ANTI-SUIT INJUNCTION: WHERE DOES GAZPROM LEAVE US?

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Resumen. Las medidas anti proceso o anti-suit injunctions tienen como objetivo evitar que las partes inicien o continúen procedimientos alternativos en otras jurisdicciones o foros. En West Tankers, el Tribunal de Justicia Europeo ("TJE") declaró que las medidas anti proceso emitidas por un tribunal de un Estado Miembro en apoyo a los procedimientos de arbitraje eran contrarias al Reglamento (CE) 44/2001. En la reciente decisión de Gazprom el Tribunal de Justicia añade que las medidas anti proceso emitidas por los tribunales arbitrales no son contrarias al Reglamento (CE) 44/2001. Así las cosas, se plantea la duda de si puede darse por zanjado el debate de las órdenes conminatorias en el ámbito de la UE.

Antisuit injunctions are a type of injunctive relief issued by arbitral tribunals and courts to prevent a party from initiating or continuing alternative proceedings in other jurisdictions or fora. The main advantages of these orders are the prevention of forum shopping and the safeguard of valid arbitration agreements. Furthermore, parallel proceedings entail multiple risks (inter alia, contradictory decisions, the waste of resources due to duplication of proceedings and the potential for harassment)³

There has been an ongoing debate on whether arbitral tribunals have the power to issue anti-suit injunctions. Against the use of this power, there are those that consider that its use could interfere with national jurisdictions (and thus state sovereignty) and the parties’ fundamental right to seek redress before them:

“...it is highly doubtful whether an arbitral tribunal should be allowed to tell another tribunal or a state court what to do, or whether it should be allowed to interfere indirectly with the working of another arbitral tribunal by ordering one of the parties what to do in the other arbitration or litigation".⁴

The EU legal landscape has been recently altered with arbitral tribunals issuing anti-suit injunctions that prohibit a party from bringing a claim before a Member State’s court, which under its rules of jurisdiction –relatively complex in the EU arena– can hear the civil case. This has raised the question of whether antisuit injunctions related to arbitral proceedings are in accordance with EU law and, in particular, EU Regulations on jurisdiction on civil and commercial matters.⁵ In West Tankers, the European Court of Justice ("the ECJ") ruled that anti-suit injunctions

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issued by a court of a Member State in support of arbitration proceedings were con-
trary to EU Regulation 44/2001.\textsuperscript{6}

However, in the recent \textit{Gazprom} decision the ECJ has stated that anti-suit in-
junctions issued by arbitral tribunals are not contrary to EU Regulation 44/2001.\textsuperscript{7} So, where do we stand?

Is the enforcement of anti-suit injunctions a non-controversial issue under EU law?

The principal aim of this review is to analyze: 1) the evolution of EU case law in
anti-suit injunctions related to arbitration proceedings, 2) possible problems that
may arise in their enforcement, 3) other approaches to be taken and, finally, 4) some
concluding remarks.

1) The evolution of EU case law in anti-suit injunctions related to arbitration
proceedings

The topic demands a brief introduction of the European legal framework.
Council Regulation (EC) No 44/2001 of 22 December (“Brussels I Regulation” or
“EC Regulation 44/2001”) can be taken as a starting point. Its Art 1 (2) d establishes
that the regulation shall not apply to arbitration. Pursuant to Art 71, the regulation
shall not affect any conventions to which the Member States are parties and which
in relation to particular matters, govern jurisdiction or the recognition or enforce-
ment of judgments.

Regulation No 44/2001 was recently repealed by 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
(“the Recast Regulation”), applicable since 10 January 2015. The Recast Regulation
states explicitly that it should not apply to arbitration (Recital 12)\textsuperscript{8} and that it shall
not affect the application of the 1958 New York Convention pursuant to its Art 73 (2).

At this point, the state of affairs on the topic is currently constituted by: (i) the
\textit{West Takers} case and (ii) the recent \textit{Gazprom} case.

(i) West Tankers, or why EU courts may not issue anti-suit injunctions

The \textit{West Tankers} [Allianz SpA and Generali Assicurazioni Generali SpA v West
Tankers Inc. (Case C-185/07)] can be described as one of the most relevant arbitra-
tion related decisions of recent years.

