2</sup> the Court of Justice of the European Union (CJEU) found that such measures are incompatible with Regulation 44/2001 (Brussels I).<sup>3</sup> The case, which goes to the core of the problematic relationship between arbitration and court litigation in the EU,<sup>4</sup> triggered an articulate debate, which resulted in the adoption of Regulation 1215/2012 (Recast Brussels I Regulation or Recast).<sup>5</sup>

Although some proposals discussed the possibility of including arbitration within the scope of application of Brussels I,<sup>6</sup> the Recast Regulation eventually adopted a minimalist approach: the arbitration exclusion is maintained at Article 1(2)(d) and its scope of application is clarified by Recital 12. In addition, Article 73(2) expressly enshrines the prevalence of the New York Convention over the Regulation.

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<sup>1</sup> Julian D.M. Lew, QC and Melissa Holm, 'Development of the Arbitral System in England' in Julian D.M. Lew, QC, Harris Bor, Gregory Fullelove and Joanne Greenaway (eds), *Arbitration in England* (Kluwer 2013) 1, 11; Lord Collins of Mapesbury (ed), *Dicey, Morris and Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2012) vol 1, 867-873. See in general on the nature and the effects of an anti-suit injunction Thomas Raphael, *The Anti-Suit Injunction* (Oxford 2012).

<sup>2</sup> Case No C-185/07 *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* [2009] ECR I-663, ('West Tankers').

<sup>3</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

<sup>4</sup> For a comprehensive overview of such relationship see Massimo Benedettelli, 'Communitarization' of International Arbitration: A New Spectre Haunting Europe?' (2011) 27(4) *Arb Int'l* 583.

<sup>5</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) [2012] OJ L351/1.

<sup>6</sup> Burkhard Hess, Thomas Pfeiffer and Peter Schlosser, Study JLS/C4/2005/03, 'Report on the Application of Regulation Brussels I in the Member States' <[http://ec.europa.eu/civiljustice/news/docs/study\\_application\\_brussels\\_1\\_en.pdf](http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf)> 50 (accessed 20 January 2015); Hans van Houtte, 'Why Not Include Arbitration in the Brussels Jurisdiction Regulation?' 21(4) *Arb Int'l* (2005) 509; Paul Jenard, 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters signed at Brussels, 27 September 1968' [1979] OJ C-59. See also the proposals put forth by the EU Commission: 'Green Paper on the Review of the Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters', COM(2009) 175 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF>> (accessed 20 January 2015); 'Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', COM(2010) 748 final, <[http://ec.europa.eu/justice/policies/civil/docs/com\\_2010\\_748\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf)> (accessed 20 January 2015); E Lein, *The Brussels I Review Proposal Uncovered* (BIICL 2012).

This article investigates whether, under the Recast Regulation, anti-suit injunctions should still be regarded as incompatible with the Brussels I system. The practical relevance of this problem was demonstrated recently by the *Gazprom* case, where the Lithuanian Supreme Court asked the CJEU to determine whether a Member State court can deny recognition and enforcement of an award which ‘restricts the right of the national court to decide on its own jurisdiction and powers in a case which falls within the jurisdiction of the Brussels I Regulation’.<sup>7</sup>

The paper proceeds in three parts: firstly, it will analyse the problem of the compatibility of anti-suit injunctions with the Recast Regulation in general. It will be argued that anti-suit injunctions should still be regarded as incompatible with EU law since they hinder the unification of the rules of conflict of jurisdiction, thus undermining the effectiveness of the Brussels I system. Secondly, the article will address the specific case where the anti-suit injunction has been issued by an arbitral tribunal in the form of an arbitral award. The article will contend that the same problems of compatibility with Brussels I system arise, irrespective of whether the injunction has been issued by a State court or by an arbitral tribunal. Thirdly, the relevance of the principle of mutual trust will be scrutinized: in this context, it will be argued that Member State courts can deny recognition and enforcement of an anti-suit injunction issued in the form of an arbitral award on grounds of public policy.

