

Anti-Suit Injunctions and EU Law: An Update

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introduction

- categories of anti-suit/anti-arbitration injunctions
 - rendered by a state court ordering a party to refrain from commencing or continuing proceedings before another state court (1st category)
 - rendered by an arbitral tribunal ordering a party to refrain from commencing or continuing proceedings before a state court (2nd category)
 - rendered by a state court ordering a party to refrain from commencing or continuing arbitration (3rd category)
 - rendered by an arbitral tribunal ordering a party to refrain from commencing or continuing another arbitration (4th category)

- only first category has interface with EU-law

European Court of Justice

- **Turner v. Grovit (2004)**
 - anti-suit injunction rendered by English court ordering a party to refrain from pursuing bad-faith court proceedings in Spain; no arbitration agreement involved
 - such anti-suit injunction is inconsistent with the Brussels I-Regulation
 - Brussels I-Regulation establishes a system of mutual trust between EU-Member States
 - therefore, a court of one EU-member state must not interfere with the jurisdiction of a court of another EU-member member state

- **Allianz/Generali v. West Tankers (2009)**
 - anti-suit injunction rendered by English court ordering a party to refrain from pursuing court proceedings in Italy due to the existence of an arbitration agreement
 - such anti-suit injunction does not fall under the arbitration exception of the Brussels I-Regulation
 - therefore, such anti-suit injunction is inconsistent with the Brussels I-Regulation

European Commission

- The Heidelberg Report
 - delete arbitration-exception from the Brussels I-Regulation
 - introduce a device “as effective as an English anti-suit injunction”

- Commission Report + Green Paper (2009)
 - delete arbitration-exception from the Brussels I-Regulation
 - massive criticism
 - therefore, deletion off-the table

- Commission Proposal (2010)
 - keep arbitration exception... but
 - obligation of a court to stay proceedings if
 - jurisdiction is contested due to arbitration agreement and
 - arbitration or court proceedings at the seat of arbitration have commenced

European Parliament

- Parliament Resolution (2010)
 - anti-suit injunctions must continue to be available
 - position prior to West-Tankers should be re-established
 - strongly opposes abolition of arbitration-exclusion from the Brussels I-Regulation

- Parliament Proposal (2011)
 - extent scope of arbitration exclusion in Brussels I-Regulation
 - consequence: anti-suit injunctions in aid of arbitration would again be possible

European Council

➤ Council Proposal (2012)

- clarification that the Brussels I-Regulation should not affect the application of the New York Convention
- insertion of a new recital, *inter alia* stating

Brussels I-Regulation should not prevent a member state-court, when seized, from referring the parties to arbitration and from determining the validity of an arbitration agreement

ruling of a member state-court on the validity of an arbitration agreement should not be subject to recognition and enforcement under the Brussels I-Regulation

Brussels I-Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of the arbitral tribunal, the powers of the arbitrators, the conduct of the arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition and enforcement of an arbitral award

➤ critique of the Council Proposal

- anti-suit injunctions in aid of arbitration agreements would, likely, remain forbidden

what will happen now?

- first reading in the plenary of the European Parliament scheduled for 19 November 2012
- not unlikely that the Council Proposal will become law
- in my understanding, this is bad news for anti-suit injunctions in Europe