The genesis of the dispute was the collision of a vessel property of West Tankers
Inc. against a Sicilian wharf property of Erg Pretoli SpA. The charter agreement in-
cluded an arbitration clause providing for arbitration in London. Following the ac-
cident, arbitral proceedings were initiated. In parallel, Allianz SpA and Generali
Assicurazioni Generali SpA (Erg Pretoli SpA’s insurance companies) initiated natio-
nal proceedings in Italy (Syracuse) against West Tankers. The systematic delay in Italian courts could eventually boycott the arbitration, a strategy commonly known as an “Italian torpedo”.

West Tankers thus requested the High Court of Justice to issue an anti-suit injunction restraining Allianz and Generali from continuing the proceedings before Italian courts, on the grounds of the existence of a valid arbitration agreement governing the dispute. The High Court of Justice accepted said petition. In response, Allianz and Generali appealed and the House of Lords referred the following question to the ECJ:

“Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?”

The ECJ handed out its Judgment on 10 February 2009 (Case C-185/07) stating that:

“Even though proceedings do not come within the scope of Regulation No 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”.

The ECJ considered that the anti-suit injunction issued by the English court, restraining jurisdiction to be exercised by other Member States’ courts, was contrary to the principle of mutual trust between the courts of the Member States. The ECJ outlawed anti-suit injunctions issued by an EU court as being incompatible with the Brussels I Regulation. In this particular case, the anti-suit injunction was deemed to be depriving the Italian courts from their right to determine their own jurisdiction under Brussels I Regulation.

According to the ECJ, under no circumstances is a court of a Member State in a better position to determine whether the court of another Member State has jurisdiction.

Furthermore, if the Italian Court 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. The applicant which considers that the agreement is void, inoperative or incapable of being performed, would thus be barred from access to the court -which it brought proceedings before under Article 5(3) of Regulation No 44/2001- and would therefore be deprived of a form of judicial protection to which they are entitled.

On another note, the ECJ stated that said solution was consistent with Art 2 (3) of the New York Convention.

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10 West Tankers, §24.
11 The injunction proceeding fell within the scope of the arbitration exclusion included in Brussels I Regulation, the court proceedings elsewhere were regarded as proceedings within the scope of the Regulation which could not be interfered with in such a way.
12 West Tankers, §29.
13 West Tankers, §31.
14 For ease of reference, Art 2(3) of the New York Convention states that “The court of a Contracting State, when seized 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.”

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To cut a long story short, the ECJ ruled that the anti-suit injunction at issue was incompatible with the Brussels I Regulation:

“It is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 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.”

Pursuant to West Tankers, antisuit injunctions issued by EU Member States’ courts restraining jurisdictions from other Member States’ courts were deemed incompatible with Brussels I Regulation. As a result, Member States’ courts were no longer entitled to enforce arbitration agreements by issuing anti-suit reliefs, which sought to prevent a disputing party from commencing or continuing proceedings in courts of other Member States’ courts. The ECJ set an important precedent which was until recently considered to be unbeatable.

(ii) Gazprom, or how arbitrators may have wider powers than EU courts

Expectations were high with the Gazprom case [Gazprom OAO v Republic of Lithuania (Case C-536/13)] as a similar issue was under review. Gazprom (a company based in Moscow) entered into a shareholder’s agreement with E.ON Ruhrgas International GmbH and the State Property Fund acting on behalf of the Republic of Lithuania. The fund was replaced in the agreement by the Ministry of Energy of the Republic of Lithuania (“the Ministry of Energy”). On 25 March 2011, the Ministry of Energy made an application to the Regional Court of Vilnius seeking the initiation of an investigation in accordance with the Lithuanian Civil Code in respect to Gazprom’s General Manager and some members of its board of directors.

According to Gazprom, such an application breached the shareholder’s agreement. It therefore filed a request for arbitration against the Ministry of Energy under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Gazprom requested the arbitral tribunal inter alia to order the Ministry of Energy to discontinue the proceedings. The arbitral tribunal, chaired by Yves Derains, rendered a final award on 31 July 2012 declaring that the arbitration clause found in the shareholder’s agreement had been partially breached, and therefore ordering the Ministry of Energy to withdraw part of the claims brought before the Vilnius court in the aforementioned investigation. In parallel, in September 2012, the Vilnius court ordered the initiation of an investigation which fell within the court’s jurisdiction and was not arbitrable under Lithuanian law.