## **2. Incompatibility of Anti-Suit Injunctions with the Recast Regulation: Clarifying the Boundaries of the Arbitration Exclusion**

### *2.1. Possible Arguments in Favour of Anti-Suit Injunctions under the Recast Regulation*

The second paragraph of Recital 12 of the Recast aims at resolving one of the problems arising out of the interpretation national courts gave *West Tankers*, whereby a judgment declaring that the arbitration agreement is null and void, inoperative or incapable of being performed would circulate under Brussels I.<sup>8</sup> Under the Recast Regulation such problems cannot arise, as the ruling on the existence and validity of the arbitration agreement is not entitled to circulation,

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<sup>7</sup> Request for preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Lithuania) lodged on 14 October 2013, Case C-536/13 ‘*Gazprom*’ *OAO v Republic of Lithuania*.

<sup>8</sup> *National Navigation Co v Endesa Generacion SA (The Wadi Sudr)* [2009] EWCA Civ 1397; [2010] 1 Lloyd’s Rep 193; in France, a different approach was adopted in *Legal Department du Ministère de la Justice de la République d’Irak v Sociétés Fincantieri Cantieri Navali Italiani, Finmeccanica et Armamenti e Aerospazio*, 15 June 2006, *Cour d’appel de Paris* (2007) 1 Rev Arb 87.

irrespective of whether the court decided on this as a principal issue or as an incidental question. In light of this it could be argued that the Recast extends the scope of the arbitration exclusion, imposing a complete separation between the evaluation as to the existence of a valid arbitration clause, on the one hand, and the Brussels I system, on the other hand. In other words one could reason that, since the Member State court judgment ruling on the arbitration agreement is not entitled to recognition and enforcement under the Recast, an anti-suit injunction could 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 arbitration exclusion.

In addition, an argument in favour of the possibility of anti-suit injunctions under the Recast Regulation could be found in Paragraph 4 of Recital 12, which 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.

## 2.2. *Ongoing Incompatibility of Anti-Suit Injunctions With the Brussels I System: The Role of Recital 12*

The above arguments cannot be accepted. It would be wrong to derive such drastic consequences from a Recital, which is not a binding provision of the Regulation: had the EU legislators wanted to radically reform the Brussels I system and exclude the applicability of *West Tankers* to the Recast Regulation, they would have altered the actual provisions, rather than simply including a more detailed Recital.<sup>9</sup> Since Recitals merely provide guidance as to how a Regulation should be interpreted<sup>10</sup> it must be concluded that, in the absence of relevant changes to the binding provisions of Brussels I, Recital 12 could at best be read as suggesting the desirability of some limited amendments as to how the Regulation

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<sup>9</sup> According to Louise Hauberg Wilhelmsen, ‘The Recast Brussels I Regulation and Arbitration: Revisited or Revised?’ (2014) 30(1) *Arb Int'l* 169, 184, ‘the Recast Regulation seeks to maintain and clarify the *status quo* with regard to the arbitration exclusion’.

<sup>10</sup> ‘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](http://www.eesc.europa.eu/resources/docs/joint_practical_guide_en.pdf)> (accessed 20 January 2015).

should be applied in practice, but cannot be invoked as the demonstration of a radical legislative change.<sup>11</sup>

Analogously, the exclusion of ancillary proceedings set forth in Paragraph 4 of Recital 12 seems to be irrelevant as far as the interplay between anti-suit injunctions and Brussels I is concerned: even under Regulation 44/2001 the CJEU has excluded ancillary proceedings from the scope of application of Brussels I.<sup>12</sup> Furthermore, the process of recast was triggered by the debate regarding the *West Tankers* case, which focused on anti-suit injunctions. From this perspective it is highly symptomatic that Paragraph 4 contains a list of ancillary proceedings, but does not mention anti-suit injunctions. This legislative choice must be seen as a deliberate omission, since the legislative debate which led to Regulation 1215/2012 revolved largely around the problem of the admissibility of anti-suit injunctions.