Gazprom filed an appeal against the Vilnius court’s decision. In separate proceedings, Gazprom further applied for the recognition and enforcement of the arbitral award. However, the Lithuanian Court of Appeal held that the arbitral tribunal could not rule on an issue already raised before the Vilnius court and denied the recognition of the award on the grounds of the non-arbitrability of the dispute (the investigation under Lithuanian Civil Code - Art 5(2)a and Art 5(2)b of the New York Convention).

In response, Gazprom appealed said decision to the Lithuanian Supreme Court. In the appeal proceedings, the Ministry of Energy claimed that recognition of the award (which included the anti-suit injunction) would be contrary to Brussels I Regulation on the basis of the West Tankers precedent. Faced with the dilemma, the Supreme Court raised a question for preliminary ruling concerning the interpretation of the Brussels I Regulation to the ECJ. More specifically, the ECJ was questioned:
1. Where an arbitral tribunal issues an anti-suit injunction and thereby prohibits a party from bringing certain claims before a court of a Member State, which under the rules on jurisdiction in [Regulation No 44/2001] has jurisdiction to hear the civil case as to the substance, does the court of a Member State have the right to refuse to recognize such an award of the arbitral tribunal because it restricts the court’s right to determine itself whether it has jurisdiction to hear the case under the rules on jurisdiction in [Regulation No 44/2001]?

2. Should the first question be answered in the affirmative, does the same also apply where the anti-suit injunction issued by the arbitral tribunal orders a party to the proceedings to limit his claims in a case which is being heard in another Member State and the court of that Member State has jurisdiction to hear that case under the rules on jurisdiction in [Regulation No 44/2001]?

3. Can a national court, seeking to safeguard the primacy of EU law and the full effectiveness of [Regulation No 44/2001], refuse to recognize an award of an arbitral tribunal if such an award restricts the right of the national court to decide on its own jurisdiction and powers in a case which falls within the jurisdiction of [Regulation No 44/2001]?

In other words, the ECJ was asked whether Brussels I Regulation must be interpreted as restraining a Member State’s court from recognizing and enforcing, or from refusing to recognize and enforce, an arbitral award which prohibits a party from initiating certain claims before a court of that Member State. The main difference between West Tankers and the case in question is that the anti-suit injunction was issued by an arbitral tribunal rather than by an EU Member State’s court.

a. The Advocate General’s opinion

The debate started with the opinion rendered by the Advocate General (“AG”), Melchior Wathelete, last December 2014, which increased the expectation of the final ECJ decision. The AG’s opinion focused on two main issues.

Firstly, Brussels I Regulation did not require the court to refuse to recognize the award at issue. That question was determined by the New York Convention. Even so, Recital 12 of the Recast Regulation (be noted that the case fell within the Brussels I Regulation) still applied. More specifically, the AG pointed out that the arbitration exception set under Art 1(2)d “must be and always should have been interpreted” in accordance with Recital 12 of the Recast Regulation.

Secondly, arbitral tribunals are not bound by Brussels I Regulation and recognition and enforcement of an award is not subject to said regulation. In particular, the AG stated that:

“...the arbitral tribunal involved in the present case is not subject to the Brussels I Regulation and is not bound by either that regulation or the principle of mutual trust applicable

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15 The new Regulation (EU) 1215/2012 entered into force on 10 January 2015, however it is not applicable to the case at issue pursuant to Article 66 (1) which reads as follow: “This Regulation shall apply only to legal proceedings instituted, to authentic instruments formally drawn up or registered and to court settlements approved or concluded on or after 10 January 2015.”
The AG also reviewed the West Tankers’ ruling by stating that intra-EU courts issuing anti-suit injunctions in support of arbitration should be also permissible both under the Recast and under proceedings governed by the Brussels I Regulation. What’s more, the AG invited the ECJ to address in its judgement the scope of anti-suit injunctions issued by EU seated courts. However, as it will be noted below, the ECJ failed to do so. In a nutshell, the AG’s proposal to the ECJ was as follows:

(1) Brussels I Regulation must be interpreted as not requiring the court of a Member State to refuse to recognize and enforce an anti-suit injunction issued by an arbitral tribunal.

(2) The fact that an arbitral award contains an anti-suit injunction, such as that at issue in the main proceedings, is not a sufficient ground for refusing to recognize and enforce it on the basis of Article V(2)(b) of the New York Convention.

Consequently, the AG’s opinion was that both courts and arbitral tribunals should be able to issue enforceable anti-suit injunctions within the EU territory.

b. The ECJ’s judgement

On 13 May 2015, the ECJ handed down the Gazprom judgement (C-536/13), in which the expectation weren’t met. The Court addressed the preliminary ruling in two parts.

First, on the question of whether the Brussels I Regulation was applicable in the present instance or whether only the New York Convention applied to the dispute in the main proceedings, the ECJ considered that only the New York Convention should be applicable.

Second, Brussels I Regulation must be interpreted as not precluding a court of a Member State from recognizing and enforcing, or from refusing to recognize 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 EU seated arbitral tribunal award. In short, anti-suit injunctions issued by arbitral tribunals are governed by national and international law, including if applicable the New York Convention.

“Thus, in the circumstances of the main proceedings, any potential limitation of the power conferred upon a court of a Member State — before which a parallel action has been brought — to determine whether it has jurisdiction would result solely from the recognition and enforcement of an arbitral award, such as that at issue in the main proceedings, by a court of the same Member State, 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”.

In support of its conclusion, the ECJ went on to note that an anti-suit injunction issued by an EU seated arbitral tribunal did not run counter to the mutual trust between Member States. More specifically, the ECJ stated that:

“… 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

17 Gazprom, § 42.
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 seized would have to determine, on the basis of the applicable national procedural law and international law, whether or not the award should be recognized and enforced.

... neither that arbitral award nor the decision by which, as the case may be, the court of a Member State recognizes it are capable of affecting the mutual trust between the courts of the various Member States upon which Regulation No 44/2001 is based.  

As previously stated, the ECJ declined to consider the Recast Regulation and instead restricted its reasoning to the previous regulation. Thus, the ECJ ended its ruling by stating that the recognition of anti-suit injunctions issued by arbitral tribunals in Member State’s courts was not governed by the EC Regulation No 44/2001.

“Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not precluding a court of a Member State from recognizing and enforcing, or from refusing to recognize 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”.

As a result, the ECJ missed the opportunity to answer certain questions which are a matter of debate internationally. The ECJ declined to address the scope of the Recast Regulation and the question on the possible validity of anti-suit injunction issued by a Member State court (referring to the West Tankers decision). As it has already been claimed, although it was the right place, it was possibly the wrong time to address these issues.

In the meantime, the AG’s opinion is an authority in which any litigant can rely on until this matter is settled by the ECJ. Even so, a ruling on anti-suit injunctions issued by EU courts is likely to appear in the near future.

2) Possible problems that might arise in the enforcement stage of anti-suit injunctions

For many scholars anti-suit injunctions are not at all an attractive alternative. Specifically, the enforcement of arbitral anti-suit injunctions against the party on which the injunction is served, is a challenging task. The Gazprom decision can give a helping hand in reducing the problems arising from a failure of voluntary compliance with reliefs issued by arbitral tribunals. However, can it be safely said that enforcement of anti-suit injunctions is non-controversial?

By way of example, a claimant succeeding on an anti-suit injunction order might have to deal with a respondent threatening the integrity of arbitral proceedings and continuing parallel proceedings in another forum. What can a claimant

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18 Gazprom, § 38 and § 39.
do to enforce the anti-suit relief? The enforcement of that anti-suit injunction can take place either at (i) the seat of the arbitration or (ii) at a foreign country.

(i) A rather more explored approach: the enforcement of an anti-suit at the seat

If the enforcement takes place in the seat of the arbitration, it shall be subject to the laws governing arbitration in that country and, in particular, to those which determine if arbitral tribunals have the power to issue anti-suit injunctions.