The 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. In any case, in order to determine whether anti-suit injunctions undermine the effectivity of Brussels I, it is necessary to enlarge the perspective and evaluate whether these measures hinder the attainment of the objectives of the Regulation. *West Tankers* did not question that anti-suit injunctions issued in support of arbitration have an ancillary function and thus do not fall within the direct scope of application of the Regulation. However, in order to assess whether a limitation of effectiveness of EU law occurs, it is necessary to evaluate the effects of an anti-suit injunction on the court proceedings (falling within the scope of application of Brussels I) which the injunction aims at preventing.

According to *West Tankers*, proceedings which do not come within the scope of Brussels I ‘may nevertheless have consequences which undermine its effectiveness’, with regard to the attainment of two distinct objectives: not only the ‘free movement of decisions’, but also the ‘unification of the rules of conflict

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<sup>11</sup> Relying on similar arguments, some commentators advocate a particularly restrictive interpretation of Paragraph 2 of Recital 12: according to Guido Carducci, ‘The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration: With Notes on Parallel Arbitration, Court Proceedings and the EU Commission’s Proposal’ (2013) 29(3) *Arb Int’l* 467, 472-473, the Recital only excludes the applicability of the rules on recognition and enforcement, but not the *lis pendens* mechanism.

<sup>12</sup> Case No C-190/89 *Marc Rich & Co. AG v Società Italiana Impianti PA* [1991] ECR I-3855, (*Marc Rich*).



of jurisdiction'.<sup>13</sup> In this perspective, the argument whereby Paragraph 2 of the Recast Regulation reinforces the arbitration exclusion is insufficient, as it is only applicable as far as the free movement of decisions is concerned.

### 2.3. *Anti-Suit Injunctions and the Effectivity of the Brussels I System*

On the one hand it is true that, from the point of view of the free movement of decisions, an anti-suit injunction issued in support of arbitration does not directly curtail the effectiveness of the Recast, as the court judgment stating that no valid arbitration agreement exists would not be entitled to circulation in any case. On the other hand, though, the injunction hinders the attainment of the second objective, i.e. the creation of a unified system for the allocation of jurisdiction, as it makes it impossible for Member State courts not only to rule on the existence and validity of an arbitration agreement, but also to assess their own jurisdiction. Inasmuch as the main subject matter falls within the scope of application of the Regulation, each Member State Court is put on an equal footing and cannot be deprived of the power to assess its own jurisdiction under the Regulation. Hence, anti-suit injunctions are incompatible with the Recast Regulation because they prevent Member State courts not only from deciding whether a valid arbitration agreement exists, but also from subsequently applying the rules on the allocation of jurisdiction set forth in the Regulation.<sup>14</sup>

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<sup>13</sup> (n 2), para. 24.

<sup>14</sup> Apparently, it could be argued that the evaluation of the existence and validity of the arbitration agreement is separated from the assessment of jurisdiction under the Regulation. However, such view is only valid in jurisdictions where the doctrine of *competence-competence* has not only a positive effect, but also a negative one, thus preventing State courts from ruling on the arbitration agreement, in order to preserve the autonomy of arbitration. In this context, it could be argued that the two preliminary questions (the one relating to the arbitration agreement and the one concerning the allocation of jurisdiction under Brussels I) are legally and logically detached from each other. However, in the EU, the negative effect of *competence-competence* is only recognised in France and cannot thus be invoked, since the problem at hand involves EU law and cannot be resolved by relying on the specificity of the arbitration statute of a single Member State. Hence, adopting the dominant view whereby the principle of *kompetenz-kompetenz* only has a positive effect, there is no doubt that an anti-suit injunction (albeit rendered in support of an arbitration agreement) should be seen as having an impact on the possibility for Member State courts to evaluate their own jurisdiction, thus limiting the effectivity of Brussels I. Whenever one of the parties raises an *exceptio compromissi* before a State court, the problem of the existence and validity of the arbitration agreement becomes part of the question which the court needs to answer, in order to determine whether it has jurisdiction to rule on the merits of the case. In this perspective, thus, it is obvious that if the State court is deprived of the power to rule on the arbitration agreement, it is also prevented from assessing whether it has jurisdiction. Since in the EU context such assessment is done through the application of the provisions on the allocation of jurisdiction set forth in Brussels I, it must be concluded that an anti-suit injunction hinders the effectivity of that part of the Regulation creating a uniform system of conflict of jurisdiction, which every Member State

The above analysis leads to a first conclusion: the contents of Recital 12 of the Recast Regulation are not enough ground to rule out the incompatibility between anti-suit injunctions ordered in support of arbitration and the Brussels I system. On the contrary, even under the Recast, the attainment of the objective of the unification of the rules of conflict of jurisdiction is undermined by a measure whereby Member State courts are deprived of the power to determine whether they have jurisdiction under the Regulation.<sup>15</sup> The opposite view, according to which an anti-suit injunction is a personal measure directed to the parties and therefore does not interfere with court jurisdiction, must be rejected as merely formalistic:<sup>16</sup> in the words of Lord Scarman in *British Airways Board v Laker Airways Ltd*,

‘an injunction restraining a person within the jurisdiction of the English court from pursuing a remedy in a foreign court where, if he proves the necessary facts, he has a cause of action is, however disguised and indirect, an interference with the process of justice in that foreign court’.<sup>17</sup>

### 3. Anti-suit injunctions in the Form of Arbitral Awards

#### 3.1. Specific Problems Arising Out of Arbitral Anti-suit Injunctions

The question whether, under the Recast Regulation, arbitral tribunals can issue an anti-suit injunction in the form of an arbitral award will be answered by the CJEU

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court must have the possibility to apply autonomously. Furthermore, an anti-suit injunction interferes with the sovereign power of Member State courts to issue a judgment on the merits, which would circulate under the Recast Regulation irrespective of whether a party has invoked the existence of an arbitration agreement as an objection to jurisdiction in the course of the proceedings. The circumstance that such objection has been raised has no effect on the circulation of the judgment on the merits, which will be issued in case the Court concludes that no valid arbitration agreement exists. This way, Paragraph 3 of the Recast Regulation avoids the undesirable prospect of a ‘super torpedo’: Peter Arnt Nielsen, ‘The Recast of the Brussels I Regulation’ in Michael Joachim Bonell, Marie Louise Holle and Peter Arnt Nielsen (eds), *Liber Amicorum Ole Lando* (DJØF 2012) 257, 273; Martin Illmer, ‘Brussels I and Arbitration Revisited – The European Commission’s Proposal COM(2010) 748 final –’ (2011) 75(3) *RechtsZ* 645, 666; Richard Fentimann, ‘Arbitration in Europe: Immunity or Regulation?’ (2011) 1 *Int’l J Proc L* 151.

<sup>15</sup> Similar views are expressed by Simon P Camilleri, ‘Recital 12 of the Recast Regulation: a New Hope?’ (2013) 4 *ICLQ* 899, 904-905; Andreas Estrup Ippolito and Morten Adler-Nissen, ‘West Tankers revisited: has the new Brussels I Regulation brought anti-suit injunctions back into the procedural armoury?’ (2013) 79(2) *Arb* 158, 168-170.

<sup>16</sup> Adrian Briggs, *Private International Law in English Courts* (Oxford 2014) 390 states that an anti-suit injunction ‘looks very much like an act of interference with proceedings before (a) foreign court, and the appearance really does not mislead’; according to Neil Andrews, *Andrews on Civil Process* (Intersentia 2013) vol 2, 229 ‘(a)lthough the respondent is the only party subject to the injunction, it might be perceived that the foreign court is indirectly affected’.

<sup>17</sup> *British Airways Board v Laker Airways Ltd* [1985] A.C. 58, 95.

in the near future in the aforementioned *Gazprom* case.<sup>18</sup> Whilst the questions referred to the CJEU focus on whether such award can be denied recognition and enforcement by Member State courts, this part of the article enlarges the perspective and discusses three interrelated problems. First of all, it will be necessary to investigate whether arbitrators have jurisdiction to issue an anti-suit injunction. Secondly, the paper will assess whether an anti-suit injunction issued in the form of an award can be considered as an award for the purposes of the New York Convention. Thirdly, the problem of recognition and enforcement of the arbitral anti-suit injunction (as occurring in *Gazprom*) will be scrutinized. In this context, the paper will investigate the differences between anti-suit injunctions issued by State courts and arbitral tribunals. It will be argued that the conclusion reached in the previous paragraph, whereby problems of compatibility with the Brussels I system still exist after the Recast, remains applicable notwithstanding of the circumstance that the measure was issued by an arbitral tribunal.