The truth is that enforcement of anti-suit injunctions orders are rarely successful, especially in civil law jurisdictions. By contrast, common law jurisdictions generally provide a special mechanism for the enforcement of anti-suit injunctions orders. Thus, a short recap of both approaches can be of use.

a. Civil law approach in the enforcement of anti-suit injunctions

Many civil law courts would deny the enforcement of anti-suit injunctions on public policy grounds and on the lack of impartiality of the arbitrator. Amongst others, courts could claim a violation of the principle of access to justice, of the principle of a state’s sovereignty and its competence to be the master over its jurisdiction. For instance, a Swiss court declared that anti-arbitration injunctions could not be ordered or enforced by Swiss courts, *inter alia*, because of violation of the principle of competence-competence. More specifically, the court ruled that “injunctions…they contradict the negative effect of the principle of ‘Kompetenz-Kompetenz’ under which courts are not entitled to rule on the jurisdiction of an arbitral tribunal until after the arbitrators have themselves ruled on their own jurisdiction”.

In terms of the lack of impartiality of the arbitrator, if an arbitrator issued an anti-suit injunction, it would generally be based on the validity of an arbitration agreement and on the competence of the arbitrator to hear the dispute. Consequently, as the arbitrator has already ruled on its competence-competence and on

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L’ordre juridique suisse, quant à lui, ne connaît pas de <<pouvoir de tutelle >> des juridictions étatiques sur les juridictions arbitrales puisque au contraire, il intègre pleinement le principe de <<compétence-compétence >> tant dans son effet positif, par le biais de la [Convention] de New York à laquelle la Suisse a adhéré (voir également l’art. 7 LDIP), que négatif (art. 186 LDIP). La compétence du juge étatique pour statuer sur la validité d’une clause compromissoire - qui ne peut en tout état déboucher sur une anti-suit injunction - n’existe dès lors que s’il est lui-même saisi d’une exception d’arbitrage, son examen étant restreint si le siège du tribunal arbitral est en Suisse et libre si ce siège est à l’étranger (Dutoit, Droit international privé suisse, 4e éd. 2005, p. 652; A TF 122 II 139; 121 II 38).

En conclusion, quand bien même il apparaît vraisemblable que l’autorité saisie du fond du litige dispose, en vertu de son propre droit, du pouvoir d’ordonner une anti-suit injunction, les requérantes ne sauraient, par le biais de mesures provisionnelles, arguer de la nécessité de préfigurer ce jugement en requérant du Tribunal de céans qu’il prononce lui-même cette mesure, contraire à l’ordre juridique suisse, par le biais d’une exequatur déguisée de l’ordonnance du 10 mai 2004 de la High Court.”
its own jurisdiction, doubts of its impartially may arise. However, many authors do not share that opinion.

b. Common law approach in the enforcement of anti-suit injunctions

The use of anti-suit injunctions has been a spread practice in common law jurisdictions. Indeed, common law jurisdictions were the ones which initiated this practice. By way of example, the English Arbitration Act sets in its section 41 (5) that the arbitral tribunal may seek an order from the court requiring the party to comply with the arbitrators’ order. However, the scope of said section is limited to arbitral tribunals having their seats in England and Wales or Northern Ireland.23

(ii) A less clear approach: enforcement of anti-suit injunctions before foreign courts

The enforcement of anti-suit injunctions in foreign courts does not always permit a similar approach. Indeed, there are some courts that do not follow the same line when dealing with locally-issued anti-suit injunctions than when dealing with foreign anti-suit injunction in support of arbitral proceedings. For instance, the French Supreme Court has affirmed that anti-suit injunctions issued by a foreign court ruling that a party cannot initiate or continue proceedings under French territory will be recognized, provided the order is based on an exclusive jurisdiction clause agreed to by the parties, and therefore protects a contractual agreement previously made by them.24

By contrast, Germany follows the same approach on dealing with anti-suit injunctions regardless of the place where issued. In particular, Art 1041 (2) of the ZPO (the German Civil Procedure Act) establishes that a party can request for court support to permit enforcement of a measure ordered by an arbitral tribunal, even if that tribunal is seated outside Germany.25

In case the enforcement takes place before a foreign court the question that arises is whether the New York Convention is applicable to orders. The enforcement of awards seems to be a non-controversial issue. However, what happens if those awards include an anti-suit injunction? Furthermore, what happens if instead of awards we are dealing with orders? Is the New York Convention also applicable to orders? We don’t think so.