### 3.2. *Jurisdiction of Arbitral Tribunals to Issue Anti-suit Injunctions*

It is debatable whether arbitral tribunals have jurisdiction to issue an anti-suit injunction. The solution to this problem largely depends on the nature and the effects of the arbitration agreement; in this regard, two different theories must be considered. According to the first theory, which could be qualified as ‘procedural’, the arbitration agreement simply confers on the arbitrators the power to assess autonomously whether they have jurisdiction to rule on the merits of the case (*kompetenz-kompetenz*), but does not entail the power to enjoin parties from starting court litigation.<sup>19</sup> In other words, the arbitrators can invoke the arbitration agreement to claim their own jurisdiction, but not to impose a prohibition on the parties, preventing them from filing an action before State courts in breach of the arbitration agreement. In case litigation is started, it will be up to State courts to decline jurisdiction and refer the parties to arbitration, as required by Article II(3) of the New York Convention.

According to the second theory, which could be described as ‘contractual’, the arbitration agreement is a contract between the parties and the arbitral tribunal has jurisdiction over disputes arising out of it. Therefore, the existence of a valid arbitration agreement empowers the arbitrators not only to claim jurisdiction over

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<sup>18</sup> (n 7). It must be noted, however, that the Recast Regulation is not directly applicable *ratione temporis* to the *Gazprom* case.

<sup>19</sup> Laurent Lévy, ‘Anti-Suit Injunctions Issued by Arbitrators’ in Emmanuel Gaillard, *Anti-Suit Injunctions in International Arbitration* (JURIS 2005) 115.

cases arising out of the main substantive legal relationship which the agreement refers to, but also to order the performance of the agreement in kind.<sup>20</sup> From this point of view, when issuing an award containing an anti-suit injunction, the tribunal would mandate the enforcement of a contract over which it has jurisdiction.

The contractual theory has been criticized in the civil law world, as it constructs the arbitration agreement as a substantive contract between the parties, whereby the arbitrators are given the powers to exclude the jurisdiction of State courts or other arbitral tribunals. On the contrary, it has been argued that

‘(j)urisdiction is something that is declared, not something that can be ordered. Declaring jurisdiction enables the arbitrator to rule on the merits of the dispute before him but does not comprise the power to exclude the jurisdiction of others’.<sup>21</sup>

The above analysis evinces that the jurisdiction of arbitral tribunals to issue anti-suit injunctions is only conceivable in legal systems where the arbitration agreement is seen as a contract between the parties, whose performance in kind can be ordered by the arbitrators. By contrast, if the arbitration clause is qualified as a procedural agreement between the parties, the problem of an arbitral anti-suit injunction should in principle never arise. In this perspective, arbitrators can claim jurisdiction, but they cannot exclude the jurisdiction of State courts by means of an injunction to the parties: it will be up to State courts to mandatorily refer the parties to arbitration, whenever litigation is commenced in breach of a valid arbitration agreement.

### 3.3. *Circulation of Anti-suit Injunctions Issued in the Form of an Award Under the New York Convention*

The second question to be answered is whether an anti-suit injunction issued in the form of an award qualifies as an award for the purposes of circulation under

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<sup>20</sup> Robert Merkin and Louis Flannery, *Arbitration Act 1996* (5th edn, Informa 2014) 187-188: ‘(t)he judicial basis of the injunction is the enforcement of both a positive right to have any disputes resolved only by way of the contractually agreed forum (arbitration proceedings), and a closely related but legally distinct and concomitant negative right *not* to be sued in any other forum. When viewed as obligations, the negative-positive dichotomy is reversed, but is still one way of looking at the issue – there is a *positive* obligation to bring proceedings by way of the contractually agreed forum (arbitration), which carries with it the *negative* obligation *not* to bring proceedings in another forum’.

<sup>21</sup> Lévy (n 19) 120. Similarly Massimo V. Benedettelli, ‘Le anti-suit injunctions nell’arbitrato internazionale: questioni di legittimità e opportunità’ (2014) 4 Riv Arb 701, 713 argues that, although the arbitration agreement is a contract, it is predominantly procedural in nature and cannot thus be regulated by ordinary contract law.

the New York Convention. In this regard it must be taken into account that the New York Convention aims at ensuring 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, 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.<sup>22</sup>

There is little doubt that an award consisting of the order to refrain from starting or continuing litigation before a State court in breach of the arbitration agreement does not serve the purpose of resolving a dispute in a final and binding fashion, but rather aims at preserving the effectivity of the agreement, in view of already pending or future possible claims relating to the main substantive legal relationship. Hence, such measure is formally qualified as an award, but has the nature of an ancillary measure issued in support of arbitration: for this reason, there are good reasons to argue that recognition and enforcement could be denied by simply arguing that the New York Convention does not apply to the case at hand.<sup>23</sup>

#### 3.4. *Incompatibility with the Recast Brussels I Regulation and Enforceability of the Measure*

Even if the State court before which recognition and enforcement are sought qualified the injunction as an award for the purposes of the New York Convention, this would not be enough ground to conclude that the award is entitled to circulate. The previous paragraph of this article has argued that anti-suit injunctions are incompatible with the Recast Regulation; it is now necessary to determine whether the same conclusions remain applicable, if the measure has been issued by an arbitral tribunal, as is the case in *Gazprom*.

Apparently problems of compatibility do not arise in this specific context, since arbitral tribunals (unlike State courts) do not have the power to coercively enforce the measure: it has been argued that arbitrators would not be able to impose compliance by means of sanctions, whilst a party ignoring a UK court-ordered

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<sup>22</sup> *Resort Condominiums International, Inc v Ray Bolwell and others*, XX YBCA 628 (1995) (Supreme Court of Queensland, 29 October 1993). Similar views are expressed by Bernd Ehle, 'Article I [Scope of Application]' in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Awards – Commentary* (Beck 2012) 26, 48.

<sup>23</sup> Similar doubts are cast by Antonio Leandro, 'Towards a New Interface Between Brussels I and Arbitration?' (2015) 1 JIDS 188, 198.

anti-suit injunction could be in contempt of court and suffer the ensuing consequences.<sup>24</sup> The above argument cannot be accepted, for three reasons.

Firstly, the arbitral tribunal is able to punish the party commencing or continuing litigation in breach of the arbitration agreement by awarding compensation:<sup>25</sup> it is important to notice that the possibility to order the compensation of damages arising out of the violation of the anti-suit injunction is not merely theoretical, but on the contrary clearly emerges from arbitral case-law.<sup>26</sup> In addition, even in cases where the anti-suit injunction is the sole purpose of the arbitration, were one to accede to the ‘contractual’ theory, it would be possible for the party lamenting a violation of the arbitration agreement to file a separate action and claim compensation. Thus, although non-compliance with the injunction cannot give rise to contempt of court, compensation can be claimed in case of violation of the injunction.

Secondly, even more arguments in favour of the enforceability of an anti-suit injunction issued in the form of an arbitral award may be found, when analyzing the contents of the applicable *lex arbitri*: the latter could set forth additional mechanisms for the enforcement of an arbitral anti-suit injunction.<sup>27</sup>

Thirdly, it must be borne in mind that the jurisdiction of the arbitral tribunal to issue an anti-suit injunction relies upon the ‘contractual’ theory, whereby performance in kind of the arbitration agreement can be ordered. Hence, the arbitral award including an anti-suit injunction should be seen as a decision

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<sup>24</sup> Trevor C Hartley, ‘The Brussels I Regulation and Arbitration’ (2014) 4 ICLQ 843, 856-857. See also written questions of the French Government to the questions put by the Court in the *Gazprom* case (n 7), as referred to in the Opinion of AG Wathelet, para 66.