The ongoing debate started years ago when a prominent scholar claimed that:

“If an award can be enforced under the Convention, then why not an interim order made by the same arbitral tribunal for the sole purpose of ensuring that its award is not ultimately rendered nugatory by the other party? It defies logic and practical common-sense”.26

23 Section 2(1) of the English Arbitration Act.


25 Art 1.041(2) of the ZPO reads as follow: ”Das Gericht kann auf Antrag einer Partei die Vollziehung einer Maßnahme nach Absatz 1 zulassen, sofern nicht schon eine entsprechende Maßnahme des einstweiligen Rechtsschutzes bei einem Gericht beantragt worden ist. Es kann die Anordnung abweichend fassen, wenn dies zur Vollziehung der Maßnahme notwendig ist”.

26 V.V. Veeder. Provisional and conservatory measures, in Enforcing Arbitration Awards under the New York Convention; Experience and Prospects, 1999, 22.
The New York Convention remains silent on the matter of enforcement of interim measures. Since it is well accepted that anti-suit injunctions are interim measures, the application of the New York Convention could be considered controversial.

Some jurisdictions understand that they are under the duty to enforce a provisional measure under Article 3 of the New York Convention if said measure is taken in the form of an award and not in the form of a procedural order. However, an arbitrator may be reluctant to issue an interim measure in the form of an award. In particular, some scholars have trouble concealing the interim character of said measures and the intrinsic stability of awards. Further, most of the institutional rules require the previous scrutiny of awards, which is incompatible with the urgency of the matter. Nonetheless, arbitrators are generally given a great flexibility on issuing interim measures as awards. In that sense, Art 26 (2) of UNCITRAL Arbitration Rules reads as follow: “Such interim measures may be established in the form of an interim award” Irrespective of its form, the interim measure will have to pass the public policy test. By contrast, other jurisdictions may reject that an award for interim measures is covered by Article 3 of the New York Convention. It is claimed that such award is not binding as it is not a final disposition of the dispute. Besides, interim awards may be subject to subsequent review by the arbitral tribunal. Thus, parties will have to rely on domestic law and court practice.

Either way, the debate on the enforceability of anti-suit injunction is still not over.

3) Other tracks worth exploring: monetary reliefs

If a recalcitrant party initiates a parallel proceeding despite an anti-suit injunction relief, what can be done? First, the aggrieved party may ask the court seized by the other party to dismiss the proceedings on the grounds of Art 2(3) of the New York Convention. Second, the aggrieved party may bring an action for damages to recover the loss incurred due to the litigation. Third, the aggrieved party may apply for the foreign judgment not to be recognized and enforced. Options one and three are outside the scope of our analysis, still they might be useful to consider. As a general rule, a challenge of the foreign court’s jurisdiction is a prerequisite for the injured to bring any action.

A strategic movement could be requesting damages for the breach of the arbitration agreement. A party could bring that action on the grounds of the consent to

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29 Id.
32 Id.
arbitrate provided by a party which enters into an arbitration agreement. In other words, parties entering into arbitration agree to be bound by the outcome of that arbitration. In that sense, parties undertake to comply with any order made by arbitral tribunals. That party’s obligation to comply with the tribunals’ orders is recognized in many institutional rules such as in the ICC Rules (Art 22 (5)). Under a similar approach, the UNCITRAL Arbitration Rules state that the parties undertake to carry out the award without delay.\(^3\) Similarly, the LCIA Rules state that the parties undertake to carry out any award (including partial awards) immediately and without any delay.\(^4\) Therefore, there seems to be reasonable elements to claim damages for the breach of an arbitration agreement and, in particular, the breach to comply orders or awards.

Those damages could compensate the injured party from the expenses incurred in the parallel court proceedings.\(^5\) Those costs can include not only the legal fees but also all the related costs of that proceeding. It is questionable whether the value contained in the judgment may be qualified as a recoverable loss.