<sup>25</sup> According to *Philip Alexander Securities & Futures Ltd v Bamberger* [1997] I.L.Pr. 73, 117, when evaluating the effects of anti-suit injunctions in a cross-border scenario, it is necessary to consider whether the injunction can circulate and be recognized by courts of other States. Hence, if the injunction is rendered in the form of an arbitral award, it is wrong to argue that its violation would have no consequence, simply because the party could not be held in contempt of court. Rather, it is necessary to take into account the means through which compliance with the injunction could be imposed: in this context compensation can be used as an instrument of indirect enforcement, similarly to an *astreinte*. In presence of a transnational legal relationship, this remedy could be even more effective than contempt of court, as the party starting litigation in breach of the arbitration agreement can suffer the negative consequences of an arbitral decision awarding compensation and circulating under the New York Convention, irrespective of where it is located.

<sup>26</sup> Final award of April 1997 in ICC case No. 8887 (2000) 11(1) ICC Bull 91, 94, cited by Lévy (n 19) 127.

<sup>27</sup> By way of example, the possibility of an arbitral tribunal subjecting its orders to criminal sanctions has been at least contemplated by the arbitration scholarship in Switzerland: see Gerhard Walter, Wolfgang Bosch and Jürgen Brönnimann, *Internationale Schiedsgerichtbarkeit in der Schweiz - Kommentar zu Kapitel 12 des IPR-Gesetzes* (Stämpfli 1991) 137.

imposing a negative obligation (in particular, an obligation to refrain from starting or continuing litigation before State courts in breach of the arbitration agreement). Such theoretical framework entails that, once the award has been recognized, it becomes an enforceable title, enshrining the aforementioned negative obligation: in jurisdictions where the judge supervising the enforcement has the authority to order coercive measures, therefore, additional means to enforce the award may be available.

Therefore, it must be concluded that the differences between a court-issued anti-suit injunctions and a measure of the same kind issued in the form of the arbitral award are not enough ground to rule out problems of compatibility with the Recast Brussels I Regulation in the latter scenario. On the contrary, the possibility to enforce an arbitral anti-suit injunction clearly suggests that the same problems arise, irrespective of whether the measure has been issued by a State court or by an arbitral tribunal.

#### **4. Mutual Trust and Public Policy**

The analysis carried out in the previous paragraphs has demonstrated that an anti-suit injunction, issued either by a court or by an arbitral tribunal, undermines the effectiveness of the Recast Brussels I Regulation, as it hinders the attainment of the objective of unifying the rules on conflicts of jurisdiction. This, of course, does not *per se* amount to concluding that an anti-suit injunction issued in the form of an award could be denied recognition and enforcement under Article V(2)(b) of the New York Convention. In order to answer this question, it is necessary to determine whether the aforementioned incompatibility between anti-suit injunctions and the Brussels I system can be interpreted as a violation of public policy.

The Brussels I system is governed by the principle of mutual trust, whereby all Member State courts must be considered equal and trusted to apply the Regulation correctly. An anti-suit injunction is clearly at odds with mutual trust, since it aims at avoiding the risk that the State court seized in breach of an arbitration agreement may incorrectly claim jurisdiction;<sup>28</sup> mutual trust, on the contrary, requires Member State courts to assume that the assessment of jurisdiction performed by a different Member State court is correct.

From the point of view of the Member State court before which recognition and enforcement of the arbitral anti-suit injunction are sought, the circumstance that

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<sup>28</sup> Miguel Gómez Jene, 'Arbitraje internacional y Reglamento Bruselas I Refundido' (2015) 1 Arbitraje 15, 44.

an arbitral tribunal is not a Member State court and thus is not directly bound by mutual trust is irrelevant. In this regard, what matters is the subject matter criterion as applied by the CJEU in *Van Uden*<sup>29</sup> and *West Tankers*.<sup>30</sup> inasmuch as the main subject matter of the court proceedings which the injunction aims at avoiding falls within the scope of application of Brussels I, the injunction is incompatible with mutual trust, irrespective of the authority which has issued it. Therefore, it must be determined whether the principle of mutual trust has public policy status under EU law.<sup>31</sup>

The CJEU has clearly stated that mutual trust is a principle of fundamental importance in EU law:

‘the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained’.<sup>32</sup>

According to the principle of mutual trust, every Member State is deemed to be compliant with EU law. When applied to Brussels I, mutual trust entails that the application of the rules on conflict of jurisdiction by Member State courts must be trusted as correct. The primary relevance of mutual trust in the Recast Regulation is evinced by Article 45(3), whereby ‘the test of public policy (...) may not be applied to the rules relating to jurisdiction’. Article 45(3) thus imposes an absolute presumption: the first Court’s assessment of jurisdiction must always be regarded as compatible with public policy and the requested Member State Court is bound to accept it.

The absolute presumption set forth in Article 45(3) is the result of a balancing choice of the EU lawmaker, whereby the scope of application of the public policy exception is limited in order to protect a competing value. This value is, undeniably, mutual trust. In order to justify the legislative choice of Article 45(3) it is necessary to conclude that the principle of mutual trust has public policy status, as the scope of application of Article 45(1)(a) could not be restricted invoking provisions which do not share the same status.

In conclusion, in light of the importance that the EU lawmaker and the Court of Justice confer upon mutual trust, a Member State court could invoke such principle to deny recognition and enforcement of an anti-suit injunction issued in the form of an arbitral award under Article V(2)(b) of the New York Convention.

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<sup>29</sup> Case C-391/95 *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line* [1998] ECR I-7091.

<sup>30</sup> (n 2).

<sup>31</sup> According to Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1997] ECR I-3055, EU public policy must be accorded the same relevance as domestic public policy by Member State courts.

<sup>32</sup> Opinion of the Court (Full Court) 2/13 of 18 December 2014, para 191.



## 5. Conclusions

Anti-suit injunctions are incompatible with the Recast Brussels I Regulation, as they deprive Member State courts of the power to assess their own jurisdiction under the Regulation. Hence, the rationale of *West Tankers* continues to be applicable: the effectivity of EU law is undermined, inasmuch as Member State courts are prevented not only from deciding whether a valid arbitration agreement exists, but also from subsequently applying the rules on the allocation of jurisdiction set forth in the Regulation.

It is debatable whether arbitral tribunals have jurisdiction to issue an anti-suit injunction. Such jurisdiction is only conceivable if the arbitration agreement is seen as a contract between the parties, whose performance in kind can be ordered by the tribunal. By contrast, if the arbitration clause is qualified as a procedural agreement, arbitrators can claim jurisdiction, but they cannot exclude the jurisdiction of State courts by means of an injunction to the parties.

In case the anti-suit injunction has been issued by an arbitral tribunal in the form of an award, it could be argued that it is not entitled to recognition and enforcement under the New York Convention, as the measure does not adjudicate in a final and binding way on claims brought by the parties and relating to their substantive rights and therefore fails to qualify as an award for the purposes of the Convention. However, even if one were to apply the New York Convention to an anti-suit injunction issued in the form of an award, recognition and enforcement can be denied in light of the incompatibility of the measure with the Brussels I system. From this point of view, it must be considered that the differences between a court-issued anti-suit injunction and a measure of the same kind issued in the form of the arbitral award are not enough ground to rule out problems of compatibility with the Recast Brussels I Regulation in the latter scenario. Even in the absence of remedies such as contempt of court, the party commencing or continuing litigation in breach of the arbitration agreement could be found under an obligation to pay compensation for such violation. Hence, the argument whereby an arbitral anti-suit injunction is not incompatible with Brussels I because it cannot be enforced must be rejected.

Anti-suit injunctions are at odds with the principle of mutual trust, as they aim at avoiding the risk that the State court seized in breach of an arbitration agreement may incorrectly claim jurisdiction; mutual trust, on the contrary, makes it necessary to assume that the assessment of jurisdiction performed by a different Member State court is correct. Since mutual trust is regarded by the CJEU as a fundamental principle of EU law, recognition and enforcement of an anti-suit

injunction issued in the form of an award could be denied under Article V(2)(b) of the New York Convention.