Despite this practice has not been widely used, successful examples are out there in both civil and common law jurisdictions.\(^6\) The doctrine has considered that this option presents more advantages than anti-suit reliefs.\(^7\) Therefore, the question that arises is where that monetary relief should be filed.

Among the options available, one could either (i) expand the claim in the same arbitral proceeding or (ii) initiate another arbitral proceeding. Each of these options is now considered in turn.

(i) Expand the claim in the same arbitral proceeding

Considering that arbitrators have the power to sanction violation of the breaches of arbitration agreements, this first option could be a valid one.\(^8\) Under this scenario, the party could add the claim to the pending arbitration proceedings. However, its success will depend on the stage of the current arbitral proceedings. For instance, under Art 22 of the UNCITRAL Arbitration Rules, a party may supplement its claim unless the arbitral tribunal considers it inappropriate to allow such supplement having regard to the delay in making it or prejudice to other parties or any other circumstances. Similarly, under the ICC Rules, a party cannot bring new claims after the approval of the terms of reference, unless the arbitral tribunal authorizes so.\(^9\) Consequently, if the arbitral tribunal authorizes so, expanding the claim and including the costs of the parallel proceeding, might be an option worth exploring.

\(^3\) UNCITRAL Arbitration Rules, Art 32 (2).

\(^4\) LCIA Rules Art 26 (8).

\(^5\) Jean Pierre-Fierens and Bart Volders. *Monetary Relief In Lieu of Anti-Suit Injunctions for Breach of Arbitration Agreements*, Revista Brasileira de Arbitragem, Comitê Brasileiro de Arbitragem (CBAr) & IOB; Comitê Brasileiro de Arbitragem (CBAr) & IOB 2012, Volume IX Issue 34), 94.

\(^6\) Id, 95.

\(^7\) Id, 95.


\(^9\) Art 23 (4) of the ICC Rules.
Furthermore, the aggrieved party could request security for costs to the arbitral tribunal relying on the breach of the arbitration agreement and on the damages caused.41

Regardless of the success of the monetary relief, the arbitral tribunal may also consider the challenging party’s attitude when allocating the costs of the arbitration.

This option presents an inconvenience. The arbitral tribunal might face an issue conflict challenge. In particular, as they have already ruled on their own competence, the respondent will have a limited defense beyond challenging the arbitral tribunal on issue conflict’s grounds.

(ii) Initiate another arbitral proceeding

If the pending arbitration proceeding does not accept extending the claim for breach of contract, initiating another arbitral proceeding might imply certain advantages, such as the application of the “issue estoppel” theory.42 The injunctive relief achieves the res judicata effect; therefore damages on the breach of arbitration could be requested in other arbitral proceedings. Hence, the new arbitral tribunal will probably rely on the anti-suit relief to grant damages.

The shortcoming of this option is that the award for damages might not be enforceable before the national courts that confirmed the judicial proceedings commenced by the party threatening the arbitral proceedings. Thus, the aggrieved party might consider seeking an order from the arbitral tribunal forcing the party in breach of the arbitration agreement to provide security for the damages caused.43

4) Concluding remarks

Anti-suit injunctions can truly preserve the integrity of the arbitration proceedings and help prevent the negative consequences of parallel proceedings.44 Without a doubt, they have the potential to be adequate means to prevent parallel proceedings and to ensure compliance with an arbitration agreement. When issued by courts, anti-suit injunctions are more easily enforceable than those issued by arbitral tribunals. At the end of the day, even if not directly enforceable, they remain as an effective means of relief. Similarly, even if they fail to stop parallel proceedings, having an anti-suit injunction may aid in reducing the negative effect of the recalcitrant party’s action.

In West Tankers the ECJ outlawed them when issued by an EU Member court as they were incompatible with the Brussels I Regulation. Hopes were placed on Gazprom to address this issue, which it finally failed to do so. The ECJ can, however, be expected to address the issue of the enforceability of anti-suit injunctions issued

42 According to the ILA Committee, issues of law, which have been arbitrated and determined by the dispositive part of the arbitral award, have a conclusive and preclusive effect in further proceedings, which is considered as the “issue estoppel”.
by EU courts in the near future. Maybe under that question for preliminary ruling it was not the time to address the issue. We will have to stay tuned.